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VOL. 2 Nº 3 DEZEMBRO 2015

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## LEGALITY AND LEGITIMACY IN GLOBAL ADMINISTRATIVE LAW

### LEGALIDADE E LEGITIMIDADE NO DIREITO ADMINISTRATIVO GLOBAL

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**Abstract:** Adopting a systematic approach, this paper sketches out three ways of questioning the legitimacy of GAL. It distinguishes between the legal, liberal and democratic forms of legitimacy and analyses their application to GAL. The argument in this article is that there is a necessary connection between legality and legitimacy, and that the legitimacy of GAL is conceptually problematic. This is not to deter future research on GAL; on the contrary, we cannot do without a comprehensive legal theory of global governance. In the final section, the pragmatic approach of GAL is compared with the more ample ambition of global constitutionalism to provide a comprehensive narrative of contemporary international law.

**Resumo:** Adoptando uma abordagem sistemática, este artigo esboça três formas de questionar a legitimidade do DAG. Nessa medida, distingue-se entre formas jurídicas, liberais e democráticas de legitimidade e analisa-se a sua aplicação ao DAG. O argumento a que se recorre consiste em defender a existência de uma conexão necessária entre legalidade e legitimidade, e que a legitimidade do DAG é conceptualmente problemática. Não se pretende, contudo, impedir futuras investigações sobre o tema; porém, não podemos fazê-lo sem uma teoria jurídica abrangente de governança global. Na secção final, a abordagem pragmática do DAG é comparada com uma ambição mais ampla de o constitucionalismo global fornecer uma narrativa abrangente do direito internacional contemporâneo.

**Keywords:** Global administrative law; Legality; Legitimacy; Constitutionalism; Public Law.

**Palavras-chave:** Direito Administrativo Global; Legalidade; Legitimacy; Constitucionalismo; Direito Público

**Summary:** 1. Introduction; 2. Legal Legitimacy; 3. Liberal Legitimacy; 4. Democratic Legitimacy; 5. Global Administrative Law and Global Constitutionalism.

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**Sumário: 1. Introdução; 2. Legitimidade Jurídica; 3. Legitimidade Liberal; 4. Legitimidade Democrática; 5. Direito Administrativo Global e Constitucionalismo Global.**

## 1. Introduction

The most fruitful way to approach the concept of law in global administrative law (GAL) is to focus on the question of its legitimacy. This is how David Dyzenhaus<sup>2</sup> and Benedict Kingsbury<sup>3</sup> proceeded: adopting a Fullerian approach to law, they defined legality as the fidelity to the ‘inner morality of law’, and, in the case of Kingsbury, described this morality as *publicness*. However, other commentators of GAL seem to have a different understanding of the nature of legitimacy. In this paper, I want to examine the claim that there is more to legitimacy than mere accountability. The ambition of this paper is to sketch out three ways of questioning the legitimacy of GAL. Adopting a systematic approach, this paper distinguishes between the legal, liberal and democratic forms of legitimacy and analyses their application to GAL. While legal legitimacy is usually seen as less contentious, I will argue that there are considerable debates concerning all three forms of legitimacy. The argument in this article is that there is a necessary connection between legality and legitimacy, and that the legitimacy of GAL is conceptually problematic. This is not to deter future research on GAL; on the contrary, we cannot do without a comprehensive legal theory of global governance. In the final section, the pragmatic approach of GAL is compared with the more ample ambition of global constitutionalism to provide a comprehensive narrative of contemporary international law.

## 2. Legal Legitimacy

Let us first set the scene for this discussion by giving a brief overview of the global administrative law project. According to Kingsbury and Krisch, “the concept of global administrative law begins from the twin ideas that much global governance can be understood as administration, and that such administration is often organized and shaped by principles of an administrative law character<sup>4</sup>.” The starting point of GAL is the current state of global governance, which was perhaps best captured by Anne-Marie Slaughter’s notion of network<sup>5</sup>. She argues that the globalization of many public issues (such as the various economic, security, and environmental challenges) induced a fragmentation of the functions of the state, which are now exercised jointly with other states and private actors through transnational and supranational networks. This dynamic blurs the traditional boundaries between the domestic and the international spheres, but allows for an increased capacity of positive action. This multi-layered space includes international organisations, intergovernmental bodies, national administrations

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2. DAVID DYZENHAUS, The Concept of (Global) Administrative Law, *Acta Juridica*, 2009, pp. 3-31

3. BENEDICT KINGSBURY, The Concept of Law in GAL. *European Journal of International Law (EJIL)*, XX-1, 2009.

4. BENEDICT KINGSBURY / NICO KRISCH, Introduction: Global Governance and Global Administrative Law in the International Legal Order, *European Journal of International Law*, XVII-1, 2006.

5. ANNE-MARIE SLAUGHTER, *The New World Order*, Princetown University Press, Princetown, 2004.

dealing with transnational issues, and private or public-private institutions exercising regulative functions of public interest. In this context, the word “global” is preferred to “international”, because it transcends the public/private distinction, and includes domestic, intergovernmental and supranational administrative bodies alike. The GAL project comes into play because these heterogeneous institutions take administrative decisions that have an impact on public actors like states, as well as private actors like individuals or corporations.

Kingsbury and Krisch further argue that this administration is “organized and shaped by principles of an administrative law character”. It is not always clear whether these principles are deduced from the existing practices of global administration, or if the project of GAL consist in the systematization and interpretation of universal standards of administrative law that should be applied to global administration<sup>6</sup>. It could be a mix of both, in which case the authors are making an empirical as well as a normative statement. The principles in question are mostly of a procedural nature: the core of the GAL project concerns requirements of transparency in administrative adjudication, the obligation to give reasoned decisions, and the possibility to exercise a recourse in review of those decisions. This is indeed very similar to domestic administrative law, at least as it stands in the common law jurisdictions. However, Kingsbury *et al* warn that in the absence of an overarching global state authority, global administration is much more informal, decentralized and harder to supervise than its domestic counterparts<sup>7</sup>, which is why many principles of domestic administrative law are inapplicable in the global context. What is described as global administration is therefore an intricate overlap of public/private regulative networks where control of the delegated authority is complicated by the lack of a constitutional structure that would formally lock down and hierarchically organize these heterodox administrative procedures. The fragmented, decentralized and often non-binding nature of these procedures explains why its status as law has been questioned so vigorously.

As mentioned previously, this paper is concerned with the legitimacy of global administrative principles inasmuch as some form of legitimacy is a prerequisite to legality. The concept of ‘legal’ legitimacy refers to the inherent rationality of law. David Dyzenhaus sums it up quite simply:

“rule by law cannot be merely instrumental to some set of external purposes or values, since it also has to be rule in accordance with the rule of law, and that rule carries its own special legitimacy. In fact, I would venture, there would be little reason to be concerned with what

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6. See for example the ambiguity in this passage: “GAL seeks to explore and map existing and emerging accountability practices, and it does so in a framework borrowed from administrative law.” NICO KRISCH, GAL and the Constitutional Ambition, in *The Twilight of Constitutionalism*, Oxford University Press, Oxford, 2010.

7. BENEDICT KINGSBURY / NICO KRISCH / RICHARD STEWART, The Emergence of Global Administrative Law, *Law and Contemporary Problems*, LXVIII-3/4, 2005, pp. 15-61.

global administrative agencies do as a *legal* phenomenon, in contrast to a phenomenon *of power*, if the claim, implicit or explicit, that their decisions have legal authority did not entail a further claim to some special legitimacy that transcends what is ordinarily conveyed by the idiom of accountability”<sup>8</sup>.

This passage is as penetrating as it is self-evident. The idea of law, if it is to be distinct from sheer power, implies the observance of what Lon Fuller called the ‘inner morality of law’. The eight criteria of a good law according to Fuller are well known: publicity, clarity, non-contradiction, possibility of execution, constancy, non-retroactivity, generality and congruence. Lon Fuller makes a distinction between a managerial order and a legal order: satisfaction of the first five criteria is enough for a managerial order (non-retroactivity being pointless in this case), but a distinctly legal order requires generality as well as congruence between the purpose of the legislation (formulated in general terms) and the ensuing executive action. This necessarily involves interpretation of the purpose of the law and evaluation of the adequacy of the executive action. According to Dyzenhaus’ stimulating reading of Fuller, this very dynamic implies a recognition of the agency of the ‘regulated’ by the ‘regulator’, or rather “a relationship of reciprocity between those who wield legal authority and those subject to the authority”<sup>9</sup>. Simply put, the requirement of congruence creates a space for participation of the ruled in the interpretation of the general norm. This is tantamount to a pre-democratic form of legitimacy, where the ruled is well founded to invoke the benefit of the rule of law in any type of legal regime – though this is more congruent with a democratic regime.

This relationship is key to the understanding of Fuller’s concept of law; but in order for it to take place, the content of the law must be sufficiently determined. In administrative law, the ‘intransitive’ legislation delegating administrative authority becomes ‘transitive’ through the decision of the subordinate administrative body<sup>10</sup>. When a statute or a treaty confers regulating power on an administrative body, the law is indeterminate (or intransitive) until those powers are exercised, and at that point, fidelity to the inner morality of law is required in order for administrative regulations to be ‘law’. Dyzenhaus concludes that a global administrative ‘law’ requires reasoned decisions in which the authority of the decision rests on the quality of the legal process rather than on “an initial act of state consent”<sup>11</sup>. He adds that changes may be necessary in order for a clear delegation of legal authority to take place in global governance.

The nature of these changes might have to do with the lack of generality in GAL. From Fuller’s perspective, global administration would be a managerial order. Drawing from Locke and Rousseau, Jeremy Waldron argues that generality is a precondition of law because it is a safeguard against arbitrary decision and

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8. DAVID DYZENHAUS, Concept, *Acta Juridica*, pp. 6-7.

9. *Ibid.*, p. 26.

10. DAVID DYZENHAUS, Concept, 2009, p. 24.

11. DAVID DYZENHAUS, Concept, 2009, p. 24.

tyranny<sup>12</sup>. A. V. Dicey famously shared a similar position. However, proponents of the GAL project like Benedict Kingsbury hold that generality is not a necessary requirement for contemporary law. Referring to Hobbes and Kelsen, Kingsbury claims that generality might be necessary at the level of formal delegation of power, but not at the level of execution. He further contends that there exist different types of legal systems, and that the law of global governance should not be held to the same criteria of legality as the law of the state. While conceptual flexibility is often a virtue, there is not much to be gained from an extensive definition of law where the specificity of positive law is undistinguishable from managerial orders. Positive law depends on an institutional structure, the lack of which cannot be simply overlooked out of commodity. Reference to Kelsen is also surprising: while it is correct that his pure theory of law considers individual norms as legal norms, it should be noted that the legal norm is a *coercive* norm to which is attached a legal consequence<sup>13</sup>. This presupposes the existence of a state enforcing sanctions. The logic of legal imputation, central to Kelsen's pure theory of law and to his recognition of individual norms as law, is dependant upon a structure that is lacking in GAL.

### 3. Liberal Legitimacy

Legal legitimacy entails more commitment from the administrative actors than mere 'internal coherence'. The fact remains, however, that the political legitimacy required in order to put forth a liberal agenda of protection of private rights is much higher. In their framework article, Kingsbury, Krisch and Stewart argue that from a liberal perspective, any infringement on individual rights should be conditional on the respect of due process, which implies a right to be heard, reasoned decisions, and the possibility of review. This protection of individual rights 'presupposes a priority of liberal values<sup>14</sup>', which of course are susceptible of various (and often conflicting) interpretations. Drawing from the English School of international relations, Kingsbury *et al* argue that a harmonious respect of individual rights by like-minded societies is possible in a *cosmopolitan* order, or even in a *solidarist* international society where human rights are part of a 'universal' international law.

This is congruent with a Hartian perspective of law as a social fact, where the concept of law is dependant upon the internalisation of an obligation by the actors. However, the empirical approach to law is dependant upon the existence of a rule of recognition, which is lacking in the informal and decentralized global administrative space<sup>15</sup>. Basically, the traditional sources of inter-

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12. JEREMY WALDRON, Can There Be a Democratic Jurisprudence, *New York University Public Law & Legal Theory Research Paper Series*, Working Paper No. 08-35, 2008 p. 46-50.

13. HANS KELSEN, *Introduction to the Problems of Legal Theory*, Clarendon Press, Oxford, 1992. ch. 3.

14. BENEDICT KINGSBURY *et al*, *Emergence*, 2005, p. 46.

15. BENEDICT KINGSBURY, *Concept*, 2009, pp.29-30.

national law are insufficient to qualify global administration as law<sup>16</sup>, and so is Hart's concept of law<sup>17</sup>. Kingsbury therefore suggests that the Hartian approach can be supplemented with a concept of *publicness* acting as a rule of recognition. Publicness here refers to the immanent qualities of public law, which include legality, reasonability, proportionality, rule of law and respect for human rights. The normative justification of public law rests on these elements, much like the legality depends on the respect of the inner morality of law in Fuller's theory. Kingsbury reconciles this notion of 'publicness' with hartian positivism by using it as a rule of recognition. But in his case, the moral content of law is dependant upon liberal values. In GAL, 'only rules and institutions meeting these publicness requirements immanent in public law (and evidenced through comparative materials) can be regarded as law<sup>18</sup>.'

This passage begs the question of the sources of GAL. Kingsbury argues that domestic public law rests not on political authority, but on the inner morality of publicness. In a similar way, GAL focuses on individual rights whose legitimacy is independent from state consent<sup>19</sup>. Beyond the controversial naturalist account of the foundation of individual rights, the argument seems to be mostly sociological: where there exist a consensus on human rights, there is a sufficient 'social basis' for their recognition as binding norms. It bears noting the similarity between this point and Jürgen Habermas' idea that "the constitutionalization of international law retains a derivative status because it depends on 'advances' of legitimation from democratic constitutional states<sup>20</sup>". In Kingsbury's account of GAL, the requirements of publicness are similarly 'derived' from domestic public law regimes, in a way that presupposes these regimes to share fundamental similarities that thus acquire a universal standing. While this might be true of certain basic human rights, it is far from certain that every state's administrative law is founded on the same conception of publicness. Administration is a historical reality that developed in concrete institutions; "precisely for this reason, it lends itself to substantial diversity and opens itself up to divergent paths of development<sup>21</sup>." This is not to say that international administration is impossible, but rather that it cannot function on principles that are assumed to be universal. While most nations agree to the general idea of the rule of law, there are major differences between the continental understanding of the *Rechtsstaat* or *État de droit*, and the British rule of law (which could also be different from the American rule of law), the main difference being the centrality of the state in the continental tradition.

This leads us to the conclusion that the *cosmopolitan* or the *solidarist*

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16. *Ibid*, p. 29. See also BENEDICT KINGSBURY *et al*, *Emergence*, 2005, p. 29.

17. BENEDICT KINGSBURY, *Concept*, 2009, p. 30.

18. *Ibid*.

19. NICO KRISCH, *GAL*, 2010.

20. JÜRGEN HABERMAS, Does the Constitutionalisation of International Law Still Has a Chance ?, in *The Divided West*. Polity, Malden, 2006, p. 141.

21. Bernardo Sordi, *Révolution, Rechtsstaat, and the Rule of Law: historical reflections on the emergence of administrative law in Europe*, in *Comparative Administrative Law*, Edward Elgar, Cheltenham, 2011, p. 25.



approach to international relations is insufficient to account for the sources of GAL. The fact that most states are at peace and increasingly interdependent does not imply that their legal traditions are homogenous. According to Kingsbury et al, this is a *pluralist* perspective of the international order, where there is no 'social basis' for the application of universal individual rights. Considering the existence of different nations with different social and value orders, the univocal determination of the content of fundamental individual rights might 'threaten every state's own way of organizing the state and society'<sup>22</sup>. To accommodate the pluralist perspective, the authors assert that the rights-based approach is not limited to individuals or private corporations, but applies to all subjects of administrative regulations, including states themselves. In addition to international dispute settlement procedures, states involved in a global administrative regime could invoke principles of administrative law to police the administrative bodies. Just how this amount to administrative law remains ambiguous; furthermore, the tools of traditional international law could very well be sufficient to settle this kind of dispute. More importantly, it leaves unanswered the question of the sources of the substantial liberal principles of global administration.

Beyond human rights, GAL can also be aimed at protecting economic rights of private actors like individuals and corporations. Kingsbury et al agree that this claim is contentious, particularly in instances where private investors are awarded enormous damages by an arbitral tribunal in response to environmental regulations by a state. This is certainly the kind of dynamic that Stephen Gill has in mind when he criticizes the constitutional "locking-in" of the neoliberal framework of accumulation, where the international administration becomes a tool for neoliberal disciplinary control<sup>23</sup>. There is some merit to this critic. How much political leeway does a sovereign state enjoy when it is entangled in an intricate network of global regulation and investment treaties? This situation, however, might not be imputable to the GAL project, but rather to the current state of global governance.

In a nutshell, the 'priority of liberal values' that underpins the GAL project is confronted to the fact that there can be (and as a matter of fact there is) a reasonable disagreement on the nature of those liberal values within and beyond the state. The liberal legitimacy of GAL is thus inseparable from the question of its democratic legitimacy.

#### 4. Democratic Legitimacy

The connection between GAL and democratic legitimacy is tenuous. Kingsbury et al acknowledge the urgent need for a democratic theory of global administration, but argue that in the absence of a convincing such theory, it is

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22. BENEDICT KINGSBURY *et al*, *Emergence*, 2005, p. 46.

23. STEPHEN GILL / A. CLAIRE CUTLER, *The New Constitutionalism and World Order*, Cambridge University Press, Cambridge, 2014, p.4.

more profitable to pragmatically “bracket questions of democracy<sup>24</sup>” and focus on legal and liberal legitimacy through accountability measures. To put it differently, in the absence of an international democratic legislator, which is necessary for a democratic delegation of administrative power, and in the absence of an international court of independent review, it is useless to think of GAL in terms of democratic “input”. Of course, it can be argued that administrative bodies created by way of treaties have a democratic basis in the form of state consent, but this dynamic does not correspond to most of global administration<sup>25</sup>. Once the administrative body is created, it becomes largely autonomous from state control. Krisch rather suggests focusing on the democratic “output”, that is to say on the democratic character of the situation produced by GAL<sup>26</sup>. The principles and procedures associated with administrative law (transparency, reasoned decisions, possibility of review) allow for an increased participation of the civil society in the administrative process. Moreover, global governance operates through networks that empower governments to address transnational issues that they could not solve on their own. According to Krisch, global governance is more inclusive than national democracy both in the issues it tackles and in the actors that are involved in the process. From this perspective, global governance and GAL strengthen democracy more than they impede it.

While innovative, this conception of democracy is perhaps at little too extensive. At this point, it is useful to make a distinction recently emphasized by Jeremy Waldron between forensic-accountability, consumer-accountability and agent-accountability<sup>27</sup>. Forensic-accountability is accountability after the fact, on the basis of predetermined norms and following the procedure of a court of justice. Criminal liability, for example, corresponds to this kind of accountability. Consumer-accountability pertains to situations where an organization deems it necessary to take into account the preferences of a limited public in a discretionary manner. Agent-accountability implies a relation between one (or more) principal and her agent, where the agent is responsible to the principal for the actions she accomplished in her name. Accountability in this case is accountability to a person, on the basis of the criteria that she decides. The agent owes the principal full disclosure of all relevant information pertaining to the mandate, and has the obligation to ensure that the principal understands this information. This is the type of accountability that political representation entails. Waldron rightly argues that the legal concept of a trust is not as apt to describe political representation, because the beneficiary of a trust plays no active role in the control of the trustee. Pointing to the renaissance-era republic of Venice, Waldron contends that a political regime where the people is beneficiary of a trust rather than principal can be republican (or liberal), but not democratic.

There is no agent-accountability in GAL, and therefore no democratic

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24. BENEDICT KINGSBURY *et al*, *Emergence*, 2005, p. 51.

25. BENEDICT KINGSBURY, *Concept*, 2009, p.40 ; NICO KRISCH, *GAL*, 2010.

26. NICO KRISCH, *GAL*, 2010, p. 251.

27. JEREMY WALDRON, *forthcoming*. This is based on a lecture given by Professor Waldron at the EHESS in Paris in March 2014.

accountability properly speaking. Traditionally, the democratic legitimacy of international law rests on the capacity of states to bind themselves democratically; indeed, all sources of international law (treaty, custom, and even *jus cogens* to some extent, considering the debates surrounding its content) come down to state consent in one form or another<sup>28</sup>. As we have seen, this logic is insufficient to account for GAL, because states have little control (if any) over global administrative bodies, and because from a cosmopolitan perspective, universal principles cannot be dependant upon state consent<sup>29</sup>. Moreover, the sheer intricacy of global administration makes it very hard to link an administrative decision to an accountable political representative. GAL offers a mix of forensic-accountability and consumer-accountability where no one is directly accountable to the people “severally and jointly” for the actions of global administrative bodies.

The claim that GAL strengthens democracy is misleading in another way. Efficiency and inclusiveness in administrative procedures is not the same as democratic deliberation and decision-making, even if it results in greater forensic or consumer-accountability. This point is important to neo-republicans like Richard Bellamy:

“Judicial claims to exemplify a form of public reasoning that is more inclusive and impartial than democracy proper are disputed in both theory and practice. It is only when the public themselves reason within a democratic process that they can be regarded as equals and their multifarious rights and interests accorded equal concern and respect”<sup>30</sup>.

Democracy is both the mean and the end of the political process; it is not only a procedure of decision-making, a way of settling reasonable disagreement about public issues, but also the fullest expression of the formal equality of each citizen. Otherwise, if citizens cannot be conceived as being collectively the source of the legal order to which they are subjected, their freedom cannot be conceived in terms of non-domination.

The problematic character of the relationship between GAL and democracy is further aggravated by the claim that GAL is grounded in a *post-public* conception of legitimacy<sup>31</sup>. Contrary to Kingsbury’s contention that GAL is an inter-public order where the multifarious publics’ immanent conceptions of *publicness* are represented by corresponding administrative entities, Kuo argues that

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28. MING SUNG KUO, The Concept of ‘Law’ in Global Administrative Law: A Reply to Benedict Kingsbury, *European Journal Of International Law*, XX-4, 2009, p. 998. See also Martti Koskenniemi’s Introduction to *Sources Of International Law*, Ashgate, Dartmouth, 2000.

29. BENEDICT KINGSBURY *et al*, *Emergence*, 2005.

30. RICHARD BELLAMY, *Political Constitutionalism* Cambridge University Press, Cambridge, 2007, pp. 4-5.

31. KUO, *Concept*, 2009.

the GAL is not rooted in any “jurisgenerative public”<sup>32</sup>. Instead, it arises from the practice of the participants in the global regulative regimes, which form a very elitist and specialized public. Administrative decisions are then self-legitimized on the basis of their efficiency and their rationality, which is considered to be in the interest of the people. In the picture drawn by Kuo, global regulators are trustees of the public good, modestly understood here as the rational settlement of global administrative litigation between mostly private actors. The general public being virtually absent from the equation, this would indeed be a post-public, privatized conception of legitimacy. As Alexander Somek puts it, this might be “meta-management”<sup>33</sup>, but it is not law.

## 5. Gal And Global Constitutionalism

In light of the many conceptual difficulties plaguing the legal quality of GAL, the question arises as to why it matters that global administration be understood in terms of law instead of governance. Part of the answer may lie in the ‘constitutional ambition’ of GAL. Like global constitutionalism, GAL is a legal theory of global governance: both seek to make sense, in legal terms, of governance beyond the state. Their main difference between the two is their ambition: theories of global constitutionalism attempt to formulate a comprehensive narrative of contemporary international law, while GAL explicitly adopts a more pragmatic stance. The first editorial of the *Global Constitutionalism* review in 2012 distinguished between three forms or ‘schools’ of global constitutionalism: normative, functional, and pluralist<sup>34</sup>. The normative perspective insists on the existence of a global value order that allows for the hierarchical organization of international law<sup>35</sup>. On some accounts, the charter of the UN would serve as the basic constitutional document of the international community, the higher law of international law<sup>36</sup>. The functionalist school adopts a taxonomic approach where international rules are categorized as constitutional when they serve a constitutional function, either by allowing for the creation or the limitation of international norms, or by further supplementing national constitutions<sup>37</sup>. The pluralist version of global constitutionalism conceives the different levels of con-

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32. Ibid, p.1002.

33. ALEXANDER SOMEK, The Concept of Law in GAL A Reply to B. Kingsbury, *EJIL*, XX-4, 2009.

34. MATTIAS KUMM *et al*, Global Constitutionalism: Human Rights, Democracy and the Rule of Law, *Global Constitutionalism*, I-1, 2012, pp. 1-15.

35. A non-exhaustive list includes JÜRGEN HABERMAS Constitutionalisation 2009, p. 141; ERIKA DE WET, The International Constitutional Order, *International and Comparative Law Quarterly*, LV-1, 2006; GRAINNE DE BURCA, The Denationalization of Constitutional Law, *Harvard International Law Journal*, XLVII-1, 2006.

36. BARDO FASSBENDER, ‘We the peoples of the United Nations’ - Constituent Power and Constitutional Form in International Law in *The Paradox of Constitutionalism*, Oxford University Press, Oxford, 2007.

37. JEFFREY L DUNOFF / JOEL P. TRACHTMAN. A Functional Approach to International Constitutionalization, in *Ruling the World*. Cambridge University Press, Cambridge, 2009.

stitutional authority in terms of “superposition without subsumption<sup>38</sup>” and does not seek to overcome this heterarchical overlap of constitutional authority. All these approaches to global constitutionalism share a fundamental impulse: to give an account of the constitutional ordering of contemporary international law by conceptually moving away from the State as the source of the domestic and the international order.

GAL, in contrast, adopts a pragmatic approach that focuses primarily on actual practices and norms. In the context of global governance, this position implies that instead of looking for an overarching factor of cohesion, like global constitutionalism, GAL recognizes the diversity and divergence of practices, and centres on the consequences of norms. The force of this approach is that there indeed exist multiple regimes of supra or transnational administration that can be considered to form a ‘global administrative space’, albeit a very decentralized and fragmented one. In comparison, global constitutionalism is little more than an “academic artefact”<sup>39</sup>. It does not refer to a concrete constitutional document, and the concept has little currency outside the academia. In a few years, global constitutionalism could turn out to have been an academic fashion, a trendy buzzword rapidly gone by.

Global governance, on the contrary, is here to stay. GAL has the merit of focussing on the existing regimes of global regulation, which is a much more promising approach in terms of ‘doctrinal’ analysis. From a philosophical perspective, the question implied by legal pragmatism remains whether non-foundationalism is a viable position towards truth. Maybe this is what Benedict Kingsbury has in mind when he writes that the definition of the concept of law is part conceptual, part political<sup>40</sup>: it basically rests on a philosophical position on the nature of truth, which becomes a political position when it concerns the organization of the political community.

It would be a mistake, however, to oppose global constitutionalism and GAL so drastically: some authors argue that GAL should be seen as the “small-c constitution”<sup>41</sup> of global constitutionalism. In domestic constitutional law, the small-c constitution is composed of ordinary laws, judgments, and conventional practices that contribute to the constitutional order and thus supplement the formal constitution, or “big-c constitution”. The principles of GAL, by insisting on accountability and transparency of the global administration, perform a similar function in the global order. The ‘juridification’ of the norms immanent in

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38. NEIL WALKER, *The Idea of Constitutional Pluralism*, *The Modern Law Review*, LXV, 2002.

39. J. H. H. WEILER, *The Constitution of Europe. ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999.

40. BENEDICT KINGSBURY, *Concept*, 2009.

41. MICHAEL J. PERRY, *What Is ‘the Constitution’? (and Other Fundamental Questions)*, in *Constitutionalism: Philosophical Foundations*, Cambridge University Press, Cambridge, 1998, pp. 99–100.

the practice of global governance produces a “constitutional spillover effect”<sup>42</sup> where the principles acquire a ‘constitutive’ nature by the formal recognition of their organizing power. The problem is that the small-c constitution is never independent from the general framework provided by the big-c constitution, towards which it stands in a dialogical relationship. The principles of the small-c constitution are interpreted in light of the general objectives set out in the big-c constitution, which is in turn concretized and upheld by the small-c constitution. The legitimacy of small-c constitution typically rests on its constitutionality, its congruence with the big-c constitution, whose legitimacy comes from the full legitimacy of a constituent power. In the current international order, such a big-c constitution is lacking. There has never been a global constitutional moment to which a big-c constitution could be traced back, and there is no constituent power that could claim authorship of this constitutional order. In the absence of a “people”, as in “We the People”, the small-c constitution looks very technocratic. It rests on the crude legitimacy of bureaucratic efficiency mobilizing principles of administrative rationality.

Is this as good as it gets? This is a valid question: given the clear lack of accountability of global regulators, demonstrated by Kingsbury *et al.*, greater accountability through administrative law principles like transparency and due process at the global level is evidently a project that should be upheld. Global governance exists as a matter of fact, and just like the modern administrative state could not function on a strict Diceyan conception of constitutional functions that excludes administrative action, modern international law cannot be conceived strictly in terms of international “legislation” by states. A theory of international law that cannot account for the existence of multiple regimes of global governance is unsatisfactory. I would venture to say that the crux of the matter is that a GAL justified by the inherent legitimacy of administrative rationality is incompatible with the narrative of our domestic political orders.

The legitimacy of a liberal democracy is a compromise between two sets of principles that often pull in different directions. A democratic regime, as is widely acknowledged, is one that is founded on the principle of equal participation of all citizens in the political process. This participation is not impaired by the fact that elected representatives usually take political action in the name of the electorate: representatives are trustees or agents of the people, and are accountable to them on that basis. A liberal regime, on the other hand, is one that is preoccupied primarily with the respect of individual rights and freedom, such as are usually (though not always) entrenched in a constitutional bill of rights. In this case, the claim to legitimacy rests on the intrinsic quality of the values defended according to one’s reason. The art of constitutional theory consists precisely in the framing of these competing legitimacies in terms of democratic *precommitment*<sup>43</sup>. A constitution definitely has a positive aspect: it creates and

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42. KUO, MING SUNG, Taming Governance With Legality? Critical Reflections Upon Global Administrative Law As Small-C Global Constitutionalism, *International Law and Politics*, XLIV-55, 2011, p. 71.

43. For an instructive exploration of the relationship between constitutional and democratic

assigns new powers, and provides channels for the expression of the popular will. From this perspective, the constitution and the people are inseparable: “it is meaningless to speak about popular government apart from some sort of legal framework which enables the electorate to express a coherent will<sup>44</sup>.” Therefore, the constitutional structure generates new possibilities of political action. Democracy, or popular will, cannot be conceived apart from the mediation of law. But constitutional restrictions on political power are democratic only if they can be seen as expressing popular sovereignty and freedom. Such is the connection, the interdependence between law and democracy.

As transnational regulatory regimes multiply in number and importance, we expect them to display a modicum of democratic legitimacy. Administrative rationality and democratic legitimacy can coexist, but in a democratic regime, the former ultimately depends on the latter. Admittedly, the interplay between the two is not necessarily linear; greater accountability of global regulators could somehow foster the emergence of a global *demos*. The point here is simply that administrative law depends on a constitutional structure. GAL and global constitutionalism can only be addressed separately for so long.

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theory, see STEPHEN HOLMES, *Passions and Constraint – On the Theory of Liberal Democracy*, University of Chicago Press, Chicago, 1995.

44. *Ibid*, p. 172.