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Globalization, Government Reform and the Paradigm Shift of Administrative Law

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ABSTRACT

This paper examines a triangular relationship between globalization, government reforms and administrative law. It argues that globalization does appear to be a key driving force for recent government reforms that took place in the many developed and developing countries. These reforms included organizational, operational and process reforms as well as new ways in human resources managements. The author argues that a shift in the paradigm of administrative law is required to successfully confront these challenges that globalization has brought to us. Administrative law must transform its focus from red light to green light, from restriction to empowerment, from accountability to democracy, and from formality to flexibility. More importantly, this paper contends that current government reforms have not been comprehensive in their responses. Not only domestic government reforms but also transnational collaborations are in great need. The rise of transnational networks in global regulatory regimes would give birth to a global discursive space where multi-layered actors participate and collaborate with one another. This multitude would certainly make changes to both administrative law and the governance.

Keywords: *Globalization, Government Reform, Administrative Law, Global Administrative Law*

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I. INTRODUCTION

Globalization has become one of the most hotly debated trends that we confront today. We may wonder if we have done enough to sufficiently confront it and the numerous profound changes it has brought to us. Many of us would probably decline to think further and instead refer this question to our governments. Indeed, whenever there is any emerging trend, minor or profound, governments are often expected to undertake corresponding measures either to grasp opportunities or to avoid possible harms. Governments worldwide have been attentive to the trend towards the information revolution by introducing e-government or similar programs. More recently, there has been an increasing urge that governments take preventive or adaptive measures in preparation for global climate change.¹ Governmental responses to these perceived trends may take a wide array of forms, many of which, however, involve government reforms in organizational settings, operational networking or human resources management areas. Thus, it is important for us to enquire into whether and how governments have undertaken any reforms in response to the mega-trend of globalization.

The expanded space created by fast and massive flows in globalization has provided governments, business and individuals with tremendous opportunities and challenges. Confronting massive flows in information, capital, personnel, and industries across national boundary lines, governments have yet to undertake measures of government reforms in order to build capacity to grasp opportunities in trade, competition, and technology diffusion and to avoid risks at economic turmoil, extreme weather or even terrorism.² We must ask whether certain measures have already been undertaken along these lines. Or, have these reform measures been undertaken for other reasons but coincidentally serve responsive functions to globalization?

This article seeks to answer this question by identifying the features of globalization and matching them with the prevailing measures of government reforms. Indeed, many governments have undertaken reforms over the last two decades although their respective purpose, intensity, measures and timing have varied from one another. While the stated link of these reforms to globalization has been divergent, reform measures appear to have borne strong connotations to the nature of globalization and the

1. See, e.g., NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE* (2007). See generally HARRIET BULKELEY & PETER NEWELL, *GOVERNING CLIMATE CHANGE* (2010) (evaluating how states and non-state actors govern and respond to the challenges from climate change).

2. James Mittleman, *The Dynamics of Globalization*, in *GLOBALIZATION: CRITICAL REFLECTIONS* 1-16 (James H. Mittleman ed., 1996).

dynamics of global governance.

In the complexity of globalization and its networking, law presents but one view of the cathedral. And yet, no matter whether in terms of the theoretical or operational levels, law still occupies the centrality in global governance and deserves our closer scrutiny. We should be attentive to not only the changed but also the unchanged in the law, and administrative law in particular, as they interact in conjunction with government reforms directed at global governance. Law has sometimes been notorious in lagging behind social change, and thus there exists presumably a divide between administrative law and government reforms that are more immediately responsive to globalization.

In addition to this introduction, the following section examines the nature of globalization. Next, the relationship between globalization and government reforms will also be analyzed. The challenges that current government reforms pose for administrative law frameworks and what should be done will be discussed and reflected upon in an attempt at forming a global discursive space. As this paper will argue, these novel challenges and responses will gradually evolve and enunciate a new paradigm for administrative law in the age of globalization.

II. GLOBALIZATION AND CHANGES: FLOW AND CONVERGENCE

Throughout human history, there have been mega-trends reflecting profound changes in the social fabric and civic dynamics. Some of the best examples include the industrial revolution and modernization, information revolution, and globalization. Among them, it may be argued that the transformations brought about by globalization have been the most accelerated, widespread and profound.

Over the years, we have witnessed a burgeoning literature on globalization and its related issues.³ Despite divergent definitions and emphases, flows and convergences best catch the spirit of globalization. Flow is the key word in sketching globalization and changes, taking constructed levels of forms. The first level of flow involves massive and speedy transportation or transmission of persons, capital, goods and

3. For discussion on globalization and challenges, see generally *id.*; JAMES H. MITTLEMAN ED., GLOBALIZATION: CRITICAL REFLECTIONS (1996); MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 183-203 (2001). Lawrence M. Friedman, *Erewhon: The Coming Global Order*, 37 STAN. J. INT'L L. 347 (2001). For globalization and its impact on administrative law, see WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY: GOVERNING WITHOUT GOVERNMENT? 52-74 (1998); Keith Werhan, *Delegalizing Administrative Law*, 1996 U. ILL. L. REV. 423 (1996); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001); Alfred C. Aman, *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001).

information across territorial boundaries. This level involves not only the flow of tangible things transmitted across boundaries but also modes of governance appearing by boundary-crossing, from government to non-government, from public to private, and from singularity to multitudes.⁴ The second level of flow involves the cross-over of institutional lines and the convergence of domains in the real operational spheres of governance. Both could be understood as the expansion of space through the process of diminishing separations constructed lines such as national borders or institutional divides.⁵ Arising from the fast and massive flows at both levels, the extended space in the global governance has created not only tremendous opportunities but also risks of very great magnitude.⁶

A. *Fast and Massive Flows Across National Boundaries*

The emergence of nation states, and modern constitutionalism has generated divergent but confined sovereignty, territory and citizenry. Border controls over movements in goods, persons or even information have been one of the core functions provided by modern regulatory states. Today, however, we witness an unprecedented growth of free trade, air transportation and internet connections that find little grounding in territorial limitations.⁷ Despite their divergence of function, the variety of massive flows shares a very significant commonality or locus of occurrence: across national boundaries. With varied levels of national control, this boundary-crossing in a massive and speedy way has marked a new regulatory reality that poses challenges to national governments, localities, regional or international organizations.⁸

For governments and non-governmental actors, this fast and massive flow yields many potential opportunities as comparative advantages may be leveraged in a wider realm of global space. For some, however, this scenario may spell out a number of potential problems, if not disasters, as the flows of goods and persons to such a magnitude may tend to result in taking over of local jobs, bringing about tensions, breed terrorism, and spread disease, any of which in turn may arguably require countermeasures and even a greater

4. HARDT & NEGRI, *id.*

5. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

6. *See, e.g.*, ULRICH BECK, *WHAT IS GLOBALIZATION?* (2000).

7. *See generally*, Christopher Chase-Dunn, Yukio Kawano & Benjamin D. Brewer, *Trade Globalization Since 1795: Waves of Integration in the World-System*, 65 *AM. SOC. REV.* 77 (2000); Scott E. Tarry, *Globalisation and the Prospect of Policy Convergence in Air Transport*, 14 *GLOBAL SOC'Y* 279 (2000); Gholam Khiabany, *Globalization and the Internet: Myths and Realities*, 11 *TRENDS IN COMM.* 137 (2003).

8. *See generally*, *GLOBALIZATION AND GOVERNANCE* (Aseem Prakash & Jeffrey A. Hart eds., 2000).

degree of border controls.

B. *Convergence in the Extended Space of Global Governance*

Modern regulatory states have built their regulatory legitimacies on a “transmission belt” that links congressional mandates to regulatory measures.⁹ In the parameter of this legislative transmission, regulatory states function in a closed unit that coordinates with one another internally, subordinated to political authority, and obligated to respect individuals and their rights and interests which serve and regulate. As a result, governmental and non-governmental realms are separated, and public and private functions are clearly distinguishable.

In a world of globalization, however, we have seen the erosion of boundaries that separate governors from the governed. Like massive flows across boundaries in a global space, the distinction between public and private has become blurred;¹⁰ resulting from the fact that decision-making processes frequently involves, and combines, public and private actors. It is no surprise that government officers, NGO representatives, think tanks, political parties, interest groups, “epistemic communities,” and “networks” become relevant actors in the decision-making processes that generate regulatory measures.¹¹ In today’s public administration and political science literature, the word “government” has largely been replaced by the word “governance.”

In the age of global governance, not only the public/private distinction, but also geographic lines have become more blurred. Nowadays, national governments are increasingly losing authority to both supra-national and sub-national governments. On the one hand, national, legal orders are frequently intervened or superseded by norms of regional or international organizations. International or regional organizations even adjudicate applications filed by individuals, such as ISO certification or clean development mechanism certifications under the Kyoto Protocol.¹²

On the other hand, localities are bypassing nation states as global space

9. Transmission belt model of administrative legitimacy was first presented by Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

10. Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN ST. INT’L L. REV. 89, 105 (2008) (identifying relativity between public and private powers as one of the characteristics of transnational constitutionalism).

11. Martin Shapiro, *Administrative Law Unbound: Reflections on Government and Governance*, 8 IND. J. GLOBAL LEGAL STUD. 369 (2001); Patrizia Nanz & Jens Steffek, *Global Governance, Participation and the Public Sphere*, 39(2) GOV’T & OPPOSITION 314 (2004) (exploring the possibility of democratic and legitimate decision-making at the global level focusing on the role of organized civil societies).

12. Yeh & Chang, *supra* note 10, at 106 (suggesting relativity between external and internal norms to be another characteristic of transnational constitutionalism).

becomes directly accessible and empowering to them. Catalonia and Scotland, for example, are achieving their respective autonomy precisely because they have access to an EU free market. The traditional threat of exclusion from the Spanish national market and the U.K. market, respectively, no longer holds them in subordination.¹³

III. GOVERNMENT REFORMS IN RESPONSE TO GLOBALIZATION

Globalization has delivered profound changes in the flow and convergence, and governments have to respond one way or the other in order to navigate. This section provides an overview of government reform measures over the last two or three decades and discusses the connectedness of these reforms to globalization. It ends with a critical analysis of the gap between the changes from globalization and from the existing government reform.

A. *An Overview of Government Reform Measures*

Over the last two to three decades, most governments initiated at least one or two major programs, in a variety of names, directed at reforming government. These flamboyant reform banners belie a substantive question: what these reforms are and what differences have they made?

Despite the great divergence, these reforms involve a common outcry for good government in terms of integrity, competence and quality of performance in the discharge of public functions. Beside this shared general expectation, however, governments launched their reform programs with different focuses and orientations.

If we divide government reforms over the last two or three decades into two parts, we can see a fair distribution of reform efforts between developed and developing countries and across the decades. The primary force of reform in the first decade happened in the developed world, ignited by Prime Minister Margaret Thatcher of United Kingdom¹⁴ and later by U.S. President Ronald Reagan.¹⁵ The focus was on reducing government workloads through privatization and economic liberalization. These efforts

13. Elisa Roller & Amanda Sloat, *The Impact of Europeanisation on Regional Governance: A Study of Catalonia and Scotland*, 17(2) PUB. POL'Y ADMIN. 68 (2002).

14. ALAN WALTERS, *BRITAIN'S ECONOMIC RENAISSANCE: MARGARET THATCHER'S REFORMS 1979-1984* (1986) (reviewing the effects of Thatcher's reform on employment and industrial management.)

15. Zachary Oberfield, *Measuring Presidential Success: Ronald Reagan, the States and Welfare Reform*, paper presented at the annual meeting of the Midwest Political Science Association, Palmer House Hilton, Chicago, Illinois, Apr. 7, 2005 (evaluating whether the reform undertaken by Reagan's administration has achieved its goals).

transcended into the second decade domestically, but also triggered similar reforms in other countries such as New Zealand,¹⁶ Australia, Canada,¹⁷ Japan¹⁸ and other OECD countries.

In the second decade, beginning in the 90's and carrying through the new millennium, we notice a trend of reform launched by new democracies or newly industrialized countries notwithstanding other developed countries carrying their course of reforms even further. Reforms have focused on the change of core government functions and government capacity building for global competitiveness.¹⁹ These reform measures are divided into four categories as illustrated in the following.

1. *Organizational Changes*

Privatization has been the dominant measures in most of the more ambitious programs of government reform undertaken in both developed and developing countries. A survey of OECD countries revealed that most of the member states enjoyed a substantial amount of proceeds raised from privatization. In 2001, Germany, Korea, Italy, Norway, and the Czech Republic accounted for around two thirds of privatization in the OECD area.²⁰ For the newly democratizing countries, such as East and Central Europe and Taiwan, privatization bears a transitional justice function beyond mere managerial efficiency.²¹

The other major aspect of privatization involves the transformation of public organizations, such as universities, hospitals, museums, theaters, nursing homes, athlete training centers and the like, into public corporations. Unlike privatization, this transformation keeps the designated public

16. Donald F. Kettl, *The Global Revolution in Public Management: Driving Themes, Missing Links*, 16 J. POL'Y ANALYSIS & MGMT. 446 (1998) (taking New Zealand as the most fast-moving and forceful reform country as an example to look into some common questions to government reform).

17. Janet Smith, *Government Reform in Canada*, 17(1) PUB. ADMIN. & DEV. 33 (1997).

18. EIJI KAWABATA, *CONTEMPORARY GOVERNMENT REFORM IN JAPAN: THE DUAL STATE IN FLUX* (2006) (examining several major reforms such as the postal business, transportation, telecommunications, and communications technology in Japan).

19. Elaine Kamarck, *Government Innovation Around the World*, 5 (JFK School of Government, Harvard University, Occasional Paper, 2003).

20. The value of proceeds raised from the full or partial sale of state owned enterprises peaked in 1998 over USD\$100 billion. The amount dropped to one fifth in 2001. See Ladan Mahboobi, *Recent Privatization Trends in the OECD Countries*, 82 FIN. MARKET TRENDS 44 (2002).

21. In authoritarian regimes, it is common for governments to monopolize or take major controls over businesses that are central to delivery of public goods such as transportation, water, electricity, social security or education among others. Thus, to liberalize or to democratize these regimes involves first and foremost the suspension of these government monopolies or controls, one of which would be privatization. It is in this sense that privatization in these newly democratizing regimes bear some functions of correcting the past wrongs and rendering transitional justice. For detailed discussion and country-study on this issue, see *THE CONSOLIDATION OF DEMOCRACY IN EAST-CENTRAL EUROPE* (Karen Dawisha & Bruce Parrott eds., 1997); *BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION* (János Kornai & Susan Rose-Ackerman eds., 2004).

functions for the units but relieves them from the burdens of transparent routine personnel, procurement, and budgetary controls in exchange for a merit-based performance review.

The final form of organizational reform involves the transformation of existing government functions or establishment of new function in the form of independent regulatory commissions.²² This practice has been trendy in the newly democratizing countries as a means for better accountability in certain public functions or as affording greater internal coordination in response to global convergence.²³ The convergence of radio, television, and the internet has prompted governments to undertake organizational reforms directed to the integration of existing fragmented regulatory units and turn them into independent regulatory commissions. The same pattern has happened in the area of financial supervisory authorities, though with a lesser intensity.

2. *Operational Changes*

Many reform measures do not involve organizational change, but entail changes in the operation of regulatory functions. Two such types of operational changes can be readily identified. The first change happens internally, directed to more efficient allocation of budgets or more rational or reasonable regulatory impacts. Regulatory impact assessments based on cost-benefits analysis or comparative risk assessments initiated by Reagan Administration carried over to the Clinton Administration represent the typical kind of such public administration reform measures.²⁴ Directed to building better legitimacy or public/private partnerships, the second type of changes does not confine itself within the administrative sphere but includes better overall transparency and empowering citizen involvement. This includes three layers of changes in regulatory practice. First is to make information public and provide process transparency for the general public.²⁵ Second involves empowering better citizen consultation or participation. More deliberative mechanisms are also introduced to facilitate deliberations

22. See, e.g., Ralph F. Fuchs, *Current Proposals for the Reorganization of the Federal Regulatory Agencies*, 16 TEX. L. REV. 335 (1938); E. Blythe Stason, *Administrative Tribunals—Organization and Reorganization*, 36 MICH. L. REV. 533 (1938).

23. See Andras Sajó, *Neutral Institutions: Implications for Government Trustworthiness in East European Democracies*, in BUILDING A TRUSTWORTHY STATE IN POST-SOCIALIST TRANSITION (János Kornai & Susan Rose-Ackerman eds., 2004).

24. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995).

25. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for New Administration*, 77 GEO. WASH. L. REV. 924 (2009).

such as deliberative polls or citizen conferences.²⁶ Third is to build up partnership mechanisms between authorities and private entities through outsourcing, BOT, OT or similar mechanisms.²⁷

3. *Process Changes*

The widespread introduction of e-government programs has been backbone of recent government reforms. Aiming for more efficient communication and delivery of public functions, e-government programs promise to handle administrative matters electronically and even digitally. Moreover, with the maturity of information technology and rising internet penetration rates, e-government serves to provide a more transparent and participatory government as information are made public on the government websites and people can submit their “comments” online.²⁸ Indeed, more and more regulatory functions are done online, such as paying taxes, fines, or tuition, getting certification, and handling all kinds of government services. The most amazing part of this change is the increasing integration of government services that were previously otherwise provided by separate agencies. In this regard, e-government serves as a pioneer for a comprehensive organizational reform.

4. *Human Resources Change*

The last category of changes is aimed at facilitating the transfer of talent within and across national boundaries.²⁹ First, the body of career government employees is downsized to make room for contract-based recruitment. Second, friendly measures are taken to facilitate transfusion of talent among governments, universities, and industry. Third, performance based standards are introduced into the evaluation system in replacement of

26. See James S. Fishkin & Robert C. Luskin, *Experiment with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284, 284-98 (2005); Caroly M. Hendriks, *Consensus Conferences and Planning Cells*, in THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY 80-83 (John Gastil & Peter Levine eds., 2005).

27. See PAULINE V. ROSENAU, PUBLIC-PRIVATE POLICY PARTNERSHIPS (2000); see also Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) (using Public-Private Partnership for contracting out of schools, prisons, welfare agencies, and social service programs); DONALD F. KETTL, SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS 4, 6-12 (1993) (describing wide range of government contracting since World War II as Public-Private Partnership).

28. But see Andrew Chadwick & Christopher May, *Interaction Between States and Citizens in the Age of the Internet: “E-Government” in the United States, Britain, and the European Union*, 16 GOVERNANCE 271 (2003) (arguing that in practice an executive-driven, managerial model of interaction has assumed dominance at the expense of consultative and participatory possibilities of the citizens).

29. See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000).

the seniority-based ones.

The government reforms mentioned above cover a wide array of measures entailing changes in government organization, operations, processes and human resource management. Despite its diversity, these reform measures have presented three public values: democracy, efficiency, and empowerment.³⁰

Many reform measures bear democratic values, for the new democracies in particular. This area of reform includes transparency and participation in changes to decision-making processes. The development of e-government in general and e-participation in particular bears many long-term implications in this regard. For new democracies, the organizational reform towards building a genuinely independent or neutral status of regulatory commission in communication or financial supervision is also of democracy-reinforcing in nature. Still, other measures have directed at promoting efficiency, including privatization and measures for better allocation of public assets and resources. Outsourcing, BOT, OT and other measures for building public-private partnership all bear the function of empowering the society.

B. *Globalization as the Dominant Driving Force for Government Reform*

While states undertake government reform for very different reasons,³¹ government reform and innovation are a global phenomenon. But, is globalization a factor that prompts national governments to undertake reform? The body of literature on government reform does not recognize globalization explicitly as an important factor behind government reform. But, have the reform measures mentioned above been the result of globalization? Or, were the reform measures directed to matching the flow and convergence of global governance?

This paper argues in the following discussion that globalization has been a factor, and a dominant one, that has triggered government reform as a “global phenomenon.” Governments around the world respond to the flow and convergence phenomenon with defensive or aggressive measures that have contributed to the global phenomenon of regulatory reform.

1. *Government Reforms as the Result of Globalization*

The dynamics of government reforms over the last two decades in both

30. Minow, *supra* note 27, at 1243-63.

31. Some countries undertook reform for the transformation of an old bureaucracy in the context of a newly democratic state, while some did so as part of their fight against corruption. For others, the challenge was to modernize large, outmoded bureaucracies and bring them into the information age. See Kamarck, *supra* note 19.

developed and new democracies have borne significant global connotations. In the age of globalization, the transnational convergence of institutional frameworks in policies and norms has provided solid ground for the spreading of government reform. In fact, the Thatcher reform and Reagan reform have spread to Japan, New Zealand, other OECD countries and new democracies in a global network. Looking into the context of these reforms, we find an underlying global network.

Indeed, developed countries, such as the U.K., U.S., Japan or New Zealand, and new democracies, such as South Korea, Taiwan, or Mexico undertake government reform for quite different reasons, but many of these reasons are related to global networks.³² Prime Minister Margaret Thatcher initiated government reform in the early 80's partly in response to EU integration pressures. Ronald Reagan undertook his regulatory relief program partly in response to the perceived erosion of American industrial competitiveness in international markets due to unreasonable costs and cumbersome red-tape required by consumer, environment, and occupational safety regulations.

In new democracies, the two reasons identified as underlining regulatory reform, economic crisis and pressure from lending organizations, also bear global connotations. Many economic crises that the developing countries suffered, such as the 1997 Asian financial crisis, are directly or indirectly linked to global business networks. Pressure from the IMF, World Bank or other international or regional organizations is also an integral part of global governance.³³

2. *Government Reforms Matching the Flow and Convergence of Global Governance*

Governments across the world operate in a global space, navigating flows and convergences of the greatest magnitudes that human society has ever confronted. Indeed, in this global world, no single government nowadays can afford to completely ignore the continuous competition among nations, cities, regions, or blocs in technological innovation, trade, films, tourism and the like. Not surprisingly, the annual release of reports on national competitiveness, e-government readiness and applications, or other rankings have attracted public attention and these in turn have served to

32. See generally RICHARD BATLEY & GEORGE A. LARBI, *THE CHANGING ROLE OF GOVERNMENT: THE REFORM OF PUBLIC SERVICES IN DEVELOPING COUNTRIES* (2004).

33. E.g. Joo-Youn Jung, *Reinventing the Interventionist State: The Korean Economic Bureaucracy Reform Under the Economic Crisis*, 23(1) PAC. FOCUS 121 (2008) (analyzing the institutional reform process of the South Korean economic bureaucracy in the aftermath of the Asian financial crisis in 1997).

boost the pressure on modern regulators. Ensuring sustainability in this global world requires governments to change themselves in size, capacity, function, and focus through government reform programs. In order to remain competitive, governments have to be flexible and credible across the flow and convergence of global governance.

Organizational reforms in many countries reflect the needs resulting from globalization. From the risk of natural disasters or acts of terrorism of global magnitude, many governments have strengthened their emergency response capacity through organization reforms, including the establishment of the Department of Homeland Security in the U.S.³⁴ or integrating fragmented functions in the Japanese Cabinet, for example. In responding to the divergent reasons behind the flow of persons globally, governments have been prompted to consolidate authorities across national borders and strengthen immigration and border control authorities as exemplified by recent establishment of the immigration administration in Taiwan.³⁵ Also, privatization has been a measure for diluting state control in favor of the free market, and consequently building friendly linkages to the flow and convergence of global governance.³⁶ Operational and process reforms towards transparency, efficiency or accountability are also important capacity-building measures for the free flow of information, capital and industrial installations in the global network. Also, reform in human resources management exemplifies an institutional readiness for the flow of human resources, including a global brain drain in the local job hunting markets.

To say that regulatory reforms that have been undertaken over the last two decades are the result of globalization may risk oversimplification. But, it would be safe to say that globalization has been a dominating driving force behind these reform drives, regardless of the relative successes they may have achieved.

But have these reforms been so far good enough to accommodate the challenges posed by globalization? The answer is no. Globalization has triggered a network of change, not only governmental change and thus governments should respond to this entire network of change, not only with changes made to government alone.

34. *See generally* RICHARD SYLVES, *DISASTER POLICY AND POLITICS: EMERGENCY MANAGEMENT AND HOMELAND SECURITY* (2008).

35. The National Immigration Agency in Taiwan was formed officially on Jan. 2, 2007. For more information, see http://www.immigration.gov.tw/immig_eng/aspcode/main4.asp (last visited Sept. 10, 2010).

36. MICHAEL HYNES, *A CASEBOOK OF ALTERNATIVE GOVERNANCE STRUCTURES AND ORGANIZATIONAL FORMS* 1-16 (2000).

C. *Challenges and Problems*

This article is not concerned with the relative beauty or ugly sides of globalization. Controversies about globalization's effects will surely transcend into the following decades. But, taking globalization as a phenomenon, what governments have done so far in government reform is surely not enough in responding to the flow and convergence in the global new governance.

Take first the defensive side of globalization for example. Risks such as natural disasters or terrorism have been intensified by the global flow of products, information, persons among others. With the experiences of 9/11, the SARS epidemics, Hurricane Katrina, and the South Asian Tsunami, there is an ample objective reason to believe that there are serious deficits in institutional capacity-building for most of the governments in the world. Globalization, in particular the expansion of free trade, has produced distributional justice issues, such as job losses in some sectors or worsened income distribution, that require comprehensive reforms in social security networks. In fact, this is an area that most governments have yet to deal with seriously.³⁷

Moreover, government reforms require corresponding legal reform to transcend the changes into law, but law typically lags behind the momentum and magnitude of government reform. The failure of developing new approaches to administrative law for coping with government reforms has resulted in many controversies with regard to major government reform measures when judged from the various traditional legal doctrines embedded in administrative law. The related arguments will proceed in the next section.

IV. ADMINISTRATIVE LAW UNDER GLOBALIZATION AND GOVERNMENT REFORM

Government reform entails substantial changes in the function and operation of the government and decision-making processes against the backdrops of existing vested interests and the stable normative frameworks. Unless there are follow-up changes in the law, reform measures adopted by the government may risk incompatibility with or even resistance from the law, and administrative law in particular. In fact, it is not surprising to notice the rather unsettling reception of government reform in administrative law. The gap between reform and law bears great significance for globalization.

37. *E.g.* GLOBALIZATION, EMPLOYMENT AND INCOME DISTRIBUTION IN DEVELOPING COUNTRIES (Eddy Lee & Marco Vivarelli eds., 2006).

A. *The Unsettling Reception of Government Reform in Administrative Law*

Modern administrative law builds on the premises that the governors and the governed are separated entities and the regulatory states have been searching for legitimacy through democratic legislative authorization. All too often, changes introduced by government reform have found little support from the prevailing administrative law doctrines which turn into normative obstacles for introducing or implementing reform measures. This is especially true when the reforms are advanced in the context of globalization, changes derived from which are not well acknowledged by the law.

Take privatization for example. Privatization may involve the transformation of public assets into private hands, devolving public power into private hands, and more prominently, career government employees transformed to contract employees. The transfer of public power to private hands has been challenged on the grounds of the non-delegation doctrine.³⁸ Also by transferring power that otherwise belongs to public administration into private hands, the transparency and due process requirements of public administration are thus taken away.³⁹ Further, the inclusion of interest groups, NGOs, community leaders, or experts in the decision making process has been criticized on the ground of permitting ex parte contact or violating the neutrality principle. Referring to the refereed protection of the rights of government employees that have been embedded deeply in the law, reform opponents may seek asylum in administrative law and boycott reform measures altogether. Still, the transformation of government organizations into public corporations has been accused by scholars of administrative law as mixing up public and private functions.⁴⁰

The extent to which the disparity as illustrated varies from one legal to the other legal systems and traditions, but the connection between government reform and law has never been straightforward. What are the underlining reasons for this disparity?

In fact, government reform demands changes in the law. Failure to do so will certainly have demolishing effects in the process of formulating or implementing government reforms. Thus, we should continuously demand a new paradigm of administrative law that is good for government reform and global governance.

38. See JERRY L. MASHAW, RICHARD A. MERRILL & P. M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 2-6 (1985).

39. Aman, *supra* note 3.

40. See Adelle Blackett, *Global Governance, Legal Pluralism & the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401 (2001).

B. *Envisaged Contextual Change in Administrative Law*

For government reforms responsive to globalization to be carried out more successfully, the existing administrative law would have to be changed in tandem with the flow and convergence of global governance.

In the dynamics of its development, administrative law has experienced changes. Richard Stewart, for instance, observed the paradigmatic change in U.S. administrative law from the perspective of administrative legitimacy.⁴¹ In light of globalization and follow-up government reform, one could reasonably presume that there should be corresponding changes in administrative law too.⁴²

It would be impossible to lay out what has actually changed in administrative law arising from government reforms and globalization, but we can identify what should be changed in administrative law in light of government reform and globalization. These include the changes from a red-light to green-light mindset, from monolithic to dual democracy, from rights-based to merits-based scrutiny, from public/private dichotomy to convergence, and from enclosed stability to flexible management.

1. *From Red-light to Green-light Mindset*

Like its constitutional counterpart,⁴³ classical administrative law was directed at controlling abuse of power by corruption-prone governments. This traditional wisdom remains firmly that government accountability issue stays at the top of the political agenda. Some have labeled this as the red light theory of government.⁴⁴ Indeed, the core of traditional administrative law has been judicial review, in which a neutral court is vested with the power to look into the abnormalities of administration to protect citizens from arbitrary and capricious government intrusion. And thus, administrative law as practiced has been more judicial than administrative or legislative.⁴⁵

If the law has to cope with social change for better governance, the

41. Stewart, *supra* note 9, at 1667.

42. See, e.g., Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695 (2005).

43. Ulrich K. Preuss, *Constitutional Powermaking of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY 143-64 (Michel Rosenfeld ed., 1994).

44. For red light and green light dichotomy, see CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 67 (1997). See also Stewart, *supra* note 9, at 1676.

45. PAUL CRAIG, *ADMINISTRATIVE LAW* 20 (1999). While this judicial-oriented nature of administrative law may be readily identified as typical in U.S. administrative law, it is now certainly not limited to the American context. Many European states—particularly Western European states—have seen a much more prominent focus on judicial control over administration. E.g. SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE UNITED STATES* (1995).

changes in government reform in the age of globalization would have to be internalized in the administrative law. While governments place more emphasis on efficiency by means of privatization, public corporations, outsourcing or social empowerment, administrative law would be leaning more towards the positive realization of public goods than mere negative prevention for the abuse of power. Administrative law would then become more administrative than judicial. To follow the labeling, administrative law would honor a green-light theory of government, demanding efficient delivery of public functions with an unquestioned presumption that government is serving public needs. Too much ad hoc and reasonableness driven judicial scrutiny may undermine the discharge of public functions in the flux of global governance.⁴⁶ In an era of globalization, as governments face global competitiveness and global governance, the law has to lean more toward social integration or smooth transition against the limiting function as we borrow a similar paradigm shift in the development of constitutionalism that has undergone from classical constitutionalism to transitional, and even to transnational constitutionalism.⁴⁷

2. *From Monolithic to Dual Democracy*

The second transformation is in the context of democracy. Traditional wisdom, especially in the tradition of parliamentary democracy, contends with a singular source of democratic legitimacy.⁴⁸ Under this monolithic democracy, legislative authorization through legislation, resolution or budget approval becomes the exclusive source of administrative legitimacy as illustrated by the transmission belt model in the U.S.⁴⁹ or Prinzip der Rechtsvorbehalt in Germany. While legislative delegation still works as an important source of legitimacy today, in the era of globalization and especially in the aftermath of the information revolution, the sources of administrative legitimacy have been substantially broadened to a dual democracy. In an expanded space of democracy, public participation or deliberation in traditional or digital forms all contribute to the legitimacy of the modern regulatory state. The so-called new democracy created by e-participation or e-voting, with which people can easily vote or participate in decision-making processes that were traditionally reserved for their

46. HARLOW & RAWLINGS, *supra* note 44, at 67.

47. Jiunn-rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4(1) NTU L. REV. 145 (2009); Yeh & Chang, *supra* note 10.

48. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10-25 (1991).

49. See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003) (explaining that under the transmission belt model, administrative action was legitimated with reference back to the authority of the legislature).

representatives, could even marginalize the role of their representatives.⁵⁰

3. *From Public/Private Dichotomy to Convergence*

The boundary between government and non-government has eroded and the distinction between public and private has become blurred in the age of globalization, as mentioned above.⁵¹ Consequently, the embedded distinction between public and private law, and related differential legal arrangements, has become less appealing though to what exact extent varies in legal systems. The crossover of public and private functions in both organizational and operational levels has pushed administrative law to a new construction. The core of the new administrative law so constructed is not directed to dealing with disputes between government authorities and private entities. Rather it has become a subject dealing with governance, in many ways it is global in nature, in which public, private, or a mixture of public and private can be regulators and the decision-making process is no longer seen as one in which private activity occurs around government decision-making, or seeks to influence government decision-making. Administrative law has to be redefined as both the regulators and decision-making process has cut across the distinction between public and private.⁵²

In some legal systems, particularly those in Europe, administrative law tend to make a distinction between private and public contracts due to the need in separating the venue of legal remedy or applying different legal doctrines. In the context of globalization and government reform, this effort may become futile as the public and private distinction has become less appealing.

4. *From Rights-based to Merit-based Scrutiny*

The global drive for competitiveness has prompted us to think about the function of administrative performance against rights and legality.⁵³ All too often, administrative law serves the function of rights protection against unreasonable government intrusion by judicial scrutiny. In line with the

50. See DICK MORRIS, *VOTE.COM: HOW BIG-MONEY LOBBYISTS AND THE MEDIA ARE LOSING THEIR INFLUENCE, AND THE INTERNET IS GIVING POWER TO THE PEOPLE* (1999).

51. For public and private flow, see Alfred C. Aman, *Globalization, Democracy, and the Need for a New Administrative Law*, 49 *UCLA L. REV.* 1687 (2002).

52. Shapiro, *supra* note 11, at 369-70.

53. Merits-based analysis to public function or in administrative law, see PUBLIC SECTOR REFORM: RATIONALE, TRENDS, AND PROBLEMS 1-16 (1997) (Jan-Erik Lane ed., 1997); Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 *U. PITT. L. REV.* 405 (1996).

red-light/green-light transformation, scrutiny of administrative functions has leaned more toward actual delivery away from formality and legality. As a result, scrutiny of any regulatory function will not be locked into rights infringement and corresponding legality review, but instead be transcended into assessment of performance and delivery of the vested functions.

Many administrative law textbooks still carry a section about the law of public employees with predominate focus on how to guarantee their rights against state infringement or policy change. Rule of law or the doctrine of reliance protection has been grounds on policy analysis against reform in the public human resources area in response to global competition. Accordingly, the focus of administrative law would be shifted from rights-based to merit-based review. An egalitarian public service is not in tune with globalization no matter whether we like it or not. A shift from a rights-based to merits-based scrutiny would certainly make government service lean towards contracts, ensuring good employees get a better return for their effort, efficiency and ebullience. The OECD's Next Step exemplifies just such a typical approach.⁵⁴

C. *Challenges Ahead: The Emergence of Global Networks Reform and Global Administrative Law*

As illustrated above, government reforms that responded to massive flows and convergence in globalization faced serious challenges from traditional frameworks of administrative law. Without a significant shift in the paradigm of administrative legal frameworks, current government reforms are not likely to succeed. Even if a few reforms may be deemed as successful, they should not be mistaken as the completely sufficient realization of reforms demanded by globalization. In fact, the scale and depth of government reforms that respond genuinely and effectively to globalization proceed way beyond what have been undertaken to date.

Genuine and effective government reforms demanded by massive flows and diverse convergence must entail renovations and collaborations in global networks. These networks include governments, private actors, transnational organizations and even a global regime. Renovations must occur on a transnational scale rather than being confined in any particular nation-states. These rising global networks and collaborations among them would in turn create a space for the emergence of global administrative law that provides both managerial and legitimate functions for global networks.⁵⁵ The

54. For next step, please see OECD (Global Forum on Governance), *THE GOVERNANCE OF THE WIDER STATE SECTOR: PRINCIPLES FOR CONTROL AND ACCOUNTABILITY OF DELEGATED AND DEVOLVED BODIES* (2001).

55. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global*

following section shall illustrate why a full scale of government reforms demanded by globalization entails renovations in transnational networks and envisages the rise of global administrative law.

V. GLOBALIZATION, REFORM AND THE LAW: DIVIDE AND BRIDGING

The mainstream criticism of globalization misses the fact that the genuine nature of globalization is its massive flows and varying kinds and degrees of convergence rather than simply the aggrandizement of capital markets. Government reforms that responded to globalization might have included certain measures regarding privatization, collaborations with private corporations, and the empowerment of some big businesses. But these were only a part of the envisaged changes really necessary. In order to effectively respond to globalization, government reforms may involve strengthening as well as making active networks and collaborations on a transnational scale with other national governments, regional organizations or even global institutions. For example, for a national government to effectively tackle with massive capital flows, it may be necessary to establish a domestic independent financial investigatory commission, collaborate with World Bank, and sign relevant international treaties.⁵⁶ Clearly, there appears to be a huge gap between what has been done and what ought to be done in government reforms that respond to globalization.

By the same token, a huge gap also exists between the existing change and the envisaged changes in administrative law. As illustrated earlier, current government reforms that focused rather narrowly on market functions and the empowerment of private sectors already posed a great deal of challenges to the existing paradigm of administrative law. But the envisaged paradigmatic change we discussed in the previous section is still not enough. It is true that in some domestic contexts, administrative laws must be made to more easily accommodate the exercise of mixed powers or private powers. The transformation of administrative law focus must be made from accountability to democracy and from formality to flexibility. However, equally noteworthy is that accountability, democratic legitimacy and even decisional accuracy may be rescued by transnational legal regimes and cooperative frameworks. Public powers may be diluted at certain domestic levels but actually strengthened at some transnational, regional or

Administrative Law, 68 LAW & CONTEMP. PROBS. 15 (2005).

56. Such as Bank for International Settlements, International Convergence of Capital Measurement and Capital Standards: A Revised Framework (Basle Capital Accord) (*entered into force* July, 1988) & Bank for International Settlements, International Convergence of Capital Measurement and Capital Standards: A Revised Framework (Basel II) (*entered into force* July, 2005).

global, legal operations.⁵⁷ By bridging the divide between what has been done and what ought to be done in government reforms and the divide between the existing and envisaged changes in administrative laws, a global space both for government reforms and changes in administrative laws would be discovered, if not created.

A. *Transcending the Shadow of Change: Renovations in Global Networks*

Government reforms that would respond effectively to globalization should not merely involve changes at domestic levels. They must, as indicated earlier, go beyond territorial boundaries of nation states and involve transnational collaborations between governments, organizations, or regional and even global regimes. As a matter of fact, transnational regulatory frameworks, organizations and actors have already arisen and provided significant regulatory functions. While regulatory responsibilities of any national governments to have been taken away or delegated to some private or mixed actors, they are actually shared by certain transnational regulatory frameworks that are more often of a mixed or collaborative nature.

Regulatory regimes regarding information technology, telecommunications, or even financial capital flows provide some of the best examples. Deregulation or revolution policies in respective governments have together created a larger space for global entrepreneurship and certainly opportunities for big businesses, but this does not mean that regulators are no longer needed.⁵⁸ Rather, regulators have just changed from domestic traditional bureaucrats to a more diverse, mixed nature of transnational regulatory frameworks. They may range from consented technical codes between private businesses, rules of conducts from transnational professional associations, rules laid down by regional collaborative frameworks such as APEC, ASEAN, EU or global regimes such as the UN.

In response to the rise of transnational regulatory authorities and actors, some further renovations must begin at both domestic and transnational levels.⁵⁹ Domestic government reforms must be oriented to make transnational decision-making mechanisms easily accessible to the domestic citizens and interest groups. Participation in transnational administrative frameworks is important and it should be clearly understood that these are no longer government monopolies. Sometimes, sub-national entities or

57. Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347 (2001).

58. See ALFRED C. AMAN, *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 87-128 (2004).

59. Slaughter, *supra* note 57, at 355-57.

non-governmental organizations, for-profit, non-profit, professional or academic groups, are more powerful or persuasive with direct access to transnational regulatory regimes.

Should this happen, these sub-national or non-governmental actors must also be held accountable although not in a traditional sense. They must be made more publicly recognized, competed and criticized. In the age of globalization, governments are no longer key regulators shouldering all responsibilities on their own but, instead, key managers to empower and encourage multiple actors capable of participating in all levels of decision-making frameworks. Private businesses are important actors but equally important are strong professional, academic as well as non-profit ones.⁶⁰

With this understanding in mind, current government reforms focused merely on delegation or privatization must be reoriented and reinterpreted. They should be seen as a part of the parcel that would empower or even create a multitude of actors and organizations from domestic to transnational levels. In some areas especially redistributive regulations concerning disadvantaged citizens, government organizations and their operations must be strengthened to make it easier for non-governmental actors to either shoulder certain functions or to collaborate with the government.

B. *Global Deliberative Space*

Comprehensive and effective government reforms in response to globalization entail not only internal changes but also transnational collaborations, formal or informal, public or private. Domestic reforms should be tailored at strengthening public, private, professional actors and paving their way for participating in transnational regulatory frameworks.⁶¹ To what extent would this new picture of government reforms change our understanding of administrative law already challenged by previous reform efforts? Would a new conceptualization of global administrative law become indispensable?

As illustrated above, global reforms in response to globalization require a new paradigm of administrative law that emphasizes a green light instead of the red light, democracy instead of accountability, empowerment instead of restriction at the domestic level. This however does not mean that power limitation or accountability is no longer an important concern in administrative law. On the contrary, the potential deficits in accountability,

60. See Rodney Bruce Hall & Thomas J. Biersteker, *The Emergence of Private Authority in the International System*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 3-22 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

61. Shapiro, *supra* note 11, at 370-71.

traditional public functions and rule of law rightly cause worries. Indeed, transnational regulatory regimes involving multi-layered actors and organizations bring in even greater dangers concerning legitimacy, accountability and fairness.⁶² As a global space for regulatory renovation enlarges, a global space for deliberation must be equally established and emphasized. Decision-making mechanisms involving multi-layered actors at domestic and transnational levels will not necessarily be immune from democratic legitimacy and political accountability. The way to bear legitimacy and accountability may change, but the emphasis on legitimacy and accountability remains.⁶³

Domestic as well as transnational actors, governments and non-governments alike, must form a global discursive forum and undertake collective actions to perform their guardianship in the new rise of transnational regulatory regimes.⁶⁴ It is precisely in this discursive process that a new framework of global administrative law may be on the rise. Yet there is no rush in the development of this global administrative law. A global deliberative space in which multi-layered actors are to gradually learn to cooperate with one another must be created first, thus paving the way for further legal formations.

VI. CONCLUSION

Globalization has become one of the most debated trends facing us today. The many influences it has brought to us remain to be studied. This paper examines a triangular, mutually reinforcing, relationship between globalization, government reforms and administrative law. It argues that globalization defined as massive flows and varying kinds and degrees of convergence does appear as a key driving force for recent government reforms that have taken place in many developed and developing countries. These reforms included organizational, operational and process reforms as well as new approaches in human resource management. New reform measures inevitably confronted criticisms from existing administrative law. This paper argues, however, that a shift in the paradigm of administrative law is required to successfully confront these challenges. Administrative law must transform its focus from red light to green light, from restriction to empowerment, from accountability to democracy, and from formality to flexibility.

62. Similar issues have also been present in the shift of classical, to transitional and transnational constitutionalism. See Yeh & Chang, *supra* note 47. See also Yeh & Chang, *supra* note 10.

63. David Held, *The Changing Contours of Political Community: Rethinking Democracy in the Context of Globalization*, in GLOBAL DEMOCRACY: KEY DEBATES 17-31 (Barry Holden ed., 2000).

64. Slaughter, *supra* note 57, at 354-55.

More importantly, however, this paper argues that current government reforms have not been comprehensive in their response to globalization. Massive flows and varying kinds and degrees of convergence require not only domestic government reforms but also transnational collaborations. The delegation of powers to domestic private or professional actors must be seen as empowering them to partake in transnational decision-making mechanisms. New thoughts and actions must be undertaken in renovations of global networks. The rise of transnational networks in global regulatory regimes may give birth to a creative global discursive space where multi-layered actors participate and collaborate with one another. This discursive forum may rescue deficits in accountability and democratic legitimacy of regulatory regimes at both domestic and transnational levels. In the age of globalization, multitudes appear not only in the forms of governance but also, perhaps more importantly, in the forms of administrative laws. It is a new task for administrative lawyers to cope with these new multitudes in the forms of administrative law and in their very normative sources.

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