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Law-Space Nexus, Global Governance, and Global Administrative Law

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<Abstract>

Situating the challenge of global governance in the reconfigured law-space nexus, this Chapter aims to shed light on the uniqueness of the multinational research project-turned Global Administrative Law (GAL) approach to global governance with focus on the unease GAL has expressed with its own constitutional implications. The argument proceeds as follows. First, it is explained why GAL's approach to global governance echoes the history of responding to the emergence of modern administrative agencies with administrative law in the United States. It is also noted that GAL reframes the world of national legal orders as a 'global administrative space'. Second, it is shown that GAL turns to the idea of "publicness" to address the dual challenge of legality and legitimacy and the question of legal pluralism arising from the heterogeneity of global governance. Finally, it is concluded with discussion of the unsettled relationship between GAL and Global Constitutionalism.

<Keywords>

Global Administrative Law (GAL), Global Governance, Global Constitutionalism, Legality, Legitimacy, Rule of Law, Global Administrative Space, Publicness, Law-Space Nexus

I. INTRODUCTION

Resulting from a multinational research project based at New York University (NYU) School of Law, Global Administrative Law (GAL) has become one of the main approaches to think the issues surrounding global governance.¹ In contrast to other approaches, it aims to

¹ Global Administrative Law (GAL) as a normative response to global governance in theory originates in a project of the same name at NYU, which has brought together scholars from both sides of the North Atlantic and beyond (Kingsbury, Krisch, Stewart, and Wiener 2005). To avoid terminological confusion, "GAL" refers to the aforementioned theoretical stance towards global governance unless otherwise specified. As regards the actual regulations concerning global governance that inspire GAL, they are called "global regulatory norms" in this Chapter. In contrast, "global administrative law" (in small letters) refers to the legal rules and principles that GAL identifies as normatively governing global administration. Notably, not all global regulatory norms can be classed as global administrative law. For a comparison of GAL and other normative approaches to global governance, see, eg, Kuo 2013; Walker 2014.

answer both the practical and normative issues of global governance with no worldwide lawmaking authority in sight. As the experience of the emergence of the modern regulatory state at the turn of the twentieth century shows, discretion is essential for administrative agencies to accomplish their tasks. Yet, discretion also raises concerns over the abuse of administrative power and how to hold the bureaucracy to account, calling the legitimacy of the modern regulatory state into question. National administrative law is regarded as responding to the issues concerning administrative discretion and accountability through substantive legal principles and procedural rules (Stewart 1975, 1671-88; Nolte 1994, 196-97; Sordi 2010). Paralleling the development in the domestic context, GAL conceives of global administrative law as the answer to the question of legitimacy of global governance. What makes GAL even more intriguing is that global governance transcends the assumption that the nation-state underlies the space of law, whether international or domestic, pointing to a fragmented, multi-layered legal order (Kuo 2012a, 859-62). Viewed thus, the identification of global administrative law by GAL suggests the changing relationship between law and space.

Situating the challenge of global governance in the reconfigured law-space nexus, this Chapter aims to shed light on GAL's uniqueness among various approaches to global governance with focus on the unease GAL has expressed with its own constitutional implications. The argument proceeds as follows. First, it will be explained why GAL's approach to global governance echoes the history of responding to the emergence of modern administrative agencies with administrative law in the United States (US). In this historical and comparative light, the way that GAL sees the question of legitimacy in the global context can be illuminated. It is also noted that GAL reframes the world of national legal orders as a "global administrative space" comprising five types of global administration (Section II).

Second, it will be shown that GAL turns to the idea of publicness to address the dual challenge of legality and legitimacy and the question of legal pluralism arising from the heterogeneity of global governance (Section III). Finally, it is concluded with discussion of the unsettled relationship between GAL and Global Constitutionalism (Section IV).

II. LEGITIMACY, THE RULE OF LAW, AND POLITICAL SPACE: FROM GLOBAL ADMINISTRATIVE SPACE TO GAL

It has been well-argued that the emergence of modern administrative law corresponded to the process of state-building. With the establishment of modern administration and bureaucracy as the underpinnings of the nation-state, the question of how to bring it under control became one of the most pressing issues in the design of national legal orders. Uncontrolled discretion amounts to administrative tyranny, putting the legitimacy of the modern state in jeopardy. Thus, control of administrative agencies and of the exercise of their discretionary power by law lies at the heart of the rule of law. Administrative law epitomizes attempts to solve the question of legitimacy of national administration by the rule of law (Nolte 1994; Sordi 2010). That national administrative law is linked to national administrative space, ie, the sovereign nation-state, in order to tame the power of its bureaucrats underpins the prototype of administrative law (Kuo 2012b, 1057).²

In correspondence with the development of national administration, concerns are raised over the legitimacy of global governance with more and more regulatory powers transferred from the nation-state to variegated international organizations, regional bodies, and other less

² For the idea of national administrative space and its significance to the emergence of administrative law, see Kingsbury, Krisch, and Stewart 2005, 26; Cassese 2005b, 112-13.

formal transnational arrangements. Against this drop, GAL proposes an administrative law-based solution to the legitimacy deficit of global governance. As the linkage of the political space of the nation-state and national administrative law suggests, the question of how legal space is conceived of in regard to global governance needs to be addressed before GAL as a normative response and the content of global administrative law can be adequately examined.

It is noteworthy that while administrative law is conventionally discussed in the domestic context, the nation-state is not the only legal space in which administrative law is conceived. Rather, “international administrative law” has long been discussed in relation to formal international institutions and domestic administrative actors when the latter function as part of transboundary regulatory authorities (Kingsbury, Krisch, and Stewart 2005, 18-20; cf. Esty 2006, 1493-95).³ Both jointly constitute “international administration,” which is the object that international administrative law aims to rein in. Besides, the rights and duties of employees with international organizations continue to be a lively subject of international administrative law (see Szasz 1997, 32). Administrative tribunals established under various international organizations have played a central role in the development of international administrative law in this regard (Kryvoi 2015).

Yet, in a pioneering work on GAL and global administrative law, Kingsbury, Krisch, and Stewart (2005) argues that “global administration” sets global administrative law apart from traditional “international administrative law” (20-23; see also Krisch and Kingsbury 2006, 2-3). In contrast to the old international administrative law and its present successor,⁴ the

³ The features of international administrative law will be discussed later.

⁴ Headed by Armin von Bogdandy, the Heidelberg School, which focuses on international public authority

identity of global administrative law is constructed against the backdrop of global governance that transcends the boundaries of nation-states. Through GAL's lens, global administrative law is to the administration of global governance (global administration) as international administrative law is to "international administration" (see Kuo 2011, 64). Then, what is it that distinguishes global administration from international administration? This holds the key to understand GAL and global administrative law.

According to Kingsbury, Krisch, and Stewart (2005), "global administration" can be divided into five types.⁵ The first two types of global administration are what they call "administration by formal international organizations" (or simply "international administration") and "distributed administration" (ibid, 20-22). Notably, these two types of global administration correspond respectively to the two constituents of international administration under international administrative law: formal international institutions and "domestic regulatory agencies" that "act as part of the global administrative space" and "take decisions on issues of foreign or global concern" (ibid, 21).⁶

In addition, Kingsbury, Krisch, and Stewart identify three other types of global

and approaches global governance issues from the perspective of international institutional law, can be regarded as the successor to international administrative law. It is based at Max Planck Institute of for Comparative Public Law and International Law in Heidelberg, Germany (Cassese 2015, 465). For a comparison of the Heidelberg School and GAL, see Craig 2015, 623-35. Notably, international institutions are one of GAL's primary research subjects (Kingsbury and Casini 2009). The idea of public authority sets international organizations and other institutions apart from multinational corporations, although the latter may appear to resemble the former. That said, multinational corporations may develop into a self-regulatory body. Dorf and Sabel (1998) discusses corporation as the prototype of new administrative organizations (292-314).

⁵ Craig (2015) addresses other ways to map global administration (569-80).

⁶ To clarify, what Kingsbury, Krisch, and Stewart (2005) calls 'distributed administration' constitutes part of 'broad notions of "international administration"' under international administrative law, while 'international administration' in their discussion of GAL refers only to formal 'international institutions' (19-21; see also Kingsbury 2015).

administration. First is what they call “transnational networks and coordination arrangements” (ibid). As a “horizontal form of administration,” they are “characterized by the absence of a binding formal decisionmaking structure and the dominance of informal cooperation among state regulators” (ibid). An example of this type of global administration is the Basel Committee, under which the heads of various central banks, “outside any treaty structure,” are brought together in order to coordinate their policies on capital adequacy requirements for banks among other things (ibid). With respect to what Kingsbury, Krisch, and Stewart call “hybrid intergovernmental-private administration,” it refers to the bodies, which combine private and governmental actors, in charge of various transboundary regulatory matters (ibid 22). For example, the Codex Alimentarius Commission, which produces standards on food safety that gain a quasi-mandatory effect via the Agreement on the SPS Agreement under the World Trade Organization (WTO) (Agreement on the Application of Sanitary and Phytosanitary Measures), is composed of nongovernmental actors as well as governmental representatives (ibid). Lastly, Kingsbury, Krisch, and Stewart discuss the private International Standardization Organization (ISO) among other examples as the epitome of the fifth type of global administration, namely, “private bodies” (ibid, 22-23). It is noted that the ISO has adopted a plethora of standards aimed at harmonizing product and process rules. These ISO-generated standards not only have major economic impacts but are also used in regulatory decisions by treaty-based authorities such as the WTO (ibid). The myriad treaties, statutes, rules, principles, codes, standards, or guidelines produced by the above types of global administration jointly constitute global regulatory norms that are essential to global governance, laying the foundation for the emergence of

global administrative law (Cassese 2005c).

What is characteristic of global administration as described above is “de-territorializ[ation]” (Cassese 2015, 466; cf. Ruggie 1993), levelling domestic administrators and other regulatory players in global governance. A bit more history of global governance will illuminate this aspect and its effect on GAL and global administrative law. Tracing the origin of global governance back to the mid-nineteenth century, Kingsbury, Krisch, and Stewart (2005) regards the variegated “international unions” in areas such as postal services and telecommunication as the predecessor of global administration.⁷ These international organizations, which lay at the centre of traditional international administrative law, did not go beyond the Westphalian system of nation-states. Thus, international administrative law derived from the international union-creating treaties that were concluded under the Westphalian system (see generally Reinsch 1909; see also Weiler 2004, 555).⁸ Moreover, international administrative law only extended indirectly to domestic administrators with limited effects (Kingsbury, Krisch, and Stewart 2005, 19. Specifically, although it has been argued that international unions were trusted “with significant powers of secondary rulemaking which did not require national ratification to be legally effective,” these autonomous secondary rulemaking powers only existed in fields whose regulatory framework had been set out in treaties (ibid). To address the regulatory issues left out by unratified

⁷ Examples include Universal Postal Union (1874) and International Telegraph Union (1865) (Kingsbury, Krisch, and Stewart 2005, 19-20 and n. 11; see also Weiler 2004, 553).

⁸ Administrative tribunals, which are the central player in international administrative law concerning the rights and privileges of international civil servants, are attached to international organizations (Kryvoi 2015).

secondary rules, domestic administrators were included in the notion of international administration. By way of the cooperation of domestic administrators with international institutions, the regulatory objectives of international unions could be fulfilled (ibid). Taken together, domestic administrators played the central role in the functioning of international administration while nation-states were the masters of international administrative law.

In contrast, the position of domestic administrators in global governance is not distinctive from that of other regulatory players. Rather, these administrators share the centre stage as the main players with other actors from the private realm⁹ and international civil service. Domestic administrators, both in international administration that involves intergovernmental organizations established by treaties or executive agreements and in distributed administration or other types of global administration, and other actors are equal players in an extended sphere of global administration, so to speak (ibid, 20-27). Taken together, global administration operates in a “global administrative space” (ibid, 18-19), which transcends nation-states. As Sabino Cassese (2015) observes, although the once all-powerful nation-states continue to play an important role in global governance, they are receding to the order of “deuteragonist” (467). Seen in this light, the global administrative space appears to herald a post-Westphalian legal order.

As the various types of global administration suggest, the global regulatory norms

⁹ ‘Private realm’ includes all nongovernmental actors, including multinational corporations, transnational civil groups, and other organizations such as ISO.

that are needed to address the complex and new transnational regulatory issues extend beyond the scope of international administrative law and are not necessarily in the control of nation-states or their delegates (Cassese 2005a). Instead, many of the rules, principles, codes, standards, or guidelines can hardly be credibly attributed to the consent of nation-states, the lynchpin of international law (including international administrative law) in the Westphalian world order. Global administrative space poses challenges to the volition-based Westphalian legal order, raising fundamental questions concerning the legitimacy of global governance (Kuo 2009a).

From the perspective of law, two issues stand out from the questions concerning the legitimacy of global governance. First, while global regulatory norms coming out of the variegated global administration are aimed at resolving transnational regulatory issues, they are mainly the creation of specialized bodies that focus on particular subjects. With their impact on more and more aspects of daily life, these global regulatory norms raise the same concerns as the establishment of modern administration: Is the decision taken by administration, whether global or national, an abuse of administrative power or a kind of administrative lawmaking in response to the practical needs of administration? Where is the line to be drawn between the respect of administrative expertise and the control of administrative discretion (Shapiro 2005)?¹⁰ Second, as the formation of global administrative space means deviating from the Westphalian model of international lawmaking, global administration appears to be cut off from nation-states. Given that nation-states remain the centre of political participation, global administration raises the

¹⁰ The classical debate between Friedrich (1940) and Finer (1941) remains relevant.

question of legitimacy and accountability: Can it be held to account? To whom should it be accountable? Is it democratic and legitimate at all (Cohen and Sabel 2006)?

As discussed above, administrative law has meant to answer both questions by framing the administration and its exercise of power with legal rules and principles enacted or authorized by the parliament (Craig 2015 675-82; see also Ziamou 2001, 56-59).¹¹ This is the classical model of administrative law, which is characteristic of the development in continental Europe (Nolte 1994). The core of this classical model is to subject administrative decisions to judicial review according to parliamentary legislation and the substantive principles of the rule of law (including reasonableness and human rights). Yet, a closer look at the global administrative rules emerging from global administration reveals the limitation of the substance-oriented model of administrative law. As Kingsbury, Krisch, and Stewart (2005) notes, informality and pluralism, among other things, are characteristic of global regulatory norms (53-54). With both conventional international administration and new types of administration involved in the global administrative space, their coexistence illustrates the multifaceted constitution of global administration. The emergence of informal types of administration such as transnational networks and coordination arrangements, hybrid administration, and private bodies suggests that global regulatory norms become more informal and flexible than international treaties or domestic legislation (ibid; Esty 2006; 1537-42; see also Cassese 2005c, 976-77). As global regulatory norms are created to address the respective needs of the specialized regulatory

¹¹ Notably, these questions are not only the concern of law. Rosenbloom (2000) addresses these issues from the perspective of public administration.

bodies in global administration, their characteristics of informality and pluralism make the scrutiny of substance difficult and question the effectiveness of the classical model of administrative law (Shapiro 2001). It is here that the US experience of controlling the emerging regulatory state in the early twentieth century inspires GAL in response to the challenges from global governance.¹²

One of the primary challenges posed by the emergence of the modern regulatory state in the US at the turn of the twentieth century is the creation of new types of regulatory bodies that transcend the separation of executive, legislative, and judicial powers as stipulated in the US Constitution. How to hold these new regulatory bodies to account has since been a constant theme in American constitutional and administrative law. The controversy over the presidential removal power with respect to the members of the so-called independent regulatory commissions (Strauss 1984) and the debate surrounding the concept of the unitary executive (Lessig and Sunstein 1994; Kagan 2001, 2331-46) are two examples. With more and more lawmaking powers delegated to the executive branch and new regulatory bodies, the legitimacy of the modern American state became a pressing concern in the early twentieth century (Epstein 2008).

Initially, the US turned to the classical model of administrative law for answers, centring on the congressional control of administrative lawmaking through statutory legislation.¹³ Failing to effectively address the deficiency of legitimacy concerning the

¹² While the rise of the modern regulatory state in the US has long been associated with industrialization and urbanization after the Civil War, Mashaw (2012) traces the origin of American administrative law to the early administration in the Founding era.

¹³ This is the core of the non-delegation doctrine, which requires that Congress specifically provide for the

modern regulatory state, the classical model eventually was dropped in favour of more participation and other procedural requirements in the making of administrative decisions, resulting in the enactment of the Administrative Procedure Act in 1946 (Rose-Ackerman, Egidy, and Fowkes 2015, 38-40, 77-93; cf. Rosenbloom 2000; Ernst 2014). The focus on the procedural control of administrative decisionmaking process distinguishes the American model of administrative law from the classical, continental model that emphasizes the substantive review of individual administrative acts (Rose-Ackerman 1994, 12-13, 15-.16; see also Nolte 1994, 197-98; cf. Craig 2015, 744-54). Specifically, to address the legitimacy issues facing the modern regulatory state, the US administrative law has managed to bolster the legitimacy of administrative decisions by imposing procedural requirements such as public notice and comment, hearing, reasoning, and transparency without turning to the classical non-delegation doctrine (Rose-Ackerman, Egidy, and Fowkes 2015, 75-93). Furthermore, with focus shifting from specific legislative authorization and substantive review to citizen participation and procedural control, the US administrative law is regarded as striking better balance between the respect of administrative expertise and the control of administrative discretion than the classical model does (ibid, 263-67; cf. Kuo 2012a, 864-67).

In light of the US experience, the question of the legitimacy of global administration is not so much the state control of the variegated transnational regulatory bodies as the due process of global regulatory norms, which is considered to be conducive to a more

major legislative contents and policy choices without delegating them to the Administration (*A.L.A. Schechter Poultry Corp. v. U.S.*, 294 U.S. 495 (1935); *Panama Refining v. Ryan*, 293 U.S. 388 (1935)).

rational and legitimate model of global governance (Krisch 2006; see also Walker 2014, 104; Craig 2015, 754-65). Inspired by the experience of how the US reacted to the rise of the modern regulatory state in the early twentieth century (Kuo 2013, 451-52, 457-58; Harlow 2006, 209; Somek 2010, 271). GAL adopts a non-constitutional, administrative approach to legitimate global governance (Kingsbury, Krisch, and Stewart 2005). By transposing the procedural (as well as some substantive) requirements of national administrative law to global governance, GAL wishes to give legitimacy to the already existing global regulatory norms.

After GAL's normative attitude towards actual global regulations is revealed, the content of global administrative law, which GAL helps identify among global regulatory norms, can be determined. Through GAL's lens, there are two types of norms in global administrative law. The first type consists of traditional domestic administrative law principles that are transposed to the global context, including legality, transparency, due process, publicity, reason-giving, principles on institutional design as well as human rights (see also Kingsbury 2009a, 37-41).¹⁴ Global administrative law in this regard is praised for enhancing the accountability of global administration. It is the process-oriented normative character of global administrative law that has since won GAL approval among many governance scholars (Craig 2015, 808; de Búrca, Keohane, and Sabel 2013, 737-38).

Yet, as GAL's process-oriented response to the legitimacy of global governance suggests, it recognizes the importance of the already existing myriad global regulatory norms in resolving the diverse transnational regulatory issues. While not all of them can be seen as

¹⁴ Due process requirements include notice and comment, consultation, hearing, and other forms of citizen/stakeholder participation in administrative decisionmaking.

corresponding to the values and goals at the core of administrative law, treating them as nothing but facts of no normative value would fail to do justice to the reality of global governance only to make the problem of legitimacy and accountability even worse. Instead, these norms effectively function as specialized substantive administrative law of global governance and should be treated so to the extent that they are subject to the requirements of administrative law rules and principles (Kingsbury, Krisch, and Stewart 2005, 16). Embedded in the practice of global governance, these substantive constituents of global administrative law not only embody the rationality of transnational regulation, which adds further legitimacy to global administration (Walker 2014, 104; Craig 2015, 706-54), but also make GAL an interdisciplinary project (Craig 2015, 570). Thus, in correspondence with domestic administrative law, global administrative law consists of procedural and substantive parts: the former is normative while the latter is of heavily empirical character.¹⁵ In this way, GAL aims to bolster both the legitimacy and rationality of decentred transnational regulatory powers in the variegated global administrative space by means of administrative law mechanisms and principles (Krisch 2010a; see also Kuo 2013, 444).

III. PUBLICNESS AND GAL: SEARCHING FOR LEGALITY AND LEGITIMACY IN THE POST-WESTPHALIAN WORLD

As GAL suggests, global administrative law is a corpus of legal rules and principles discovered in the practices of global governance with the help of administrative law principles. Global administrative law appears to be situated between fact and norm (Habermas 1996).

¹⁵ The role of GAL in steering the relationship between regulatory constituents of global administration adds a third, 'conflicts-of-laws' dimension to the discussion of GAL (Kuo 2012b, 1063-64; Kuo 2013 444). GAL's conflicts-of-laws function will be addressed in the next Section.

As a rule of law-based approach to global governance, which sets it apart from others, GAL are faced with the following questions: Is it law or simply a body of fact? What is the source of global administrative law? Is it law at all (Craig 2015, 635)? In addition, despite GAL's claim that global administrative law provides solution to the legitimacy of global governance, global administrative law faces the challenge of legitimacy. Existing independently of any political authority, what/who gives legitimacy to global administrative law (ibid, 674-75; see also Somek 2010)? Taken together, global administrative law is faced challenges of "legality" and legitimacy: the former asks how to distinguish law from non-law; the latter concerns the democratic grounding of global administrative law (Kuo 2012b, 1059). To be a complete legal response to global governance, GAL needs to tackle this twofold challenge facing global administrative law head-on.¹⁶

Benedict Kingsbury, one of the founding GAL scholars, attempts to answer this challenge by centring global administrative law on the notion of "publicness" (Kingsbury 2009a 52; see also Kingsbury 2009b).¹⁷ In the first place, it is noteworthy that the legal character of global administrative law is conceived of in the strand of HLA Hart's legal positivism.¹⁸ Given the absence of agreement on content-based criteria and of an agreed political theory, Kingsbury questions whether any approach to law other than legal positivism can provide a baseline

¹⁶ The discussion in this Section draws on Kuo 2012b and Kuo 2013.

¹⁷ Among GAL scholars, Kingsbury is the one who gives the foremost jurisprudential account of global administrative law. Craig (2015) notes that similar normative reasoning also appears in the work of Sabino Cassese, another founding scholar of GAL (635, 648-49). Kuo (2012b) critiques global administrative law as the new paradigm of international law (1053-60).

¹⁸ Notably, Nico Krisch, another GAL pioneer, takes a more ambiguous position on Hartian legal positivism as the jurisprudential foundation of global administrative law (Krisch 2010b, 11-12, 96-103). Engaging with GAL, Dyzenhaus (2005) suggests a non-positivist normative approach to the legality of global administrative law (128).

acceptability for determining what is law (Kingsbury 2009a, 28-29). Abandoning positivism, global administrative law would likely be plunged into ideological wars. Moreover, as global administrative law is situated beyond the control of sovereign will, command theories in the positivist vein do not fit in the search for an analytic framework within which the legality of global administrative law can be reckoned (ibid, 27-28; see also Kingsbury and Casini 2009, 353-54). Given that GAL discovers global administrative law in the practices of global governance, Hart's positivist conception of law, which is centred on nonvolitional social facts, appears to hold the key to the issues concerning the legality of global administrative law (Kingsbury 2009a, 29-30).

Yet, as has been discussed in Section II, GAL attributes the emergence of global administrative law to the normative values of traditional administrative law tools being read into the practices of global governance. Through GAL's lens, the concept of law in global administrative law goes beyond Hart's strict separation of the rule of recognition from normative judgment. Thus, Kingsbury reads Hart's social fact conception of law through Lon Fuller's notion of the "inner morality of law" with an eye to answering the dual challenge – legality and legitimacy – facing global administrative law. In other words, GAL aims to embed global administrative law in the practices of regulatory regimes that correspond to generality, predictability, publicity, intelligibility, coherence, stability and other requirements, ie, the "inner morality of law" (ibid, 30-31). This is where the notion of publicness comes into play in Kingsbury's attempt to conceive of both the legality and legitimacy of global administrative law in sources detached from the sovereign will of nation-states.

Specifically, while the ultimate rule of recognition for global administrative law is

constructed around social facts and practices as Hart's legal theory suggests, they are extended to include the notion of publicness. According to Kingsbury (2009a), 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." Thus, a law that answers to publicness will rest on a more solid normative ground than a pure Hartian conception of law, which is ultimately determined by social fact independent of normative judgment. To avoid the challenges facing content-based conceptions of law in the absence of agreement on moral values, however, Kingsbury contends that the substantive notion of publicness is embedded in the practices of law (see *ibid*, 30-32). Instead of being situated in the normative judgment external to the fact of legal practices, publicness underpinning global administrative law is conceived in the operation of the legal system itself.

What is important in Kingsbury's rescue attempt as regards the legality of global administrative law is that publicness is understood as "what is intrinsic to public law as generally understood" (*ibid*, 30). Law is public in nature and thus distinct from private deals for "it has been wrought by the whole society, by the public" and "addresses matters of concern to the society as such" (*ibid* 31).¹⁹ A "legal" rule that cannot be attributed to the whole society or does not address the public concerns is devoid of the underlying values of the notion of publicness. It is law in name alone. Such a rule is nothing but expression of private

¹⁹ In terms of the fragmented landscape of global governance, to speak of 'the public' on the global scale is more aspirational than real. Applying it to the landscape of global governance, however, Kingsbury shifts emphasis from the entire world society to individual regulatory regimes, which he argues have brought about individual publics. The issues raised by Kingsbury's notion of publics will be addressed later, especially in Section IV.

preferences (Kuo 2012b, 1062).

The underlying principles of the notion of publicness Kingsbury identifies include the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights. They reflect the values embodied in the practices integral to the legal system and are thus considered to be “immanent in public law.” Through GAL’s lens, current transnational regulatory regimes are mostly oriented towards the values underpinning publicness. Thus, the practices in today’s global regulatory regimes can be construed as effectively indicating the “fit” between Hart’s social fact conception of law and the practices-derived global administrative law (see Kingsbury 2012a, 30-34). On the other hand, what is characteristic of global governance is the multiplicity of networks of sectoral governance arrangements (Cassese 2005b, 123; Casini 2015, 477). On this view, publicness is rooted in, not imposed on, the “publics” underpinning various sectoral governance regimes that produce the inchoate global administrative law through regulatory practices (Kingsbury 2012a, 56). As the attributes, constraints, and normative commitments associated with publicness are considered to be “immanent in public law,” a normative notion of publicness can be added to the components of the Hartian rule of recognition. In this way, Kingsbury reconstructs Hart’s positivism in light of Fuller’s concept of “inner morality of law,” bringing the property of legality to global administrative law (see *ibid*, 30, 38-40).

Seen in this light, the notion of publicness not only resolves the question of legality concerning global administrative law but also suggests an alternative notion of legitimacy in GAL. Through the lens of publicness, the variegated practices of decentred transboundary

regulatory regimes can be further divided into those that correspond to publicness and those that do not, resolving the issue of what is (non-)law in the debate over global administrative law. In the meantime, this revisionist social fact conception of law lays the normative ground for global administrative law without being dragged into the debate over moral disagreement. Conceived thus, the notion of publicness appears to provide GAL with an alternative baseline concept of legitimacy, answering the legitimacy challenge that results from the separation of global administrative law from state consent (ibid, 39-40).

Nevertheless, up to this point, GAL has yet to fully address the challenges that legality and legitimacy pose to global administrative law. In contrast to the nation-state as the traditional administrative space where national administrative law operates, the landscape of global administrative space is one of legal pluralism (Krisch 2010b). Against this backdrop, the steering of relationships between heterogeneous regulatory regimes in the global administrative space is central to the functioning of global governance, raising the issue of “conflicts of laws arrangements” in the face of the fragmented global governance (Kingsbury 2012a, 56). Specifically, as governance issues become complex and diverse, new arrangements as to the exercise of regulatory power are made in global governance. In the cases where governance issues are intertwined, it is not clear which regulatory body constitutive of global administration holds sway in individual cases. Leaving this inter-regulatory regime relationship unaddressed, however, global governance would be plunged into regime collisions as literature on the fragmentation of international legal order suggests. For example, the abovementioned SPS Agreement, which adopts a science-based approach to the government measures that restrict trade for the protection of human life or health, may conflict with the precautionary principle under the Convention on Biological Diversity when

the trade-restricting government measures concern imported food that contains genetically modified organisms (GMOs) (Winham 2003). Thus, beyond its original focus on the legitimacy and rationality of transnational regulatory powers, GAL further ascribes the steering of the relations between regulatory jurisdictions in global governance to the function of global administrative law (Kuo 2013, 444).

Bearing this landscape of legal pluralism and the issue of regime collision in mind, Kingsbury appeals again to the idea of publicness in his attempted comprehensive jurisprudential account of global administrative law. In addition to the enhancement of the legitimacy and rationality of decisions of individual regulatory regimes, it is suggested that the “conflicts of laws arrangements” of global administrative law pivots on the balance in the inter-regulatory regime relationship in light of the idea of publicness and its associated principles (Kingsbury 2012a, 56; Kingsbury 2012b, 197). To avert the possible regime collisions, the intricate interrelationships between regulatory regimes are steered with consideration of the underlying principles of the idea of publicness. Notably, the steering of the inter-regime relations is carried out on a case-by-case basis. In each instance of conflicts of laws arrangements, the laws of two regulatory regimes in conflict are balanced against each other to decide which one to apply in each case (cf. Krisch 2010b, 277-78). Take the foregoing example of the conflict between the science-based approach and the precautionary principle. To decide whether the trade regime (SPS Agreement) or the environment regime (the Convention on Biodiversity) should prevail will depend on which regime is more in line with the idea of publicness in practice. In other words, when it comes to the conflicts of laws function of global administrative law, GAL relies on the exercise of balancing (ibid, 269-74; cf. Cassese 2005a, 680), the result of which is deeply rooted in the practices of global

governance.

Taken together, GAL is ambitious to embed global administrative law in the actual practices of global administration without reducing it to mere fact by reading Hartian legal positivism in light of the idea of publicness. How much success GAL has in resolving the legal issues surrounding global governance and global administrative law, including legality, legitimacy, and the steering of inter-regime relations, remains to be determined. Yet, GAL's jurisprudential account of global administrative law as discussed above also raises more questions. As global administrative law is deeply rooted in the heterogeneous practices of the fragmented global administrative space, the line is blurry between general public interest and sectoral private preference. Thus, when GAL rests global administrative law on the idea of publicness, it is unclear whether it is the former or the latter to which GAL responds (Kuo 2011, 81-101; Kuo 2012b, 1072-74). Construing Hart's social fact-based positivist concept of law in line with Fuller's concept of "inner morality of law," GAL risks undermining its positivist stance (Craig 2015, 645). As a result, GAL is dragged into a kind of ideological war, which Kingsbury aims to keep it from with his jurisprudential account of global administrative law, and thus accused of imposing Western values at the expense of value pluralism (Harlow 2006, 207; Barak-Erez and Perez 2013, 483-85; cf. Chimni 2005; Marks 2005).

IV. GAL AND GLOBAL CONSTITUTIONALISM: THE (UNANSWERED) CONSTITUTIONAL QUESTION OF GAL

As has been discussed in Section II, GAL draws inspiration from the development of national administrative law. Yet, it parts company with its source of inspiration on one fundamental point: GAL disavows any "constitutional ambition" and focuses on the discovery

of global administrative law in the practices of global governance (Krisch 2010a; cf. MacDonald and Shamir-Borer 2010), whereas national administrative law has long been an integral part of national constitutional orders (see generally Ginsburg 2010). Thus, GAL distances itself from those attempts to conceptualize global governance from the constitutional perspective under the umbrella of Global Constitutionalism.²⁰

Considering its pronounced bottom-up approach to frame global governance in legal terms, GAL's avowedly non-constitutional stance is not difficult to understand (Stewart 2015, 506). As the constitutional order is tied to the concept of demos, GAL asserts that it is of little use to frame global governance in constitutional terms in the absence of a global political community. Without a global demos, the constitution fails to travel from nation-states to the space of global governance, which is administrative, not constitutional. Also, the constitutional approach to global governance suggests a legal "settlement" of normative issues, risking the politicization of global governance. Any premature "constitutional settlement" would only exacerbate global inequality. Relatedly, global governance can only be constitutionalized at the expense of its inherent value pluralism, leading to the reinforcement of hegemonic values (Krisch 2010b, ch. 2 and 3; cf. Kennedy 2009). To respond to the practical needs of fragmented global governance, GAL adheres to its pragmatic stance guided by the idea of publicness, not constitutionalism.

Yet, it is doubtful whether GAL's non-constitutional position is tenable in terms of the nature of the issues surrounding global governance. As has been discussed in Section III,

²⁰ Kuo (2010) provides a typology of Global Constitutionalism (861-67).

there is no unified global public in the landscape of global governance. In the global administrative space are various regime-centric publics. Thus, to rely on the idea of publicness to resolve the practical and normative issues of global governance begs the question of how to reconcile the diverse publics in the global administrative space (Kuo 2012b, 1063). Besides, GAL's apolitical stance does not shield itself from political contestation and criticisms of value imperialism even if it proclaims to leave value pluralism unaffected (Barak-Erez and Perez 2013; Marks 2005). Moreover, GAL's scepticism about demos-independent constitution talk as Global Constitutionalism proposes more reveals its supposed premise of constitutional order than reflects its non-constitutional stance (Kuo 2013, 453-58). Seen in this light, GAL appears to be another implicit form of Global Constitutionalism despite its pioneers' contention to the contrary (Kuo 2011, 71-80; Teubner 2012, 50; Möllers 2015, 471). In the event, the debate between GAL and Global Constitutionalism appears to a recast of what has been going on in democracies: how to govern in a pluralist society without sliding into some form of tyranny, whether it is expert-centred minority or popular majority (cf. Kuo 2013, 453-64).

Notably, in a 2015 symposium published in *International Journal of Constitutional Law* in celebration of the then ten-year-old GAL, the constitutional question was not dodged anymore. In contrast to the avowedly non-constitutional stance in the earlier development of GAL, most of the contributors to that celebratory symposium have embraced the constitutional question of global governance (Symposium 2015).²¹ Some note that GAL cannot be a

²¹ Apart from the editor Joseph Weiler, there are eight contributors to this symposium, including GAL's founding scholars Sabino Cassese, Benedict Kingsbury, and Richard Stewart among others. Only Kingsbury stops short of touching upon the relationship between GAL and Global Constitutionalism. Other symposium

complete project without tackling the issues raised by Global Constitutionalism (Casini 2015, 477; cf. Cassese 2015, 465-66); others contend that GAL's normative approach to global governance needs to rest on a constitutional stand (Savino 2015, 493-96; cf. Chiti 2015, 491); still others move in the constitutional direction in terms of GAL's inevitable political implications to global governance (Möllers 2015, 471; cf. Napolitano 2015, 484). Nevertheless, when it comes to the content of GAL's constitutional vision, there is no consensus. The relationship between GAL and Global Constitutionalism remains unsettled (Kuo 2009b).

V. CONCLUSION

As a theoretical approach to global governance, GAL breaks new ground in reconceiving the landscape of global governance as a global administrative space along the law-space nexus. Its contribution lies in its pragmatic approach to address the normative concerns over the legitimacy and accountability of global governance in legal terms without undermining the rationality of transnational administration when global political community remains an elusive idea. In this way, it seems to have averted the politicization of global governance. Yet, its recent embrace of the constitutional question suggests that GAL cannot leave political issues unaddressed. Whether this constitutional turn in GAL will result in a new paradigm of legal framing of global governance or a rethink of Global Constitutionalism altogether remains an evolving subject in the study of global governance.

contributors' positions on GAL's constitutional implications are discussed in the rest of this Section.

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