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Doomed aspiration of pure instrumentality: Global Administrative Law and accountability

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Abstract: The article attempts to illuminate how the concept of accountability is diversely shaped and signified in the theoretical legal discourse. It engages in a threefold mapping review: (i) it portrays, according to the basic divide between the angles 'within the state' and 'beyond the state', the geographical and functional contexts in which real-world political accountability mechanisms exist and interact; (ii) it interprets an influential legitimating discourse that is being used as a benchmark to appraise institutions and political processes beyond the state – the Global Administrative Law project (GAL); (iii) it highlights how this sort of accountability discourse is tied with demands for legitimacy in global governance that cannot be detached from the old political ideals. Largely oriented towards due process, I argue that the GAL project, in order to maintain a normative appeal, should not ignore larger political ideals, however controversial they might be. Otherwise, it remains a manipulable and hence unreliable cause to be endorsed.

Keywords: accountability; Global Administrative Law; institutional arrangements; legitimacy; within and beyond the state

I. Introduction

Evaluative claims aired in the public sphere often struggle with the temptation to insert most cherished institutional qualities into a single master concept that entangles all others and simplifies the message. Nuances fade away in such an all-encompassing picture. Accountability discourses have probably, if inadvertently, suffered from this verbal mannerism. The word has earned a flashy rhetorical influence. The concept behind it, though, recommends circumspection.[1] Accountability is not the

[1] Echoing Dubnick's distinction between 'accountability-the-word' and 'accountability-the-concept'. M Dubnick, 'Seeking Salvation for Accountability' Paper for the 2002 Annual Meeting of the American Political Science Association, 29 August–1 September 2002.

summa of all legal and political virtues. It may not even be virtuous at all.[2] This article departs from the premise that what complicates accountability discourses is not only the multiplicity of *concepts* they imply and their more or less pronounced normative undertones, but also the various *contexts* they address. To this end, this article is dedicated to illuminate what accountability-talk has so far meant in practice, along with the values that are built in accountability arrangements, and some of the challenges that lie ahead.[3]

Zooming out, and in spite of a dense interconnectedness between them, two general contexts of political accountability come forth: 'within the state' and 'beyond the state'. If one zooms in, one would perceive that the state context comprises, due to the pulverization of internal sovereignty through a broad distribution of power, an intricate chain of interlocking bodies that are accountable in multiple ways (certainly not just in the hierarchical principal–agent style). One would also realize that the 'beyond the state' context – traditionally depicted as a world of sovereign and autarchic political communities that may contract among themselves – is under intense transformation. It not only accommodates and sets the terms of engagement between multiple sovereigns, but also includes non-state actors that did not have any significant political weight until recently. If one gets even closer, one would further notice that the very distinction between domestic and international gets blurred at the edges and fails to grasp an evolving institutional space in between, which is not precisely grasped, however much one tries, by that categorical dichotomy.[4]

This article has six additional sections. The following section will briefly stipulate the concept of accountability and its limits. The third section will describe how accountability, despite obvious variations, is generally

[2] As Raz pointed out: 'Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.' J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979) 210. Or as Kopell remarked: 'Accountability has become a catchall for everything good in governance and administration.' JGS Koppell. *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (Chicago University Press, Chicago, IL, 2010) 293.

[3] The article draws some inspiration, it may fairly be said, from Keohane's and Grant's claim: the 'appropriateness and efficacy of any of our mechanisms for accountability will depend on the particular context'. R Keohane and R Grant (2005), 'Accountability and Abuses of Power in World Politics' 99(1) *American Political Science Review* 40. This is not, to be sure, an unprecedented insight, but is definitely one that straightforwardly meets the conditions for a sensible discussion on accountability.

[4] What David Held calls 'intermestic'. See D Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective' (2004) 39 *Government and Opposition* 364, 371. Kingsbury *et al.* call 'distributed administration'. B Kingsbury, N Krisch and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15, 20.

organized in constitutional democracies. The fourth section will then describe how accountability had been somewhat settled, and has currently been disrupted at the international arena. This sequence – from 'within the state' to 'beyond the state', using the former as a departing default template for looking at the latter – replicates the expository strategy of the mainstream literature thereupon.[5] The dichotomy, however, is a loose one and should not obscure the presence of significant intermediary decision-making sites.

The fifth, sixth and seventh sections will outline how that sense of 'accountability deficit' or 'legitimacy crisis' has been approached by one of the most influential legitimacy discourses that have recently surfaced: 'global administrative law' (GAL). The 'GAL project'[6] is one of the current intellectual enterprises that seek to understand, describe and take a critical stand on what is happening beyond the state from a legal and institutional point of view. Despite usually sharing some deep values with other reformist discourses, the GAL project has its own distinct takes and proposals. Rather than a mere terminological or peripheral disagreement, though, the project diverges from other similar enterprises with respect to (i) the remedies for current pathologies of accountability arrangements, (ii) the perception of historical feasibility of reforms and (iii) what is, at least in the foreseeable future, the most desirable model of global governance through international law.

This broad backdrop, despite overlooking specificities, shows whether and how the GAL project is a pertinent analytical template and a fruitful legitimacy discourse to inform the investigation of concrete international arrangements.

II. The concept of accountability and its limits

Accountability is a quality that may or may not permeate power relationships. It exists where the decision-maker has the obligation or is factually impelled

[5] As Keohane and Grant have asked: 'How should we think about global accountability when there is no global democracy? How can understanding accountability at the level of the nation-state clarify the problem of accountability at the global level?' (n 3) 30.

[6] A caveat about the meaning of 'GAL project' should be put forward. The expression might suggest a false image of a rigid and self-contained group of people working under a commonly shared conceptual apparatus. This first take on it, though, is inaccurate. The 'GAL project' is not exactly an organic and homogeneous school of thought in international law, but rather a collective initiative of scholars that are concerned with the need to conceptualize the space of administration within the overall structure of global governance. GAL is an umbrella term that has convened authors to ask a set of crucial questions. For the sake of clarification, I will use 'GAL project' when I refer to this research enterprise, and only 'GAL' when I refer to the emergence of an institutional phenomenon that can be plausibly called 'global administrative law'. This distinction will become clearer in section VI.

to account, and where the subjects to the decisions are entitled or factually able to demand an account for the actions or inactions of the decision-maker.[7, 8]

According to this basic concept, accountability is nothing more than a special link between a decision-maker and a decision-taker, or, in a common terminology of the accountability literature, a power-holder and an account-holder. Such relationship is not presumptively valuable for its own sake. When we restrict our appeal for decent politics to an evasive invocation of accountability *tout court*, we risk losing sight of what makes accountability desirable and beneficial in the first place.[9] If the plea for accountability is going to be attractive, it cannot turn a blind eye to some minimal traces of the good old political ideals – those values, symbols and institutional practices to which we have tended, in modernity, to ascribe allegiance.[10] Without them, accountability is just an empty container that structures and explicates a bilateral or multilateral power-relationship. Some substantive normative view, thus, must flesh out this skeleton.[11]

One hardly denies that public power, wherever it comes from, should be duly accountable – or, according to traditional normative ambitions, to

[7] O'Neill delineates the formal structure that accountability relations share: 'Systems of accountability are highly varied, but they have a common formal structure. They are used to define, assign and help enforce second-order obligations to account for the performance (or non-performance) of primary or first-order tasks or obligations.' O O'Neill, *Rethinking Informed Consent in Bioethics* (Cambridge University Press, Cambridge, 2007) 167.

[8] According to Stewart, 'accountability is a relational concept. At a minimum, an accountability mechanism meets four basic requirements: (1) a specified accountor, who is subject to being called to provide account including, as appropriate, explanation and justification for some specified aspect or range of his conduct; (2) a specified account holder or accountee; (3) authority on the part of the accountee to demand that the accountor render account for his performance; and (4) the ability and authority of the account holder to impose sanctions or secure other remedies for performance that he judges to be deficient or, in some cases, to confer rewards for superior performance.' RB Stewart, 'Accountability, Participation, and the Problem of Disregard in Global Regulatory Governance' NYU Law School, IILJ International Legal Theory Colloquium (2008) 15, available at <http://iilj.org/courses/documents/2008Colloquium.Session4.Stewart.pdf> (accessed 19 July 2014).

[9] As Philp maintains: 'simply asking for more accountability is unlikely to contribute much to resolving the deep inequalities of power and wealth that systematically weaken the legitimacy of global institutions'. M Philp, 'Delimiting Democratic Accountability' (2009) 57 *Political Studies* 28, 47.

[10] E MacDonald and E Shamir-Borer, 'Meeting the Challenges of Global Governance: Administrative and Constitutional Approaches' NYU Hauser Globalization Colloquium (2008) 3, available at <http://iilj.org/courses/documents/MacDonald.Shamir-Borer.92508.pdf>. See also G de Búrca, 'Developing Democracy beyond the State' (2007) 46 *Columbia Journal of Transnational Law* 221–78.

[11] See N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17(1) *European Journal of International Law* 247, 250–1. Knowing 'to whom' someone should be accountable is a crucial question, the answer to which can hardly be 'to everybody' or 'to anybody'.

face limits, to be inclusive, to display proficiency and, eventually, to enjoy the respect of its subjects.[12] Nowadays, it is rather uncontroversial that a power arrangement should fulfil the constitutional, democratic, epistemic and populist demands for legitimate accountability, however combined and in whatever specific form and depth those charges are deemed appropriate in each site of public power.[13]

This claim, though, needs to be voiced with care. After all, accountability might do harm as much as it might do good. If accountability turns out to be almost everywhere in social and political relations, any quest for it turns out to appear redundant and dispensable. Its ubiquity, nonetheless, does not turn such a quest futile: there are more and less justifiable accountability arrangements. Winnowing the wheat from the chaff, thus, requires attention to contextual nuances.

This methodological caution is not usually explicit in recent accountability literature. If the concept of accountability has any critical role to play (that is, to aid the assessment or reform of current institutional arrangements), it has to earn adequate normative traction. That is not derived from the idea of accountability itself, but from exogenous normative inputs. Turning power accountable is a misleading and superfluous enterprise most of the time. Turning power *appropriately* accountable is not. The question that gives direction to this article, then, is whether the GAL project actually proposes an *appropriate* accountability arrangement to decision-making processes beyond the state.

III. Power and accountability within the state

Any attempt to summarize how accountability is shaped within the state, or how it operates within the self-styled constitutional democracies, needs to face the bare fact that there surely are as many variations of domestic accountability systems as there are states. The risks of parochialism,

[12] Held and Koenig-Archibugi, for example, claim: 'the conception of political legitimacy prevalent in most countries today is hostile to the idea of any form of power that is unaccountable to those over whom it is exercised and especially to those who are most affected by it'. D Held and M Koenig-Archibugi (eds), *Global Governance and Public Accountability* (Blackwell Publishing, Oxford, 2005) 1.

[13] In a previous work, I claim that there are four *functions* of accountability that should be pursued: (i) the constitutional, which limits power and inhibits abuses; (ii) the democratic, which recognizes, listens and responds to the plurality of voices of the account-holders – those who are deemed to have legitimate stakes on the matter; (iii) the epistemic, which builds institutional capacity – a particular craft for taking substantively good decisions; and (iv) the populist, which fosters allegiance and obedience from the account-holders. DH Rached, *The International Law of Climate Change and Accountability* (2013) PhD thesis in International Environmental Law submitted to the University of Edinburgh Law School.

anachronism, ethnocentrism or simplistic didacticism remain behind any such effort. Yet, the opposite risk – namely, the risk of overlooking the existence of insightful commonalities and core features at a more general level – is not less disconcerting. It is true that reputedly democratic nation-states diverge immensely on how they instantiate some general devices of authority, such as electoral and participatory mechanisms. It is no less true, though, that oftentimes these particular devices are conceived and justified under strikingly similar accountability principles.

However that may be, the goal of this section is to offer a panoramic view of some basic archetypes of accountability that function within constitutional democracies, or to pinpoint what is it that they share.[14] The accountability project of constitutional democracies is mainly undertaken by public law in general, constitutional and administrative laws in particular. As Mashaw reminds us, there is an 'accountability project implicit in public law liberal legality'.[15] It is, thus, a project that resorts to hard state law, even if one can also identify elements of soft law and long-established conventions operating in the interstices.

The democratic state embodies a large chain of institutionalized accountability relationships. It comprises (i) a series of delegations and transmission-belts from the vertical point of view (typically hierarchical, principal–agent relationships) and (ii) divisions of labour from the horizontal point of view (which follow some sort of checks and balances and coordination logic). Let me elaborate on how accountability is diffused along these two spatial perspectives.

Spatial picture[16]

The vertical angle enables one to pick out accountability relationships in at least two spheres. First and foremost, the one established between political institutions and the people. Before anything else, the people hold authorities

[14] Kumm claims: 'There is a consensus today that legitimacy of domestic law is predicated on it being justifiable in terms of a commitment to liberal constitutional democracy.' M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15(5) *European Journal of International Law* 907, 910.

[15] JL Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in M Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, Cambridge, 2006) 115, 133.

[16] In a previous work, I stipulated the concept of accountability and defined the spatial vector as one among 11 *coordinates* of such concept. It regards how the power relationship between two agents materializes along horizontal or vertical lines. Vertical accountability is characterized by some asymmetry of power between accountees and account-holders. As for the horizontal-type of accountability, the constraint between accountees and account-holders is more delicate and stems rather from a cooperative commitment in light of mutual dependence. DH Rached, *The International Law of Climate Change and Accountability* (n 13).

to account by means of democratic elections and their right to an equal vote. However, various additional participatory tools may allow individuals to intervene, directly or mediated by a third body, like a court, in the general decision-making of administrative, legislative and other judicial bodies. In these extra-electoral channels for holding authorities to account, it is usually the pressure of justification and reason-giving, intensified by transparency and contestatory tools, that purportedly compensates for the absence of election.[17]

These sorts of arrangements are usually classified into the compartment of either constitutional, administrative or procedural law: into constitutional law due to its substantive standards to check the validity of collective decisions; into administrative law because of its formal requirements to constrain discretion; and into procedural law due to its formal rules that discipline the procedural steps necessary for an individual to hold an authority to account in a judicial or extrajudicial arena.

Second, hierarchical dynamics within the intrabranch sphere also underscore a vertical accountability phenomenon. From the ultimate chief of a respective branch, the chain of delegation may go downwards along several levels (like, for example, from the president to her ministries, secretaries and so on). A typically hierarchical relationship will predominantly be shaped by trust. The accountee, at the inferior position, usually has some minimum measure of discretion to take decisions, whereas her superior, the account-holder, can sanction her without the need for rule-based public justification.

Third, another genre of vertical relationship may be struck through devices of territorial decentralization and sub-national entities, either in a hard form of a federation, which divides internal sovereignty into further relatively autonomous units of power, or in lighter forms of division of labour between the centre and the regionalized units. Accountability relationships, thus, are here established between a central authority that has jurisdiction over the whole territory, and the regional or local authorities with competence to act over an internally demarcated region. Techniques for dividing the competencies between the parts and the unifying whole, and further tools to adjudicate occasional conflicts that arise between these different vertical levels, are usually meant to oil the wheels of such accountability relationships.

To sum up, the vertical perspective is able to identify not only a vast array of principal–agent delegation relationships (in the two first spheres),

[17] Ferejohn conceives the distinction between political and legal accountability on the basis of how close the accountee is to the people (that means, to elections). The farthest from election an authority is located, according to him, the greater its burden of reason-giving should be. J Ferejohn, 'Accountability in a Global Context' (2007) IILJ Working Paper 2007/5, 1–24.

but also a federal-like division of legislative, adjudicatory and policy-driven competencies across sub-national levels. Such competencies will be either bottom-up, tracing back the ultimate account-holders to the people, or top-down, whereby higher-level authorities control the acts and assess the performance of the lower-level officials.

The horizontal angle, in turn, illuminates another type of accountability dynamics that is also widespread in constitutional democracies. Rather than a command-and-control or hierarchical way of organizing power, the horizontal prism captures an element of accountability constraint in interbranch 'checks and balances' and other bilateral coordination mechanisms that take place at the intrabranch domain.

Horizontal accountability, in such context, may be unidirectional (when, for example, a court controls administrative acts, but the executive branch lacks any formal tool to control courts back) or bidirectional (when, for example, a court controls legislative acts, but the parliament has competence to respond and challenge judicial decisions).

Horizontal mechanisms solve a classic dilemma of public law that vertical mechanisms spark: how to control the ultimate guardian? By letting 'overseers'[18] check one another, the trap of infinite regress, or of sheer absence of oversight, is circumvented. Vertical mechanisms, on the other hand, are supposed to solve the dilemma that horizontal mechanisms elicit: who settles the issue at last? By defining an ultimate, however provisional, decision-maker, the trap of infinite circularity and lack of settlement is partially relieved. It is the balance between these two spatial coordinates of accountability that help constitutional democracies to eschew, accommodate or alleviate both predicaments.

Legitimizing the interlocking axes

This is certainly not all that accountability at the domestic level means. Though relatively cursory, the description above should suffice for singling out the backdrop rationale of accountability within the state. Mashaw contends that 'accountability regimes directed toward public governance are meant to reinforce the normative commitments of the political system'.[19] In order to grasp the character of a given accountability arrangement, thus, he rightly stresses the importance of unveiling the principles that undergird its overall structure, its general telos.

[18] As Thompson contends: 'A completely hierarchical system of accountability is subject to a regress of authority; overseers overseeing overseers all the way up. But in the absence of a single trustworthy guardian … the answer must be to multiply the overseers at various levels, and allow them to check one another.' DF Thompson, *Restoring Responsibility: Ethics in Government, Business, and Healthcare* (Cambridge University Press, Cambridge, 2004) 261.

[19] JL Mashaw (n 15) 153.

That chain of accountability relationships calls for a justificatory discourse in its background. How are, then, these accountability relationships justified? Actual constitutional democracies promote a normative fusion between the ideals of democracy, constitutionalism and the rule of law. Such regimes somehow managed to interweave such diverse ideals into one institutional tissue. They strive, at one and the same time, to render political power accountable to the people, to fundamental rights, and to previously enacted and predictably enforced general rules and principles. Such entangled demands forge a legitimacy story that, however contested, has become a fairly consolidated mainstream public philosophy that underlies the current power arrangements within the state. That story cannot unfold without invoking each of those general ideals.

This is a kind of disseminated common sense, the 'folk theory' in which constitutional democracies are embedded.[20] Regardless of the complexity to which vertical and horizontal axes might get, they have a vital common denominator. Power has a final cornerstone, a common root that grounds it. There is a magnetic needle that pulls the claims of legitimacy towards an all-encompassing polity.

The pyramidal metaphor has been a stereotypical image to grasp how political power is understood, and its respective legitimacy basis conceived, within the state. A pyramid, for sure, misses the horizontal accountability phenomena described above. Nonetheless, it depicts the prevailing working logic. Even if there are cooperative and horizontal mechanisms along the way of intermediate decisions, the state provides for a procedural circuit that reaches a final decision (however 'provisional' its characterization as 'final' might be). This decision, at least in a short-term perspective, settles the legal matter and is ultimately enforceable by recourse to physical coercion. And that coercion is believed to be legitimate, again, because of a justificatory logic that can be traced back to the people, rights and law within a self-constituted polity. Within the state, therefore, the cartography of political power and legal authority, no matter how complex its internal structure might be, is defined by an elemental anchor, by a single point of reference. The political and legal environment beyond the state, as so many have argued, lacks that organizing centripetal feature.[21]

[20] Ferejohn called it 'folk democratic theory' (n 17) 7.

[21] See N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373–96; and N Walker, 'Taking Constitutionalism Beyond the State' (2008) 56 *Political Studies* 519–43. Krisch (n 11) and Krisch, 'The Case for Pluralism in Postnational Law' (2009) LSE Law, Society and Economy Working Papers, 12/2009. Finally, see E MacDonald, 'The "Emergence" of Global Administrative Law?' paper presented at the 4th Global Administrative Law Seminar, Viterbo, 13–14 June 2008.

IV. Accountability beyond the state: The mosaic of international law

Accountability arrangements within the state lean towards an ultimate arbiter or source of legitimate power, an ultimate account-holder and accountee. That is the case not only in the complex internal design of constitutional democracies, which were exemplified above, but also in non-democratic state systems. In both cases, irrespective of whether state sovereignty is more or less internally divided, it presents itself in a compact and unified form from the transnational point of view.

Unlike the domestic, the global context is considered 'highly imperfect', 'defective' and 'nonideal' for political action.[22] Hierarchical metaphors, like the irresistible pyramidal image, do not work. The global context, so to say, lacks the 'burden of the whole',[23] a transnational sovereign that carries, like the state, the ultimate general responsibility for actions, one that takes binding collective decisions and that has the power to coercively enforce them. Without a centralized government, there are a variety of power-holders who relate to each other in non-hierarchical ways. For this very reason, in such domain, 'there is no single "problem of global accountability"; there are many'.[24]

I shall now proceed to explain how global accountability is structured and justified. This explanation will be made in two steps, reflecting upon two stylized models of international law. For lack of a better typology, let us call the first 'Westphalian' and the second 'post-Westphalian'.[25] This division presupposes neither a hard and fast point in time when there was a movement from one model to the other, nor the emergence of an entirely new system that supplants the old one. Nonetheless, it usefully sheds light on patterns that stray from the path of classical international law and build something distinct. It assumes that the current institutional outlook beyond the state has significantly shaken the old conceptual resources through which that landscape has been depicted, understood and warranted until recently.

Old picture

One of the customary criticisms directed against international law laments its lack of any resembling mechanism to constrain power and enforce

[22] Ferejohn (n 17) 1–2.

[23] G Palombella, 'Global Legislation and Its Discontents' (July 2013) available at <http://works.bepress.com/gianluigi_palombella/17> 15.

[24] Keohane and Grant (n 3) 41–2.

[25] N Walker, 'On the Necessarily Public Character of Law' (2010) University of Edinburgh School of Law, Working Paper Series 2010/35, 18.

decisions that is reputedly present in domestic systems.[26] International law would be essentially weak and primitive: it is followed insofar as it is convenient to, and ignored insofar as it is against states' self-interest. States contract with each other and, once they do so, they find themselves surrounded by intricate horizontal enforcement mechanisms that can be activated in case of non-compliance.[27] A 'thin and derivative'[28] spontaneous order would surface from the interaction between agents that celebrate agreements according to their mutual interests.

From the horizontal perspective, therefore, there exists a system of states among themselves. Through treaty-making (either bilateral or multilateral), states make mutual promises and acquiesce to certain rules of behaviour. Treaties, indeed, may also create discrete international organizations. From the vertical perspective, however, such organizations are strictly bound by those same treaties and hierarchically accountable to the states through a principal–agent relationship. Procedures of domestic implementation, moreover, give states the chance to retain their autonomy with regard to international law.[29] A state's consent to these international or thin transnational arrangements is perceived to be enough for legitimizing such legal state-of-affairs.

In a Westphalian world, international law and institutions are subordinated and hence accountable to states. They are a product of states' autonomous will. As a measure of last resort, as this story goes, sovereign states have the power to withdraw themselves from international law altogether. There is no legal impediment for them to do so. That is the doctrinal formulation put forward by international law to operationalize

[26] Keohane and Grant explain: 'The problem of abuse of power is particularly serious in world politics, because even the minimal types of constraints found in domestic governments are absent on the global level. Not only is there no global democracy, but there is not even an effective constitutional system that constrains power in an institutionalized way, through mechanisms such as checks and balances. Lacking institutionalized checks and balances, the principal constraints in world politics are potential coercion (as is the balance of power) and the need for states and other actors to reach mutually beneficial agreements. But these constraints are quite weak in restraining powerful actors, and they are not institutionalized in generally applicable rules.' at (n 3) 30.

[27] For Koskenniemi, it is a 'system of contractual obligations between independent states declared at Westphalia'. M Koskenniemi, 'The Future of Statehood' (1991) 32(2) *Harvard International Law Journal* 397.

[28] N Walker, 'Out of Place and Out of Time: Law's Fading Co-ordinates' (2010) 14(1) *The Edinburgh Law Review* 13.

[29] N Krisch, 'Global Administrative Law and the Constitutional Ambition' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 246–9. Kingsbury *et al.* argue: 'In classical theory the domestic regulatory measures are the implementation by states of their international obligations. Private actors are formally addressed only in the implementation stage, and that is solely a domestic matter.' at (n 4) 23.

itself. Whether this has been and still remains a plausible and realistic account on international relations, and whether powerful and weak states have had even-handed means to exercise such autonomy, are distinct types of problems, as we shall see.[30]

New picture

The development of international law and institutions during the second half of the twentieth century has reshaped this forthright picture. There has been a perceptible transition, analysts claim, from a classic model of international cooperation (by means of conventional bilateralism or multilateralism) towards more intrusive modes of supranational decision-making.[31] The world is in the process of becoming, to an already observable extent, post-Westphalian, and states, rather than sovereign agents (whatever that has genuinely meant), gradually turn into what one could label as, in the absence of a more precise name, 'post-sovereign'.[32]

This diagnosis points to a different global scenario of power and institutions, which comprises relevant non-state actors alongside states. It apprehends a shift from a state system to a multi-actor system of international relations.

To say that the state is just *one actor among others*, rather than *the actor* of international law is certainly, as yet, an overstatement. Although the state is not withering away, its political and legal centrality slowly gets attenuated.[33] That sounds frightening because of what it practically

[30] Ferejohn (n 17) 2.

[31] M Zürn, 'Global Governance and Legitimacy Problems' (2004) 39(2) *Government and Opposition* 260–87.

[32] Several authors have been using the prefix 'post' to refer to the current international state of affairs: 'post-sovereign' and 'post-Westphalian' are usual ones. For the former, see N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth Practical Reason (Law, State, and Practical Reason)* (Oxford University Press, Oxford, 2001) 123; for the latter, see N Fraser, 'Reframing Justice in a Globalizing World' (2005) 36 *New Left Review* 69, 73 and Walker (n 21) 373. There are also alternative labels. Abram and Antonia Chayes, for example, refer to a 'new sovereignty' in order to explain that sovereignty, instead of granting states the freedom to act as they wish, requires that they make compromises in order to honour their role as members of the international community. According to them, 'the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system'. A Chayes and A Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, Cambridge, MA, 1995) 27.

[33] Cassese goes in that direction: 'The centrality of the state to the notion of public powers has become an optical illusion. This does not mean, however, that the global legal order has supplanted the state, nor that it has become dominant, in as much as it is also through global regulatory systems that domestic public powers are able to make their voices heard.' S Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2006) 37 *NYU Journal of International Law and Policy* 673.

means and normatively implies: power may have gradually slipped from the terrain which tends to be most public, visible, accessible and controllable, and has shifted, or has been gradually moving, towards an area that seems to be more technocratic, paternalistic and distant, definitely less familiar to us.

Although one can rightly claim that the backbones of the Westphalian rationale are slightly breaking down, two important caveats deserve our attention. The first concerns the nature of this shift. The emergence of the post-sovereign model of international law does not imply the disappearance or entire overhaul of the Westphalian model.[34] The former model refers to a conceptually loose way to capture more complex institutional arrangements that place themselves over and above the conventional horizontal agreements that remain valid anyway. Such arrangements, though, fall below the radar screen and are inaccurately detectable through Westphalian categories.

The second caveat, which springs from the first, is that the binary and stylized distinction between the sovereign and the post-sovereign models lacks refinements that other classifications attempt to rectify.[35]

To sum up, we have witnessed a multiplication of atypical sites of global decision-making. The alleged novelty of these sites is a product not only of a *horizontal expansion* of new domains but also of the *vertical incisiveness* of transnational norms. As the explanatory narrative advances, in order to overcome international coordination hurdles that come up when state interests do not converge, international law was asked to stretch its authority along the horizontal and vertical coordinates: it has gained width as it pervades new subjects (previously treated by domestic jurisdictions alone) and depth by stronger modes of subordination and enforcement. The natural effect of these movements was the mitigation of sovereignty and of its legal corollary – the principle of consent.[36] More than a monolithic system of autonomous states

[34] As José Alvarez has claimed in a public lecture: 'We are still living in Westphalia. States are still very much alive and the trickle-up effects show this.' (Edinburgh Lecture, May 2011). Koskenniemi also asserts the 'continuing vitality of statehood' (n 27) 397.

[35] Weiler, for example, looks at three specific periods (1900–10, 1950–60 and 1990–2000) and recognizes respectively three command modes in international law: transactionalism, community and regulation. JHH Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *ZaöRV* 547, 552. For him, one cannot talk about revolutionary transformations, 'but of layering, of change which is part of continuity, of new strata which do not replace the earlier ones, but simply layer themselves alongside' ibid 551. This geological metaphor symbolizes the superposition of different kinds of institutional structures, each of which with a distinct capacity of autonomous decision-making and a specific legitimatory burden, and thus helps us better grasp the plurality of existing arrangements in international law.

[36] Kumm describes the transformations suffered by international law with respect to its scope, to its enforcement measures and to state consent (n 14) 913–16. In the same sense, Weiler also talks about 'the widening and deepening in the scope of the international legal order' (n 35) 561.

entering into horizontal agreements with one another, these new sites compose a more heterogeneous environment. A 'mosaic'[37] or a 'patchwork' are images that better express the phenomenon and allow this theoretical effort to better apprehend the components of that landscape.

Although one can claim that the national sphere is still the overriding domicile of political power, the scale of new functional demands has largely surpassed the walls of that domicile. A suitable example comes from the area of human rights.

International law of human rights is built upon the idea that individuals, not states, are at the centre of its normative claims.[38] This feature of international law of human rights, at least theoretically, has a clear impact on traditional sovereignty. Rather than a 'dark picture of the condition of state sovereignty',[39] one perceives a mode of authority that cannot claim to enjoy total independence from the international community, a mode of authority that is sensitive to rights and interests other than the states' own interests. This phenomenon is definitely not restricted to the field of human rights, and it calls into question some premises on the basis of which traditional international law, rightly or wrongly, was accepted as legitimate.

Legitimizing the mosaic and the sense of crisis

The Westphalian era stabilized a legitimacy theory attached to states and subordinated the authority of international law to states' consent. Traditional international law, therefore, had a shorthand answer to the question of whether and how international institutions of that kind are accountable: through states' consent, a principal–agent transmission belt is set up, that is, the state delegates to international organizations non-discretionary power and would keep intact its sovereign power while subjecting itself to international rules.

This rationale became outdated. New configurations of authority, as it happens, do not fit well into the traditional legitimizing discourse any more. They have, thus, been challenged by new demands of accountability. These two 'moving targets',[40] namely, the new institutional forms and the new accountability demands, are still in search of accommodation. In the

[37] The point of the mosaic metaphor has been well characterized by Walker, Tierney and Shaw. N Walker, J Shaw and S Tierney, *Europe's Constitutional Mosaic* (Hart Publishing, Oxford, 2011).

[38] See PW Kahn, 'American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order' (2000) 1 *Chicago Journal of International Law* 1, 11.

[39] L Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999) 68 *Fordham Law Review* 1, 5.

[40] Weiler refers to international law and legitimacy as 'two moving targets' (n 35) 548.

light of more complex and autonomous transnational institutions that originated in the last decades, accountability through state consent became fake and unwarranted. To the extent that these new kinds of transnational institutions distance themselves from that original act of state consent, the respective legitimizing discourse calls for re-elaboration.[41]

This is not to deny that state consent remains a pivotal component of a substantial part of international law's legitimacy. Consent, however, can hardly be seen as the sole one any more. Insofar as new regimes start to have the ability to bind states even against their will, one cannot be entirely satisfied with consent doing the whole legitimizing work that in the past was done by thicker sorts of authority.[42] Each layer of international law, as Weiler contends, has a different 'charge of legitimation'. When a disquieting portion of international law escapes states' oversight or control and thus deviates from the conventional frame of legitimation, when some slices of state autonomy erode by virtue of an international regime that is too costly to opt out, the appeal to sovereignty becomes too theoretical, overly impractical and unrealistic. Or worse: it is utterly unable to justify what is happening, does not accord to basic standards of legitimacy and ends up leading to an accountability deficit.

Transmission-belt concepts, therefore, have lost their grip to ground international organizations that can hardly be seen as mere agents with a clearly defined mandate. Rather than agents of states, these organizations can be considered as trustees. Rather than principals, states become actual trustors. And these trustors, in some situations, cannot even sanction the trustee when they do not agree with the latter's decisions.

For the 'post-sovereign layers' of international law, legitimate accountability is still an open and deeply disputed question. It has been a widespread belief that several existing organizations are being accountable to the wrong constituencies, by the wrong reasons and procedures.[43] Their legitimacy, thus, remains in doubt.

[41] See D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 606; Weiler (n 35) 548 and Henkin (n 39) 5.

[42] Chayes and Chayes, among others, have asserted that the legitimacy of governance regimes lies predominantly on the open process of norm elaboration and application and not only on state consent (n 32) 128–9. It is also the point of the 'paradigm of human rights', on the basis of which Kahn argues that international law can be legitimate even in the absence of consent (n 38) 5.

[43] Krisch argues that: 'the problem is that these institutions are often accountable in the wrong way: in part, they are accountable to the wrong constituencies' (n 21) 250. Keohane and Grant go in the same way: 'The problem is not a lack of accountability as much as the fact that the principal lines of accountability run to powerful states, whose policies are at odds with those of their critics, and which may or may not themselves be fully democratic. Public within countries are not heavily involved in these processes.' See (n 3) 37.

Devising pathways for accountability improvement and legitimacy promotion is the ultimate aspiration of a series of academic and practical endeavours. These projects purport first to theorize about and then to implement what is deemed to be a rectification of current institutional flaws. In the following section, I will approach one of these available pathways and briefly contrast it with some alternatives.

V. Between adaptation and invention: The quest for accountable global governance

How should one understand the demands of accountability directed towards the so-called 'post-sovereign' transnational institutions? The state has been the centre of gravity of political imagination in modern times, a necessary part of our political cognitive horizon. It provided the primary boundary of a political community. The ruling ideals of democracy, constitutionalism and rule of law have all been (re) conceived within its frame.[44] It is still the default vantage point of political argumentation and the ordinary locus of everyday political action. It stands as the chief reference of individual self-identification, political membership and loyalty. Pre-modern political ideals, not originally connected to states, happened to be envisioned under their mantle and became normalized as sides of the same coin. This is a contingent conceptual operation that produced a legitimating toolbox for the state through a variety of accountability arrangements. Let me call it 'state-centred conceptualization' or, as some call it, 'methodological statism'.[45]

In that light, when we move to the transnational legal-political sphere, an immediate question arises: what normative framework should travel to this variegated environment? Constitutionalism, democracy, rule of law or, as far as possible, all of them together? Both scholars and institutional designers have been struggling to test the transferability of this state-based legitimating toolbox (its built-in concepts, institutional devices and analytical lenses). When it comes to the transnational sphere, a cacophony of ideals envelops the calls for accountability. They act like magnets that evoke a cluster of values and aspirations, more or less envisaged in, or requested from, existing international institutions.

[44] D Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2011) Wissenschaftszentrum Berlin (WZB) Discussion Paper, SP IV 2011-802, 23–4.

[45] C Chwaszcza, 'Beyond Cosmopolitanism: Towards a Non-Ideal Account of Transnational Justice' (2008) 1(3) *Ethics & Global Politics* 132.

It is not simple to get rid of the state-centric analytical baggage.[46] Neither is it necessarily commendable to pursue that path.[47] The default methodological statism of international relations and international law is anything but pointless. It should, thus, be treated as worth accommodating, as a hurdle to be faced, not rejected.[48] It creates a sort of theoretical path-dependency, an unrelenting yet unsurprising cognitive bias: in order to conceive of accountable global governance, one would have to build upon state categories and institutions. The state still counts as the benchmark from which we depart (either to replicate or to innovate). The most refined and experimented elements of our institutional technology derive from that ground.

At the domestic level, the mechanisms of accountability are relatively consolidated. Free electoral competition, checks and balances, several principal–agent transmission-belts, insulated and impartial judicial oversight and rights protection: no political regime has been able to claim legitimacy or to earn the admiration and respect of the international community if not internally structured around these core institutional features. That set has become the threshold test to enter the 'club' of constitutional democracies.

At the global level, however, such mechanisms are harder to replicate, mainly for reasons of magnified scale and deeper societal pluralism. Other tools, though, might be available without necessarily disfiguring or abandoning the four *functions* of accountability indicated above.[49] There, the democratic function would entail, at the very least, the participation of the less powerful countries as well as of any affected communities and individuals in the relevant decision-making bodies; the constitutional function, to be credible, would have to mitigate the power of the most

[46] As Stein eloquently puts it: 'we still insist on translating solutions developed within the state to the novel phenomenon and using state nomenclature. This, in a sense, is a natural tendency since the state is, so to speak, the only show in town if one looks for a model and international law is of little help.' E Stein, 'The Magic of the C-Word' (2005) 18(3) *European Union Studies Association* 1.

[47] For Rosenau, one has to break such 'stranglehold': 'Perhaps the most dangerous trap involves what I call the "domestic analogy": the tendency to think about the problem of accountability at the international level as if we had domestic processes in mind. … Does this mean that transnational accountability cannot be achieved? No, it does not if one can break free of the stranglehold that the domestic analogy has on our thinking.' J Rosenau, 'Transnational Accountability and the Politics of Shame' (2001) 8 *ILSA Journal of International and Comparative Law* 353–4.

[48] Krisch's arguments echo this perception: 'When we try to imagine the postnational space, it is not surprising then that we turn for guidance first to the well-known, the space of the national.' N Krisch, 'Postnational Constitutionalism?' (2008) Hauser Globalization Colloquium, NYU, 1.

[49] See (n 13).

powerful, reduce asymmetries and re-equilibrate the arms; the epistemic function would have to be instantiated by the creation of competence for dealing with the problems of a global community; the populist function, finally, means gaining the allegiance of the multiple actors that interact in this sphere.

How should these functions be implemented in institutions of global governance? Ingenuity, for Keohane and Grant, is more important than a 'single-minded and mechanical application of the ideals of democracy'.[50] If one resolves to follow such common-sense advice, one can conceive of two remedies for the obsolescence or unfitness of the state-based conceptual and procedural repertoire: on the one hand, one can invent a new one; on the other, rather than simply emulating, one can update, revamp and reconstruct the old one. Furthermore, in order to reach the desired destination, one can also plan the timing and rhythm of change, with different degrees of incrementalism.

How to infuse the transnational agencies of decision-making, either regional or global, with the technology of good government (or governance)[51] that modern states are supposed to have developed? Is there a need for new equipment, or should the domestic one just be transposed?

The most influential discourses for legitimate global governance have been crafting a middle ground between these two poles. In the course of this attempt to reconceptualize state-based references, it does not come as a surprise that the constitutional and administrative law registers at the domestic level appear as primary inspirational candidates for the reform and legitimation of transnational governance.

Recast as 'global constitutionalism' (GCon) and 'global administrative law' (GAL), these two 'efforts of translation'[52] depict and critically probe what is going on beyond the state from the political and legal points of view.

[50] Keohane and Grant (n 3) 41.

[51] The distinction between 'government' and 'governance' has been serving to identify, respectively, thicker and thinner modes of the exercise of authority. States are the typical sites of 'government', whereas various transnational institutions are described as part of 'global governance'. Krahman puts that shortly: 'government and governance as ideal-typical poles at either end of a continuum ranging from centralization to fragmentation permits an analysis of the transformation of political authority at the national, regional, and global levels'. E Krahmann, 'National, Regional, and Global Governance: One Phenomenon or Many?' (2003) 9 *Global Governance* 323, 340. Finkelstein summarizes it: 'Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home.' L Finkelstein, 'What is Global Governance?' (1995) 1 Global Governance 367, 369. See also DC Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2005) 115 *Yale Law Journal* 1490–1562; G Stoker, 'Governance As Theory: Five Propositions' (1998) UNESCO, Blackwell Publishers, Oxford; and Krisch (n 29).

[52] Krisch (n 29) 245.

Rather than ready-made compulsory blueprints, domestic constitutional law and administrative law make up the level playing field for GCon and GAL.[53] Both are concerned with the exercise of public power outside the purview of the state, and convey more or less divergent proposals about how far international institutions should reach and what the available and feasible historical routes towards such destinations are. This article engages with the GAL's framework more intimately. The next section helps to locate and estimate the precise aspiration of GAL project's account of global governance.

VI. 'Global administration' in the search of a 'global administrative law'

The departing insight of the 'GAL project' is that much of contemporary 'global governance' should be conceived as 'global administration'.[54] According to the project proponents, the concept of global administration is drawn by exclusion. It comprises all norm-generative practices that are not strictly legislative like treaty-making, and all dispute settlement procedures that are not strictly judicial like international adjudication. It consists, in turn, of quasi-legislative rule-making and quasi-judicial adjudicative functions.[55] The boundaries of each function, just as it happens in domestic law, are indeed loose and volatile. The 'quasi' demarcation, nevertheless, conveys an attempt to apprehend the varying conceptual degrees and institutional forms through which these core public functions are manifested.

The exact nature of 'global administrative action', thus, is first defined by what it is not. It basically falls short of the highly contested, vocal and politicized treaty-making events or judicialized dispute settlements. However, global administration – an institutional reflection of the administrative burdens generated by growing global interdependence – is not yet 'global administrative law'.[56] The former corresponds to an

[53] For Krisch, domestic administrative law comes as 'inspiration and contrast: it serves as a framework for identifying converging and diverging developments in institutional practice, and it helps us sharpen our sensitivity to the problems and possibilities of establishing accountability mechanisms on the global level'. It is a 'background rather than basis for prescription', it aids the 'reflection on the transferability of domestic concepts' (n 29) 256–7.

[54] Kingsbury *et al.* (n 4) 17 and Krisch (n 29) 255. See also MacDonald (n 21) 4. As Cassese also points out: 'Administration is becoming increasingly international. … Their number is increasing … . Their staff is growing … . Their influence is on the rise.' S Cassese, 'A Global Due Process of Law?' (2006) NYU Hauser Colloquium on Globalization and Its Discontents 2.

[55] Kingsbury *et al.* (n 4) 17.

[56] This idea has been captured in three general statements of MacDonald: 'Global *administrative law* doesn't exist. … Global *administration* exists. … Global *administrative laws* exist.' (emphasis added) at (n 21) 2–4.

increasing institutional reality, whereas the latter is, first and foremost, a normative call, if not an embryonic set of procedural tools that are 'emerging' in different sites of global public power. The modest 'rhetoric of emergence'[57] indicates a circumspect yet faithful portrait of what decisional processes are in place, but, at the same time, a confident normative ambition with respect to where these processes should go. That is why, for sure, this literature introduces itself as an 'advocacy project',[58] not only as a radiography of contemporary global governance. It is an analytical enterprise as much as the product of a mobilization for institutional change. Not only an intellectual, but, as far as possible, a practical advocacy project.

The project's inaugural article[59] starts off with a meticulous taxonomical effort to map and understand the 'institutional topology'[60] of contemporary global regulatory governance. That taxonomy allegedly helps us acknowledge and understand some blind spots that conventional categories of international law overlook. In other words, relevant international bodies operate below the radar screen of grand and highly visible events of transnational decision-making. Global governance, the argument continues, comprises not only (i) traditional intergovernmental institutions, but also (ii) transnational horizontal networks between national regulatory officials, (iii) distributed transnational administration between national regulators, (iv) hybrid intergovernmental–private institutions, and (v) private bodies.[61] Each type exercises more or less authoritative power at the global level and impacts on both domestic policies and non-state actors.[62]

Within this global administrative space, complex interactions are forged between the global bodies and the addressees of their regulations. Among the addressees we find states, individuals, private companies and NGOs. The global administrative space is autonomous and distinct from the spaces governed either by international law or domestic administrative law.[63] The GAL project tries to capture this institutional configuration that runs

[57] Ibid (n 21) 2. Kingsbury *et al.* (n 4).

[58] For MacDonald, GAL is 'not simply identifying the emerging principles, but advocating their spread' (n 21) 27–8.

[59] Kingsbury *et al.* (n 4).

[60] MacDonald and Shamir-Borer (n 10) 6.

[61] Kingsbury *et al.* (n 4) 21–2. One can mention several representative examples of each type: (i) the UN Security Council or the International Labour Organization (ILO); (ii) the Basel Committee on Banking Supervision; (iii) several national environmental regulators which implement international environmental law; (iv) the Codex Alimentarius Commission or the Internet Corporation for Assigned Names and Numbers (ICANN); (v) the International Standardization Organization (ISO) or the World Anti-Doping Agency.

[62] Ibid 23–4.

[63] Ibid 26.

alongside the confines of classical international law. It conceptually ties up a web of cross-cutting transnational decisional bodies that has been increasingly constraining all sorts of actors in the transnational arena.

These global bodies have jurisdiction over topics as diverse as the issuance of commodities, the management of refugees' camps, the declaration of a state's non-compliance with its agreed obligations, the sanctioning of individuals and so forth. To recall Weiler's typology, which maintains that contemporary international law revolves around three overlapping geological strata (transactionalism, community and regulation), the GAL project would be mostly concerned with two attributes of the third layer: the increasing importance of the administrative part of treaties and the development of cooperative policies that used to lie within the jurisdiction of states' administrative apparatus.[64] Still, the project's framework transcends that typology by including hybrid and private bodies.

Together with this large descriptive and classificatory endeavour, the project has an evaluative and prescriptive prong, which spells out the normative repercussions of global administration. This dimension of the project consists in a programme for institutional reform 'writ small', aiming at legitimizing accountability arrangements of institutions beyond the state. Rather than proposing macro-structural reinvention, that is, institutional design 'writ large',[65] the project addresses micro procedural variables that would enhance accountability at the margins. This task is equally important to and more quickly achievable than its macro-structural counterpart.

If one attempts to catch a comprehensive view of the academic literature that the GAL project has so far produced, one would see at least three things: (i) a descriptive framework, as the one depicted above, (ii) a general normative stance for accountable global governance and, lastly, (iii) a large set of case studies that somewhat combine both prongs – the descriptive and the normative.

In what follows, I will further elucidate the particular features of such a normative prong of the GAL project. I organize this elucidation around

[64] These two characteristics have been described by Weiler (n 35) 559.

[65] The distinction between institutional design 'writ small' and 'writ large' has been carefully developed by Vermeule. His analysis takes for granted the broad historical constraints of some structural elements of institutional choice, and focuses on 'a repertoire of small-scale institutional devices and innovations that promote democratic values against the background of standard large-scale institutions'. A Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press, Oxford, 2007) 2. Ely, when delving into the role of judicial review, also draws a similar distinction between 'process writ small' (individual disputes) and 'process writ large' (the broader conditions of participation in government). JH Ely, *Democracy and Distrust* (Harvard University Press, Cambridge, MA, 1980) 87.

three questions that the project has been trying to answer: (i) why does global governance have an accountability deficit; (ii) what would be, at least for the time being, appropriate accountability for that domain; and (iii) what would be, under present circumstances, the feasible alternatives. This threefold expository order helps specifying exactly how the GAL project differentiates itself from other accountability discourses that have so far been set forth.

A diagnosis of accountability deficit (or inappropriateness)

Problem-solving demands that were traditionally dealt with by domestic legal machinery are shifting away from the state and sliding towards transnational centres of decision-making. Many of these centres, as pointed out above, are located under or above the conventional corners of classical international law. This phenomenon certainly sparks serious misgivings. Mashaw, for example, perceived the difficulty of justifying bodies that are 'outside domestic processes of political accountability, yet weakly policed by a still patchy international political and legal order'.[66] He is worried about a power arrangement that is still rudimentary when compared to a reputedly more mature structure of accountability, like the one that is typical of states.

The GAL project has the same unease with this 'patchy and weakly policed' order. Like many other intellectual efforts directed to rethink global governance, the GAL project tackles the accountability deficit that springs from the fact that 'transnational systems of regulation or regulatory cooperation' have expanded in 'reach and forms'.[67] These systems have become increasingly intrusive and, in some cases, directly regulate the behaviour of multiple actors without having to resort to states to implement their rulings. Rather than being mechanical agents of states, these institutions exercise a significant measure of 'de facto independence and discretion'.[68] Examples of this practice abound.[69]

This sense of accountability deficit is prompted, therefore, by the realization of the fact that these bodies are controlled neither by states nor by any other sufficiently legitimate actor or process.[70] Following that perception,

[66] Mashaw (n 15) 115.

[67] Kingsbury *et al.* (n 4) 16.

[68] Kingsbury *et al.* contend: 'the global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states'. Ibid 26.

[69] Kingsbury *et al.* enumerate examples like the certification of CDM projects by the Executive Board, the determination of refugees' status by the UNCHR, the certification of NGOs to participate in meetings by UN agencies. Ibid 24.

[70] That is what Zürn highlights when he points to the 'removal of numerous decisions from the circuit of national and democratic responsibility' (n 31) 260.

the GAL project aims at turning global administration accountable in its own particular way, that is to say, through the infusion of traditional administrative law principles into the processes of such global bodies. To be sure, this distinct institutional setting strays from the logic of domestic administrative law. Whereas the domestic environment, as it has already been contended, is geared to an authoritative apex (an ultimate constituency to which administration is subordinate), global administration lies outside the delegation-belts of the states.[71] Although global bodies are not free-floating entities, they still remain, as yet, insulated against what the GAL project deems as 'appropriate' accountability.

A modest and sectorally sensitive proposal on appropriate accountability

The normative prong of the GAL project considers whether and to what extent administrative law mechanisms are able to reduce or fix the accountability deficit explained above. As a matter of fact, Kingsbury *et al.* observe that procedural mechanisms of that sort are already being implemented as a response to that charge.[72] The 'rhetoric of emergence', thus, refers to something that is not just an aspiration, but an actual phenomenon.[73] In the face of growing criticism, global bodies are opening themselves, if not to a complete overhaul of their very institutional character and identity, at least to internal reforms that echo some of those administrative law principles. This is a trend that, however fragmented and unsystematic, the GAL project praises and attempts to spread.

This systematization is put forward by means of a package of accountability tools; more precisely, by the institutional corollaries of two

[71] As contended by Cohen and Sabel. J Cohen and C Sabel, 'Global Democracy?' (2006) 37 *International Law and Politics* 763, 765. This point has been also raised by Stewart (n 4) Kingsbury *et al.* (n 4) 53; and Krisch (n 29) 247–8.

[72] For Kingsbury *et al.*, the accountability deficit 'has begun to stimulate two different types of responses: first, the attempted extension of domestic administrative law to intergovernmental regulatory decisions that affect a nation; and second, the development of new mechanisms of administrative law at the global level to address decisions and rules made within the intergovernmental regimes' (n 4) 16.

[73] Cassese provides a number of examples: 'a body of general principles is being consolidated in the global arena: the principle of legality, the right to participate in the formation of norms ("notice and comment", as recognized by the OIE) the duty of consultation (imposed by the World Bank on domestic administrations in the context of the Heavily Indebted Poor Countries Initiative) the right to be heard ("procedural participation" recognized by the FATF and the WTO Appellate Body) the right to access administrative documents, the duty to give reasons for administrative acts (the duty to give a reasoned decision, affirmed by the WTO Appellate Body) the right to decisions based upon scientific and testable data, and the principle of proportionality' (n 33) 690. Echoing the same realization in another text, he claims that global administration is not 'still ruled by secrecy, informality and arbitrariness' (n 54) 2.

fundamental rights: the 'right to participation' and the 'right to defense'.[74] Five are the dominant devices: transparency, participation, interest-representation, revisability and duty of justification.[75] This is a rather crude package.[76] An in-depth exploration of its five principles would highlight several variations through which each principle can be concretely carried out.

Transparency, for example, can mean either access to gross information, or an active effort to provide a more intelligible and qualitatively superior piece of information. Participation, in the same way, can be widened through mechanisms of consultation, notice and comment, hearings and so on.[77] Interest-representation can manifest itself through the ascription of actual weight to groups or individuals in decision-making. The right to review, in turn, can be implemented through a variety of appeal procedures. A duty of principled and public reason-giving, finally, may range from technical jargon conveyed through rigid structures of argumentation and to an accessible terminology and rhetoric.[78]

Instead of a one-fits-all programme of accountability enhancement, the role and weight of those principles need to be grasped and adjusted to the context of each global administrative body, in accordance with its respective purpose and power.[79] Domestic administrative law may be a rich source of inspiration, but does not deliver definitive answers. In this

[74] As Cassese further explains, these rights engender a 'chance to intervene' and a 'right to appeal' (n 33) 685.

[75] Kingsbury *et al.* (n 4) 17. See also JL Mashaw, 'Structuring a "Dense Complexity": Accountability and the Project of Administrative Law' (2005) 6 *Issues in Legal Scholarship* 11. MacDonald and Shamir-Borer (n 10) 11.

[76] The GAL package is quite similar to other proposals for accountability enhancement. Koppell, for example, proposes five 'conceptions' or 'dimensions' of accountability: transparency, liability, controllability, responsibility and responsiveness. JGS Koppell, 'Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder"' (2005) 65(1) *Public Administration Review* 95. In his later book, Koppell called these same five elements 'concepts' of accountability (n 2) 34.

[77] Cassese furnishes a thorough classification of participatory channels (n 54).

[78] Some of the GAL proponents include 'accountability' as a discrete device alongside the others of this package. See, for example, Stewart (n 8). What is often meant by accountability is a particular procedure for sanctioning the power-holder. We could name this sense of accountability as 'accountability *stricto sensu*'. Reducing accountability to a proceduralized sanctioning device can lead to overlooking other accountability types and less formal sanctions that take place. I prefer, thus, keeping 'accountability' in its '*lato sensu*' perspective, which covers all devices.

[79] This is what Krisch means by pointing to the 'relative and provisional' features of the project: 'GAL is a self-consciously "modest' project" which comes up with "relative and provisional conclusions"' (n 29) 262.

spirit, the GAL project intends to be 'modular'[80] and sectorally sensitive, that is, to verify how, in each and every global body, those general principles of administrative law are and should be put into effect. The exact mix and form, or the particular version of due process that obtains in one sector,[81] 'remains very much up for grabs'.[82] Therefore, a 'fully emerged' GAL, as the project envisions it, does neither possess universal homogeneity in terms of procedural solutions, nor resembles an arbitrary 'adhocracy'.[83] It leads, instead, to a relative convergence between those devices.[84]

A contextual and pragmatic claim on feasibility

The normative aspiration of the GAL project is to improve global centres of decision-making through institutional devices 'writ small'. Instead of contending that international institutions should resemble the institutional archetypes of the grandiose political ideals instantiated at the state level, it proposes some low-profile administrative law devices. Instead of defending the transference of the full box of thick procedural mechanisms that those

[80] MacDonald and Shamir-Borer explicate that feature: 'Global administrative law thus has a *modular quality*: it provides a *toolkit* that allows us to pick and choose the mechanisms that best suit the particular regulatory structure in question.' (emphasis added) at (n 10) 13. GAL's modular quality would escape one of the traps pointed by Rosenau: 'A third trap to avoid is that of aspiring to one instrument of accountability suitable to all situations.' at (n 47) 354. This quality would facilitate, moreover, what Nye has identified as 'willingness to experiment': 'Increasing the perceived legitimacy of international governance is therefore an important objective and requires three things: greater clarity about democracy, a richer understanding of accountability, and a willingness to experiment.' J Nye, 'Globalization's Democratic Deficit: How to Make International Institutions More Accountable' (2001) 80(4) *Foreign Affairs* 3.

[81] Cassese (n 54) 57.

[82] MacDonald and Shamir-Borer (n 10) 53.

[83] This neologism was coined by Cassese: 'From the organizational standpoint, the global legal order does not follow a single model. It is instead an example of "adhocracy," in the sense that it adapts to the functions to be performed, sector by sector.' at (n 33) 679. In another text, Cassese also elaborates on sectoral conformations of global due process: 'each regime has its own due process principle, not every one grants participatory rights and there is a lack of overarching principles, that can be applied to all regulatory regimes.' at (n 54) 57. See also S Chesterman, 'Globalisation and Public Law: A Global Administrative Law?' in J Farrall and K Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, Cambridge, 2009) 77.

[84] As MacDonald and Shamir-Borer explain: 'We suggest that we might expect to see this eventual unity manifest itself in three main ways: in a *relative homogeneity* of general, abstract principles that are then applied differently in different sectors; in a *relative homogeneity* in the more concrete rules and mechanisms applied within sectors both domestically and extranantionally; and in the creation of a *generalised 'culture'* of administrative law, in which it can be generally expected that some type of administrative law rules, some form of concretisation of the general principles, will attach to all exercises of public power in global governance.' (emphasis added) at (n 10) 27.

ideals carry, it takes a less bombastic and controversial step: it disaggregates those ideals and tries to gradually embed some of their constituent components into transnational institutions. According to its supporters, then, one of the most appealing characteristics of the GAL project is its greater feasibility as compared to other approaches to global governance.

The GAL project is reputedly more attentive to *realpolitk*, to the need of adjusting normative calls to what is politically viable and expedient. It elucidates the values underlying institutional alternatives that already are, so to say, 'on the table' of historical possibilities. It works 'within a given institutional and social environment'.[85] With that in mind, we can say that the GAL project strives not only to 'rebuild the ship at sea'[86] (to borrow a metaphor that suggestively conveys the burden of institutional design), but also to do so at a micro level. It defends, as the most fitting approach to legal and political development, small-scale and opportune improvements of existing regimes through taking into account all their constraints and path dependencies.[87] It introduces itself as the 'next step', not as the 'ultimate step'. In other words, the GAL project endorses a cautious tactic for walking 'one step at a time' on the way from 'here' to 'there'. It allows for some prescriptions, but is prudent enough not to ignore the non-ideal factual contexts.[88] To sum up, its philosophy adopts a measure of incremental pragmatism.[89]

It is still important to remark that, although political ideals can be deflated by down-to-earth estimations of historical feasibility, such deflations do not render the said ideals less central for unveiling the critical grip of any accountability claim.[90] That the GAL project has no intent to

[85] Krisch (n 29) 257. And Krisch complements: 'It is a project with a partial, not a comprehensive aspiration and seeks an independent existence both as an analytical project and as a normative one, albeit on narrower (and potentially less contested) grounds.' Ibid 258.

[86] This metaphor is the title of a book co-organized by Elster, Offe and Preuss: J Elster, C Offe and U Preuss, *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea* (Cambridge University Press, Cambridge, 1998).

[87] Krisch (n 29) 255–8.

[88] Ferejohn addresses the question likewise: 'My answer will be more or less optimistic: I think there are ways to improve things from a recognizably democratic perspective, even in the nonideal global context.' at (n 17) 2.

[89] The pragmatism of the GAL project, for MacDonald and Shamir-Borer, relies on 'acknowledging and confronting the realities of globalization. It recognizes the structural nature of global governance "as is", and works from within.' at (n 10) 13. It would help escaping one of Rosenau's traps: 'A second mistake to avoid is that of focusing on radical rather than practical changes.' at (n 47) 354.

[90] Such theoretical vigilance, that aligns the ambition of normative arguments with what is believed to be historically realistic, is a common recourse in the literature of global politics that GAL resonates with. This point has not escaped the attention of Stewart, Kingsbury, Krisch, MacDonald, in the publications already mentioned.

build 'global democracy', whatever that might mean in practice, has been stated a number of times.[91] Despite subscribing to 'bracket questions of democracy', the project does not abandon the purpose of 'nurturing democratic attributes and tendencies where viable'.[92]

Neither this pragmatic hands-on approach, nor the call for accountability, participation and so on has been advocated only by the GAL project.[93] Nonetheless, the GAL proponents do not consider it only as a second-best strategy in the light of the impracticability of extending complex and costly participatory mechanisms to much larger scales. According to its proponents, the GAL project would rather be a first-best alternative under the circumstances of radical pluralism and given the need for reasonable accommodation.[94] Instead of freezing arrangements that will likely mirror the current asymmetrical power relations in the transnational sphere, GAL mechanisms would achieve the feat of channelling a plurality of voices without foreclosing further contestation.[95]

VII. The shifting places of legitimacy discourses: GAL project and its partners

The reshuffle of transnational institutions, as earlier explained, calls for fresh elaboration of the categories that have long served law and politics within and among the states. Nobody knows how imminent arrangements will look like, but we do have enough historical evidence to believe that whatever materializes will further mitigate and constrain state sovereignty.[96]

[91] For instance, as Kingsbury *et al*. have argued: 'This inquiry usefully highlights the extent to which mechanisms of procedural participation and review, taken for granted in domestic administrative action, are lacking on the global level. At the same time it invites development of institutional procedures, principles, and remedies with objectives short of building a *full fledged (and at present illusory) global democracy*.' (emphasis added) at (n 4) 27.

[92] Ibid 50.

[93] For example, Keohane and Grant argue that global accountability requires 'new, pragmatic approaches', which should be sensitive to two types of accountability: to states (delegation model) and to those affected by its decisions (participation model). If the latter were always to trump the former, the immediate risk for international institutions would be to lose state-members' support (financial and any other). At the same time, if the interests of those who are affected by international bodies' decisions were overlooked, international institutions' legitimacy might be questioned. For them, the key to have vigorous global accountability lies somewhere in between the two models. See (n 3) 34.

[94] MacDonald (n 21) 18.

[95] According to Krisch: 'In the divided, highly contested space of the postnational, ideal solutions are elusive – pluralism may be the best option we have.' at (n 21) 45. See also MacDonald (n 21) 21.

[96] A Boyle, 'Environment and Development: Accountability through International Law' (1993) 12 *Third World Legal Studies* 95.

What is disturbing for some, and auspicious for others, is that the sovereignty-based conceptual apparatus and procedural devices are not automatically available for organizing and legitimizing this set of bodies and practices. In other words, that apparatus is not immediately applicable when we shift from one context to the other.

This article has so far focused upon some particular contexts of accountability discourses. These discourses consist in a set of claims about how accountable an institution ought to be. They follow a basic logical structure, which connects a factual premise – 'as long as one holds power' – to a prescriptive inference – 'one should be accountable for how such power is exercised'. If one presses that inference a bit further – by asking, for example, in whose name and for the sake of what value power should be accountable – one will get trapped in inexorable normative debates.

The concepts of accountability and legitimacy, not surprisingly, go hand in hand. They do not simply overlap though. Whereas all legitimate power is accountable power, not all accountable power is legitimate.[97] A timely clarification about the relationship between accountability and legitimacy helps to appreciate the character of the GAL project.

Legitimacy is a central normative category of legal and political thought.[98] It is the moral flip side of power.[99] Whether there are acceptable reasons to justify authority claims and whether an individual has a genuine duty to obey are the elementary questions it confronts. A conception of legitimacy devises counterfactual standards against which actual institutions and their decisions can be assessed. This assessment enables reflection,

[97] Zürn clarifies the two sides of the concept of accountability: the normative, associated with validity and a claim to legitimacy, and the descriptive, attached to societal acceptance (n 31) 260.

[98] Pitkin states: 'To call something a legitimate authority is normally to imply that it ought to be obeyed. You cannot, without further rather elaborate explanation, maintain simutaneously *both* that this government has legitimate authority over you *and* that you have no obligation to obey it'. (original emphasis) H Pitkin, 'Obligation and Consent – II' (1966) 60 *American Political Science Review* 39, 39.

[99] Inadvertent uses of different definitions of the word 'legitimacy' may cause misunderstandings. The presently used normative definition should not be mistaken with the descriptive senses in which the term is sometimes used: legitimacy as the fact of obedience (sociological version) and legitimacy as legality (formal validity, sheer compliance with rules, whatever the content of the rules is). Fallon has satisfactorily analysed this distinction (see R Fallon, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787). There are, for sure, intricate interconnections among the moral, the sociological and the legal conceptions. These connections must be drawn carefully so that one avoids making the moral collapse into either the sociological or legal senses. The risk is instrumentalizing the former for the sake of either one of the latter, defending the putative moral quality of a certain arrangement only to the extent that it generates compliance, or worse, taking the 'fact of compliance' as an indicator of moral quality.

critique and institutional reform. Oftentimes, when the structure of power in question has reshaped itself in the course of history, the bell of legitimacy rang. This process of continuing stabilization and destabilization of legitimacy discourses is an essential feature and a constant burden of institutional development.

Although legitimacy is an indispensable quality to the operation of legal institutions, when it comes to the province of transnational law, its meaning and demands are still far from straightforward.[100] At the outset of such inquiry, one should be attentive to three methodological warnings: first, it is crucial to distinguish binary 'either-or' from gradualist 'more-or-less' styles of legitimacy talk; second, one cannot ignore that international law is not a monolithic box composed of homogenous norms and institutions, but a combination of elements of strikingly different legal nature; third, legitimacy standards usually combine elements of input and output. Let me shortly explain these claims and then check how GAL handles them.

By defining legitimacy as a matter of degree rather than an all-or-nothing attribute, the analysis enters a 'compared to what' basis and sidesteps a static 'black and white' conceptual straitjacket. Of course, this nuanced analysis does not ignore that, no matter how gradualist an approach might be, it does still need to establish a general threshold between the legitimate and illegitimate terrains (within which there might be, respectively, degrees of legitimacy or illegitimacy). This concession keeps us safe from the risk of ending up accepting that all decisions of international institutions have at least some grain of legitimacy. In a way, thus, there is a binary element even in a gradualist approach, and the line between legitimacy and illegitimacy must be drawn somewhere. However that may be, the acknowledgement of varying degrees of legitimacy allows for more refined contrasts between institutions.

Secondly, being sensitive to the multiple types of transnational law also helps refining the analysis. It is not possible to think about legitimacy in transnational law without a diligent perception of the variety of norms and institutions with distinct abilities to make discretionary decisions, to affect the lives of other agents and to 'bite'. Law beyond the state constitutes a complex geological body,[101] not a fixed container formed by indistinguishable components. Each one of these legal types entails different measures of authority and a particular relation between authority and state consent. Unpacking this 'global legal configuration',[102] then, illuminates what precise legitimacy demand will be adequate to each institution.

[100] See TM Franck, *Fairness in International Law and Institutions* (Oxford University Press, New York, 1995) and *The Power of Legitimacy among Nations* (Oxford University Press, New York, 1990); Bodansky (n 41); Kahn (n 38); Weiler (n 35).

[101] To use, again, Weiler's metaphor (n 35) 552.

[102] Walker (n 21).

Finally, the ascription of legitimacy to a particular institution often hinges upon two sorts of concomitant standards: a formal source-based and a substantive result-based standard.[103] To use a more common jargon in the literature of international law, they correspond, respectively, to input and output patterns of legitimacy. Although one can claim that legitimacy tends primarily, even instinctively, to be associated with sources and procedures, so that disagreement upon outputs can be outweighed by a previous endorsement to a *modus operandi*, outcomes can hardly be excluded from the overall legitimacy assessment. That *prima facie* deference to procedures, therefore, can hardly withstand a flagrantly wrong outcome.

The discourses on legitimate accountability at the transnational level are various. The quarrel between them can be *linguistic*, *conceptual* and *structural*. It is linguistic when the choice of terms that will carry the normative proposal engenders a 'politics of label'. It becomes conceptual when the actual elucidation of those terms points to different directions and prompts a 'politics of definition'.[104] It also might get structural when the concrete arrangements that try to put those concepts into effect finally lead up to a 'politics of institutional design'.

Among the main partners of GAL, global democracy is one such candidate. Scholars discuss whether the word, the concept and the conventional machinery of democracy, being an 'indispensable normative component for the legitimacy of a legal order',[105] can be transposed into the transnational context. The absence of a *demos* at that level, for Weiler, makes that alternative innocuous.[106] Whereas a *demos* – the shared sense of community and belonging to a political system – would help to explain why an opposing domestic minority should be bound by the decision of the majority, at the global level, the deeper cultural differences would make the acceptability of majoritarian decision-making unrealistic.[107]

[103] Typical examples of the former are the *pouvoir constituant*, elections, principal–agent delegations and consent, all of them embodying an autonomous act of will, an opportunity of an agent to have a say or exercise some influence upon a decision. Examples of the latter will necessarily bear upon rights, measures of reasonableness, proportionality and so on.

[104] For an example of the 'politics of definition', see Walker (n 21) 524.

[105] Weiler (n 35) 547.

[106] Weiler argues: 'The demos is an ontological requirement of democracy. There is no demos underlying international governance, but it is not even easy to conceptualize what that demos would be like.' Ibid 560. For Bodansky, unless there is an identifiable group able to 'make decisions' either by themselves or through representatives, there is hardly a democratic arrangement. The formal devices of direct participation or some sort of representativeness are, as opposed to Weiler's cultural notion of *demos*, inherent to democracy. See Bodansky (n 41) 614.

[107] Bodansky (n 41) 615–17.

Cohen and Sabel, among others, go in the opposite direction. For them, the implausibility of replicating domestic democracy in the transnational setting does not render it pointless: 'dismissing the possibility of global democracy, as often done, by saying "no demos, no democracy" is no more helpful than responding to the chicken and egg problem by saying "no chicken, no egg"'.[108] It is not clear how far the GAL project is from a flexible approach of the kind put forward by Cohen and Sabel. In spite of opting for a distinct label and of being more hesitant to associate itself with democracy, what the GAL project advances in terms of procedural mechanisms often resonate with democratic qualities.

Global constitutionalism, in turn, as defined by GAL advocates, has a strikingly more wide-ranging scope. Its aim would be to develop a 'fully justified global order',[109] and it basically pursues it by reproducing much of what is cherished in the domestic domain: human rights coupled with judicial review and strong legalisation of political relations, all under the auspices of a constitutional text.[110] It would put the emphasis on the foundational moment (of a *pouvoir constituant* type), through which an all-encompassing polity makes a claim of agency. GCon, in sum, intends to keep the 'C-word'[111] when it moves beyond the state. It requires a vast institutional reconstruction and, therefore, for that operation to take hold, one cannot but presuppose a significant level of societal consensus in the global order.

Despite sharing a departing goal – 'correcting the legitimacy deficit that global regulatory governance suffers'[112] or 'subjecting public power to public control'[113] – GCon and GAL convey different road maps for political action and reform. They have different prudential judgments on feasibility and timing,[114] furnish different scales of legitimate accountability.

The GAL project ascribes to GAL a myriad of advantageous features. If one gathers together the main adjectives used by GAL's literature, a minimal list would include: open, plural, flexible and adaptable; versatile, pragmatic and modular; heterarchical, horizontal, soft; relative and provisional;

[108] Cohen and Sabel (n 71) 767. For de Búrca, despite the usual attachment of the concept of democracy to the context of the state, one should not necessarily be satisfied with global governance without democracy. She argues: 'any serious proposal for addressing the legitimacy of transnational governance must include a robust *democratic aspiration*' (emphasis added) at (n 10) 237.

[109] Krisch (n 29) 253.

[110] Ibid 253–4.

[111] To borrow Stein's expression (n 46).

[112] MacDonald and Shamir-Borer (n 10) 3. Krisch points out that, while both GCon and GAL are concerned with the legitimacy deficit of global governance, they do so from different angles. The peculiarity of the latter, as noted earlier, would be that it 'focuses on questions of accountability' (n 29) 246 and 256.

[113] MacDonald (n 21) 18.

[114] This 'temporal self-restraint' refers, as it has been constantly reminded by MacDonald and Shamir-Borer, to the conditions that exist 'now and for the foreseeable future' (n 10) 5.

realistic, feasible and modest; incremental, quotidian[115] and bottom-up. These qualities should be contrasted with the ones attributed to GCon: unity, hierarchy, idealism, verticality, command-and-control, top-down.

Perhaps this contrast overstates their differences and underrates their similarities. In any event, arguments for the superiority of GAL are conditional and context-oriented. GAL would be ethically,[116] functionally[117] and practically superior[118] to the alternative candidates, but only under the specific historical context it departs from. It seems to be better shaped, moreover, to meet the requirements of the three methodological warnings submitted above: (i) by disaggregating the several devices 'writ small' and being open to the variety of combinations between them, it is more sensible to variable degrees of legitimacy; (ii) through its comprehensive taxonomy, it directs its normative grip to legal layers that GCon ignores;[119] (iii) finally, unlike what Cassese's emphasis on 'global due process' might suggest, GAL does not only impact on input legitimacy, but also includes output considerations.[120]

The GAL project vindicates regular yet minute refinement rather than root-and-branch reinvention of global governance structures. To put it differently, it favours retail reform rather than wholesale revolution. Krisch contends that the project seeks the realization of 'narrower

[115] Ibid (n 10) 51.

[116] MacDonald (n 21) 21.

[117] For MacDonald, GAL is 'divested of a constitutional impulse to hierarchy and unity' and 'well calibrated to respond to irreducibly plural and heterarchical conditions of contemporary global governance'. Ibid 24–5. As MacDonald and Shamir-Borer also claim: 'In providing us with both a framework and tools for apprehending these institutions largely as they are (or in any event, to change them in a less invasive manner than constitutionalist approaches of necessity must) global administrative law is better adapted to protect the regulatory gains that have come from *institutional and functional specification*.' (emphasis added) at (n 10) 37.

[118] For Chesterman, GAL would be practically superior because it is 'more likely to find traction with decision-makers themselves' (n 83) 77.

[119] For MacDonald, GCon cannot account for the vast array of different bodies that exercise public power in global governance (n 21) 18, This partly leads up to MacDonald's succinct conclusion: 'Global administrative law is a necessary complement to any global constitutionalism; the inverse, however, does not hold.' at (n 21) 24–5.

[120] MacDonald and Shamir-Borer highlight the procedural side: 'It is worth emphasizing that global administrative law – for the most part at least – focuses largely on formal and procedural, rather than substantive, requirements. These are intended not to definitively condition any substantive regulatory outcome, but rather to ensure, to the greatest degree possible, that all affected by public power have a say.' at (n 10) 53. Cassese goes in the same direction and coins the expressions 'global due process' or 'global proceduralism' to characterize the point of GAL (n 54) 55. Chesterman, however, expands the agenda of GAL to accommodate the substantive/epistemic considerations: 'The goals of global administrative law go beyond constraining decision-makers, however. In addition to providing 'input legitimacy' to decision-making processes, broadening participation, shining light on deliberations and providing the possibility of revisiting bad or unfair choices, global administrative law should *improve the decisions themselves*. This may be thought of as ''output legitimacy''.' (emphasis added) at (n 83) 88.

political ideals, especially accountability'.[121] For him, concentrating on accountability would release GAL from the controversial normative connotations of 'legitimacy'. That, however, is an equivocal statement, since accountability and legitimacy, as I have argued earlier, are inextricably tied up in one another. The difference between GAL and other discourses lies in the character of the latter's proposals on legitimate accountability, not on the putative capacity of the former to bracket or shield itself from intricate normative debates. Accountability, in itself, stands for nothing and can hardly be understood as a political ideal *per se*. The distinctiveness of GAL is more plausibly associated with what its launching paper has suggested: to allow rethinking the usual legitimacy concerns in a more 'specific and focused way'.[122]

This interpretive effort situates the GAL project within a larger picture, and sheds light on the reasons that might answer persistent questions – about which normative spectre should undergird global governance for the time being; and about whether administrative law, in light of pragmatic considerations, should go first.

VIII. Conclusion

The current article engaged in a threefold mapping review: (i) it portrayed, according to the basic divide between the angles 'within the state' and 'beyond the state', the geographical and functional contexts in which real-world political accountability mechanisms exist and interact; (ii) it interpreted one already influential legitimating discourse that is being used as a benchmark to appraise institutions and political processes beyond the state – GAL; lastly, (iii) it highlighted how this sort of accountability discourses is tied with demands for legitimacy in global governance.

How to build effective institutions and decision-making processes that do not suffer from the existing legitimacy or accountability deficits? For GCon and GAL alike, what is out there in the international and transnational institutional arena is troubling for various reasons. Both, as we have seen, point to alternative paths.

The GAL programme consists in a step-by-step route for accountability-building in institutions of global governance. As Krisch reminds, 'proceeding in small steps, with limited ambition, may be the only sensible option'.[123] The project itself, therefore, does not promise an overhaul legitimation

[121] Krisch (n 29) 246.
[122] Kingsbury *et al.* (n 4) 27.
[123] Krisch (n 29) 265.

of international institutions through that rather small set of procedural devices *writ small*. Its expectation has never been so ostentatious.

A question remains, however, about the nature of GAL's normative propositions. In other words, there is some disagreement about how neutral GAL's normative propositions actually are or can consistenly be. MacDonald, for example, understands GAL as 'purely instrumental'.[124] Thanks to its fundamental ambivalence and versatility, GAL 'can be flexed and adapted in thoroughly inappropriate – not to mention unethical – ways'.[125] In the words of MacDonald and Shamir-Borer, GAL 'can, for the most part, only be as ''good'' as the ends it is intended to serve, be they constitutional, democratic, rights-based or, indeed, efficiency-enhancing'.[126] In sum, GAL can be 'harnessed to any end'.[127]

For GAL advocates, *democracy* is perhaps too strong a word through which to judge the institutions that populate the international arena.[128] *Accountability* would sound as a more achievable target in the current stage of international relations. It would be a second-best option for better governance while the first-best remains untenable and counterproductive in the foreseeable future.

However, once we recognize that the claim for accountability, *per se*, is normatively empty, is there any political ideal sneaking behind GAL project's proposals? Can it really be just about a thin and managerial idea of efficient and responsive administration?

MacDonald and Shamir-Borer have hinted at a tentative answer: 'it would be naïve and misleading to suggest that global administrative law does not presuppose some values of its own: the desirability of accountability, participation, transparency, even the rule of law itself – these are all normative questions, the answer to which is simply assumed within the global administrative law project'.[129]

[124] MacDonald claims: 'Global administrative law, unlike global constitutionalism, functions as pure instrumentality.' at (n 21) 24.

[125] MacDonald and Shamir-Borer (n 10) 55.

[126] Ibid 53.

[127] MacDonald (n 21) 25.

[128] Stewart explains: 'A final issue is the potential linkage, if any, between global administrative law and democracy. A system of electorally based representative democracy at the global level is at present far beyond reach. … Nonetheless, the development of a global administrative law, including through "bottom up" as well as "top down" approaches, could work to strengthen representative democracy at the national level by making global regulatory decisions and institutions more visible and subject to effective scrutiny and review within domestic political systems, and thereby promote the accountability of international regulatory decisionmakers through those systems.' RB Stewart, 'U.S. Administrative Law: A Model for Global Administrative Law?' (2005) 68 *Law and Contemporary Problems* 63, 108.

[129] MacDonald and Shamir-Borer (n 10) 53. See also Krisch (n 11).

They seem to suggest that GAL is either something more than sheer instrumentality, or there would be no good reason to embrace its cause, however pragmatically modest this cause might be.[130] One would not be able to argue, therefore, for the superiority of one form of accountability over another regardless from a normative theory. And in order to take a stand on what GAL is being used for, we need some substantive value to come on board. Vindicating a value of such kind is a condition to keep the normative appeal of the whole project.

If pressed to justify, then, GAL proponents cannot help but excavate deeper normative premises. Apodictic statements about the desirability of participation, transparency or reason-giving will not do, for they cannot be self-standing by justificatory *fiat*. The GAL project, thus, would better disclose its normative alliances and speak out. It cannot ignore larger ideals, however controversial it is to define them and, at the same time, to identify what the next institutional step should be within a gradualist strategy of procedural reform. Otherwise, it remains a manipulable and hence unreliable cause to be endorsed. That does not entail losing the virtues of modesty and incrementality.

Pursuing normative modesty, therefore, does not need to go as far as to make GAL 'purely instrumental'. That would probably weaken rather than strengthen the whole project. A more convincing reading of the GAL project may see it as an attempt to carve common ground from the bottom-up and to agree on a normative level-playing field from where to assess and criticize currently existing decision-making processes and structures.

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[130] For the idea of 'pragmatic modesty', see Krisch (n 29).