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in cooperation with the

Hertie School of Governance

**GLOBAL GOVERNANCE AS PUBLIC AUTHORITY: STRUCTURES, CONTESTATION, AND NORMATIVE CHANGE**

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# Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law

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# Global Governance as Public Authority: Structures, Contestation, and Normative Change

This Working Paper is the fruit of a collaboration between The Jean Monnet Center at NYU School of Law and the Global Governance Research Cluster at the Hertie School of Governance in Berlin. The Research Cluster seeks to stimulate innovative work on global governance from different disciplinary perspectives, from law, political science, public administration, political theory, economics etc.

The present Working Paper is part of a set of papers presented at (and revised after) a workshop on 'Global Governance as Public Authority' that took place in April 2011 at the Hertie School. Contributions were based on a call for papers and were a reflection of the intended interdisciplinary nature of the enterprise - while anchored in particular disciplines, they were meant to be able to speak to the other disciplines as well. The discussions at the workshop then helped to critically reflect on the often diverging assumptions about governance, authority and public power held in the many discourses on global governance at present.

The Jean Monnet Center at NYU is hoping to co-sponsor similar symposia and would welcome suggestions from institutions or centers in other member states.

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## Prologue:

Global governance is no longer a new phenomenon – after all, the notion became prominent two decades ago – but it still retains an aura of 'mystery'. We know much about many of its instantiations – institutions, actors, norms, beliefs – yet we sense that seeing the trees does not necessarily enable us to see the forest. We would need grander narratives for this purpose, and somehow in the muddle of thousands of different sites and players, broader maps remain elusive.

One anchor that has oriented much work on global governance in the past has been the assumption that we are faced with a structure 'without government'. However laudable the results of this move away from the domestic frame, with its well-known institutions that do not find much correspondence in the global sphere, it has also obscured many similarities, and it has clouded classical questions about power and justification in a cloak of technocratic problem-solving. In response, governmental analogies are on the rise again, especially among political theorists and lawyers who try to come to terms with the increasingly intrusive character of much global policy-making. 'Constitutionalism' and 'constitutionalization' have become standard frames, both for normative guidance and for understanding the trajectories by which global institutions and norms are hedged in. 'Administration', another frame, also serves to highlight proximity with domestic analogues for the purpose of analysing and developing accountability in global governance.

In the project of which this symposium is a part, we have recourse to a third frame borrowed from domestic contexts – that of 'public authority'. It seeks to reflect the fact that much of the growing contestation over global issues among governments, NGOs, and other domestic and trans-national institutions draws its force from conceptual analogies with 'traditional rule'. Such contestation often assumes that institutions of global governance exercise public authority in a similar way as domestic government and reclaims central norms of the domestic political tradition, such as democracy and the rule of law, in the global context. The 'public authority' frame captures this kind of discourse but avoids the strong normative implications of constitutionalist approaches, or the close proximity to particular forms of institutional organization characteristic of 'administrative' frames. In the project, it is used as a heuristic device, rather than a normative or analytical fix point: it is a lens through which we aim to shed light on processes of change in global governance. The papers in the present symposium respond to a set of broad questions about these processes: what is the content of new normative claims? which continuities and discontinuities with domestic traditions characterise global governance? how responsive are domestic structures to global governance? How is global governance anchored in societies? and which challenges arise from the autonomy demands of national (and sometimes other) communities?

The papers gathered here speak to these questions from different disciplinary perspectives – they come from backgrounds in political science, international relations, political theory, European law and international law. But they speak across disciplinary divides and provide nice evidence for how much can be gained from such engagement. They help us better understand the political forces behind claims for change in global governance; the extent of change in both political discourse and law; the lenses through which we make sense of global governance; and the normative and institutional

responses to competing claims. Overall, they provide a subtle picture of the pressure global governance is under, both in practice and in theory, to change its ways. They provide attempts to reformulate concepts from the domestic context, such as subsidiarity, for the global realm. But they also provide caution us against jumping to conclusions about the extent of change so far. After all, much discourse about global governance – and many of its problems – continue in intergovernmental frames. Global governance may face a transition, but where its destination lies is still unclear. 'Public authority' is an analytical and normative frame that helps to formulate and tackle many current challenges, though certainly not all. Many questions and challenges remain, but we hope that this symposium takes us a step closer to answering them.

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# INTER-PUBLIC LEGALITY OR POST-PUBLIC LEGITIMACY? GLOBAL GOVERNANCE AND THE CURIOUS CASE OF GLOBAL ADMINISTRATIVE LAW AS A NEW PARADIGM OF LAW

By Ming-Sung Kuo*

## Abstract

This paper aims to explore the impact of global governance on legal thinking by studying the case of global administrative law. Tracing global governance at the core of the international rule of law movement to the restructuring of legal landscape, I suggest that global administrative law underpinned by the underlying values of administrative law reflects a deliberately chosen approach to the new nomos of the earth in the global era. Distanced from the will of nation-states, the legality and legitimacy of global administrative are reconstructed around the idea of publicness, suggesting a new paradigm of law based on inter-public legality. I argue that under this new paradigm of law, political calculation displaces legal reasoning. Legality amounts to the dispensation of legal weight and is thus merged with politics. Given the non-public, interest-oriented character of dialogues in the politics of weighing, however, global administrative law suggests a post-public conception of legitimacy.

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## I. INTRODUCTION

Riding the wave of globalization, discussions on the "the juridification of the new world order" have spread through academic circles.[1] Law is now expected to reign in international relations that used to be conducted according to the realist logic of power and interest. It is noteworthy that the aspiration to projecting the idea of rule of law beyond national boundary is not a recent phenomenon. The evolution of modern international law tells us that a variety of proposals have been made under which the world order would be conceived in legal terms.[2] Yet, global governance has stood out as the rallying call for the latest wave of the international rule of law movement. On the one hand, it suggests continuity with the past movements to extend the reach of law to international relations.[3] On the other, it goes beyond the order vis-à-vis anarchy debate as to the nature of the international "legal" system. Global governance is revolutionary in that governance issues resulting from globalization are its core concern.[4]

It is unclear whether the notion of global governance can shed any analytical light on our responses to governance issues in the globalizing world.[5] Is global governance a placeholder for different visions for the globalizing world? Is it a normative idea or simply a descriptor of various regulatory regimes that jointly manage transboundary governance issues? Viewed as a part of the evolution of modern international law as noted above, the notion of global governance needs to be examined through a legal lens.[6] Yet, recasting global governance in legal terms generates more questions than answers. Does it suggest the extension of traditional legal concepts to the globalizing legal landscape? Or, does the linkage between governance and law suggest a new

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[1] *See* Jean L. Cohen, *Whose Sovereignty? Empire Versus International Law*, 18 ETHICS & INT'L AFF. 1, 2 (2004). *See also* LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., MIT Press 2001).

[2] For the project of building a global rule of law in the development of modern international law, see Martti Koskenniemi, *The Fate of Public International Law: Between Techniques and Politics*, 70 MOD. L. REV. 1, 1-3 (2007).

[3] *See* David Kennedy, *The Mystery of Global Governance*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 37 (Jeffrey L. Dunoff & Joel P. Trachtman eds., Cambridge University Press 2009).

[4] *See* Gralf-Peter Calliess & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 RATIO JURIS 260 (2009).

[5] *See* Claus Offe, *Governance: An 'Empty Signifier'?*, 16 CONSTELLATIONS 550 (2009).

[6] *See* Calliess & Renner, *supra* note 4.

paradigm of law in correspondence to global governance?[7] If so, what are the features of this envisaged new global paradigm of law?

I aim to address these issues by taking a closer look at the case of global administrative law.[8] Global administrative law stands out among the various attempts to rest global governance on a legal basis.[9] On the one hand, it treats global governance as going beyond the transactional model of private regulation. Global governance bears greatly on the reordering of the globalizing world. On the other, global administrative law acknowledges that legal concepts premised on the Westphalian international system are not sufficient to deal with the issues surrounding global governance.[10] Moreover, aware of the elusiveness of the idea of a global political community, global administrative law keeps the constitutional ambition at distance.[11] Rather, it aims to lay legal grounds for global governance by turning to traditional administrative law tools.[12]

It remains to be seen whether global administrative law provides the best answer to issues arising from global governance. Departing from the will of sovereign states and embedding itself in the practices of global governance, however, global administrative

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[7] *See, e.g.*, Christian Joerges, *Reconceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws, in* DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION 311, 315-16 (Beate Kohler-Koch & Berthold Rittberger eds., Roman & Littlefield 2007).

[8] The idea of global administrative law originated in a project based in New York University School of Law and has generated plenty of theoretical reflections and case studies. Approaches to the challenges of global administrative law differ among contributors to this project. *See, e.g.*, Symposium, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (2005); Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1 (2006). *See also* Gordon Anthony et al., *Values in Global Administrative Law: Introduction to the Collection, in* VALUES IN GLOBAL ADMINISTRATIVE LAW 1 (Gordon Anthony et al. eds., Hart 2011). My interlocution is mainly with Benedict Kingsbury for two reasons. First, among the proponents of global administrative law, he is the one who gives the foremost jurisprudential account of global administrative law. Second, he is the principal advocate who explicitly rests global administrative law on an extended concept of social fact that includes and is underpinned by the notion of publicness. *See* Benedict Kingsbury, *The Concept of 'Law' in Global Administrative Law*, 20 EUR. J. INT'L L. 23 (2009).

[9] *See generally* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 3.

[10] *See* Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005); Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT'L L. 247 (2006).

[11] *See* Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 687-89 (2005); Nico Krisch, *Global Administrative Law and the Constitutional Ambition, in* THE TWILIGHT OF CONSTITUTIONALISM 245 (Petra Dobner & Martin Loughlin eds., Oxford University Press 2010). *But cf.* Ming-Sung Kuo, *Taming Governance with Legality? Critical reflections upon Global Administrative Law as Small-c Global Constitutionalism*, 44 N.Y.U. J. INT'L L. & POL. (forthcoming 2011).

[12] *See, e.g.*, Cassese, *supra* note 11; Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

law is faced with the challenges of how to distinguish between law and non-law and of where to rest its legitimacy beyond state consent.[13] Instead of returning to the fold of the Westphalian legal order or being reduced to regulatory practices, global administrative law turns to an extended concept of social fact underpinned by the idea of publicness as the answer to the dual challenge of legality and legitimacy.[14]

The objective of this paper is to answer the question of whether and to what extent the global governance-oriented notion of global administrative law suggests a new paradigm of law, at the center of which lies the idea of publicness. I first look into the structural transformation of the international legal system in which global administrative law and global governance are aligned. Tracing the centrality of global governance in the international rule of law movement to the restructuring of legal landscape, I suggest that global administrative law reflects a deliberately chosen approach to the new *nomos* of the earth in the global era by virtue of the values tied to administrative law tools (Section II). Situated in global governance, global administrative law remains centered on the issues of legality and legitimacy. Even so, global administrative law distances itself from the sovereign will of nation-states. Rather, the legality and legitimacy of global administrative law are embedded in the social fact of governance practices and reconstructed around the idea of publicness. In this way, global administrative law is defined by its inter-public legality, suggesting a new paradigm of law (Section III). On closer inspection, I argue that global administrative law does herald a new paradigm of law under which political calculation displaces traditional legal reasoning. What is characteristic of politics in global administrative law as a new paradigm of law turns out

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[13] *See* Ming-Sung Kuo, *The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT'L L. 997 (2009).

[14] It should be pointed out that my discussion on the linkage between publicness and global administrative law in the present paper is centered on but not confined to Benedict Kingsbury's work. *See supra* note 8. Notably, Nico Krisch, another major theorist of global administrative law, traces the same traits of publicness to the normative idea of public autonomy. *See* NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 92-103 (Oxford University Press, 2010). Yet, Krisch's component holder of public autonomy is not formalist but normative in the sense that it must be inclusive and deliberative to be considered as a "relevant constituenc[y]." I will come back to this issue later. *Cf.* Krisch, *supra* note 10, at 273-74. As a result, even if Krisch follows Kingsbury in distinguishing between law and non-law in global administrative law by identifying the social practice of publicness or public autonomy in the functioning of global governance, the relationship between his account of global administrative law and Hartian legal positivism is more complicated than Kingsbury's. *See* KRISCH, *supra* 14, at 11-12, 96-103.

to be a post-public concept of legitimacy instead of the inter-public legality (Section IV). I conclude with a summary of my argument (Section V).

## II. THE RISE OF THE NEW *NOMOS* OF THE EARTH: SITUATING GLOBAL ADMINISTRATIVE LAW IN GLOBAL GOVERNANCE

In *The* Nomos *of the Earth*,[15] Carl Schmitt suggested a meta-constitution of international law, which he termed the *nomos* of the earth.[16] Drawing upon the implications of boundary-drawing from its Greek origin, he attributed the *nomos* of the earth to the boundaries demarcating the centers of political power in the world, i.e., sovereign states. Writing amid World War II (WWII), Schmitt recognized a new *nomos* of the earth in the making as the *nomos*-related boundary shifted from national borders to the lines dividing the spheres of influence on earth.[17] In this train of thought, globalization has changed the post-War *nomos* again. The bipolar system established in the end of WWII collapsed as the Soviet Union and the Warsaw block dissolved. The front lines dividing the world into East and West no longer decides geopolitical alignments. Rather, the world order has been discussed in terms of "colossus" or "multipolarity," just to name a pair.[18] In the meantime, the post-WWII international law trapped in the Cold War era broke free from the ideological net, impacting on international law and politics in unexpected manners. The rebirth and rapid growth of international human rights law in the post-Cold War era have evidenced how the changed *nomos* of the earth has borne on the international legal system.[19]

Moreover, globalization has taken the new *nomos* of the earth further down the road of change. As penetratingly discussed by scholars from different disciplines, the transboundary nature of policy issues is the defining feature of the age of globalization. Transnational economic linkages have not only resulted from the lifting of trade barriers

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[15] This is the short title for CARL SCHMITT, THE *NOMOS* OF THE EARTH IN THE INTERNATIONAL LAW OF THE *JUS PUBLICUM EUROPAEUM* (G.L. Ulmen trans., Telos 2003).
[16] *See id.* at 82-83, 197-98. *See also* Ming-Sung Kuo, *The End of Constitutionalism As We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering*, 1 TRANSNAT'L LEGAL THEORY 329, 338 (2010).
[17] *See* SCHMITT, *supra* note 15, at 214-355.
[18] *See* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 680-87 (Knopf 2002); NIALL FERGUSON, COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE (Penguin 2004).
[19] *See* Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

but have also been strengthened by the new technologies in facilitating international economic activities such as complex computer networks and new information technologies that have made instantaneous transactions possible.[20] Economic globalization has also stirred up issues concerning social fabric such as demographic migration and the redistribution of wealth.[21] As social issues take on transboundary character, they require bilateral or multilateral regulatory cooperation between states. Economic globalization alone cannot be held responsible for all contemporary regulatory issues. With the advancement of science and technology, new issues that were unknown before have been identified, calling for global responses. Climate change[22] and the scare over avian influenza[23] are obvious examples. In sum, transbounday issues call for transboundary responses. The boundaries drawn in the Westphalian era and then redrawn during the Cold War have become more and more blurred, pointing to a new *nomos* of the earth in the age of globalization. The new global *nomos* of boundary-blurring has distinguished globalization from the preceding epochs of international law.[24]

It should be noted that tranboundary issues that require transboundary responses are not new. In the nineteenth century, various "international unions" were created to deal with issues of common concern to all countries the world over such as postal services and telegraph.[25] In addition, the majority of bilateral treaties were adopted to address concerns shared by bordering countries such as the development of the water resources across the borders and the management of border rivers. As Joseph Weiler points out, these pre-globalization transboundary arrangements not only constituted the bulk of the

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[20] *See* SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 40-43 (Columbia University Press 1996). *See also* Gunther Teubner, *Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law*, 33 J. L. & SOC'Y 497 (2006).

[21] *See, e.g.*, Paul Stewart & Ohilip Garrahan, *Globalization, the Company and the Workplace: Some Interim Evidence from the Auto Industry in Britain, in* THE LIMITS OF GLOBALIZATION: CASES AND ARGUMENTS 223 (Alan Scott ed., Routledge 1997).

[22] *See, e.g.*, Daniel C. Esty, *Climate Change and Global Environmental Governance*, 14 GLOBAL GOVERNANCE 111 (2008)

[23]*See, e.g.*, Kenneth W. Abbott, *Innovation in Global Health Governance: Critical Cases*, 50 CLINICAL INFECTIOUS DISEASE 130 (2010).

[24] *See* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (Michael Byers rev. & trans., Walter de Gruyter 2000).

[25] Universal Postal Union (1874); International Telegraph Union (1865). *See generally* Paul S. Reinsch, *International Administrative Law and National Sovereignty*, 3 AM. J. INT'L L. 1 (1909). *See also* Kingsbury et al., *supra* note 10, at 19.

international regulatory system but have also coexisted with subsequent regulatory regimes.[26] Thus, what is important is how distinctive the transboundary issues in the global era are, even if the globalization-generated regulatory regime has been layered over its preceding transboundary regulatory models to jointly constitute a "geology" of international regulation.[27]

In the first place is the prominence of transboundary issues in the functioning of the international legal system. While transboundary issues existed before the latest wave of globalization, they were considered backburner issues. International law was aimed primarily at the matters of war and peace in the world.[28] To be sure, war and peace implicates more than a single state. Still, a single state can decide whether to go to war by its own policy decision, although this may end up with "humiliating peace."[29] By no means do I suggest policies of pacifism or even appeasement. Nor do I intend to make light of the decisions about war and peace. Rather, my point is to show that the matter of war and peace in and of itself is not transboundary as we understand it in the vein of globalization. In contrast, globalization-generated issues are considered transboundary because their solution cannot be confined to a single state. As transboundary issues take center stage in the global era, international law can no longer afford to push them to the margin. Rather, transboundary issues have mushroomed to the extent of leading to the transition to a new global *nomos*.[30]

As noted above, transboundary issues existed before the current wave of globalization. According to Weiler, they were addressed through the transactional model or through the constitutional model of transnational regulation. When technical issues involved bordering countries, for example, the management of bridges spanning a border, they were dealt with through bilateral treaties, which constituted the prototype of the transactional model of international regulation. Notably, the transactional model was not confined to bilateral treaties. The nineteenth-century international unions were also

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[26] *See* J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547 (2004).
[27] *See id*. at 553-56.
[28] *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 11-97 (Cambridge University Press 2001).
[29] *See* GIAMBATTISTA VICO, THE ART OF RHETORIC 59 (Giorgio A. Pinto & Arthur W. Shippee eds. & trans., Rodopi 1996).
[30] *See* Kuo, *supra* note 16, at 352-68.

created on the transactional model. Their multilateral organizational form was simply to facilitate their parties to transact bilateral agreements. [31] On the other hand, as national interests at the heart of the transactional model gave way to concerns over "common assets," the character of multilateral regulatory regimes changed from transactional agreement to constitutional community. Seen from this angle, transboundary issues not only affected national interests of individual states but also impacted on humankind's common assets. Thus, the regulation of transboundary issues required continuous monitoring and administration, leading to the establishment of international organizations entrusted with the mission of long-term management.[32]

Regardless of whether transboundary issues were addressed according to the transactional or constitutional model, their responses were conducted in accordance with the underlying principles of international law in the Westphalian system. Both transactional arrangements and constitutional institutions were conceived with state consent and their competences were delineated in advance.[33] Yet, globalization changes the equation. As the pre-globalization models of transboundary regulation fail to live up to the challenges of the globalizing regulatory environment, the regulation of transboundary issues is reframed as global governance. Through the lens of global governance, transboundary issues are addressed through mechanisms that may transcend the organizational forms of government.[34] Defying the hierarchical state-centered order of international regulation, global governance pivots on the management of transboundary issues by networking and other unconventional mechanisms.[35]

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[31] *See* Weiler, *supra* note 26, at 553-55.
[32] *See id*. at 556-57.
[33] This does not mean that transactional and constitutional models of international regulation indicate the best responses to transboundary issues. Rather, the idea of state consent underpinning both regulatory regimes has been stretched to the extent of losing its substantive meaning. Nevertheless, state consent has been the underlying principle of the transactional and constitutional models of international regulation. *See id*. at 553-58.
[34] *See* PHILIP ALLOTT, THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE 168-69 (Cambridge University Press 2002).
[35] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press 2004). *See also* Offe, *supra* note 5, at 550-51, 557; Sabino Cassese, *Global Standards for National Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 109, 123 (2005); Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality – The Viability of the Network Concept*, 3 EUR. L.J. 33 (1997).

Against this backdrop comes up global administrative law.[36] As a response to the structural transformation of the global *nomos*, global administrative law contains both elements of change and continuity. Structurally, global administrative law echoes the blurring of boundary characteristic of the changed global *nomos* and global governance. Departing from traditional "international administrative law," global administrative law extends the reach beyond international organizations and their domestic collaborators to, say, International Organization for Standardization (ISO) and other regulatory players in the management of transboundary issues.[37] Both national administrations and international organizations are seen as being subsumed under an umbrella structure of "global administration."[38] As the prototype of administrative law indicates, national administrative law is linked to national administrative space, i.e., the sovereign state, in order to tame the power of its bureaucrats.[39] What is striking in terms of the change resulting from global administrative law is that the earth is treated as a "global administrative space," transcending the great divide between international and domestic.[40] National and other administrative spaces are recast as part of a global administrative space in which regulatory power becomes global and needs to be responded to by a global administrative law. The emergence of global administrative law expresses the change of the Westphalian world structure into a "global legal space."[41]

As noted above, that global governance is central to the regulation of transboundary issues in the global era reflects the limitation of sovereign states and traditional

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[36] *See* Benedict Kingsbury et al., *Foreword: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 2 (2005). This echoes what Weiler calls the regulatory model in response to transboundary issues. *See* Weiler, *supra* note 26, at 559-61.

[37] *See* Kingsbury et al., *supra* note 10, at 19-20.

[38] Benedict Kingsbury, Nico Krisch, and Richard Stewart identify five types of global administration: international administration, distributed administration, transnational networks and coordination arrangements, hybrid intergovernmental-private administration, and private bodies. *See id*. at 20-23. Notably, Armin von Bogdandy uses global administrative law and international administrative law interchangeably. *See* Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, 9 GERMAN L.J. 1909, 1918-21 (2008).

[39] *See* Kingsbury et al., *supra* note 8, at 26; Cassese, *supra* note 35, at 112-13. *See also* Bernardo Sordi, Révolution, Rechtsstaat, *and the Rule of Law: Historical Reflections on the Emergence of Administrative Law in Europe*, *in* COMPARATIVE ADMINISTRATIVE LAW 23 (Susan Rose-Ackerman & Peter Lindseth eds., Edward Elgar 2010).

[40] *See* Kingsbury et al., *supra* note 10, at 25-27; Cassese, *supra* note 35, at 125. *See also* von Bogdandy, *supra* note 38, at 1919.

[41] *See* Cassese, *supra* note 11, at 670. *See also* KRISCH, *supra* note 14.

international regulatory regimes in responding to the challenges from globalization. Global governance suggests that regulatory actions be taken beyond the scope of state consent.[42] As a result of its embeddedness in the practices of global governance, global administrative law is flexible and informal in order to resonate with the dynamic regulatory ecology in the global era.[43] However, the substance of global administrative law cannot be conflated with the multiplicity of governance practices. In spite of its informality and pluralism, global administrative law needs to maintain distance from practices to operate as a normative analytic framework.[44] Global administrative law continues with the normative values developed in national administrative law as it turns to traditional administrative law tools such as due process, transparency requirement, accountability control, and reasonable and rational administration.[45] Taken together, global administrative law emerges as the practices of global governance are equipped with traditional administrative law tools and understood in light of the values of procedural fairness, transparency, accountability, reasonableness, and rationality.[46] Against the backdrop of boundary-blurring becoming the new global *nomos*, global governance emerges as the governing concept in transnational regulation. This is where to situate global administrative law.

## III. NO ESCAPE FROM THE SOVEREIGN WILL? RESTING GLOBAL ADMINISTRATIVE LAW ON THE IDEA OF PUBLICNESS

If boundary-blurring is the defining character of the new global *nomos*, the international legal order under the global *nomos* seems to be untied from the volition of bounded sovereign states.[47] As a result, the Westphalian legal universe is called into question. In this Section, I first show why the post-Westphalian legal order poses a dual challenge of legality and legitimacy to global administrative law. Then I discuss how the idea of publicness, considered part of an extended concept of social fact, is utilized to resolve the question of legality and legitimacy of global administrative law.

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[42] *See also* von Bogdandy, *supra* note 38, at 1923-25.
[43] *See* Kingsbury et al., *supra* note 10, at 53.
[44] *See* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187 (2006).
[45] *See* Kingsbury et al., *supra* note 10, at 37-41; Esty, *supra* note 12, at 1524-37.
[46] *See generally* VALUES IN GLOBAL ADMINISTRATIVE LAW, *supra* note 8.
[47] *See* Kuo, *supra* note 16.

### A. The Dual Challenge in the Post-Westphalian Legal Universe: The Legality and Legitimacy of Global Administrative Law in Question

Global administrative law echoes recent developments in international law, suggesting the end of the Hobbesian era of international relations and the beginning of the age of global rule of law.[48] As noted above, global administrative law departs from the Westphalian tradition in the sense that it is seen as distanced from stat consent, arising from the pragmatic needs of transboundary regulation underpinned by a normative aspiration to a global rule of law.[49] As a consequence, global administrative law is faced with a dual challenge: legality and legitimacy.[50] The former is concerned with how to distinguish law from non-law;[51] the latter with the democratic ground of global administrative law.

Notably, 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 as to the contents of customary international law as well as *jus cogens* has never been settled.[52] On the other hand, it remains a subject of contestation whether state consent provides the sufficient condition for the legitimacy of international legal system.[53] Nevertheless, state consent provides the common ground for scholars of different persuasions to settle on what is necessary for the legitimacy of international law.[54] Moreover, with the translation of the issue of legality concerning customary international law into one of legal and constitutional interpretation,[55] its incorporation into national legal systems is decided in light of national constitutions,

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[48] *See* Alexander Somek, *Administration without Sovereignty*, *in* THE TWILIGHT OF CONSTITUTIONALISM, *supra* note 11, at 267.
[49] *See id*. at 272.
[50] *See*, *e.g*., Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*," 17 EUR. J. INT'L L. 1, 10 (2006).
[51] As Scott Shapiro notes, the meaning of legality is ambiguous. It may refer to values associated with the rule of law or to the condition of lawfulness. Yet, it is used here to denote "the *property* that can be instantiated by [what we call legal] rules, organizations, official texts, concepts, statements, judgments, and so on." *See* SCOTT J. SHAPIRO, LEGALITY 7, 404 n. 3 (Belknap Press 2011) (emphasis added).
[52] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 41-44, 488-90 (6th ed. Oxford University Press 2003). For the relationship between customary international law and *jus cogens*, see Andreas L. Paulus, Jus Cogens *in a Time of Hegemony and Fragmentation: An Attempt at a Re-appraisal*, 74 NORDIC J. INT'L L. 297, 302 (2005).
[53] *See* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 309-33 (reissued ed. Cambridge University Press 2005).
[54] *Cf. id*. at 132.
[55] This is part of the general issues regarding the status of international law in the domestic legal system, including *jus cogens*. *See* Paulus, *supra* note 52, at 319-23.

which are considered the ultimate expression of the national will.[56] Accordingly, state consent provides the conceptual tool, thereby the questions of legality and legitimacy facing traditional international law being resolved.

From the perspective of global administrative law, however, state consent is not the solution to, but instead the problem of, the world order. Grounded by state consent, international law has traditionally been subject to state sovereignty, falling prey to national interests.[57] Against this backdrop, global administrative law is conceived of as unhinged from state consent.[58] Nevertheless, that global administrative law, as the prototype of contemporary international law, departs from state consent unsettles the aforementioned voluntarist view of the international legal order.[59] Unmoored from 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, are inflicted with legitimacy deficit and haunted by the question of how to distinguish law from non-law.[60] Seen in this light, global administrative law does not appear to indicate a new paradigm of law at all but eventually finds no escape from the will of sovereign states instead. Does this mean that the project of global administrative law is doomed to fail because of its detachment from state consent?

### B. Beyond Social Fact: Searching for Legality and Legitimacy in the Light of the Idea of Publicness

Against the backdrop of the dual challenge, legality and legitimacy, the notion of publicness has arisen as the bridge to a new paradigm of international law as epitomized

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[56] In the United Kingdom (UK) where there is no codified constitution, the status of customary international law in the domestic law is decided according to its unwritten constitutional law. Specifically, customary international law is incorporated as domestic law provided that it does not contravene Acts of Parliament and the UK participated in the formation of the rules concerning customary international law in question. Thus, state consent, albeit in a tacit way, is crucial to the legal status of customary international law in the UK. *See* BROWNLIE, *supra* note 52, at 41-44.

[57] *See generally* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (Oxford University Press, 2005).

[58] *See* Krisch & Kingsbury, *supra* note 50.

[59] *See* Krisch, *supra* note 10, at 247-48. *See also* KOSKENNIEMI, *supra* note 53, at 316-22.

[60] *See* Kingsbury, *supra* note 8, at 24-26; Alexander Somek, *The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury*, 20 EUR. J. INT'L L. 985, 988 (2009). *See also* Cohen, *supra* note 1, at 7.

by global administrative law.[61] Normative connotations of publicness notwithstanding, global administrative law resting on the notion of publicness is conceived in the strand of H.L.A. Hart's legal positivism. On the one hand, given the absence of agreement on content-based criteria and of an agreed political theory, it is doubtful whether any approach to law other than legal positivism can provide a baseline acceptability for determining what is law.[62] Abandoning positivisim, the new paradigm of international law free of sovereign will would likely be plunged into ideological wars and burdened with the politically charged notion of the "clash of civilisations."[63] On the other hand, as the state's determinate sovereign command as the foundation of law is regarded as the source of the problem of rather than the solution to the international legal order, 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.[64] Given that global administrative law results from the practices of transnational governance, Hart's positivist conception of law, which is centered on nonvolitional social facts,[65] seems to hold the key to the issues concerning the legality of global administrative law.[66]

Yet, as noted above, global administrative law evolves as the normative values of traditional administrative law tools are read into global governance. The concept of law in global administrative law goes beyond Hart's strict separation of the rule of recognition from normative judgment. Rather, Hart's social fact conception of law is read 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.[67] This is where the notion of publicness comes into play in the attempt to conceive both the

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[61] *See supra* note 14.
[62] *See* Kingsbury, *supra* note 8, at 28-29. *But see* David Dyzenhaus, *The Rule of (Administrative) Law in International Law*, 68 LAW & CONTEMP. PROBS. 127 (2005).
[63] *See* Paulus, *supra* note 52, at 329-30.
[64] *See* Kingsbury, *supra* note 8, at 27-28. *See also* Benedict Kingsbury & Lorenzo Casini, *Global Administrative Law Dimensions of International Organizations Law*, 6 INT'L ORG. L. REV. 319, 353-54 (2009).
[65] *See* Frank I. Michelman, *Constitutional Authorship*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 64, 69-70 (Larry Alexander ed., Cambridge University Press 1998).
[66] For Krisch's ambiguous position on Hartian legal positivism as the jurisprudential foundation of global law, see *supra* note 14. *See also* KRISCH, *supra* note 14, at 11-12.
[67] *See* Kingsbury, *supra* note 8, at 30-31. *See also* Kuo, *supra* note 13, at 998-1000.

legality and legitimacy of global administrative law in sources detached from the sovereign will.

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 Benedict Kingsbury, 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 rests on a more solid normative ground than a pure Hartian conception of law, which is ultimately determined by social facts independent of normative judgments. To avoid the challenges facing content-based conceptions of law in the absence of agreement on moral values, however, the substantive notion of publicness is embedded in the practices of law.[68] 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 the 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."[69] 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."[70] A "legal" rule that cannot be attributed to the whole society or does not address the public concerns falls short of the underlying values of the notion of publicness. It is only law in the nominal sense. Such a rule is emptied of publicness and connotes nothing but the expression of private preferences.

Notably, the underlying principles of the notion of publicness 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." Given that current transnational regulatory regimes are

[68] *See* Kingsbury, *supra* note 8, at 30-32.
[69] *Id.* at 30. *See also* Armin von Bogdandy et al., *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance*, 9 GERMAN L.J. 1375, 1383-84 (2008).
[70] Kingsbury, *supra* note 8, at 31.

oriented toward the values underpinning publicness, the practices in today's global regulatory regimes can be construed as indicating the "fit" between Hart's social fact conception of law and the reality of global administrative law.[71] On the other hand, what is characteristic of global governance is the multiplicity of networks of sectoral governance arrangements.[72] On this view, publicness is rooted in, not imposed on, the "publics" underpinning various sectoral governance regimes that produce the nascent global administrative law through regulatory practices.[73] 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, Hart's positivism is reconstructed in light of Fuller's concept of "inner morality of law," bringing the property of legality to global administrative law.[74]

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. 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 (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. Thus conceived, the notion of publicness appears to provide an alternative baseline concept of legitimacy, answering the legitimacy challenge that results from the separation of global administrative law from state consent.[75]

Nevertheless, up to this point, the challenges that legality and legitimacy pose to global administrative law have not been fully addressed. In contrast to the sovereign state as the traditional administrative space where national administrative law operates, the "variegated" global administrative space is decentered.[76] Correspondingly, the social

[71] *See id*. at 30-34. *See also* Kuo, *supra* note 13, at 999.
[72] *See* Cassese, *supra* note 35, at 123.
[73] *See* Kingsbury, *supra* note 8, at 56.
[74] *See id*. at 30, 38-40.
[75] *See id*. at 39-40.
[76] *See* Kingsbury et al., *supra* note 36, at 3.

fact conception of global administrative law as portrayed above emerges from the practices in heterogeneous transboundary regulatory regimes. 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. Each transnational regulatory regime involves regulators, regulatees, as well as third parties without direct interests, jointly making up a single regime-based "public."[77] 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.[78]

In other words, publicness is associated with the public to which a particular regulatory regime relates.[79] As an imagined global community remains elusive,[80] the regulatory regimes and the corresponding regulatory publics are decentered and indefinite, making global administrative law unintelligible. Thus, in the face of the overlayering publics in the global administrative space, how to draw the jurisdictional 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.[81]

Here comes in the duality of global administrative law in taming global governance with the rule of law. It is noteworthy that when it comes to the question of where to locate the practices underpinning publicness, the focus of global administrative law is not on the publics where the notion of publicness is substantiated but instead switches to the existing entities that exercise regulatory powers.[82] On this view, jurisdictions in global

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[77] *See* Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, *in* 50 YEARS OF THE NEW YORK CONVENTION, ICAA CONGRESS SERIES NO. 14, at 5 (Albert Jan van den Berg ed., Kluwer 2009). *See also* Krisch, *supra* note 10, at 272-74.
[78] Kuo, *supra* note 13, at 1000.
[79] *See* Kingsbury, *supra* note 8, at 56. *See also* von Bogdandy, *supra* note 38, at 1914-15; Kingsbury & Casini, *supra* note 64; von Bogdandy et al., *supra* note 69, at 1383-84.
[80] *See* KRISCH, *supra* note 14, at 59.
[81] *See* Kuo, *supra* note 13, at 1000; Somek, *supra* note 48, at 285.
[82] *See* Kingsbury, *supra* note 8, at 56; Benedict Kingsbury, *International Law as Inter-Public Law*, *in* MORAL UNIVERSALISM AND PLURALISM 167, 190-91 (Henry Richardson and Melissa Williams eds., New York University Press 2009). Krisch notably adopts a more delicate position on this issue. On the one hand, while focusing attention on the entities that exercise public power, he extends the scope of a

administrative law are the state and non-state entities that exercise public authorities and regulatory powers in global regulatory practices.[83] In this formalist way, the difficulty of specifically identifying and delineating individual regulatory publics in the global administrative space is averted. Instead, what is at stake is the interrelationships between regulatory regimes in the variegated global administrative space, raising the issue of "conflicts of laws arrangements."[84] Global administrative law is expected to respond to the needs of conflicts of laws arrangements arising from the multiplicity of networks of sectoral governance regimes. In sum, global administrative law not only refers to the legal principles that underlie the legitimacy of distinct sectoral governance regimes but also plays the steering role in the relations between regulatory jurisdictions. Whether and how global administrative law lives up to the expectation of managing the conflicts of laws in global governance is the issue to which I proceed next.

## IV. FROM INTER-PUBLIC LEGALITY TO POST-PUBLIC LEGITIMACY: POLITICIZING GLOBAL ADMINISTRATIVE LAW

In this Section, I take a closer look at the role of global administrative law in steering the relations between regulatory regimes in the global administrative space. I first establish that the idea of publicness at the center of the functioning of global administrative law is mediated through balancing. Looking into different types of balancing, I then show that balancing in global administrative law amounts to political calculation. Lastly, I argue that what lies beneath the prominence of political calculation in global administrative law is a recasting of law and politics in a post-public legitimacy, suggesting the emergence of global administrative law as a new paradigm of law.

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regulatory public to the supporting actors of the entities that formally exercise public powers, for example, the funders of some institutional (non)governmental organizations. On the other hand, he does not address the issue of the location of publicness and the management of the inter-regime relations as a whole. Rather, in terms of the range of constituencies in relation to regulatory publics, his view is normative. Only those entities that are inclusive and deliberative are included as "relevant constituencies" for the purpose of global administrative law. *See* Krisch, *supra* note 10, at 272-74. For his take on the management of the inter-regime relations, see KRISCH, *supra* note 14, at 285-91.

[83] *See* Kingsbury, *supra* note 8, at 56; Kingsbury, *supra* note 82, at 189-90. *See also* von Bogdandy, *supra* note 38; Kingsbury & Casini, *supra* note 64; von Bogdandy et al., *supra* note 69; Laurence Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 INT'L ORG. L. REV. 655 (2009).

[84] Kingsbury, *supra* note 8, at 56.

### A. Operationalizing Global Administrative Law: Publicness Mediated through Balancing

The solution to theoretical issues of legality and legitimacy concerning global administrative law rests on the substantive concept of publicness. As indicated above, however, the concept of public, the incubator of publicness, is formalistically understood. Moreover, given the multiplicity of sectoral regulatory regimes, the fragmentation of the international legal system has been placed front and center in the academic debate over contemporary international law.[85] Thus, global administrative law plays a dual role in global governance. On the one hand, it is central to lend legitimacy to the practices of variegated regulatory regimes in the global administrative space. On the other hand, it also plays the pivotal role in steering the relations between distinct regulatory publics. In the latter role, global administrative law functions as the inter-public law governing the inter-regime relations in the fragmented architecture of global governance.[86]

What ensues from global administrative law as the inter-public law is the issue of how the "conflicts of laws arrangements" should be conducted and based on what criteria. It is no surprise that the notion of publicness is called in again to back up global administrative law in its capacity as inter-public law.[87] As noted above, the notion of publicness on which the legality and legitimacy of global administrative law rests lies in the "inner morality of law." On this view, an inter-public law must pivot on the notion of publicness to be law proper. Publicness and its underlying principles substantiate global administrative law as an inter-public law. Embedded in the fragmented global governance, the inter-regime relations are coordinated in accordance with the principles of "legality" in its power-limiting sense,[88] rationality, justification, rule of law, and human rights at the core of the notion of publicness.[89]

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[85] *See* Koskenniemi, *supra* note 2, at 4-9; Andreas L. Paulus, *The International Legal System as a Constitution*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 3, at 69, 82-87.
[86] *See* Kingsbury, *supra* note 8, at 55-57; Kingsbury, *supra* note 82, at 190-98.
[87] *See* Kingsbury, *supra* note 82, at 188-91.
[88] As pointed out above, the term legality has multiple meanings. *See* SHAPIRO, *supra* note 51, at 404 n 3. Here it is understood as "the channeling and organizing of power." *See* Kingsbury, *supra* note 8, at 32-33.
[89] *See* Kingsbury, *supra* note 8, at 32-33.

Taken together, at the core of global administrative law as an institutional and legal response to the fragmentation of global governance is the notion of publicness immanent in the functioning of legal systems in transnational regulation. It operates both in each regulatory public and on the inter-public level. The incorporation of publicness into global administrative law as an inter-public law suggests that the "conflicts of laws arrangements" are also made in light of the notion of publicness.[90] For this reason, global administrative law as the inter-public law appears to function as the conflict of laws in the variegated global administrative space.[91] As the issue of regime collision looms large in the fragmentation of global governance,[92] the role of global administrative law as an inter-public *law* is becoming more and more prominent in transnational regulation. Viewed from this angle, an inter-public *legality* expressed in global administrative law's steering role in the "conflicts of laws arrangements" holds the key to the institutional and legal challenges facing global governance,[93] suggesting a new paradigm of law.[94]

It remains yet to be further analyzed whether global administrative law succeeds in presenting a feasible new paradigm of law with the character of inter-public legality at its core. A closer look at the way that the underlying principles of the notion of pubcliness play out in global administrative law as the inter-public law helps to shed illuminating light on the true nature of this implied new paradigm of law. As noted above, the inter-public legality of global administrative law rests on the notion of

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[90] *See* Kingsbury, *supra* note 82, at 188-90.

[91] *Cf*. Kuo, *supra* note 13, at 1001-02. *But cf*. Christian Joerges, *A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation*, *in* KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 465, 496-97 (Christian Joerges & Josef Falke eds., Hart 2011).

[92] *See* Koskenniemi, *supra* note 2, at 4-9; Paulus, *supra* note 85, at 82-87; Andreas Fisher-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

[93] *See* Kuo, *supra* note 13, at 1001-03. It is noteworthy that Krisch also emphasizes the importance of the construction of "interface norms" in managing the inter-regime relations in the face of the fragmentation of global governance. Nevertheless, he argues, "[T]he conflict rules do *not* have an overarching legal character; they are normative, moral demands." KRISCH, *supra* note 14, at 296 (emphasis in original). If so, Krisch's account of the "law" governing the inter-regime relations in global governance apparently suggests a new paradigm of law. *Cf*. KRISCH, *supra* note 14, at 305-07.

[94] What constitutes a paradigm of law is contested. Does a paradigm of law pivot entirely on the modality of legal reasoning? Or, to appraise a new legal paradigm, the institutional setting in which a certain mode of legal thinking would play out should be taken into account. Given that law bears greatly on the exercise of power and the deployment of institutional violence, my argument that global administrative law suggests a new paradigm of law is made with consideration of the institutional setting of law. *Cf*. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

publicness. To avert the possible regime collisions, the intricate interrelationships between regulatory regimes is steered with consideration of the underlying principles of the idea of publicness, including the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights in each governance sector. Nevertheless, global administrative law in its capacity as inter-public law is not conceived as a higher law superseding variegated regulatory regimes. With little hope for and for fear of a world government in the foreseeable future,[95] global administrative law does not proclaim a uniform set of rules inferred from the underlying principles of publicness. Instead, the steering of the inter-regime relations is carried out on a case-by-case basis, albeit in light of publicness. In each instance of conflicts of laws arrangements, the inter-public legality of global administrative law comes down to an exercise of balancing.[96] The laws of two regulatory regimes in conflict are balanced against each other to decide which one to apply in each case.[97]

It should be noted that the law of a particular regime that is chosen over another in one instance does not suggest its higher status. It only means that this chosen regime would provide a better answer to the dispute at issue. The law that is not chosen in this case may prevail over other competing legal regimes and function as the applicable law in other situations. For this reason, global administrative law as the inter-public law stands closer to conflict of laws than to constitutional law.[98]

At the core of the choice of which legal regime provides the applicable law in global governance is a decision on the "weight" that should be meted out to each legal regime.[99] Embedded in the practices of global governance but filtered through by the notion of publicness, global administrative law is not considered binary with a definitive answer to the issue of what is law and non-law with respect to each practice of global

[95] *See* KRISCH, *supra* note 14, at 52-61.
[96] *See* Krisch, *supra* note 10, at 269-74. *Cf*. Cassese *supra* note 11, at 680.
[97] *Cf*. KRISCH, *supra* note 14, at 277-78.
[98] *Cf*. Joerges, *supra* note 91, at 495-98. For a conflict of laws understanding of constitutional adjudication, see Alec Stone Sweet & Martin Shapiro, *Abstract and Concrete Review in the United States*, *in* MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 347, 366-67 (Oxford University Press 2002).
[99] *See* Kingsbury, *supra* note 8, at 27.

governance. Rather, the issue of legality is one of "weighing," which concerns the legal weight of governance practices.[100]

To be clear, this does not mean that the effort to rest legality on the notion of publicness is futile. It rather indicates that the property of legality of a legal norm in global administrative law is not fixed, falling far shy of something already existing to be discovered. The legality of global administrative law results from the judgment on the legal weight that should be given to each governance practice. Calculation of legal weight of each law-related practice is integral to the mode of legal reasoning underpinning global administrative law.[101] Thus, the publicness-based concept of legality at the core of global administrative law turns out to be balancing,[102] echoing the centrality of balancing to global administrative law in its capacity as inter-public law.

### B. Beyond Typologizing Balancing: Global Administrative Law as Legal Reasoning or Political Calculation?

While balancing has been recognized as central to legal reasoning,[103] a close inspection of different types of balancing will lay bare the distinctiveness of balancing in global administrative law. Balancing is invoked to address the situation in which legitimate interests are in tension and not all of them can be completely satisfied.[104] It describes both a process of measuring these competing interests to determine which is "weightier" and a particular substantive outcome characterized as a "balance" of competing interests.[105] The decision resulting from balancing as the method of legal interpretation, however, is not clear. If the decision is made to be "balanced" to reflect all competing factors instead of choosing the weightier one over the rest, balancing is the means to the reconciliation or accommodation of competing interests.[106] In contrast, balancing may also lead to a zero-sum choice: the weightier legitimate interest as a function of the

[100] *Id.*; KRISCH, *supra* note 14, at 294-96.
[101] *See* Kingsbury, *supra* note 8, at 30-31, 54-55.
[102] *See id.* at 30-31; Krisch, *supra* note 10, at 269-74.
[103] *See generally* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., Oxford University Press 2002). *See also* Jacco Bomhoff, *Genealogies of Balancing as Discourse*, 4 (1) LAW & ETHICS HUM. RTS. 6 (2010), http://www.bepress.com/lehr/vol4/iss1/art6. *But cf.* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).
[104] *See* Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 3 (1987).
[105] *Id.* at 3-4.
[106] *See id.* at 5-25.

determinant factors in the factual context should be chosen over other competing interests by virtue of balancing. In this vein, balancing is aimed at the resolution of conflict.[107] Notably, at the core of "resolutional balancing" is the process through which opposing values are at play and the choice between them is made and guided by fundamental principles.[108] An example of resolutional balancing can be found in the methodology of categorical or definitional balancing the U.S. Supreme Court adopts in its jurisprudence in freedom of speech.[109] On this view, balancing is no different from traditional legal interpretation.[110]

In contrast, "accommodational balancing" raises some concerns when it is deployed in the judicial setting.[111] To the extent that the purpose of accommodational balancing is to reach a balanced decision with all competing interests represented in the outcome, the function of accommodational balancing is characteristic of legislative and administrative policy choices.[112] Nevertheless, it does not mean that accommodational balancing is off-limits to traditional judicial policymaking. Sentencing decisions in criminal justice,[113] awarding damages in civil suits,[114] and equity-like judicial proceedings such as granting injunctions and child custody adjudications[115]are examples of the exercise of accommodational balancing by the judiciary. Even so, these examples need to be situated in their institutional settings to understand their unique roles in judicial decisionmaking.

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[107] *See id*. at 26-37.
[108] *See* Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 68, 76-77, 87-90 (2008).
[109] *See* Daniel A. Faber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917 (2009). *See also* Marko Novak, *Three Models of Balancing (in Constitutional Review)*, 23 RATIO JURIS 101, 107-12 (2010). *Cf*. Kahn, *supra* note 104, at 26-37.
[110] *See* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 264 (2010).
[111] Even if judicial balancing has become integral to judicial decision-making in Europe with the widespread of proportionality review, judicial decisions are more liable to criticism when the judiciary is seen as taking on the accommodational as opposed to resolutional role in the exercise of balancing. *Cf*. PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 13 (Columbia University Press 2011).
[112] *See* Kahn, *supra* note 104, at 5-25.
[113] *See, e.g*., Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006).
[114] *See, e.g*., Benjamin Taibleson, Note, *Forgiving Breach: Understanding the Preference for Damages over Specific Performance*, 27 QUINNIPIAC L. REV. 541, 554-56 (2009)
[115] *See, e.g.*, KIRSTEN STOLL-DEBELL ET AL., INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 125-47 (American Bar Association 2009).

The aforementioned three types of accommodational balancing by the judiciary can be grouped as two categories. The first category can be called remedial, including sentencing decisions in criminal justice and awarding damages in civil suits. In this category, balancing is remedial and subsidiary to a prior decision, for example, a criminal conviction in the former and a delictual verdict the latter. Balancing is not a freewheeling policymaking but rather indicates an exercise of judicial administration complementary to principal judicial decisions.[116] Moreover, balancing in this category is residual in that it is granted mainly in the interstices of legislative and administrative policy choices.[117] With respect to the second category of judicial accommodational balancing in the equity-oriented proceedings, it can be characterized as managerial.[118] It remains to be seen whether the growth of judicial managerialism will compromise the traditional judicial role in the legal system.[119] Yet, as the widespread of the principle of proportionality in various jurisdictions shows, accommodational balancing has taken roots in judicial decisions. By means of the principle of proportionality, judicial balancing extends to the accommodation of conflicting interests, blurring the distinction between resolutional and accommodational balancing.[120]

Proportionality review gains currency because balancing at the core of proportionality analysis provides the tool for the court to substantiate constitutional rights when they are in conflict with government policies without endangering the judicial role vis-à-vis political departments.[121] Specifically, balancing is a test to accommodate both constitutional rights and the legitimate policy goals pursued by the political departments. When it comes to constitutional rights in conflict, balancing is employed

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[116] *See*, *e.g.*, Tracy A. Thomas, *Proportionality and the Supreme Court's Jurisprudence of Remedies*, 59 HASTINGS L.J. 73 (2007).

[117] *See*, *e.g.*, Stephen Wizner, *Judging in the Good Society: A Comment on the Jurisprudence of Justice Scalia*, 12 CARDOZO L. REV. 1831 (1991).

[118] Paul Kahn also interprets equity as the judicial exercise of untraditional, nonlegal power. Yet, he regards the classical exercise of equity jurisdiction in the English legal system as an intervention of political sovereignty rather than an indication of judicial managerialism. *See* KAHN, *supra* note 111, at 35-37. In its modern form, I suspect that equity moves closer to the direction of judicial managerialism, regardless of its historical roots in sovereignty.

[119] *See* OWEN FISS, THE LAW AS IT COULD BE 37-39 (New York University Press 2003).

[120] *See* Stone Sweet & Matthews, *supra* note 108, at 94-95.

[121] *See* ALEXY, *supra* note 103, at 44-110. *See also* Stone Sweet & Matthews, *supra* note 108, at 76; Jacco Bomhoff, Lüth*'s 50th Anniversary: Some Comparative Observations on the German Foundations of Judicial Balancing*, 9 GERMAN L.J. 121 (2008).

to reconcile both rights of equal ranking.[122] Nevertheless, it is also resolutional in that judicial decisions are centered on resolving a specific dispute: Whether the disputed government measure violates the claimed constitutional right under such circumstances or whether in this particular situation, for example, the freedom of the press should prevail over the opposing claim based on privacy. Facing these disputes, judicial decisions are conditioned by the determinant facts in relation to the legal issue. In other words, the resolution of the conflict of two constitutional values in individual cases is a function of the judicial assessment of the relative weight of these two conflicting values conditioned by the factual condition.[123] Judicial balancing in the interpretation of constitutional rights is both resolutional and accommodational.

It is true that accommodational balancing is traditionally associated with legislative bodies or administrative agencies. Judicial exercise of accommodational balancing may put the judiciary at the risk of political second-guessing, inviting more rounds of political reconsideration. Nevertheless, this risk has been alleviated not by more politics but by more reasoned arguments instead. To justify its accommodational role in balancing, the judiciary needs to provide principled argumentation to distinguish its decisions from political bargaining.[124] In this way, judicial exercise of accommodational balancing in relation to two constitutional values in conflict has been brought back to the fold of traditional legal reasoning.[125] Thus, with the principle of proportionality widely adopted, balancing does not contradict but instead takes the ideal of rule of law one step further to fruition.[126]

Moreover, the practice of accommodational balancing in the application of proportionality analysis suggests the institutional conditions for its successful operation in the legal system. The addition of accommodational balancing to traditional judicial functions results from the institutional designation of the judiciary and its functional equivalents as the "constitutional trustee[]," which is characteristic of the post-WWII

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[122] *See* ALEXY, *supra* note 103, at 390-94.
[123] *See id*. at 396-414.
[124] *See id*. at 405.
[125] *See* Stone Sweet & Matthews, *supra* note 108, at 80-97. *See also* Bomhoff, *supra* note 121, at 124.
[126] David Beatty regards the principle of proportionality as the ultimate rule of law. *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (Oxford University Press 2004).

"new constitutionalism."[127] Judicial exercise of accommodational balancing is grounded by the institutional framework set up in the political decisions of a constitution.[128]

Against this analytic framework, the distinctive character of balancing at the center of global administrative law becomes more revealed. Global administrative law in its capacity as inter-public law not only decides how much weight should be given to each legal regime but also weighs legal regimes in conflict against each other.[129] First, in an easy case where only a particular governance practice in a single regulatory regime is in question, the notion of publicness provides the reference framework within which the legality of that particular governance practice can be decided. Nevertheless, this dispensation of legal weight is not so much an interpretation of law as a decision resulting in the creation of a legal regime. When it comes to a hard case in which multiple regulatory regimes are involved, the act of weighing concerning the legality of governance practice is even more different. In this situation, the notion of publicness only suggests a guideline, which falls short of shedding light on how much weight should be meted out to each regulatory regime and its governance practice at issue.

Turning to weighing and balancing does not help much under such circumstances. Unlike the paradigm cases where balancing is invoked to accommodate distinct constitutional values and to resolve the conflicts of competing constitutional rights, the choice over the applicable legal regime does not involve two competing values. Rather, what is at stake is the integrity of two distinct legal regimes. In this situation, the choice over the applicable legal regime amounts to a decision in what Robert Alexy calls 'stalemate situations' in which, for example, the interference with freedom of the press is as strong as the protection of privacy after balancing. In the face of such a stalemate, Alexy concedes that balancing gives way to discretion.[130] While stalemate situations are considered rare in the paradigm cases of balancing, they occur in each instance of choosing between conflicting legal regimes in global administrative law as an inter-public law. Thus, in contrast to balancing as part of legal interpretation in the resolution

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[127] *See* VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE 3-9 (Yale University Press 2009). *See also* Stone Sweet & Matthews, *supra* note 108, at 85-87.
[128] *See also* ALEXY, *supra* note 103, at 414-25.
[129] *See* Kingsbury, *supra* note 8, at 55-56.
[130] *See* ALEXY, *supra* note 103, at 408-14, 421.

of conflicts or accommodation of interests, balancing in global administrative law stands close to political decisions as it constantly retrogresses to discretion.[131]

Moreover, the objective of balancing in the steering of the inter-regime relations is not limited to finding out the better applicable law. It is aimed to avoid the possible collisions between regulatory regimes. Choosing between laws should not lead to the superiority of one legal regime over another. "Accommodation" of legal regimes in conflict tops the list of the factors to be taken into account in the exercise of balancing in global administrative law as the inter-public law.[132] In this regard, legality of global administrative law appears to operate under what Martti Koskenniemi calls the "instrumentalist mindset" as accommodating conflicting legal regimes stands out as the objective.[133] Or, it may be argued that it is an exercise of the Alexian-Dworkinian idea of practical reasoning rather than the instrumentalist mindset that guides the accommodation of legal regimes in the capacity of global administrative law as inter-public law.[134] From this perspective, legality in global administrative law turns out to depart from the revisionist Hartian legal positivism underpinned by the idea of publicness. If so, the effort to keep global administrative law away from the ideological wars by resting it on the non-moral foundations of legal positivism may falter. Still, it is nowhere near indicative of a new paradigm of law.[135]

Taking account of its unique institutional environment, global administrative law is much more than an innovative application of practical reasoning. Unmoored from the well-designed institutional settings in which judicial exercise of accommodational balancing can be differentiated from political bargaining, accommodation in global administrative law is free of the constraints of discursive structures. Unrestrained accommodational balancing boils down to politics.[136] At the end of the day, politics

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[131] *See also* MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 252-54 (Hart 2011). *Cf.* Kingsbury, *supra* note 8, at 26-27.
[132] *See* Krisch, *supra* note 10, at 267-68, 278.
[133] *See* KOSKENNIEMI, *supra* note 131, at 252.
[134] *See also* Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, *in* RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE, *supra* note 3, at 258.
[135] I am indebted to Mattias Kumm for this observation.
[136] *See* KRISCH, *supra* note 14. *See also* Kahn, *supra* note 104. This also explains why judicial supremacy lies at the heart of the constitutionalization of politics. Alec Stone Sweet argues that with the establishment of judicial/ constitutional review in the Continental Europe, the constitutionalization of

rather than practical reasoning underlies the exercise of balancing at the core of global administrative law.

### C. Toward a New Paradigm of Law? Uncovering the Post-Public Legitimacy of Global Administrative Law

To be sure, it is one thing to say that politics is indispensable to global administrative law; it is quite another to jump to the conclusion that global administrative law lacks legality at all.[137] After all, some self-involved jurists aside, that politics plays a role in legal reasoning is well received in legal theory even to the extent of becoming a cliché.[138] However, the fundamental question concerns the way that law and politics are interrelated.

Regardless of the diversity of legal thoughts, the ultimate legitimacy of law is considered extralegal. Law gains legitimacy from political actions external to itself but in the meantime politics does not dominate the functioning of the legal system.[139] Notably, the legitimacy-bestowing political action is not a one-off episode. Rather, it has lasting bearing on the entire institutional setting in which the law functions. Even if legal interpretation and judicial decision are commonly referred to in terms such as judicial politics[140] or political judging,[141] the judiciary finds its source of legitimacy in the mandate conveyed through the legal system. Thus, while law and politics are

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politics has taken place in the post-WWII era. On this view, the political branch, the legislative department in particular, also conducts its own constitutional assessment in its policy-making process in order to keep the judiciary from setting aside its policies. Through this process, Stone Sweet characterizes the relationship between judicial review and the political branch as based on an archetype of constitutional dialogue. *See* ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (Oxford University Press 2000). Still, it should be noted that balancing made in the hands of political branch is considered not so much legal as political and thus subjected to judicial supervision, leading to judicial supremacy.

[137] *Cf.* KOSKENNIEMI, *supra* note 131.

[138] *See*, *e.g.*, RONALD DWORKIN, JUSTICE IN ROBES 255-56 (Belknap Press 2006).

[139] *See generally* THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM (Martin Loughlin and Neil Walker eds., Oxford University Press 2007). *See also* GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., University of Chicago Press 2005); Jacques Derrida, *Force of Law: The Mystical Foundation of Authority*, *in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell et al. eds., Routledge 1992). *Cf.* PETER FITZPATRICK, MODERNISM AND THE GROUNDS OF LAW 70-107 (Cambridge University Press 2001).

[140] *See* KRISCH, *supra* note 14, at 126-27, 146-49; RAN HIRSCHL, TOWARDS JURISTOCRACY (Harvard University Press 2004).

[141] *See* Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989): 643.

interrelated, law cannot be stripped down to politics.[142] In contrast, politics and law are fused together in global administrative law. As noted above, the judgment with respect to the legality of individual governance practices is different from the practice of legal interpretation. It is an exercise of weighing, paralleling the political calculation in ordinary lawmaking rather than the principled exercise of practical reasoning in judicial lawmaking.[143] When it comes to the choice of the applicable law where two regulatory regimes are in conflict, the decision is made with the accommodation of both regimes as the baseline. Unlike the externality of politics to law in the traditional paradigm of law, global administrative law suggests that politics is internal to the functioning of the law.

If so, the ensuing issue concerns how the legitimacy of law would be accordingly conceived of. To the extent that global administrative law absorbs politics, its legality is not so much judgment based on legal reasoning as political calculation through the prism of publicness. Correspondingly, the legitimacy of global administrative law resides in politics within the law itself rather than that situated extralegally. As a result, the distinction between global administrative law and traditional legal thinking lies in the different location of politics and its effect on the legitimacy of law.

As noted above, the legitimacy of law traditionally resides in extralegal politics. Even if judicial politics is widely used to describe what happens with respect to the legal system, the legitimacy of the functioning of law is not thus severed from its external political origination. In the eyes of some observers, the judiciary should even be chosen over the legislative body as the main holder of political mandate.[144] From this perspective, the better forum to deliberate and decide the issues of crucial importance to the public is the courtroom rather than the parliament hall. Even so, it does not indicate that the judiciary is political in and of itself but that it is more suitable to conduct dialogues with the public over fundamental questions, resting legal judgments on more solid grounds

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[142] *Cf.* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 73-77 (University of Chicago Press 1999).
[143] *See* Kahn, *supra* note 104, at 47-59. For the character of judicial lawmaking, see Stone Sweet & Matthews, *supra* note 108.
[144] *See* Stone Sweet & Matthews, *supra* note 108, at 85-87. *See also* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

of legitimacy.[145] Taken together, the legitimacy of law in traditional legal thinking, both balancing and non-balancing, is the function of public dialogues.[146]

However, in global administrative law, the politics of weighing at the core of global administrative law finds legitimacy in different sources. Noticeably, global governance is far from sovereign states. In the global administrative space, there is no institutional arrangement through which an authoritative dispensation of legal weight can be legitimately administered. Nor can the case of supranational setting such as the European Union (EU) be likened to global governance.[147] Global governance is diffuse and its judicialization is uneven and rudimentary compared to the EU.[148] For this reason, the envisaged judicial dialogues revolving around the accommodation of regulatory regimes in conflict would not bring public legitimacy to the conflicts of laws arrangements in global administrative law.

That said, institutional dialogues between distinct regulatory regimes do not vanish from the arena of global governance.[149] Dialogues in individual regulatory regimes are not lacking, either. Moreover, these dialogues revolve around the politics of weighing, seemingly bestowing legitimacy on global administrative law indeed. Nevertheless, these dialogues need to be distinguished from the public dialogue in which the legitimacy of law traditionally originates. Instead of finding its linkage with the general public, the dialogues that are seen to bring about the legitimacy of regulatory regimes in global governance are conducted among limited interested parties, regardless of whether their interest is in academics or profits.[150] Given the interest-oriented character

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[145] *See* PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 179-89 (Yale University Press 1992).

[146] *See* FISS, *supra* note 119, at 38-39; MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 99-100 (Oxford University Press 1994); Daphne Barak-Erez, *An International Community of Legislatures?*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 532, 533-34 (Richard W. Bauman & Tsvi Kahana eds., Cambridge University Press 2006). *See also* KAHN, *supra* note 111, at 146-51

[147] *See* Tim, Koopmans, *Globalisation of Administrative Law—the European Experience*, *in* VALUES IN GLOBAL ADMINISTRATIVE LAW, *supra* note 8, at 393.

[148] *See* Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, *in* CAMBRIDGE COMPANION TO TRANSNATIONAL LAW (James Crawford & Martti Koskenniemi eds., Cambridge University Press 2011 forthcoming). *Cf.* Armin von Bogdandy & Ingo Venzke, *Beyond Disputes: International Judicial Institutions as Lawmakers*, 12 GERMAN L.J. 979 (2011).

[149] *See* KRISCH, *supra* note 14, at 214-15.

[150] *See* Kingsbury, *supra* note 8, at 56-57; Kingsbury, *supra* note 82, at 189-90; 193-97. *See also* Kuo, *supra* note 13, at 1000, 1003.

of dialogues in the global administrative space, the legitimacy of global administrative law is not rooted in public dialogues.[151] Global administrative law turns out to find its legitimacy in non-public, interest-oriented dialogues, suggesting a new paradigm of law based on a different conception of legitimacy.

To sum up, global administrative law implicates a new paradigm of law with its distinctive approach to the issue of legality in its unique institutional context. Given the centrality of political calculation to legality in the form of meting out legal weight and the non-public character of institutional dialogues, the relationship between law and politics is recast in global administrative law. With dialogues underpinning the politics of weighing being oriented towards limited interests, the legitimacy of global administrative law does not pivot on public dialogues. Rather, global administrative law suggests a post-public conception of legitimacy. As a result, what defines global administrative law as a new paradigm is not its inter-public legality but rather a post-public legitimacy.

## V. CONCLUSION

Global governance has generated various proposals as to how to align governance with the rule of law. Among the rest is global administrative law.[152] What is common between global administrative law and other proposals to global governance is to conceive the corresponding institutional arrangement beyond the confines of the sovereign state. I have no ambition to provide a thorough analysis of the state of contemporary debate over the rule of law on the global level in the present paper. Nor do I intend to make a normative prognosis of the implications from the emergence of global administrative law. The objective of this paper is simply to contribute to reflections on whether global governance has brought about a paradigm shift in legal thinking by studying the case of global administrative law.

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[151] This explains why a court-centered understanding of the rule of law is not that which distinguishes global administrative law from the traditional paradigm of law. For example, even holding a skeptical view of strong forms of judicial review, Jeremy Waldron considers the dialogues that take place outside the courtroom such as democratic deliberation in legislature in particular to be the foundation of the political legitimacy of traditional legal systems. In his view, the legitimacy-bestowing dialogues centering on legislature is not conducted among interested parties but public in nature. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

[152] *See* Kennedy, *supra* note 3, at 44-51.

I first examine the structural transformation of the international legal system in which global administrative law and global governance are aligned. I argue that the rise of global governance and the formation of a global administrative space take place in the structure of boundary-blurring, indicating a new *nomos* of the earth. Given this boundary-blurring meta-constitution, I suggest that global administrative law reflects a deliberately chosen approach to the new global *nomos* of the earth by virtue of the values embedded in administrative law tools. Situating global administrative law in global governance, I further argue that it deviates from the Westphalian legal system in which the sovereign will of the nation-state holds the key to the issues of legality and legitimacy. Through the recasting of legality and legitimacy in an extended concept of social fact underpinned by the idea of publicness, global administrative law appears to implicate a new paradigm of law defined by inter-public legality. On closer inspection, I conclude that global administrative law does herald a new paradigm of law under which political calculation displaces traditional legal reasoning. Legality is translated into the issue concerning the dispensation of legal weight and thus merged with politics. In this way, the relationship between law and politics is redefined in global administrative law. Given the non-public, interest-oriented character of dialogues underpinning the politics of weighing, global administrative law suggests a post-public conception of legitimacy. What defines global administrative law as a new paradigm of law is a post-public legitimacy instead of its inter-public legality.

Echoing other proposals on the legal architecture of global governance, what underlies global administrative law is an attempt to unhinge it from national sovereignty by situating its content in the practices of existing regulatory regimes in the global administrative space.[153] The issues of legality and legitimacy central to traditional legal thinking are addressed with the aid of the notion of publicness. In this way, it seems that global administrative law not only answers the epistemic question of what constitutes its legality but also reconstructs the legitimacy of global governance in the image of a post-Westphalian legal order. However, my investigation shows that global administrative law introduces a post-public legitimacy, albeit in the guise of inter-public legality, making a curious case of global administrative law as a new paradigm of law.

[153] *See* Cohen, *supra* note 1.