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Law and Justice

IILJ International Legal Theory Colloquium Spring 2010
The Turn to Governance:
The Exercise of Power in the International Public Space

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Straus Institute for the Advanced Study of Law and Justice

Wednesdays 2pm-3.50pm on dates shown

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
(unless otherwise noted)

(additional seminar for students et al is Thursdays 4pm-5.50pm, on GAL)

Topics are indicative and are subject to change.

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| January 20 | Andrew Hurrell, Oxford University
Topic: Emerging Powers, Global Order and Global Justice |
| January 27 | Richard Stewart, NYU Law School
Topic: The World Trade Organization: Multiple Dimensions Of
Global Administrative Law |
| February 3 | Robert Keohane, Princeton University
Topic: The Regime Complex for Climate Change (paper with David Victor,
UC San Diego) |
| February 10 | No Colloquium - Postponed due to weather conditions |
| February 17 | No Colloquium |
| February 24 | Gianluigi Palombella, University of Parma, Law Faculty
Topic: Rule of Law in Extra-National Governance |
| March 3 | Joseph Weiler, NYU Law School
Topic: On the Distinction between Values and Virtues (and Vices) in European Integration |
| March 10 | David Kretzmer, Hebrew University/Ulster
Topic: State Reports to the UN Human Rights Committee |
| March 11 | (SPECIAL SESSION, 4pm-5.50pm, Pollack Colloquium Room, Furman Hall 900)
Jan Klabbers, University of Helsinki
Topic: Controlling International Bureaucracies |
| March 17 | No Colloquium – Spring Break |
| March 24 | Marta Cartabia, University of Milan
Topic: Rights in Europe |
| March 31 | No Colloquium |
| April 7 | Grainne de Burca, Fordham Law School
Topic: EU External Relations: Foreign Policy or Governance? |
| April 14 | Beth Simmons, Harvard Government Department
Topic: Effects of Investor-State Treaty Regimes and Arbitral Processes |
| Thurs April 15- | (SPECIAL SESSION, 4pm-5.50pm, Furman Hall 214)
Daryl Levinson, Harvard Law School
Topic: Public Law: Constitutional and International |
| April 21 | Benedict Kingsbury, NYU Law School
Topic: Techniques of Global Governance |

THE RULE OF LAW AND GLOBAL GOVERNANCE*

Introductory note

By focusing on the Rule of Law in the global arena, I shall not pursue a further guiding “meta-principle”¹, but rather ask how this ideal, cherished in our solemn legal documents, can shed its light on global governance processes, that are increasingly expected to meet some legal quality.

As I submitted in a previous chapter², the Rule of law means more than compliance with rules, certainty and predictability.³ It implies an *institutional* scheme⁴ bearing the “duality” of law in a given domain. Being referred to the quality and structures of law it does not necessarily depend on some preeminent presupposition of the State. In its English roots, and unlike the experience of the continental Europe *pre*-constitutional States, it can be understood through a tension between the law of the ruling powers and “another” law, one that despite being *positive* is beyond their reach and purview.⁵ This legal structure counters the possibility that the *whole* extent of available law be reduced to a sheer instrument in the hands of those in power (a rule *by* law).

On the global arena, this normative meaning can persist. One can readily assume that the Rule of law is not a system relative, or jurisdiction related notion, but it is implied externally, by being

* This paper is a draft to be revised. References are incomplete. Please do not cite without permission (gianluigi.palombella@nyu.edu).

¹ One with overarching epistemic and controlling function over the globe (see N. Walker, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, in *I*Con*, 2008 6 (3-4): 373.

² Cf. here my “background” paper attached for this session: “The Rule of Law as an Institutional Ideal” forthcoming in L. Morlino, G. Palombella, *Rule of Law and Democracy. Internal and External Issues* (Leiden 2010)

³ For such a view, see instead A. Scalia, “The rule of law as a law of rules”, 56 *U. Chi. L. Rev.* 1175 (1989). Naturally, I am not assuming anything against the importance of compliance with international law and the fact that most States “almost all of the time” do comply with international law (L. Henkin, *How Nations Behave: Law and Foreign Policy*, 1979, II ed., at 25-26.)

⁴ In the mentioned work (supra note 2) I pursue a route different from the alternative thick and thin (“essential”) conceptions of the rule of law.

⁵ In the modern history, law contributed to this achievement by the separation of powers, an independent judiciary, legal protection of other principles (and rights) even *vis à vis* legislation (and the democratic or sovereign principle itself), and by fixing pre-given rules for the exercise of legitimate power in a non-arbitrary way. The last aspect, though, wouldn’t tell the whole story, and if taken alone would be misleading. As the pre-constitutional (XX and XIX) *Rechtsstaat* (or *Stato di diritto*) proved, power’s formal steps can be non-arbitrary, rule-based, hierarchically rigorous, and still legislation (let alone the whim of the Executive) can monopolize the social available normativity in a legally dominating way. Contrariwise, a *dual* structure of law, better apparent in the rationale of the English rule-of-law tradition (where common law and judge made law developed), is a reason why the power, from the legal point of view, is neither “unlimited” nor “unbridled”.

cherished internally: as I shall submit, its place is the *relationships* in the complex transformative *multiversum* of legalities.

I shall take initially an ‘enlarged’ perspective, and recall swiftly, on the background, mindsets about ‘ways of being’ of law. Its old or new phenomenologies manifest other than flat legal homologies (I recall Montesquieu’s “esprit”, *jus gentium*, global administrative law, medievalism). Beyond strict necessity for the reader, an Appendix shall give however some wider narrative of these formats.

This article divides in two parts: the first has to do with understanding the frames of law that intersect in the global environment, their layers, their different extension, and different depth (i.e. the third dimension of figures bearing “volume”). It also shall deal with the import of conceiving law as a “system”, as a “whole”. In Part two, I will return to the concept of Rule of law, considering more closely the intellectual challenge raised by the construction of the Global Administrative Law. In the complex interplay among different orders, and along with the slow, case by case construction of judicial confrontation, I shall unfold the role that the normative assumption of the Rule of law is to play, one that is crucial to legal coexistence, and to viability of global governance. In the general reasoning, and essential to the understanding of the view that I propose here, some further concepts shall be taken to matter, like accountability and responsibility, communicative recognition, equilibrium, non domination, the “right” and the avoidance of injustice.

Part 1: Legalities

I. Geology and geometry, layers and fragments.

1. Metaphors can be illuminating. The metaphor of international law as a progressive formation, in vertical cross section, of “geological” layers, has revealed that the flat view from the surface would miss, and waste, the actual complexity. Joseph Weiler⁶ has looked at how layers developed, and conventional law, community law, regulatory law, have consecutively enriched the significance and spectrum of international law. The metaphor holds together parts that would be otherwise divergent and meant to embody different logics, nature, fundamental rules. The suggestion is that we cannot make sense of the same thing unless through the layers of which it still consists, that is, which its “consistence” is made of.

Other views have a different dynamic concern: mainly they see one of the layers above as explaining the others, to reveal the real fulcrum, the governing principle. The *clavis universalis* is rather elusive though: is the “human dimension”⁷, the development of a *super partes* law, or is the holding of the Masters of the Treaties, the conventional nature, still ultimate; explaining, for instance, as its generative root, the imagined autonomy of international, transnational or supranational institutions?

⁶ . J. H. H. Weiler, “The Geology of International Law. Governance, Democracy and Legitimacy”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547.

⁷ A. Cassese, *The Human Dimension of international law* (2008).

or is rather the further engine of regulatory and administrative rule making, one that is spreading through disseminating entities with an unparalleled self authorizing jurisgenerative power?

One can say that insisting on the progressive transformation of old concepts towards the meta rule of “humanity” clarifies the trends and the hierarchy of “contents”: redefines sovereignty⁸, or trade law maybe⁹. On the other side, the other “regulative” layer makes even stronger claims. It interconnects, horizontally and vertically, traditional and new entities developing rule making and administration in all fields of peoples’ and individuals’ life (from human rights to commercial standards, from sport agencies to forest conservation, from environment to agriculture, from cultural heritage to energy, trade, security). For the very fact of progressively tuning its own viability among diverse imperatives and concerns, it purports to shed the only light through which things are visible. And by considering its processes as inexplicable through the lens of the conventional layer, the scholars of regulatory international governance see how the law they are facing, rather than the traditional *inter gentes*, is instead the global law. This is a paradigm shift, for one general reason at least, that what was a layer of the same whole becomes the whole of the same layers.

But what can a global law be like¹⁰? Does law have such a format?

2. For the sake of reconnaissance, one is brought to a preliminary insight on ideas of law that would otherwise hardly resurface in a standard legal theory fashion. Law can be seen through the volume that it occupies; and one can think of different “formats”¹¹ of which the simple primacy of rules doesn’t explain much. Thus, one encounters, “L’esprit des lois”, for instance. Starting from a huge amount of data and experience among diverse peoples, Montesquieu came to an intuition of “principles”: laws are “relations” that result from the combination of social, cultural, geographical

⁸ A. Peters, “Humanity as the A and Ω of Sovereignty”, *EJIL* (2009), Vol. 20 No. 3, 513. See also the early opening by R. Teitel, “Humanity’s Law”, 35 *Cornell International Law Journal* (2002) 355.

⁹ The issue lends itself to ambiguity. In the limits that such a subject might be indirectly touched by this paper, as it shall be clear in the pages that follow, I am not inclined but to interconnections, and those of that kind that I find resumed by R. Howse: “Instead of international human rights law enhancing the purported function of WTO legal norms as protections for private economic actors against the activist state, consideration of human rights implies flexibility under WTO law for the state to take positive action to protect individuals and communities against the excesses of economic globalization. For example, if states are fully to discharge their obligations with respect to the right to food or the right to health under the CESC, they may need to rely on various exceptions or safeguards provisions in WTO treaties. Interpreting such treaties in light of the human rights obligations in question would help to ensure that the exceptions or limitations provisions in question allow states the policy space to fulfill these obligations.” (see “Human Rights, International Economic Law and ‘Constitutional Justice’: a Reply by Robert Howse to Ernst-Ulrich Petersmann’s Article in *EJIL* Vol 19:4”, *EJIL*, Talk!, dec. 9, 2008.)

¹⁰ The expression is used now often, and has been lastly invoked as a comprehensive label in the title of the last book by S. Cassese *Il diritto globale* 2009.

¹¹ I suggest here that it has an heuristic use conceiving some law as a “format”, and I find as examples a few, that one can call *esprit*, *jus gentium*, *Gal*, and as a false friend, *medievalism*. These formats, that are spelled in the text only enough to serve its reasoning, might be described more extensively: and in fact, I am adding below an *Appendix* were I treat them at more length (for those who are interested).

factors, commerce, economy, manners and costumes, as much as from the sound (or unsound) role played by political rule. Not a naturalist, and I believe not a determinist, Montesquieu explains in this sense the *volume* of law, as a situated notion, under general rationales: not simply its logic, or its ultimate belonging in nature or will. And as to politics, he did not stop at their structures, as many have done: he pointed to the “principles” that “set in motion”, and make a structure “act”. Passions, not private, but public, towards common “institutions”, of which for popular governments essentially, and in part for aristocracies (moderation) as well, virtue is the required one, as a functional, objective element of the complex system¹². One can take this pattern to fairly reflect some part of our received ideas on law, let’s call it, “esprit”. Admittedly, “esprit” seems to leave some gaps. One example is *jus gentium*. It is different: it makes sense of, and is seen to be made of what is common to many legal orders, to many peoples: from Roman ages, to Grotius, and to the contemporary legal comparative doctrines, its nature oscillates between reason, morality, and consent (which is not a minor issue), but for sure it is but a recognizable level of law which normatively depends on the existence of each systems of which it partakes.¹³ It is of incommensurable value: Verdross eventually saw it as a counterpoise to *jus dispositivum* in international law¹⁴. It is hardly a legal order of itself though, and conflating the two things ends up concealing something. However, teams gathering the best players ever, do not exist, or if they exist never win.

Now coming to global (regulatory and administrative) law, it is meant to cope with the thousands of specialized regimes (sometimes even self-authorised), whose technically driven imperatives appear often to eventually detach from the root of international law, or hardly to be explainable by its legal chain: “Instead of neatly separated levels of regulation (private, local, national, interstate), a congeries of different actors and different layers together form a variegated ‘administrative space’ that includes international institutions and transnational networks, as well as domestic administrative bodies that operate within international regime or cause transboundary regulatory effects”, and private, public, domestic and international fade: “transnational networks of rule-generators, interpreters and appliers cause such strict barriers to break down. This global administrative space is increasingly occupied by transnational private regulators, hybrid bodies such as public private partnerships involving states or inter-state organizations, national public regulators whose actions have external effects but may not be controlled by the central executive authority, informal inter-state bodies with no treaty basis

¹² Ch. L. de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent, Cincinnati, R. Clarke & Co., 1873) vol. I, 22 ff. See also the Appendix *infra*.

¹³ *Jus Gentium* is treated more extensively in the Appendix.

¹⁴ A. Verdross, “Jus Dispositivum and Jus Cogens in International Law”, in *The American Journal of International Law*, Vol. 60, No. 1 (Jan., 1966), 55-63. The reference is to Art. 53 of the Law of Treaties (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (and for the superveniens jus cogens, see art. 64).

(including ‘coalitions of the willing’) and formal interstate institutions (such as those of the United Nations) affecting third parties through administrative –type actions”¹⁵. So in this administrative¹⁶ dimension, a de-territorialised law emerges: if some earlier *jus gentium*¹⁷ was shaped by the Roman praetor to treat individual non-citizens, away from their land and “esprit”, here it is legality itself that inheres in no location, but reaches distant individuals, piercing their borders and shelters. It is a law that cross-cuts political allegiances, territorial meanings, and that somehow flattens the “orography” of the world. It also escapes the coordinates of “situated” system-related practices and mirrors an unearthed template: its double move is narrowing the scope of law (specializing it) and extending its reach as far as globally. Overall it neither fits the law attributable to a controlling *will*, nor is it well described as reflecting the inspiration of natural principles. It develops its rules of procedure, its own principles through borrowing and jurisprudential *topoi*, but it issues massive amounts of intrusive material provisions as well. It structures its own space as a layer of law. It is the world seen through the lens of regulation-administration, an optimized “administered” world, rather than a sheer branch of law (like constitutional, criminal, private law).

It qualifies for its own specificity, as a “format”, then, but one would not think of it as “the whole”. Evidently, it does not replace the “esprit”, and would not fit the complementariness inherent to *jus gentium*. Seen as a matter of volume, the globe hosts still a plurality of legalities. Nothing impossible. Another world thrived for a thousand years on an open variety of legal orders, and it also considered juris prudentes job as definitely the controlling one. However, medievalism¹⁸ - leaving aside its theological pull to unity - was not yet complicated with the evolving gifts of modernity, like the idea of legislation as political control, the strength of the State, its ethos, the “civilizing” force of international law, the self driven authority of technical efficiency.

However, the global law, if there is any, takes further issue with geometry.

3. Global regulatory law engendered concerns, precisely because of its overflowing and the supervened epistemic insufficiency of our grids. The subsequent state of uncertainty has been called “fragmentation”. Fragmentation, be it pathology or physiology, is a value laden perspective. It depends on the relevant dispersed unity: not just the lack, but properly the (ontological) loss of a reassuring unified legal world. So it tells us more about the premises than about the world itself.

¹⁵ B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, in *EJIL* (2009), Vol. 20 No. 1, 23, at 25

¹⁶ Ibid. at 25: “Global administrative law is emerging as the evolving regulatory structures are each confronted with demands for transparency, consultation, participation, reasoned decisions and review mechanisms to promote accountability. These demands, and responses to them, are increasingly framed in terms that have a common normative character, specifically an administrative law character.”

¹⁷ For more treatment about this, see *infra*, Appendix, *jus gentium*

¹⁸ A wider analysis of medievalism is however in the Appendix.

It is often recalled as a matter of increasing number of international tribunals, whose proliferation is neither curbed nor hierarchically controlled by the ICJ. As famously confirmed from the ICTY (Appeals Chamber, in *Prosecutor v. Tadic*), international law lacks a centralized system “operating an orderly division of labour among a number of tribunals” so that “every tribunal is a self contained system (unless otherwise provided)”.¹⁹

But the proliferation of *courts* or quasi jurisdictional bodies is not purely artificial, because it follows an equally discrete law, the autonomous topic-related law, in specialized areas²⁰, which ends up in the known self-contained legal regimes. The general idea of some common law of international adjudication, driven by judges as an “epistemic community”, has a decisive role of itself²¹: nonetheless, in so far as fragmentation developed as an increasing proliferation of legalities (of which courts are simply part), they must be included in the explanatory focus.

Thus, at stake is, as well, a metamorphosis of law in the global order, that the ICTY statement reflects in an unsatisfactory way, because of the potential frustrating effects and irrationality of self-contained tribunals as part of a space where fractures are legal treatments to cope with the high complexity of interconnections.²² Different kinds of law end up blurring their mutual borders: a domestic policy regulation letting pharmaceutical production flourish outside a system of patents (in India for facing HIV, for ex.), overlaps with WTO rules, and TRIPS Agreements (on “Trade-related Aspects of Intellectual Property Rights”), and the latter, by defending the trade interests of States and powerful industrial companies in the patent system, do hardly concur, in turn, with the goal of WHO, i.e. that especially developing countries must raise the life expectancy of the people, which of course, availability of medical treatment would do.²³ In this and a myriad of similar cases, one can take different “internal points of view” (as judges respectively do), that of the WTO, the Constitutional Indian order, the Global Health regime, bearing different accent on trade, health and human beings priorities, and involving different participants, actors, addressees. But none would be adequate.

¹⁹ ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1-I, Appeals Judgment, 34-75, para. 11. (The merits concerned disagreeing with the ICJ about the relevant threshold of responsibility of states for the acts of private individuals, under a test of effective or overall control (ICJ *Nicaragua v Us* (Merits) 1986 ICJ Rep 14, 65.). Then the ICJ contrary ruling on *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91 (Feb. 26) rejected the applicability of a broader “overall control” test to assess State responsibility (Serbia) and denied to such matters the ICTY jurisdiction, which is concerning individual criminal responsibility instead.

²⁰ A as a preliminary study report had already stressed: G. Hafner, “Risks ensuing from the fragmentation of international law”, in Official Records of the General Assembly, 566 session, Supplement n. 10, 321 (UN Doc A/55/10) and Id., “Pros and Cons ensuing from Fragmentation of International Law” (2004), 25 *Michigan Journal of International Law* 849.

²¹ See S. Cassese, *I Tribunali di Babele*, 2009; and Ch. Brown, *A Common law of International adjudication*, 2007

²² See for ex. Ch. Brown, *supra* note 21, at 28.

²³ Cfr. Neus Torbisco Casals, “Beyond Unity and Coherence: The Challenge of Legal Pluralism in a Post-National World”, at [http://www.law.yale.edu/documents/pdf/SELA/NeusTorbiscoEnglish .pdf](http://www.law.yale.edu/documents/pdf/SELA/NeusTorbiscoEnglish.pdf) (Jan. 21, 2010 last visit).

Our highest idea of unity, on which the perception of fractions is premised, is placed mainly in the general conception of law as associated with a “system”: despite its performing the service of control, the global regulatory layer breaks into pieces the “wholes” that traditional legal orders are inherently held to encompass, by cross cutting the formats that they reflect.

Such “wholes” are not transient though, in as much as their patterns persist; they are received views from modernity and mirror generally a legal order connected to the State as a “general ends” entity (i.e. with no specific task limitation), from whose all-encompassing reach the unitary nature of its legality must descend. I will now briefly deepen this point.

II. The law as a whole

1. Although those transformative challenges do not cancel the relative persistence of a State level of legality, they can be better understood by the contrast with it.

Legal systems have been explicitly or implicitly considered to be a premise for law, a kind of *transcendental* condition for it, i.e. a condition of conceivability. The capacity of law to build itself as a unity and as an object of knowledge is often connected to it as an epistemically and ontologically “whole” object.²⁴ As a matter of fact, it has been, however, mainly construed on the premise of the modern State.

The connection between legal system and States is all but an irreversible conceptual one. Even with the Hartian union of primary and secondary rules, nothing prevents the acceptance of the rule of recognition to be made by officials that are not State officials²⁵. But in the general understanding, it is somehow presupposed, implicitly or explicitly, that they are. From the point of view of democratic constitutionalism, the comprehensive existence of the State, in its unity with people and territory,

²⁴ The construction of the epistemic unity or the self-creation, etc. as a separated object have been reflected by different speculations and theories. On the more general question recall Kelsen’s *Grundnorm*, (H. Kelsen, *The Pure Theory of Law* (1934, II ed.), 1967, ch. V, 34, 193 ff. or Hart’s *rule of recognition*; H.L.A Hart, *The Concept of Law*, II ed. 1994, ch. VI, 100 ff.) and see J. Raz, *The Concept of a Legal System*, 1980; M. Van de Kerchove, F. Ost, *The Legal System between Order and Disorder* 1994.

²⁵ R. Cotterrell, *Law Culture and Society. Legal Ideas in the Mirror of Social Theory* (Ashgate) 2007, at 37.

J. Waldron, “No Barking: Legal Pluralism and the Contrast between Hart’s Jurisprudence and Fuller’s”. dec. 2008, *The Hart-Fuller Debate 50 Years On*, Australian National University College of Law, at <http://law.anu.edu.au/JFCALR/Waldron.pdf> (last visit Feb 11, 2010), at 9, reminds us of the thesis of Cotterrell, and recalls hartian openness to customary law, but also recognizes that it was accompanied with the idea that the autonomy of customary law was harboured in the same central recognition of it as part of the valid law for the wider legal system. As Waldron writes, resuming Hart (*The Concept of Law*, supra note 24, at 46), “his interest in custom as a form of law does not really extend beyond situations where custom is fully integrated into a state-dominated legal system--integrated in the sense that there are clear principles for its subordination as well as for its recognition. Even though the legal status of custom is not necessarily created by the sovereign’s (tacit) command, still legal customs are subject to the system’s overarching rule of recognition, and that rule will determine what the relation is between custom and other forms of law such as statute and precedent”(*Ibid*, 10).

affects, in the top down mode, the general perception of law. This embraces as well the defense of “borders” *vis à vis* external legalities²⁶.

It is the top of an iceberg bearing deeply on the inseparable line- law-system-State - enhancing a “situated” character, the nexus with the confined domain of “real” people’s life. It conveys successfully the idea of law as coherence: one that has material embeddedness, and is not simply due to the consistency among its rules, or to the logical connectedness of its parts. The two mutually reinforcing notions, the law as a system and the law of a State based society, as a “whole”- can be taken here in a rather “neutral” way: neither a sheer “organicistic” unity, nor the fading of the State’s socio-political entity into clusters of rules, the “pure” kelsenian legal order; nor even the obscure determinants nurtured by blood and soil, nor the overlooking of the empirical and conceptual link between law and society (in the sense, say, of Hart).

Now, if the bond between law and the state protects, rather than a formal consistency, the self limiting domain of a polity’s social practices, it is so because the State is not just any “public” entity whatsoever, but the fullest image/archetype of any existent “public” and-- what is highly defining its very nature--, the only public entity entitled to all encompassing reach: the one that can by definition embody “general ends”²⁷. The entirety of ends, one might say, overlaps with the law as “entire”, as a system. Law- as- a- system is therefore deeply associated with a “general ends” capability: which requires it to ultimately shelter any sort of common objectives “deserving” care, protection, regulation, control, and the like. This couple, to which territory is premised, factually entails at the same time the *responsibility* to cover the full circle of publicness and public problems, i.e. a *responsibility for the “whole”*, and coherence as a “general” result. Its “esprit” format works the dimension of time, both reflecting some premised “verfassung”, the past and the “tradition”, and projecting or ruling its common future. Its institutional legality bears on the notion of custom, constitution, legislation.²⁸

The breaking in of global governance detaches law from that ground and is focused more on “present” than on the political project over the future: at least the old way to conceive of the time dimension tails off increasingly while the space expands itself. But this is not yet the whole story.

Among its significant innovations it downplays the reassuring modern enterprise of law as inherent in the *full circle of human activities*. It weakens increasingly the *holistic* frame of public interest, and

²⁶ One traditional view on the matter, although susceptible of more than one interpretation, is given by the German Constitutional Court treatment of the Lisbon Treaty. Otherwise, it is instructive the reading of decisions of the Supreme Court of the U.S., since 2004 (for ex. *Rasul* 2004, *Hamdi*, 2004, or *Hamdan* 2006) concerning Guantanamo detainees, the relation to International law, and admittedly some of Justice Scalia dissenting opinions. On this also G. Palombella, “The Rule of Law, Democracy and International Law”, *Ratio Juris*, Vol. 20 No. 4 December 2007 (456–84).

²⁷ It is to be avoided the misunderstanding, however, that for the State to embrace “general ends” means to satisfy the requirement that “law must be general”. This is possibly linkable, but clearly a different concept.

²⁸ See Husserl and Ost & Kerchoue

the political control of complex issues. Administration, somehow the intermediate legal form between particular and general, has thereby transformed itself from the instrumental arm, the bureaucratic or technical apparatus, as it was within the state, into a self standing form of sectoral global regulations. Segmented law, of itself, is unsuited to shoulder “responsibility” for the “whole”. The “whole” looks, all the more now, clearly as a metaphysical concept, and its very width and complexity are here out of sight. This consequence has some bearing on the relational shift between *responsibility* and *accountability*.

III. Responsibility

1. As it may be clear, the notion of responsibility that is in the background has less to do with the notion of “imputabilité” (or that of “imputation”, or with the Kelsenian *Zurechnung*)²⁹ than with an attitude of taking on one’s own shoulders the scope of the state of affairs. Commonly, a “responsible person”. Thus, not simply somebody whose personal autonomy, and capacities, in given circumstances, allow us to hold her accountable for her action, liable for some commitments, deserving punishment, and the like. In this first sense, responsibility regards the past, and the action performed by someone. But in a second sense,³⁰ the meaning of *respondere*, addresses the future and better introduces our notion, at least because of its sensitivity and orientation, that is not directed toward the past. Put it briefly, “responsible” here projects a *sensible self involving consideration* of as many relevant factors (be they facts, interests, intentions, consequences, and the like) as possible. It exceeds the *view of a required task* (which leaves aside any further concern).³¹

One can find in the work of Hans Jonas some converging conceptual hints. Firstly, his assumption that our mastering of new technology should be informed by a new ethics of responsibility, one that exceeds the Kantian idea of duty, in the deontological mode, as largely consequence-insensitive³². Secondly, what he calls “political responsibility”³³ (in the sense of the responsibility of the State felt through the role of the Statesman), which in his words bears a significant relation with *totality*, *continuity* and *future*, because it encompasses the “total being” of its object, with no possible interruption in time, and “beyond its immediate present”³⁴.

²⁹ Cfr. Kant and Kelsen (concerning the nexus between the prescription of the sanction and the action type described in the same norm as its condition). See also Hart on punishment and responsibility.

³⁰ that can be traced back to the role of those who guarantee with their word, (the *responsor*, in roman law. Generally see, among others, M. Villey, “Esquisse Historique sur le mot ‘responsable’”, in *Archives de Philosophie de Droit*, 1977, n. 22, 45-58.)

³¹ I will return to this question in the second part of this paper.

³² H. Jonas, *The Imperative of Responsibility* (Eng. Transl. 1984). This does not mean, in my view, that neither we have a duty on the basis of justice reasons, nor future generations have rights of their own before us. I only suggest Jonas’s sensitivity for “responsibility” in its more limited implications.

³³ For Jonas, by the way, in analogy with parental responsibility (Ibid, 97).

³⁴ Ibid., 98-105.

In fact, for example, the law as continuity and as future-projection stands for the above temporal qualities of our State legal systems: as van der Kerchove and Ost have written, they “suppose a time intentionally controlled by legal agents: this will therefore be a Promethean time, although often tempered by cumulative time [customary law], alternate between advance and lag”³⁵

Though responsibility is mainly related to virtue, and ethics, I would nonetheless assume that the notion sheds light on our understanding of the State as a general ends entity. It is not the ethics of beneficence, one that evidently cannot be imposed³⁶ : it is instead the simple objective *raison d’être* of the State, affecting thereby our idea of law. It is a normative “implication”: it concerns the abstract ultimate “capacity” or capability of a legal order as a State related concept: this holds true, despite the fact that it can be locally superseded, complemented or countered by other competing legal orders, as the changing records of legal pluralism show, in the last decades or centuries.³⁷

Needless to say, this structural connection holds regardless of variable ethical - political visions *vis à vis* society: if the State abstains or heavily impinges on individual spheres for collective purposes, that is, depending on its liberal or welfarist attitude, in either cases that only affects the “how” of its accomplishing its general responsibility. Similarly unnecessary is the confusion with responsibility as a counterpoise versus the inflationary development of individual rights³⁸ : this contrast, based on whatever good reasons, doesn’t bear on the objective import of the State as the only general ends entity³⁹.

The objective association of “responsibility” with the chain laws-and-system, locates within the pattern of law as “esprit”. All the more so, if one recalls the montesquieuan concept of the “principle”: as to a form of government, its principle is “that by which it is made to act”, not its structure, but what sets “it in motion”. Responsibility has not the working role of “virtue” in popular governments, but it equally inheres objectively in the system, though as an underlying belief, one that develops as a secular explanation of the increasing and all encompassing legislative reach of the modern State.

“Responsibility” does not replace and does not even overlap with “accountability”. The first inheres in our understanding of the couple State & law in a way which cannot be repeated in other

³⁵ M. Ost, F. van de Kerchove, *Legal System between order and disorder*, supra note 24, 167 . I added parentheses.

³⁶ For ex. H.T. Engelhardt Jr. (*The Foundations of Bioethics*, Second Edition, 1996, 109-110) writes that beneficence cannot be imposed, because the others are entitled neither to beneficence, nor to solidarity, which cannot be numbered among justice issues.

³⁷ I shall not enter into the literature on pluralism, that is to day infinite

³⁸ . I have treated such subjects in my book *L’Autorita’ dei diritti* (2002). More recently, “Fundamental Rights and Human Rights: On the consequences of a conceptual distinction”, *Archiv fuer Rechts- und Sozial Philosophie*, 3, 2007.

³⁹ Of course, it is true that perception of rights from the State’s point of view is different from that of individuals, or of a self-centered individual perspective. The State can only look at rights as within the general ends that it has to care of, and as components of its structural responsibility for the whole (and of its interpretation of it).

institutions. The very fact that “responsibility” here embodies ideas of the “whole”, of continuity and future, illuminates the State law characters in a way that “accountability” cannot.

2. For sure, our internal view of the State (-law) is premised in the background on its being responsible in the above sense. But as a legitimate power, the modern State sits on principles of legality, separation of powers and “checks and balances” that have been understood- recently by Grant and Kehoane- to “prevent action that oversteps legitimate boundaries”. Moreover, “accountability mechanisms” are meant to operate “after the fact”⁴⁰. Of course, administrators and the wielders of public powers are to be held accountable, mainly to those who delegated that very power to them. Accountability refers to them as holding offices and functions, series of discrete purpose-related, competence-defined and in-scope- limited powers: they ought to be accountable, and in the legal sense, mainly by complying with with the relevant law entrusting and shaping such a delimited power to them.

Nonetheless, it holds true that States also, especially as agents are in the global or the international arena, can be held accountable themselves, facing scrutiny with reference to specific provisions (concerning treaty obligations, or non treaty provisions, like jus cogens rules, and the like): in other words, they can be bound to comply with rules of some global regime and with international law. From this view angle, though, States are simply similar to any other single agent held subject to legitimate rulings.

Accountability measures, suggested for institutions operating in global governance, are of diverse nature and tend to compensate for the lack of true democratic control, operating on various grounds, of which the legal one is seen as minor.⁴¹

In some way, global regulatory entities structures and procedures can be progressively integrated with legal counterweights, be made accountable on giving reasons, granting transparency, review. Their legal nature is said to reflect the inherent “public” character of law (embodying the general legality principle, rationality, proportionality, the Rule of law and basic human rights), that generates from the constituencies and returns onto them as governed, i.e. refers inherently to caring for the *salus rei publicae*, and should grant the connection to society⁴². The significance of this insight is on one side to detach the law from the contingent reference to the *State and system* couple, on the other side to hold nonetheless- as *structural*- law’s relation to “publicness”.

⁴⁰ R.W. Grant and R. O. Kehoane, “Accountability and Abuses of Power in World Politics”, in 99 *American Political Science Review*, 1, 2005, 29, at 30.

⁴¹ In Grant and Kehoane, however, accountability divides in two strands: in the *participation* model, the performance of power wielders is evaluated by those who are affected by their actions. In the *delegation* model, by contrast, performance is evaluated by those entrusting them with powers” (Ibid., 31).

⁴² Kingsbury, “The Concept of ‘Law’ “, supra n. 15, at 23.

This sound understanding can certainly be implemented by the requirements of accountability that for instance Stewart develops for the WTO⁴³. But through the various transformations that lead us from the law & State couple towards the global specialized regimes, the shift of dimension, and the perceived fading of the ultimate connection between law and the burden of the whole (i.e., the notion of responsibility in the foregoing, no matter how complex) are inevitable. Regardless of its feasibility, being responsible plays a largely different drama than being accountable: it points to the overall state of a community, in a problematic integrated awareness of the equilibrium among segmented rationalities, and it is premised on a general interpretation of ideas, needs, values, and priorities, dictated by a situated perception and encumbered with a kind of meta-concern (so to speak) that is not institutionally required from the “accountable” discrete components, forces, organs, powers acting within pre defined imperatives⁴⁴. What in the global governance environment is missing, and theoretically needs to be reconstructed, concerns precisely the “whole”, “continuity” and “future”, perhaps a Kantian “regulative idea”, that however shall not rely on the illusory aspiration to Olympic rationality, optimal design, and the like, and can only rest on more nuanced and comprehensive procedures than those driven by efficiency or lead by single minded concerns on a limited domain.

Global regulatory governance (and especially GAL’s) scholars are well aware and mindful of such a problem, as they stress the opportunity to frame accountability so to address the issue of disregard of excluded actors, constituencies, addressees, and asymmetries of power⁴⁵, and of equal significance, in the contrast between rules, the questions of “weight” beyond those of validity⁴⁶.

But this requires some normative underpinning to weaving threads of connection that are not essentially included in the internal legality of the operating regimes, are missing within the limits of specialized functions, and do not respond to the logic of accountability per se, but entail a commitment of responsibility that has yet no legal ground to develop, since there is no further global meta-rule with which diverse legalities should comply.

The accountability/responsibility divergence is in other words a case for re-considering the autonomy and the relation *between legal orders*.

⁴³ R. B. Stewart and M. Ratton Sanchez Badin, “The World Trade Organization and Global Administrative Law”, *IILJ Working Paper 2009/7*.

⁴⁴ The limited and discrete character of such imperatives turns to be condition of the very accountability for their implementation.

⁴⁵ See Stewart and Ratton, *supra* note 38: “The organization and its components are deeply challenged by twin imperatives: 1) continually adapting international trade regulatory disciplines in order to expand and secure liberalized trade 2) bolstering its institutional legitimacy against attacks by critics faulting it for secretive decision making and disregard of non-trade interests and values. This chapter examines these challenges in the context of Global Administrative Law (GAL) for multilevel regulatory governance.1 It argues that the challenges faced by the WTO can be addressed by greater application of GAL decision-making mechanisms of transparency, participation, reason giving, review, and accountability to the WTO’s administrative bodies including its councils and committees and the Trade Policy Review Body.”

⁴⁶ Kingsbury, *supra* note 15.

From this premise, I shall ask in what follows, whether a route is opening that can lead us to draw, from separate regimes, and diverse legalities, national and international order included, beyond accountability, a global surrogate of the unfashionable notion of “responsibility” for the (missing) “whole”.

Part 2: The Rule of law in global context

I. Recognition, interactions, the “internal” and the “external”.

1. I have spelled elsewhere⁴⁷ the general notion of the Rule of law. In developing it within the setting of global governance I shall deal with the relations among diverse legalities that actually populate on different layers, and with different extension, the “multiversum” of our “globe”.

Admittedly, often our views have to represent such legalities regardless of the different patterns and thickness that the emergence of the transnational and global has caused us to acknowledge. Notably, ILC 2006 Report worked out a de-fragmentation⁴⁸ apparatus based on the *topoi* of legal reasoning⁴⁹, a question of rules, deliberately leaving out the “beyond” issue concerning the structures of the institutions, the allocation of authorities, and the self- authorized entities in the global space. Again, we fail to see a unique format, one matrix covering, in the last instance, the diverse generators of normativity (that range from sub-national, State, the transnational and “merchants” law, conventional or customary inter-gentes law to “humanity” *jus gentium*, regional supranational orders, global administrative law). And finally, we are far from the pre-understanding of law as ultimately coherent.⁵⁰

A universalized coherence would be premised on a kind of *internal point of view* to the globe itself as an entirety, that, put in Hartian terms (aside from the insuperable “situatedness” of our angles of view, and the abstractness of a view from “nowhere”) is unavailable for the time being: for a “practiced” common rule of recognition cannot be empirically described as existing⁵¹.

If we acknowledge that regardless of upholding universal standards of morality, the ultimate conditions of validity in our systems are those spelled out by social sources⁵², we should accordingly

⁴⁷ See G. Palombella, “The Rule of Law as an Institutional Ideal”, *supra* note 2.

⁴⁸ On fragmentation see *infra*

⁴⁹ The ICL Study Group Report in 2006 found it substantively manageable under the framework of the Vienna Convention of the Law of Treaties (esp. the role of its art. 31 (3) (c).).

⁵⁰ See the “relevance of coherence” both as a propriety of legal reasoning and of a legal order, in different versions, that there is no room here to discuss, especially in Raz, Dworkin, MacCormick, and also Aarnio.

⁵¹ This does not detract from the progressive coherence seeking efforts and trends of the single different layers of orders taken separately.

⁵² On this, and also on the *separability thesis*, there is well known and vast legal theory literature. One shall recall however that for Hart this does not exclude a role- in questions of validity- for principles: the latter may also be identified by virtue of their “ pedigree, ” much as in the case of “ norms ” if those principles are created or adopted by a recognized authoritative source (Hart, *The Concept of Law*, *supra* note 24, at 266). Moreover, a

assume that different legal orders depend on different domains of social practices. This holds true for each of the layers of the globe recalled, from State, or regional law to international law, or global administrative law.

The latter represents a telling *Sonderweg* indeed, whose interpretation is still in progress, and that shall be instructive to follow. Its scholars have had to consolidate firstly its normativity as “legal”, by re-framing a *concept of law*, that in fact has been proposed to accommodate it, given its mismatch with international law and national law.⁵³ Should GAL be felt to belong in some other “system” one would not ask what wider conception of law should be envisaged: it would simply undergo the test of the given system’s criteria of validity. The question of whether GAL *is law and under which concept of law*, can emerge because it is believed to unfit the parameters of *validity* of the known legal orders. Now, *given this premise*, if it is law, then it shall also be a legality of its own, that neither international (and supranational) law nor national law encompasses.

Yet, the two questions are different in nature: *what is the notion of law* like has an essentialist purpose, that extends to all legalities (in the sense of legal orders: in the Hartian scheme, the one that GAL proponents follow, in the non “primitive” mode, *law* requires further secondary rules, of which the rule of recognition *is* the practiced criterion of validity- *vis à vis* any candidate norm-, to be “accepted” from an *internal point of view*, at least by officials.) This holds true regardless of the variability of criteria of recognition, one that exposes the differences among systems of law.

Accordingly, the second issue as to *what those criteria actually are*, is different, and shall depend on the practice within the specific order observed, thereby drawing the boundary of “membership. Thus, if we engage in the *first* question (the concept of law), still we do not touch the *second*.

As it is theorised, GAL is law because *law* essentially presupposes a) a rule of recognition and ordinary rules, b) that the rule of recognition admits a varied typology of very diverse source entities, states or not states (including those producing specialised rule making, and of an administrative nature), provided that, however, they comply with the principles of publicness, as further elaborated⁵⁴, and referred to the nature of entities, not to the involved publics. According to the path-breaking work of Kingsbury, “what it means to be a ‘public’ entity would routinely be evaluated by reference to the relevant entity’s legal and political arrangements, which may derive from national law, inter-state agreement, self-constitution, or delegation by other entities.”⁵⁵ The reasoning partakes both of a principle-based cognition of law as such and of a source based delimitation of it.

strong contribution on this point has come from strands of “inclusive” legal positivism (see esp. Waluchow and Coleman).

⁵³ See Kingsbury, *The Concept*, supra note 15, at 26.

⁵⁴ See also *infra* Appendix.

⁵⁵ Kingsbury, *The Concept*, supra note 15, at 56

One might observe that such a sound definition embeds criteria that could at least prompt a rule of recognition⁵⁶ to be practiced globally, and if only some further step or the regulative and administrative nature of candidate norms were spelled out, that would easily fit as a test of validity, within the peculiar (albeit open) realm encompassed by GAL, of which it rationalises *the practiced standards*. Thus, somehow, it has to oscillate, so to speak, between legality and validity.⁵⁷

The reason is that GAL has been identified and studied (in my opinion, properly so) from the start as more than a loose set of rules⁵⁸. The dual, descriptive and normative, stances of the discourse, are inherent in the actual way of being of GAL itself, thereby turning GAL into a *legal order of incremental nature*, within a predefined scheme. The further specification of a unitary rule of recognition might be considered an endeavour that is certainly in progress: but its lineages under a public chain are partially spelled out already and partially deferred to the practices of the classified sources under the requirements of publicness. This is developed out of the need to make sense of this matrix of law under the constraint of tackling a visible puzzle: that is, on one side, its premised lack of belonging (to any other single system), on the other its consequent need to qualify otherwise as “law”. In a positivist and Hartian attitude, the general characters of law are a theoretical predicament. If the question about what is law is to be addressed so to fix whether something in particular is law, it can be answered in the positive only if that something has already self defined its internal conditions of validity by a specified social practice, i.e. is- or refers to- a legal order.

Naturally, the *incremental* definition of GAL’s rule of recognition cannot determine the conditions of validity pertaining exclusively to any other legal order: upon them it can make no claims. What counts as law in international law, in a State legal order, or in the EU, is determined through their own secondary rules⁵⁹. They cannot pretend to define some global legality as a whole, since this would be, *ceteris paribus*, as imaginary as the *other way round* unless the respective practices take that very role in displacing one another.

Otherwise, it would imply a monist conception of the global order, where *no relation/ interaction* is possible among legalities, all of them being hierarchically contained as part of one single system, under its rule of recognition. This matters definitely because as we now know, GAL is itself and works as an

⁵⁶ Hart confirms that this “rule of recognition,” unlike other rules and norms (which are “valid” from the moment they are enacted and even “before any occasion for their practice has arisen”), is a “form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts” (Hart, *The Concept of Law*, supra note 24, at 256.)

⁵⁷ The statements on sources say already about their typologies, and these are drawn on existing sources, that are implied and can be listed in further detail or incrementally identified by what I would call a kind of “cooptation”.

⁵⁸ See this expression for example in Hart, *The Concept of Law*, supra note 24, at 233.

⁵⁹ Therefore, what counts for GAL as criteria recognition might well be different from what counts for some candidate norms to be conceived of as legal norm, say, in the British legal order...

interconnection among actors and layers, international institutions and transnational networks, domestic and global, with vertical and horizontal kinds of transitivity⁶⁰

2. This said, the subsequent question has to do with the intersections and coordination among legalities. The scholars that have focused their attention on the law that actually develops precisely on the Global administrative layer of law, and that they consider overflowing the coordinate of sources and systemic pedigree of international law, see that legality as vertically penetrating States order⁶¹. But the point remains that different systems persist separately from GAL itself, and the confrontations among them have, normatively, a *double dimension*: within the confined realm of the rules of recognition of the GAL legality, all the involved entities, and those actors, mainly judges, domestic or supranational, and institutionalized bodies with decisional entitlements, should work theoretically within its criteria of validity: *at least* conflict of rules techniques and others, like *lex specialis*, *lex posterior*, principle of hierarchy, harmonization, systematic interpretation, etc. apply. From this point of view, the normative claims are all to be considered “internal”, and the different regimes or the States’ orders, are all seen from the perspective of the operationalization of GAL. The *practice* of the rule, as a social source, i.e. a factual datum, shall be ultimately controlling.

But there is a *second* dimension, that shall always *affect the viability* of the first: on this dimension GAL is just *one* order among the many, it is not the eminent legality functioning as the yardstick to assess the validity within the remaining legal orders. Needless to say, validity is always an *internal* issue, it *cannot* be predicated of a legal order *as a whole*, but simply of a rule on the basis of one legal order requirements. Thus, when different orders confront each other, it *cannot* be a matter of their “validity”, one that can be solved with common shared practice of a rule of recognition.

This impinges on the first dimension because connections among them, i.e. the interaction of different orders, requires *more* and *less* than the “practice” of a superior rule. It requires *less*, because a superior rule would simply undermine the autonomy of any other legal orders; requires *more*, because an alleged universal rule of recognition is by definition only appropriate to deal with matters of *internal* validity, and those autonomous orders can only look at it from an *external* point of view, i.e. as a *factual* datum. And understandably, the latter has neither normative import on them, nor can be “accepted” internally without losing autonomy.

⁶⁰ Kingsbury, *The Concept*, supra note 15, at 25: “For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime.”

⁶¹ S. Cassese, supra note 10 (thanks also to material interaction, and institutional penetration: for example by way of taking in their operating members, officials belonging in diverse States’ corresponding administrative fields). On the horizontal plane, diverse legal regimes have in common the progressive development of principles of administrative law.

It is thus the *normative* question that the GAL's "framers" are opening to the understanding of a theoretical cooperative endeavor. What is the "*why*" all actors should behave so to fairly interact in a heterarchical order of autonomous partners? and *how* can they construe their relations without fading under one overarching system of the globe?

As a matter of fact, kind of interactions are factually inevitable, and many indicia show the role of law as an independent tool. But, to this regard, it is helpful to contrast this setting with the analogies in the medieval pattern⁶²: the job of legal scholars, arbitrators, and "jurisperiti", in a medieval multileveled set of legalities, although strongly enhanced, operated in the view of the "case" at stake, without further implications as to the weaving of a frame of interactions among orders: at least in the sense that the final unity was to be searched at *the bottom* in the "*convenientia rerum*" and at *the top* in the overarching fidelity to an order shaped in theological concepts. The contemporary globe is orphan of such a final unity, and also does not purport to leave the pluralism of legalities in an *anarchical* setting, at the mercy of the material forces of globalization. Accordingly, the work of judges appears to contribute something different. As institutionally held to lack (or at least, to reason without) political bias, their task is seen to increase in framing a texture that ⁶³ enhances accountability and endeavors to *compensate* for dis-order. The value of this work, as I recognized many times, is high, not just because courts and other jurisdictional bodies treat conflicts, but because they weave the lines on which States and other supranational actors start making sense of some normative mutual commitments, and try and reason on the principled ways in which they can be articulated⁶⁴. Now, even behind such a work, there must be a supporting choice, that can only be traced back to the normative commitments that *legal orders* autonomously take.

II. Enhancing the Rule of law.

1. One such commitment that I purport to enhance is the Rule of law.

At one level of meaning the Rule of law may be intended to protect the linkage between constituents and the law, ethos and legal order. One can say that this conception reflects conservatively the matrix I called "*esprit*". One of its versions in the "Burkean" mode, speaks of the Courts as reflecting the *whole experience* of a nation. ⁶⁵ This kind of task is accomplished also externally, as one of the functions of interfacial constitutional rules on the legal force and status that

⁶² On medievalism, more in the Appendix.

⁶³ S. Cassese, *supra* note 10, chap. V, n. 26 . Cassese also enhances the Shrimp Turtle case (but firstly in S.Cassese, "Shrimp, Turtles and Procedures: 'Global Standards for National Administrative Procedure'", 68:3 *Law & Contemporary Problems*, (2005) 109.

⁶⁴ See also G. Palombella, "The Rule of Law beyond the State", in *I*Con*, July 2009, section 7. and also Id., "Global Threads: Weaving the Rule of Law and the Balance of Legal Software" in Carrozza, Fontanelli, Martinico eds. , *Shaping the Rule of Law through Dialogue*, (Dec) 2009.

⁶⁵ Oliver Wendell Holmes, in *Missouri v. Holland*, 252 U.S. 416, 433 (1920). and see R. Post, "The Challenge of Globalization to American Public Law Scholarship", in *Theoretical Inquiries in Law*, (2001). 2:323, at 326 ff.

domestic law can assign to conventional or customary international law, to Treaties and general principles. It is, in brief, the “Rule of law *in this jurisdiction*” as solemnly the Supreme Court (in the US) calls it.

Beyond the State, the main connection between the Rule of law and global governance is apparently turning to be a contribution to enhancing *accountability*. This can be justified. It can be said that accountability means the way through which the law keeps itself in tune with the interest of its addressees: and the Rule of law, in terms of the definitional requirements for the law, has also been thought of as implying a legitimating relation to its addressees.⁶⁶ In a different vein, the Rule of law is counted among the criteria that a sound conception of legality *should* embody, if global governance entities and functional regimes, must embed the quality of “publicness”, as I recalled.⁶⁷ Publicness ties authorities to “accountability” as well, in the guises alternative to those participatory channels otherwise available in constitutional democracies, by implying review, transparency, reason-giving, participation requirements, legal accountability and liability⁶⁸.

We equally can recognise that the Rule of law is a recurrent ideal belonging as well in all the other layers that we take here into account. It is in them an internal principle, that I have described mainly as serving legal “non domination”, basing on a duality of law (requiring some “other” positive law developed out of the legal reach of the ruling powers), and on the equilibrium of two legal sides (once upon a time, *gubernaculum* and *jurisdictio*). Such objectives can be described as a constant *fil rouge*, from the medieval English traditions to our contemporary constitutions, and have been and can be realised in diverse incarnations, in different times and institutional settings, placing the “ideal” as the benchmark concerning the quality of legality.⁶⁹ At any rate, the issue is that such commitment to the Rule of law has not a parochial or self referred significance⁷⁰, but as an ideal, its import, once taken consistently, without a double standard, can be naturally externalised. It is a kind of ideal that does not only control each legal order’s quality of law, but has implications in the legal quality of the interactions among legal orders, that have been enhanced so far.

What the interactions between autonomous orders do, among other things, is evidently open the field beyond the strict normative tasks inherent in each single domain, in other words making “fragments” to *magnetize* each other. Both in the global specialized regimes and in the even wider global space of orders, our image of law as linked to the States’ general ends, is naturally missing. This I

⁶⁶ D. Dyzenhaus’s interpretation on Fullerian basis, to this regard. *Accountability and the Concept of (Global) Administrative Law*, IILJ WORKING PAPER 2008/7 (Global Administrative Law Series) (2008)

⁶⁷ Cf. also here Appendix and Kingsbury, *The Concept* supra note 15, at 12. And Id., “International Law as Inter-Public Law”, in H. Richardson and M. Williams (eds.), *Moral Universalism and Pluralism* (2009), 167.

⁶⁸ Kingsbury, supra note 15, at 34.

⁶⁹ This definition of a scheme of institutional qualities, as I recalled supra (note 4) does follow a different path from both the thick and the thin conceptions of the Rule of law. See supra note 2.

⁷⁰ I spelled out this point in my “The rule of law beyond the State”, supra note 64, by assuming that in the confrontation between two legal orders, and given the separate appeal to two different “rule of law” as system related, the ideal of the rule of law means instead a “third chance”.

have described above as the shift from “wholes” to “fragments”. If the Rule of law commitment plays a role beyond each confined platform within which it is elaborated, and thus in the global context, it does more than structure the quality of public rule-making entities; in the metaphor, it not (only) bears directly on the fragments, but on the legal quality of a potential *interaction*. In this sense, it overflows the question of accountability⁷¹, but, yet, it operates on weakening self-referentiality and kinds of normative monism. In a loose and “aspirational” sense, it can be said that it is premise to the fostering of a background and “regulative” idea of responsibility⁷². It might be so in an indirect way.

2. For sure, the Rule of law cannot do the work of generating a more or less fictitious and all encompassing substantive project or a general authority: this is a matter of constitutional empowerment, authority creation/ authorization, legitimation, that has less to do with the appeal to the ideal of the Rule of law as such. Nonetheless, the Rule of law can do a different but still valuable job, one that refers to the question of the equilibrium among legalities at different latitudes, and without essentialist presuppositions, perfectionist faiths, might normatively sustain a process reaching beyond the separated realms, and their accountability.

As I have said, the Rule of law is concerned with the quality and structure of law in a defined environment. It counters a dominating ruling authority by the way of the existence of “another” positive law which is out of the reach of those who from time to time, within or without the limits of a territorial power, or a field (issue) related power, intend to play a monopolising legal role. Seen through these lenses, which have a historical background, the Rule of law works mainly by reducing or attenuating the chances for law to be dominated to the point to becoming a sheer instrument to the ends of the contingent rulers. Of course, one of the main mirrors of totalitarian (not Rule of law-based regimes) orders is the elevation of the goals of the most powerful to the dignity of the unique interest of a community, it is the transformation of some ethical majoritarian (or forcefully imposed) aspiration into the only “legally” permissible contents, by overwriting individual justice concerns and de-legalising any other law capable of granting legal standing and protection to the weakest and least powerful. Equally, on the extended setting beyond the State, the Rule of law, as I hinted above, has to do with the duality of law as a scheme aimed at the equilibrium between existing normativities; it purports to avoid the absorption of all available law under the purview of one dominating source.

The new regulative layer of law is firstly a transmission belt of an instrumental efficiency, and the increasing importance finally assigned to accountability devices is itself meant to avoid that such an exercise of power being either inconsistent with such imperatives (delegated or self created competence limits) or mindless of some basic “moral” constraints or wider requisites borrowed from the more developed administrative law principles (procedural fairness and basic human rights). The

⁷¹ I am not submitting here that matching accountability requirements does not enter into the mutual confrontation or appraisal of the nature of a public entity: It does instead and affects the plausibility of its claims.

⁷² On this concept and its difference from accountability, see part I

unilateral (i.e. following functional internal objectives) character of the regulations issued by authorities with mainly administrative roles (nonetheless exercising full power over the fate of individuals and peoples) is structural to each regime, it is not contingent.

The Rule of law indeed doesn't change any of this, but its normative principle, once adopted, not only bears at an internal level, but by institutionally imbuing our notion of a qualified legality, affects our understanding of a legal code, and determines how are we to conceive of the *juridical* character of the Globe, as made of multiple legalities.

The implications of the RoL bring the subsequent fostering of mutual recognition among legalities as peers, and should countervail unifying "ethical" constructions of a *material* order of the global good via a simply legal hierarchization.

The consequence of the RoL on this meta-level, indirectly activates a process that mimics, in the background, the possibility of "responsibility". By allowing for a juridical interlinking on a case by case basis among "legalities" with heterogeneous reach, extension, nature, and depth, the RoL can objectively trigger a re-circulation of needs, ends and claims that surge elsewhere. In other words, being allowed to a forum should shape tools for ideally harboring as wide legal claims and ends as possible, i.e. pointing to the "regulative" idea of reflecting the "whole" (as if it could really "exist"). Moreover, the legal treatment of such interconnectedness shall shift the actors medium of confrontation from a power based one, in the realm of autonomous contracting, bargaining and negotiations, to one based on public arguments and universalisable legal reasoning, that is, a constraining channel.

From a legal point of view this need not be substantial, but works through showing the civilized role of hypocrisy.⁷³ It is a consequence of the Rule of law, that what is performed as public discourse in institutionalized ways, submitted to procedural rules, and substantively to fitting the rationale of the public institutions concerned, is driven by argumentation within such channels, instead of negotiation outside of them (one can think of a Tribunal, and under certain conditions of Parliaments).

The idea of general ends and responsibility for the whole on a legal plane, is not a substantive claim that can be made in itself, doesn't apply to any of the participants, and cannot reasonably be the claim of anyone in particular. That would be precisely what is to be avoided in a Rule of law vein, the elevation of one to the role of representing the whole. It is instead, and firstly, an accepted potentiality of the multiple processes of confrontation in an unlimited run. It is a potentiality inherent to the objectivity of these dynamics in their entirety. Secondly, as recalled above, it is a quality of the process itself, as a matter of framing arguments in a required universalisable and communicative guise.

In my view, in the background, there certainly is the recognition of "other" legalities as peers, endowed, from the point of view of the Rule of law, with a peculiar role in composing the general puzzle, contributing in the overall scene.

⁷³ Elster, 'Deliberation and Constitution-Making', in J. Elster (ed.), *Deliberative Democracy* (1998) 97.

This leads us to the question of bridging the gap between the self referred claims of internal legal validity made by opposing interlocutors, and the purely external stance that is possible to take towards each other. Recognition as a bearer of a respectable legality is tantamount to recognizing that someone else's order is not a manageable instrument, and is out of the purview of external players. However, this is a potentially productive standpoint. I shall now focus a bit more on this, through legal realities.

III. Legal realities, Global tolerance?⁷⁴

"Self observing" specialised regimes do normally interfere *inter se* as much as with State or regional legal orders. As Koskenniemi recalled, institutional and procedural questions are lurking in cases like Mox Plant- nuclear facility at Sellafield, UK, which involved three different institutional procedures, the Arbitral Tribunal at UN Convention on the Law of the Sea, the procedure under the Convention on Protection of the Marine Environment of the North-East Asiatic Atlantic, and under the European Community and Euratom Treaties within the European Court of Justice⁷⁵.

One of the *compensating* strategies, as often suggested in the foregoing, has been focussing on the judicial side: judicial work could advance, so to speak, some additional *software*, one of a distinctive kind though: shaped "through cases" but providing for gap bridging criteria and connective texture, not found in the "primary" rules that it is for judges to apply or enforce, often borrowed from general principles of law, or background international law general rules, or even from the most advanced legal tools of national orders. Even Courts indirect "communicative" strategies (circumstances-relative, comity, reciprocity, equivalent protection, margin of appreciation, scope of manoeuvre, subsidiarity, proportionality, and more) might either reflect or produce interfacial rules, purport to develop some shared working idioms helping coexistence and connections in the absence of the "grand box". And whereas the "system" might be out of sight, some criteria of mutual reference might increase relevance and role, up to becoming the closest thing to a post- "Babel"⁷⁶ legal understanding. But as remarked in the sect. above, the question was *why* should judges on a legal plane do so?

When, as in the Swordfish case⁷⁷, a supranational entity (the EU) and a national State

⁷⁴ I am taking the word from elsewhere, echoing the pattern expounded by Joseph Weiler with reference to the European Communities "constitutional tolerance".

⁷⁵ M. Koskenniemi, *Introduction*, § 13, p. 11 of "Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of IL", ILC, 58 sess, 2006 (A/61/10, para. 251). [<http://untreaty.un.org/ilc/reports/2006/2006report.htm>].

⁷⁶ The metaphor has become a *topos* and is recalled as a rather favourable opportunity both in R. Higgins, "A Babel of Judicial Voices? Ruminations from the Bench" in *International & Comparative Law Quarterly*, 55: 791 (2006) and in S. Cassese, *I Tribunali di Babele*, Roma, Donzelli, 2009.

⁷⁷ The case: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, Chile v. Eur. Com. (Mar. 15, 2001)(available at www.un.org/Depts/los/ITLOS/Order1_2001Eng_pdf)(suspended). For a presentation of the case, recently S. Cassese, *I Tribunali di Babele*, 2009, 31-35. Cf. also T. Treves, "Fragmentation of International Law: the Judicial Perspective", in *Comunicazioni e Studi*, XXIII, 2008, 42 ff. M. Orellana, "The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea", ASIL INSIGHTS (2001),

(Chile) defend their claims, they happen to find their own case as one potentially relevant, or “belonging”, in more than one regulatory regime (or system), each endowed with fundamental “political” objectives, functional imperatives, scientific expertise, principles, rules, and finally, Tribunals: to this extent, the International Convention on the Law of the Sea, and the World Trade Organisation emerge as they are, separate in the space, each with an attracting and unifying force, and both can announce the Rule of law *according to their own realm*. But their *parallel validity* has to face a crucial challenge, when from the point of view of the parties involved (Chile, or the Eu, in *Swordfish*, or say, Mexico and US, between NAFTA and WTO in *Soft Drinks*⁷⁸), as a matter of Euclidean geometry, the (parallel) non intersection property fails the evidence. The transcendental answer cannot be traced back to a large system, there is no Grundnorm, and should it exist, in the Kelsenian mode, it would hardly attach to such an environment.

The alternative route has no clear results, but the first viable tool, in a legal environment, is the choice for the Rule of law, provided that it is taken as more than a system-relative, or jurisdiction related concept. But this is still part of the problem.

As a well known example, the European Court of First Instance appealed to the rule of international law in order to state that the Security Council resolutions (in particular those listing ALQuaeda suspects, and deciding the freezing of their funds, without providing them information, right to defence, and review, and infringing their right to property) are binding not only on UN member states (UN Charter, art.103) but also on the European Community⁷⁹, which should be held responsible for compliance. Thus, harmonization between states, Community, and United Nations system is thereby achieved, so that scholars who look at the decision with a view to a more unitary or even “monist” account of international legality believe that the court “is to be congratulated ... for accepting the primacy of the UN system without any general restrictive caveats”⁸⁰. However, it has been likewise and again the appeal to the Rule of law to provide a basis for ECJ to *reverse* the first decision. What is significant is the connection between the quest for legality as compliance and the system-relative nature of the Rule of law. The ECJ decision did reason by introducing a new level of discussion: even if there were an hierarchy under international Rule of law, the primacy over Community law “would not,

available at <http://www.asil.org/insights/insigh60.htm>; M. Orellana, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, *NORDIC Journal of International Law*, 71(1): 55 (2002).

⁷⁸ Cfr. Panel Report, Mexico–Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R (Oct. 7, 2005).

⁷⁹ CFI Kadi. Case T-315/01, Kadi v. Council and Commission, 21 September 2005, [2005] ECR II-3649 § 205. In November 2005 Kadi brought an appeal against the decision of CFI (decided by ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008).

⁸⁰ The author adds: “— with one exception only”: the exception refers to *jus cogens* norms. Then: “The Community can live quite well under the regime suggested by the Court, a regime which unambiguously acknowledges the primacy of those parts of the UN legal order which are binding on the Member States of the world organization” (Ch. Tomuschat, Case Law: Case T-306/01 (Yusuf Al Barakaat), and Case T-315/01 (Kadi), judgments of the Court of First Instance of 21 September 2005, 43 *Common Market Law. Review*, 543 (2006).

however, extend to primary law, in particular to the general principles of which fundamental rights form part⁸¹. This means, first of all, that the primacy of the international order is never content independent. It coexists with the autonomy of legal orders, each pursuing their own review of their own decisions, even those depending, as in this case, on resolutions issued in the international order.

Of course this relative autonomy holds true, even *within* the EU, where supremacy and direct effect have been established, along the years when the construction of the common order and the subsequent vertical relationships, were in progress, and possibly each time a step forward is required to find a stable ground. Even more notably because the ECJ adopts of itself an internal *monist* attitude towards the Member States. Thus, the Italian Constitutional Court wrote in *Frontini v. Ministero delle Finanze*⁸², that the limitations on sovereignty, even within the European Communities, have to be connected with the pursuit of legitimate and valued objectives, and, notably, it must be done so coherently with “fundamental principles” of the member states’ constitutional orders. In general, it holds with the famous “Solange” interplay between legal orders, according to which the German Constitutional Court did subordinate domestic compliance *so long as* an adequate substantive and procedural system of fundamental rights protection was working in the European legal order⁸³. Eventually, a similar attitude concerns other confrontations between legal orders, for example as to “direct effect” of WTO norms within the EU: “It is established case law (from *Portugal* to *FIAMM*)” that the WTO norms according to the ECJ are not “parameters” for reviewing the legality of normative acts adopted by Community institutions. In other words, WTO norms do not have “direct effect”, i.e. cannot be invoked “by private parties *and* Member States in proceedings before the EU judges, unless an act of implementation has been adopted”⁸⁴. Reasons for this to be so have been given more than one. In *Portugal* all started with enhancing a still relevant matter of horizontal symmetry, i.e. that direct effect is not granted by other Members, thereby the condition of “reciprocity” and the functional advantages from homogeneous behaviour are missing. Thus, internally, the margins left for legitimate negotiation, would be cancelled: “Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community’s trading partners”.⁸⁵

⁸¹ Of course, this is fully and conclusively noted by the ECJ, *Kadi* at §§ 316 – 317, that “the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”

⁸² Corte Costituzionale, 27 dec. 1973, n.183, *Foro It.* 314, 1974.

⁸³ The two “Solange” decisions are BVerfGE, May 29, 1974, 37, 27; BVerfGE, Oct. 22, 1986, 73, 339 – 388.

⁸⁴ A. Tancredi, “The absence of direct effect of WTO law in the EU legal system: a matter of institutional balancing?”, paper at *NYU Hauser Global Forum* 26 January 2010.

⁸⁵ Judgment of the ECJ 23 November. 1999, Case C-149/96, *Portuguese Republic v Council of the European Union*, para. 46.

Generally, in these and other cases judges are called upon to “vertically define the relationships between diverse legal orders and horizontally integrate diverse specialised regulatory bodies” .⁸⁶ Admittedly, on the one hand, some kind of fuller integration among diverse specialised regulatory bodies might strengthen the coherence of global administrative law, as a peculiar legality in itself. One can think, on the other side, that further relations among the GAL level of legality and State legal orders, or others like the EU, and between them and international law are being defined along lines of what I would call respectful recognition and autonomy, responding to a logic of confrontation in which openness and “giving reasons” are still visible. The one line that seems outdated is instead the monistic attitude. As I shall comment later, a general frame along these lines would appear as a source of equilibrium, that responds to the underlying principle of the Rule of law, as I have developed it so far.

Despite judges weaving growing threads of legal reasoning, they are operating between recognition and the internal point of view. They assess mutual relations from within their own order. Precisely this recurrent judicial attitude toward the “internal” questions of validity, which otherwise is considered to be backward looking, has to play a role as important as the forward looking attitude in “opening” and linking “external” legalities.

In many ways, for the sake of categorizations, that should be called a *dualist* stance. Diverse strategies of interaction are ways of addressing the fact of plurality. But if we line up the possible ‘relations’ along an axis of “engagement”, we can here stipulatively simplify⁸⁷ that a strict *pluralist* view might signal the overlapping on the same field of two or more different “systems” controlling it: systems that in a pluralist understanding see the things from their own perspective, and irrespective of one another. Monism might also end up with simply asking for the supremacy of one legal order over the other, while dualism as an equilibrium point, entails the recognition of the “others” within the domain that they regulate (e.g. global trade or international human rights law) and normally provides for interfacial norms as to their domestic validity, internal applicability, direct effect, elaborated by courts or included in constitutional or legislative texts. Relations towards external legalities emerge as a matter of legal principle.⁸⁸

⁸⁶ S. Cassese, *Il diritto globale*, 2009, 138. Cassese suggests instead that the best direction would be different from the route taken by the ECJ, i.e. it would be that of recognising fuller integration among the orders.

⁸⁷ I am not going to assess here the viability of different conceptions of pluralism, I am suggesting an heuristic scheme along which the rule of law consequence on the “communicative” level can be understood.

⁸⁸ I have recalled the role of different interfacial rules, *vis à vis* the relevant transformations and the increment of *super partes* norms of relevance to the general international community (in my “The rule of law, democracy and international law. Learning from the US experience”, in *Ratio Juris*, Dec. 2007). No doubt many difficulties can be recognized for ex. as to the status of general international law “codified” through treaties in the absence of incorporation: a crucial matter in dualist systems that do not allow for some supra legislative force either general principles or at least some conventional international law (see instead Art. 25 German Const.; art. 10 and 117 Italian Const. and see also C.Cost, dec. n. 348 and n. 349 2007: according to the Italian Const. Court, art. 117 of the Italian Const. determines for International treaties (or the “adaptation rules” for them) “una maggior forza di resistenza rispetto a leggi ordinarie successive”. Thus they are ranked higher than

IV. The pattern and onus of communication

A “communicative” attitude should be, theoretically, at odds with exclusion, arbitrariness, and dominance; it might help understanding for example, that domestic “resistance” to the implementation of international provisions is not *always* the consequence of a blind closure, regardless of the reasons, merit, and principles supporting it.

One can find a significant philosophical point in the core of the debate on interpretation, understanding, and communication, developed along the ‘80s between Juergen Habermas and Hans Georg Gadamer. The hermeneutical perspective of the latter (⁸⁹) apparently focused on the relevance of the interpreter’s horizon, his context of *motivation*. Understanding does not simply mirror faithfully a cluster of fixed and timeless meanings laid down once by an author. It involves some kind of time-related appropriation. The emphasis falls on judges, ⁹⁰ as a model: they face the “text” in between *pre-understanding* of facts/ values and a case-oriented attitude. Understanding revives the text, trusts it and elaborates on it as a claim to be validated in our own context: that is, more than frozen signs, it imports an *application*⁹¹ into the horizon of the interpreter. If one should think of a pattern of communication, allowing for a fair role to the parties, Gadamer’s hermeneutic could admittedly be attractive. And even in a judicial context of confrontation, say, between legal orders, it could provide both for some deference and for some discretionary assessment.

Surprisingly, Habermas questioned the pattern in itself. The point can be said to bear precisely on the *conflation* between understanding and acceptance, in our “context”, of claims to rightness and validity made by “the author” (the text, the “interpretandum”). The hermeneutical model thrives on the presumption that for the interpreter there is no option: the only relevant claims are the author’s, and the hidden premise is that we can “learn” from him while he is not supposed to learn from us. Such a model might be sound in some special cases. Contrariwise, the general issue in the enterprise

ordinary legislation, albeit under the Constitution). Remarkable before 1998, the article by R. Higgins, “The Relationship between International and Regional Human Rights Norms and Domestic Law”, in 18 *Common Law Bulletin* (1992), 1268 . On dualism, monism and multilevel constitutionalism (esp. in the EU), I suggest, in an unlimited literature, only some: for ex. I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, in “Common Market Law Review”, vol. 36, 1999, E. Scoditti, “Articolare le Costituzioni. L’Europa come ordinamento giuridico integrato”, in *Materiali per una storia della cultura giuridica*, XXXIV, 1, 2004, pp.196 ss. E. Cannizzaro, “Il pluralismo dell’ordinamento giuridico europeo e la questione della sovranità”, in *Quaderni Fiorentini*, XXXI, 2002, 245; or E. Cannizzaro, “La Costituzione pluralista. A proposito della natura giuridica del Trattato costituzionale”, in “Il Diritto dell’Unione Europea”, 1, 2005, 1.

⁸⁹ H. G. Gadamer, *Truth and Method*, II ed. (1988) [Continuum New York],

⁹⁰ According to Gadamer in fact : “ In reality then, legal hermeneutic is no special case but is, on the contrary, capable of restoring the hermeneutical problem to its full breadth and so re-establishing the former unity of hermeneutics, in which jurists and theologian meet the philologist” (*Ibid.*, 328).

⁹¹ See Gadamer *Ibid*, 341: “Application does not mean first understanding a given universal in itself and then afterward applying it to a concrete case. It is the very understanding of the universal- the text- itself. Understanding proves to be a kind of effect and knows itself as such.”

of “understanding” is that a claim can be taken seriously even without granting it any transitive application into our context. Comprehension has not to take all the interlocutors as though they were “sacred texts”, deserving exegesis premised by an uncontested validity. For Habermas, when committed to comprehension, the “interpreter cannot understand the semantic content of a text if he is not in a position to present to himself the reasons that the author might have been able to adduce in defence of his utterances under suitable conditions”. But these reasons cannot be taken to be “sound” unless the interpreter takes a “negative or positive position on them”.⁹² What can be termed “suspension” of application, grants us the option, and denies to credit in any circumstances the “author” as the bearer of a “tradition”. Thus, the conflation between understanding and *application* can only happen under conditions affected by an unbalanced weight of the parties, provided by faiths, or by power.

Turned toward the relation among legal orders, *mutatis mutandis*, this resembles, schematically, some of the stances taken (externally) for example by the European judge: communication means that the parties can both learn from each other, only if the interpreter is allowed to make his own claim and his own argument. Learning is an essential benefit of communication, and if it applies to both parties it grants fairness: one can think of the mentioned “Solange” dialogue, with the ECJ, for example, but also of the change, albeit slow, in the Security Council procedural safeguards concerning its “listing” of individuals allegedly suspected of terrorism: an advancement started by *resistance* in diverse fora, that the decision of the ECJ finally confirmed.

But communication implies on the other hand *more* than a simple closure and dissent: it imports some degree of clarity in framing a coherent stance, taking account of both legalities concerned, and of their mutually referred claims.

In the Solange decisions the German Constitutional Court made a claim to a clear standard of fundamental rights protection as a condition for EU decisions’ viability within the German Legal order. In my view, a recently decided case by the European Court of Human Rights, shows the weaknesses of an opposite situation, in which not even indirect communication and learning are possible. In the *Lautsi*⁹³ case concerning the display of a crucifix, the ECHR has upheld the right to be free “from” religion, triggering Italian government dissent: apart from the main contrary argument raised for the judgment by Italy, that understates the meaning of the crucifix as a “cultural” symbol⁹⁴, the display in public edifices is, in that legal order, normatively unassisted. Beyond the sheer practice, one finds neither enacted Italian legislative choices in the last 60 years (indeed, never) nor an interpretive frame suggested by the Italian Constitutional Court (also in the light of the ECHR), thus, whichever stance, rooted in between traditions, constitution, normative provisions, fidelity to the EHR Convention, is

⁹² J. Habermas, *A Theory of Communicative Action*, vol. 1 (1987), 132

⁹³ ECHR, *Lautsi v. Italy*, no. 30814/06 (Sect. 2) (fr) – (3.11.09).

⁹⁴ It was an argument adopted with the decision of 13 febbraio 2006 by the Italian Consiglio di Stato, VI, n. 556, 2006.

objectively missing. And it cannot be claimed. No domestic attempt has been made either to normatively uphold, compensate such practice, or to shape, say, some other coherent version of domestic *laïcité*. Thus, the scope for implicit communication and confrontation of claims is to be considered, so far, rather empty.⁹⁵

However, mutual understanding, unlike the “hermeneutic model”, is a relatively open practice, to which the Rule of law provides a “negative” condition of equality, while it is unable to predetermine the merits.

One can also get beyond the Rule of law, on further “rules of engagement”, suggested as including the international legality, subsidiarity, procedural legitimacy and “outcome legitimacy”: this hypothesis⁹⁶ or similar further criteria can be certainly laid down through the s. c. trans-judicial dialogue, in the slow resort of courts, tribunals, and other types of judging authorities in the global sphere, to techniques of confrontation.

But the often recalled judicial communication, evidently, is not simply good will, it is the normative option addressing the factually overlapping tectonic plates. It is the reverse of the original sin of governance control, i.e. the eradication of relatedness and the “divide et impera”. Regimes are “already” related and sometimes managed so to take account of some relevant relations⁹⁷:

⁹⁵ This is the existing frame in Italy: after -and aside from- the 1859 Casati Legislation, assuming the crucifix in the schools as a consequence of the Statuto Albertino upholding of a State religion, and since Italy has a Constitution (1948), it is relevant the decision n. 203 1989, in which the Const. Court declares “il *principio supremo della laicità dello Stato*” a pillar of this legal order and an essential feature of the very “*form of the State*”. However, this is in the Italian context insufficient to understand its contents: which pattern of “laicità” do we get, for ex.: say, the US, the French, the Turkey mode? The subject including display of the Crucifix was regulated by two s.c. “Regii Decreti” (literally Decrees of the King): art.118 of the R.D. n.965, 1924 e art. 19 R. D. n. 1297, 1928. A part from their being one hundred years old, they were a sub-legislative source, and like in a surrealistic chain, despite their substantial hold on the issue, the Italian Constitutional Court, which is “only” the judge of laws, could dismiss the question about their coherence in the Constitutional frame (advanced by an administrative Tribunal Tar Veneto, Ord. n. 56/ 2004 and see C. Cost. Ord. n. 389, 2004). So, the only comprehensible claim, in the concurrence with Lautsi’s position, is the vague appeal to the “laicità dello Stato”.

⁹⁶ M. Kumm, “Constitutional Democracy Encounters International Law: Terms of Engagement”, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2007).

⁹⁷ M. Koskeniemi has written, for example: “A better place to start would, therefore, not be their separatedness but their connectedness, not their homogeneity but heterogeneity. Every regime like every State is always already connected with everything around it. We know this from practice. Environmental law may be best supported by market mechanisms through introducing pollution permissions. For the market to fulfil its promise, again, a huge amount of regulation is needed, not merely on conditions of exchange or the terms of ownership or banking. A market with no provision for social or environmental conditions will fail. Human rights may be best advanced by giving up strict human rights criteria and, for example, insisting on early accession of Turkey in the European Union. Critical lawyers have long rehearsed arguments about the porosity of the limit between public and private, political and legal, the national and the international. Extended to a world of multiple regimes and multiple modes of thought such arguments would highlight the contingency of the limits of individual regimes, their dependence on other regimes, and the politics of regime-definition. Here there is room for much ingenuity. A regime of trade may always be redescribed as a regime for human rights protection while any human rights regime is always also a regime for allocating resources.” (“Global Legal Pluralism: Multiple Regimes and multiple modes of thought”, *Harvard*, 5 March 2005).

nonetheless, the question, I believe, can be posed precisely in terms of protecting the *distinction* against increasing colonization or “homogeneization”.

In sum, in the real world of global governance one can find the *dominance of power and exclusion as the substantive state of affairs*. Rule of law contrasts the abusive elevation of the particular to the universal, and operates towards providing a formal right to make sound arguments legally equal. This has to do with dialogue as much as dissent (⁹⁸). Of course, one must know that the Rule of law cannot prevent material power from violation of, say, fundamental rights, but it can prevent this from being thought of as “legal”.

V. The inherent tension between justice and the good.

The indirect consequence of a Rule of law on the global dimension fosters a case by case work by constantly enlarging the view, toward balance, reconnecting the law to the whole, instead of legitimating one-sidedness. It indirectly generates a basic empirical constructive endeavor. Instead of the Olympic rationality⁹⁹ of a full scale global control of global law’s general ends, it can result in an *incremental* step by step reasoned conjunction of operating rationalities and normativities. Their stratification is simply mirroring our allegiance to different levels of needs and legal practices which do interact and overlap. Neither the *jus gentium*, as a cross cutting universal recurrence of successful legal institutions¹⁰⁰, nor the “*esprit*” law, as the law resulting from the idiosyncratic ethos of a situated community, nor the regulative normativity issued by global disembodied administrative and self referential entities, or the transnational *lex mercatoria*, are capable of overwriting each other, and their existence seems, on the contrary, only possible on the basis of a synergistic concurrence of different models of legality. The Rule of law operates on the relation between them.

This tension toward non domination and balance, that we borrow from the ancient history of the Rule of law, embodies some further reasons that are more related to the “equilibrium” between the right and the good, than to upholding a clear cut definition of the content of justice or of well being. In the words of John Rawls as in those of Immanuel Kant, for example, the two notions can be distinguished, and the idea of right has a priority over the contending conceptions of the good¹⁰¹. The

⁹⁸ Behind some normative support for “pluralism” one can find the support for dissent. Efforts were done in trying to build channels of convergence without hiding power conflict or dissent. See for ex. S.M. Feldman, “The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism”, in *The Georgetown Law Journal*, 81 (1993), 2243.

⁹⁹ H. A. Simon, *Reason in Human Affairs*, 1983.

¹⁰⁰ I use the term in the legal sense of contracts, marriage, death penalty, torts, and the like: in this sense for example the term is used by N. MacCormick and O. Weinberger, *An Institutional Theory of Law, An Institutional Theory of Law: New Approaches to Legal Positivism*, 1986

¹⁰¹ See for this, references in my “The Rule of Law as institutional ideal”, *supra* note 59.

“right” concerns the status of our social coexistence according to freedom, i.e. as free and equal individuals. In principle it should be preserved in any cases, against any conception of the common good that would undermine it. The “transcendental” view of rational law with Kant was construed as granting such conditions, regardless of particular realms of action and ethical convictions.

All the more so, in the global environment, where legal imperatives, generated at different levels, each appeal, ultimately, to an *internal* conception of the good, say, to domestic social welfare, to democratic self determination, to a religious faith, to the regulative necessities of free trade or to the protection of environment: each of them carrying a full load of ethical and political choices as to our well being. Needless to say, each of them potentially or actually interferes with one another (managing global environmental priorities does interfere with the choices of economic welfare of the addressees, for example). Thus, the Rule of law point is here to prevent the silencing of the opposite sources of validity and meaning. Should the law be turned to serving the ultimately unique “good”, this would certainly throw us into a one dimensional universe, where such a full monopolisation would have overcome any legal standing, albeit not any concern, for the “right”¹⁰².

There is at least a further sense in which this conception of the Rule of law as enhancing the side of “the right” can be valued. The most impressive shortcoming of globalisation is the impossibility of preventing interference: the latter, even unintended, can be arbitrary, and the first concern therefore to start with has to relate to avoiding injustice.

This is one intuition in the non conventional route to an incremental pursuit of justice suggested by Amartya Sen. Since rationality and objectivity can easily lead to a plurality of possible defensible ideas, a “critical scrutiny from the perspective of others must have a significant role in taking us beyond rationality into reasonable behavior in relation to other people”.¹⁰³ But doing this in relation to other people implies the notion of “responsibility” toward them, one that might *exceed* compliance with our immediate duties, with the rules to be followed, and our accountability for the task which we have been assigned.

Sen explains this point by returning to the ancient distinction (in Sanskrit) between justice as Niti and as Nyaya; and let them be incarnated by the warrior Arjuna and the master Krishna. In supporting the necessity of waging war, Krishna insists on doing “one’s duty irrespective of consequences”, despite the likelihood that this leads to death and carnage. As Oppenheimer later confessed, about his leading role in developing the XX century nuclear bomb, being accountable for the task of his scientific mission, the pursuit of technical success, were the only concern: without further arguing about “what to do about it” .¹⁰⁴ Sen does not advocate “simply” a consequentialist vision (against a deontological

¹⁰² Apparently, this is also a political problem. One can say that it is the contribution from the rule of law to prevent such political shortcoming.

¹⁰³ A. Sen, *The Idea of Justice*, 2009, 197 is here mainly supporting Scanlon’s theory, which “allows broadening of the collectivity of people whose interests are seen as relevant. They need not all be citizens of a particular sovereign state, as in the Rawlsian model” (ibid., 199).

¹⁰⁴ Citing Oppenheimer, *ibid*, 211.

one), focused on “culmination” results: in defending his view, i.e. a Nyaya conception of avoiding injustice, Arjuna is concerned with human beings’ lives, and equally with his action firstly towards people that are connected with him, and towards whom he bears, being their friends, relatives, or children, a distinctive “responsibility”. He invokes “outcomes in their comprehensive form” because he worries about “social realizations”¹⁰⁵. It is not a matter of consequential utilities, then, but it is about the overall consideration of inequalities, liberty or shortcomings that according to Sen would not be of ultimate importance for utilitarian ethics.

Avoiding injustice is not a “Niti” matter of behavioural correctness, but requires gathering the diverse sensitivities, construing impartiality by making the perspective of others heard, and dissolve one-sidedness.

Thus, returning to the Rule of law ideal, it is known how it is interpreted, often enough, as compliance with rules (a law of rules), predictability, certainty, accountability. Again, despite their priceless value, they are of insufficient import for inter-legalities confrontations, cross cutting the borders of different regimes, agents, constituencies, addressees. If the premise for this is the legal ideal of the Rule of law, in turn the premise for the Rule of law to be such a normative ideal is the equilibrium between the right and the good, and avoiding injustice from one-sidedness and domination. To this extent, behind it, as much as one can say, with Sen, that we are not envisaging any “perfect justice”, we are leaning toward Nyaya rather than Niti, and we are, in the background, aware that there are “wholes” beyond fragments, our operating standard can be a civilized accountability, while our regulative ideal is, all in all, responsibility.

¹⁰⁵ This belongs in Sen’s critique of utilitarian ethics, even updated to taking account of utilities, welfare and sum ranking, *ibid.*, 219.

APPENDIX

A RECONNAISSANCE: ABOUT LAW' S REALITIES, VOLUMES AND LAYERS

1. The “esprit” matrix.
2. Jus Gentium or the law common to all peoples.
3. The further reality of G.A.L.
4. Medievalism and what to learn from a “false friend”

1. **The “esprit” matrix** . According to President Montesquieu, power, commerce, laws and education, climate and territory, social conditions and religion, common sentiments are necessary to understand how any form of government works, its corruption, survival or flourishing. Montesquieu’s enquiry started from infinite experiences and observation of the lives of several countries. Governmental typologies are drawn on *qualitative* criteria (not the Aristotelian, divide). Every *polity* shows a “nature” and a “principle”: “There is this difference between the nature and principle of government, that the former is that by which it is constituted, the latter that by which it is made to act. One is its particular structure, and the other the human passions which set it in motion.” ¹⁰⁶ .

Law is made of the “relations” connecting diverse contextual vectors, the tension among concurring factors. In the reign of diversity, it both reflects and re-determines as a factor among others, a fabric of dependence and meaning, embedded in the “nature of things”¹⁰⁷; and the general “esprit des lois” takes shape as such a “whole” re-composing, a *rationale* that would be missed should outward factors be overlooked. ¹⁰⁸

Laws are hardly detachable from what they are supposed to regulate: accordingly,¹⁰⁹ “something is right not just because it is a law; but it must be a law because it is right”. Contrariwise, monarchic

¹⁰⁶ Ch. L. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, (Thomas Nugent, Cincinnati, R. Clarke & Co., 1873) vol. I , at 22. (The passions: Virtue is necessary in a republic, honour in monarchies, and fear in despotism. I cannot deal here with further classifications and issues (for instance, the relevance of the “object” as it was for England “liberty”, requiring a mixed structure, belonging to monarchy aristocracy and democracy. The separation of functions famously reflected upon by Madison’s n. 47 Federalist Papers, and his interpretation in terms of checks and balance, and so forth).

¹⁰⁷ Montesquieu, *The Spirit of Laws*, supra note 106, *Pref.* , at XXXII.

¹⁰⁸ This is suggested by E. Ehrlich, “Montesquieu and Sociological Jurisprudence” (1916) 26 *Harvard Law Review*, 582, at 589.

¹⁰⁹ Montesquieu, *Pensée* 460. I, 393 [1906]]

despots think of laws as *their own will*¹¹⁰. Political rule, on the other hand, belongs as part in a complex of factors.¹¹¹ Thus, while it would prove unlikely that law is mere sovereign “will”, it wouldn’t suffice either to say that natural law (or deterministic elements) governs of itself.

For the “imperativist” legal mindset of John Austin, if animals and natural phenomena have their “laws”, the latter have different meanings than laws concerning societies¹¹² which are not those “relations”. Contrariwise, Ehrlich,¹¹³ understands the social (and multifactorial) embeddedness of law in Montesquieu as standing neither within naturalist views, nor within command notions of law. And the importance of diversity in the recurrent Montesquieuan *caveats*: the same rules do not always have the same effect, or the same spirit, the same motives, and sometimes, they might actually be not the same at all.

Laws and “relations” have *depth*, and the geo territorial richness overwhelms indulgency to “similarities”. It is decidedly true that with Montesquieu, prejudices and political rule are sometimes more likely causes than “climate or culture”, that conquest and commerce *alter* those causes and promote change, that local diversities can coexist with wider or even universal legal systems¹¹⁴. This *horizontal* openness, however, unquestionably follows law’s *depth*, connotation before denotation: mapping the world is the ordering enterprise of those seeking what law is, how it works, what it does (and eventually why). The universality of the *ratios* can only be possible on the basis of the diversity of the factors. Finally, as recalled in the outset, laws themselves live close to that by which polities are “made to act”: a principle, which is virtue for popular governments (honor for monarchies, fear for despotism). And virtue is required in aristocracies as well (moderation), although only from the optimates. It is not a private sentiment, however, it is not a *moral* virtue, it is a political and an institutional attitude seen as a property of systemic coherence, an ingredient of a rather “objective” dynamic that is one thing with the functioning of the whole¹¹⁵.

I shall take this as the “esprit” format of law. It is often seen as a precedent to the later flourished cultural or linguistic views of law¹¹⁶, opposing the Enlightenment creed extending the universal codification model as far as the French army, and celebrating the “national” character of law.¹¹⁷ On the other hand, as with the comparativist Ewald, Montesquieu is said to be “contextualist”, failing to

¹¹⁰ *Ibid*, 670, I, 465

¹¹¹ The omnipotence of law as a commanding device is a chance that can become true, only under some conditions. Montesquieu considers “absolutely wrong” the principle of Hobbes that king’s authority when given by the people is *soluta*, and unconditioned.

¹¹² J. Austin, *The Province of Jurisprudence Determined* (CUP edition 1995) at 210.

¹¹³ Ehrlich was recognising Montesquieu as a precursor of legal sociology, as well as the various limits of his scientific work : see esp. Ehrlich, *supra* note 108, at 583, and 596-600.

¹¹⁴ R. Howse has recently advocated a more universalist Montesquieu in his *Montesquieu, on commerce, conquest, war and peace*, in Brooklin J. Int’l L., 31:3, 693.

¹¹⁵ In the *Avertissement* Montesquieu, *The Spirit of Laws*, *supra* note 106, at XXX, clarifies that he calls “virtue” in a republic the love for country, that as such is not a moral or Christian virtue.

¹¹⁶ One might recall for example Savigny and his Historical School, in the German tradition from Hegel to the idea of *Volkgeist*: the German BGB, private law code, took one more century (1900) after the Code Napoleon (1804), to be enacted.

¹¹⁷ That was until the second half of XX century, that instead was pursuing the opposite project of the “inherent unity of law”. R. Sacco, “Diversity and Uniformity in the Law”, 49 *AMJCL* 171, 171-2. A. Gambaro, “Western Legal Tradition”, in P. Newman(ed.), *The New Palgrave : A Dictionary of Economics and the Law* (1998)

go far enough to see the “internal” character of law, as a “mindset of thought”: the law beyond texts and action, that is law “in minds”, which can hardly be grasped from *outside*¹¹⁸.

Here, I rather take “esprit” as a more comprehensive matrix, where will and reason, outward ingredients of law, political and institutional passions no less, formal and material components, affect the “governance” of things and the place for law, in some understandable combination, leading to the “difference” of the “wholes”, despite many components being equal, and shedding a cautious light over quick tracing similarities and removing disagreements.¹¹⁹

2. Jus Gentium

Though it is successful, the format “esprit” might divert us from real possibilities. When first “decoupling” affects the static pair people/territory, “esprit” is challenged by de-contextualisation and “dynamic” phenomena of detachment of thought, language and practices from their territorial shelf¹²⁰. Roman *jus praetorium* developed so as to cope expediently with legal habits of non- “citizens” (*peregrini*) reaching Rome¹²¹. That was *jus gentium*: born out of a “political necessity”, less perfect than *Jus civile*, it assumed, for Maine, a dignified status through Stoicism and *aequitas*, being equated with the law of nature, common to mankind¹²². Law of reason *and* of nature, in the words of Cicero: “Est enim unum jus, quo devincta est hominum societas et quod lex constituit una. Quae lex est recta ratio imperandi atque prohibendi” (*De Legibus*, I, xv, 42).

Out of the ambiguous limbo, between reason, positivity, and nature, with Gaius it referred to laws present in diverse *societies*, because common to humanity (or *viceversa*)¹²³. Far later, Grotius clearly paralleled it with *jus civile commune* or “non scriptum”: “when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and

¹¹⁸ W. Ewald, “The Jurisprudential Approach to Comparative Law: A Field Guide to Rats” (1998) 46 *American J. Of Comp. Law*, 701, 2-3.

¹¹⁹ See P. Lagrande, *Fragments on Law as Culture*, W. E. J. Tjeenk Willink, Schoordijk Institute, Deventer, 1999, 10 ff. See also R. Cotterrell, “Comparative Law and Legal Culture”, in R. Zimmermann and M. Reimann (eds) *Oxford Handbook of Comparative Law*, 2008, 709-38. The alternate attitudes of scholars in comparative law and in legal sociology are typical, whether their explicative focus enhances invariable archetypes of law, the common denominators, or the “intangibles” which culturally support and distinguish a not transplantable legal language (like the good faith concept exported toward English law from the Continental Europe, by a EU directive, and transformed into something of unpredictable meaning). See G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law ends up in New Divergencies*, 1998 (61) “Modern Law Review”, 11.

¹²⁰ I refrain here from the further (but too simplistic) argument about the migratory fluxes of our centuries, or the de-nationalisation of contemporary societies.

¹²¹ Pomponius, *Digest*, 1,2, 1-47. See also, *infra*, G. Sherman, “Jus Gentium and International Law”, *The American Journal of International Law*, vol. 12, n. 1, jan 1918, 56-63; Genc Trnavci, “The Meaning and Scope of the Law of Nations in the Context of the Alien Tort Claims Act and International Law”, 26 *U. Pa. J. Int'l Econ. L.* (2005) 193, 199-222 and H. S. Maine, *Ancient Law* (1917 ed., Project Gutenberg 2007) 29 ff. 36 ff.

¹²² Maine writes: “Whenever a particular usage was seen to be practised by a large number of separate races in common it was set down as part of the Law common to all Nations, or Jus Gentium” (*Ancient Law*, *supra* note 121, at 29). Cfr. Also Sherman, “Jus Gentium and International Law”, *supra* n. 121.

¹²³ Such a meaning can be traced back to Gaius, *Institutiones* (I, 1): «Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur; nam quod quisque populus ipse sibi ius constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur». Cite as *Institutiones* : J. Inst. 1.2.1, at 80 (photo repr. 1997) (Th. Collett Sanders trans., London, John W. Parker & Son, 2d ed. 1859).

this cause ...must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature, the latter, to the law of nations".¹²⁴

The fullest strand of *Jus gentium* was later mainly referred to as underlying inter-states law, and also the transnational commercial intercourses. In both senses it was present also in the writings of Immanuel Kant¹²⁵.

Enough to map the general notion's enhancing rather than similarities, what is in "common", and is being repeatedly confirmed and chosen among peoples.

Contrariwise, the father of the positivist *law as will*, returned *jus gentium* to *nature*, universal "leges et mores" being other than positive law ("distinguished from those peculiar to a particular nation"). Law of nature indicates "dictates of utility" that "are always and everywhere the same", and "hardly admit of mistake": "there are legal or moral rules that are nearly or quite *universal*, and the expediency of which must be seen by merely *natural* reason, or by reason without the lights of extensive experience and observation"¹²⁶.

By assuming that *jus gentium* exposes "common answers to common problems" throughout various legal systems¹²⁷, Jeremy Waldron seems, like Austin, to emphasize the natural law or morality side: firstly stressing that a large diffusion (even if not majoritarian) should be accompanied with a moral (supplementary) soundness¹²⁸. Secondly, suggesting a "scientific" measure of reason: it is critical to assess, though, which "reason" is really invoked, as in the sense we learnt from Coke, or which among the distinct modes we learnt with Kant, and so forth¹²⁹. However, Waldron suggests that each country should look "abroad to see what scientific conclusions and strategies" have emerged: there is a repository of legal science that would be obtuse to ignore,¹³⁰ unless one thinks of law as "will" instead of "reason" (and thus in a "scientific spirit")¹³¹.

Jus gentium teaches about navigation between the two mythological monsters, Scylla and Charibdi. On the one hand, Austin also maintained the connection with universal morality and reason, without feeling the necessity to forfeit the idea that law, as an imperative, is very different. On the other side, if

¹²⁴ Grotius continues: <<The distinction between these kinds of law is not to be drawn from the testimonies themselves (for writers everywhere confuse the terms law of nature and law of nations), but from the character of the matter. For whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man (*The Law of War and Peace.*], (1646, trans. 1925 F. Kelsey ed., 23-24 [*Prolegomena*])).

¹²⁵ For example, I. Kant, "To the Perpetual Peace" [1795], in Id., *Perpetual Peace and Other Essays*, (Ted Humphrey trans. 1983) 107.

¹²⁶ J. Austin, *The Province of Jurisprudence Determined*, (CUP ed. 1995) 210. It is not displacing law, though: *Ibid.*, 151-2.

¹²⁷ J. Waldron, "Foreign law and the modern *jus gentium*", 119 *Harvard Law Review* 129, at 133: "But I shall use the Latin phrase "*ius gentium*" to refer to the law of nations in the more comprehensive sense--a body of law purporting to represent what various domestic legal systems share in the way of common answers to common problems".

¹²⁸ J. Waldron, "Ius Gentium: A Defense of Gentili's Equation of the Law of Nations and the Law of Nature", *Public Law and Legal Theory Research Papers Series*, WP n. 0834, Nov. 2008, at 9.

¹²⁹ One can think however of a knowledge in a non naturalist way, and this might be a possible interpretation.

¹³⁰ Waldron, "Foreign law", *supra* n. 127, at 144. Moreover, we should look at countries whose consensus we would share as epistemic authorities, and at the same time selecting their solutions on the basis of our sense of the "right", in a "reflective equilibrium".

¹³¹ Waldron, *ibid.*, at. 145.

law is reason (scientific) and not will, one risks the slippery ending of a “unitary system of law”. James Gordley had maintained himself that a domestic lawyer should not ignore what foreign lawyers say, no more “than a physicist should ignore a German or an Italian”¹³². Then, given the “scientific” character of law, he worked on the premise- and in the view- that there is *one legal system* precisely as there is only *one physical system*.

Indeed, *jus gentium* doesn’t lead us so far. Commonalities and diversities coexist, and law is partly reason, and partly not. *Jus gentium*’s pedigree simply provides for a format where “common” rests on a complementary rootedness of law: unless it is conflated with an all-encompassing “natural” scientific knowledge of a unique unitary system.

The complex relation between moral rightness and factual consensus is reflected in the internationalist use of *jus gentium* as categorically different from the “disposability” of the *jus inter gentes*. Verdross assumed *jus gentium* to convey general *cogentes* clauses disproving the legality of conventions contrary to them¹³³. *Jus gentium* as a legal counterpoise to *ius dispositivum*.

Thus, it becomes of value in different systems which it belongs to: it isn’t a system of its own, only a distinguishable domain. Going further, it can be produced through a reframing of known legal principles in the global arena, by trans-judicial work¹³⁴: this is, in fact, a definitely necessary and on going endeavor. Of course it hardly would make the entire content of a legal order. And why should: it?

3. The further reality of Global Administrative Law.

The two formats of law in the above belong to the world as we know it for centuries. Both of them are real world construct, and escape the “will or nature” alternative. Is anything left out?

The world is still inhabited by the stable law of our communities (and States), with recurrent general constants. It has not ceased either to develop *inter gentes* law. Often, the main customary or generally recognised principles are here also deemed to belong, in this sense, to all, as *jus gentium*.

Nonetheless, some other law has developed firstly as the “regulative layer” of international law. which progressively developed out of the known features. It also escapes the coordinates of “situated” system-related practices, and mirrors an unearthed template: its double move is narrowing the scope of law and extending its reach globally. In its whole, it neither fits the law of an overarching, controlling will, nor is normally described as essentially purporting to reflect the inspiration of natural principles.

For some it can be still included within a revised international law sphere, whence it has taken mostly its start. But the point is that it alters the distinction between “domestic and international law”, the legitimacy of the latter, and gradually undermines sovereign equality among states.¹³⁵

¹³² J. Gordley, “Is comparative law a distinct discipline?” 46 *Am. J. Of Comp. Law*, 607 (1998), at 611.

¹³³ See *supra*, note 14.

¹³⁴ Taking, for example, the principle of *subsidiarity* can have this sense, once one realizes its implications and the ways to adapt its results in a new environment. In the EC Treaty, the principle of subsidiarity reads in the Art. 5, as follows: “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Community”.

¹³⁵ See B. Kingsbury and N. Krisch “Introduction: Global Governance and Global Administrative Law in the International Legal Order”, in *EJIL* (2006), Vol. 17 No. 1, 1–13, at 1; and especially as to the challenge of “global” to international law, *ibid*, 10-13.

Even the law of UN hosted institutions (UNCHR, FAO, ILO, WHO, WIPO, etc.) or of further entities generated by global authorities of public nature, like the Codex Alimentarius Commission (by FAO and WHO), express substantively autonomous governance. And albeit born through traditional treaty-making, the most outstanding, the World Trade Organisation, is taken to exemplify “the pervasive shift of authority from domestic governments to global regulatory bodies”. Such a “shift of authority” also includes “transnational networks of domestic regulatory officials, private standard setting bodies, and hybrid public-private entities”¹³⁶. And what is equally relevant, such separate functional regimes address more often private actors rather than simply states¹³⁷: as with the international climate regime, regulations take effect “behind the national borders, within the national societies”, and the ultimate addressees in various fields of global regulatory institutions are consumers, companies, and societal actors.¹³⁸

The relevance of other “informal” entities of supranational nature like the Basel Committee (on Banking Supervision) or of the IAIS (the International Association of Insurance Supervisors) is undoubted. There is not only public entities: ISO or ICANN reach global actual effectiveness despite lacking formal public authorisation processes behind their birth. ISO, by standards affecting any kind of productions, also undermines the ultimate effectiveness of national authorities on the same issues, and achieves worldwide respect, having been adopted in WTO TBT (Technical Barriers to Trade Agreement). Given its general acceptance and viability it has lost de facto its voluntary character¹³⁹.

Given the more and more refined account of the different types of regulatory authorities, producing “non treaty law”, traditional state and interstate understanding “are inadequate to ensure that these diverse global regulatory decision makers are accountable and responsive to all of those who are affected by their decisions”.¹⁴⁰

The massive production of regulatory norms clearly transfers a considerable amount of power “to technical experts well-positioned in the specialised bodies administering those branches”¹⁴¹.

As Carl Schmitt wrote, the admonition to silence, once pronounced by jurists against theologians of the “just war” (Gentili: *silete teologi in munere alieno*), is now pronounced against jurists themselves, in order to keep them out of the realm of the superior necessity of technique¹⁴². For him, many indicia showed that the time had come for legality to be neutralized and reduced to silence by technocracy, silence being commanded by the “new objectivity of pure technique”.

¹³⁶ R. B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, IILJ Working Paper 2009/7, at 1.

¹³⁷ See the GAL manifesto, B. Kingsbury, N. Krisch and R.B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* 15 (2005). See also Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 33 N.Y.U. J. INT’L L. & POL. 663, 677 (2005)

¹³⁸ M. Zuern, *Global governance and Legitimacy Problems*, in *Global Governance and Public Accountability*, ed. by D. Held and M. Koenig-Archibugi, 2005, 144.

¹³⁹ An exhaustive analysis of ISO and of its legitimacy pillars, beyond traditional concepts of authority, is in Eran Shamir-Borer, *Legitimacy without authority: Explaining the Pre-Eminence of the ISO in Global Standardisation governance, A Global Administrative Approach*, J.S.D thesis, NYU School of Law 2009.

¹⁴⁰ As Stewart supra note 137, at 2, adds: “At the same time, we believe that the divisions and differences in regimes, interests and values are too wide and deep to support, at this point a constitutionalist paradigm for global governance”.

¹⁴¹ Martti Koskeniemi, “Global Governance and Public International Law”, 37 *Kritische Justiz* (2004) 241

¹⁴² C. Schmitt, *Ex Captivitate Salus* (§ 5, Italian ed.) 77.

The compensating effort has been to focus on and to harden measures of accountability¹⁴³. And GAL has elaborated on a model of normative requirements based on transparency, participation, reasoned decision and review. These affect “the accountability of global administrative bodies”,¹⁴⁴ and can be exemplified in various cases¹⁴⁵.

The conceptual grasp is of primary importance, beyond mapping the field. Kingsbury has framed a new Hartian positivistic understanding of law itself which includes, among criteria of recognition of validity, the requirements of “publicness” in law, that demand the satisfaction of principles of legality, rationality, proportionality, Rule of law, and respect for basic human rights. From these premises, a uniform rule of recognition can develop in the mutual relations among administrative bodies, which can strengthen mutual check, and the adoption of criteria of law borrowed from different legal orders, the international law general principles, or the administrative procedural law of more advanced experience like the EU Member States or the US.

As it is visible, the global administrative law is a legal reality of its own. It is not apt to become, thanks to the increase of inter orders functional connections, the general legal order to which all the others end up to belong, despite the transforming relations between public and private, international and domestic, state and non state law. Neither global development of a regulative-administrative law requires us to see, even to limited purposes, all its “agents” as functional units of a working “regime”, equally absorbed into its coherent “administrative” format, from States to supranational organizations, from the EU “autonomous legal order” (whose factual/normative trend toward a *suigeneris* “polity” are known) to ICANN (the global non state authority governing internet assignment of name and numbers), the Anti-doping (sport) agency. It operates instead on a “cross-sectional” level of regulatory/administrative legality, whose trajectories GAL projects to reveal, often being obscure to alleged constituencies, addressees, or “publics”.

In the view that emerges here, this *layer of law* develops by defining its own space, not by locating somewhere within the borders of a previous existing legal order; its peers are not other branches of law, as one might expect (like criminal law, private law, constitutional law as fields of a legal order). Its “space” is being structured increasingly. In a weak sense, it is itself the image order of an autonomous “administered” world. Its interlocutors are legal orders, like those of the States and of International Law, or of the European Union.

It qualifies for its own specificity, as a “format”, but not because it embraces the others. ISO or WTO have different nature of themselves and *vis à vis* traditional “governments” legalities: the former- not the latter- are created (only) to the objective of ruling on a global extension, in a fragment of human practice, and perform a peculiar jurisgenerative practice that locates nowhere in particular.

Evidently, this is not the case for law as “esprit”. It rather confirms the question that Robert Post described: those international legal institutions “are *sui generis*; they blend the procedures and

¹⁴³ See also S.Cassese, “Shrimp, Turtles and Procedures: ‘Global Standards for National Administrative Procedure’”, *Law & Contemporary Problems*, 68:3 (2005) 109.

¹⁴⁴ “in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make” (B. Kingsbury, “International Law as Inter-Public Law”, *supra* note 67, at 190)

¹⁴⁵ Kingsbury refers to the Shrimp Turtles case, when the WTO Appellate Body found USA banning decision arbitrary for failing to provide India with notice in advance and opportunity to contestation, that was due since USA Turtles policies were affecting a public other than its own (Kingsbury, “The Concept” *supra* note 15, at 37. See Cassese, *supra* note 144.

substantive premises of many different legal systems. They cannot be understood from the perspective of any single national tradition. They would thus appear to elude the forms of comparative analysis that have been a mainstay of American legal scholarship [...]. The new global legal order seems to subsist within an almost free floating melange of legal organizations [...] ¹⁴⁶. In a more refined stage of understanding, Kingsbury has written: "If a claim to 'law' is made in applying the label GAL (...), it is a claim that diverges from, and can be sharply in tension with the classical models of consent-based inter-state international law and most models of national law." ¹⁴⁷

On the other side, although it avails itself of legal principles borrowed from elsewhere, like international or national law, it would hardly reduce to the surface features of *jus gentium*. The latter always partakes in and completes differently rooted legal orders, as born within them or confirmed through them. The global administrative and regulative layer is not only a procedural set of shared modes of accountability, achieving standard of "publicness", it is seen also for *what* authorities *do*: an overwhelming amount of "substantive" provisions, their ultimate *raison d'être*. It exceeds any *jus gentium* extracted from other legal orders and targets objects not conceived in the discrete realms of lower level (of universality) systems, affecting potentially all.

If global administrative law, despite interconnecting agents and orders at different layers, is a further legality far from cancelling the others, the global stage ends up to resembling a multilevel setting of disseminated legalities (i.e. of at least potentially circumscribable clusters of legal normativity, already possessing or on the way to define also internal criteria of validity).

4. Medievalism: what to learn from a false friend.

It was maintained by Hedley Bull ¹⁴⁸ that the multiple horizons drawn by separate States reproduce a *medieval* structure of a number of discrete worlds. The "similitudo" many times recalled, is morphologically helpful, but sometimes misleading. Its use as a template to explain the European legal order developed out of several decades of integration, leads to underestimating the "unification" process as an intentional, consensual and value-laden effort. The apparent multileveled European legality would be misunderstood by ignoring the fact that an "autonomous legal order" ¹⁴⁹ extended to a fully delimited territory developed and that it is coupled with a self renovating (albeit controversial) political discourse, that clearly separates the EU both from any other kind of goal oriented inter-state agreement and from any non territorial and functional supranational entity. But on the other hand, one would hardly think that an "integration" of legal orders is in place in the global stage.

The search for a unified paradigm in the global legal environment as a multiversum of legal regimes might turn out to be unsatisfactory, if not unilateral. Medievalism would not provide such general template, but helps reflecting with the closest thing to a not State-unified legal universe. A legal world that lasted one thousand years (after the decay of the Roman Empire) might at least prove to be an

¹⁴⁶ R. Post, "The Challenge of Globalization to American Public Law Scholarship", in *Theoretical Inquiries in Law*, (2001). 2:323, at 330

¹⁴⁷ See Kingsbury, "The Concept", supra note 15, at 26

¹⁴⁸ H. Bull, *The Anarchical Society* (Basingstoke, Palgrave) 1977, 254-65.

¹⁴⁹ See *Van Gend en Loos* (Case 26/62, N. V. Algemene Transport – en Expeditie Onderneming Van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1) and *Costa* (Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 1141) where the ECJ stated: "By contrast with ordinary international treaties the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply".

heuristic tool, for us to approach plurality of orders, particularism, localism, multilevel loyalties. The absence of an exclusive institution with full political control over the fate of a community is well known. Multiple societies, memberships, allegiances, belonging, normative orders with overlapping applicability, depend on the extent of the relevant circle taken into consideration: tellingly, this picture is said to reflect a multiversum "ordered by law". Law as *instrumentum regni* doesn't belong in the medieval institutions and mindset.¹⁵⁰ To the contrary, law simply connects with needs and aims emerging through social practices: Roman law, as much as the merchants law, do not concern monarchs, local sovereigns, princes, and cities- municipalities: their own law-production was mainly self referred, organizational, borders drawing (vis à vis the ecclesiastical power, for ex.) or meant to self describe power's prerogatives¹⁵¹: the relative "indifference" of the power to the bulk of the law production as a self driven societal practice caused the autonomy of the latter to increase.

Medieval law interweaves *iura propria* and *ius commune*, local law and the universalised law elaborated on for centuries by jurists, scientists, on the basis of the roman law and canon law, merchant law, and the like.¹⁵² The unifying substratum is "aequitas" ¹⁵³ "leges" are an authoritative recognition of a pre-existing "convenientia rerum", are justified by things in themselves.¹⁵⁴ Of course, the fragmented appearance of everything in its own right, not only relies on law as a stable resort, but on the very background presupposes the Augustinian and Thomistic pre defined universal order. Nothing is in itself unless it is part of a universe ordered in the shape of God. Within it, the prince pursues the common good¹⁵⁵.

Importantly, the many centuries generated the need for adaptation and change, re-interpretation of the past: this pivotal role was played by legal science¹⁵⁶. The relatively minor role of political power is paired with the prevailing of some "juridical civilisation". Reviving the *Corpus juris* of Justinian centuries after centuries, was done by crediting the undisputed authority of *sapientia juris*: the power of bridging universal principles and changing realities is termed by the word "interpretatio"¹⁵⁷ Science and interpretation, as in the words of Bartolo da Sassoferrato, bear the most of the weight of ordering

¹⁵⁰ P. Grossi, *L'ordine giuridico medievale*, 2000, 31.

¹⁵¹ Ibid., 50

¹⁵² Ibid., 54.

¹⁵³ Ibid., 177 and see esp. E. Cortese, *La norma giuridica. Spunti teorici nel diritto comune classico*, 1962, 295.

¹⁵⁴ Reicentrism here means the complex factual mixture of social meanings relevant to the legal assessment of the concrete situation: things in themselves, in other words, were logically prior to the *regula juris*, considered as a further distillation of concrete knowledges.

¹⁵⁵ Thomas, *Quaestiones*, 91, art. 1 e ff.; *Quaestiones*, 91 ff.).

¹⁵⁶ But it is not that simple. Thomas's magister, Alberto Magno, taught that lex is a composite production: since law has an autonomous status beyond political power, and is a constraint against the power holders, in the reality of common life it is depending on the cooperation of three actors, the people for whose welfare acceptance and observance (compliance) it is given; the legal scholar and master, the jurist, who writes it down and takes care of its technical appropriate form; the princeps whose authority and sanction is required as supporting it (Alberto Magno (XIII sec.) "De Bono", Tract. V, *De Justitia*, q. II- *De Legibus*; art. I- *quid sit lex*.)

¹⁵⁷ It was in fact meant the challenging endeavor dealing with an increasingly complex reality by a primarily creative activity, that neither the princes, uninterested in the everyday business of the societal intercourses, nor the often un- refined custom alone could bear and afford. . Interpretatio (see the Glossa Magna: i.e. the self understanding of the interpreter's activity: "interpretor, idest corrigo (...) Item verbun apertium esprimo (...) item arrogo (= ugualmente, aggiungo), item prorogo (estendo), sed econtra corrigo, idest addo" (Glossa al Corpus Juris, cfr. Grossi, *supra* note 151, at 165).

the world: from *aequitas* and through legal competence, the legal scientist finds an answer that he might (simply even ex post) trace back to the relevant "texts", i.e. those *Corpus iuris* passages that could better fit.¹⁵⁸ While there is no hierarchical rule and no *immanent* single order, things "hold" due to confidence in the *legal medium*, which allows for *open* relations: in given circumstances "spontaneous" law prevails over the alleged (and somewhat illusory) universality of higher orders, not endowed with absolute priorities.

While resisting any mirroring of the global contemporary structures of law, we learn about the contingent nature of the unifying instruments, like a world constitution or the modern State, as inherently necessary to "law." An entire legal civilization worked out complex forms of overlapping, and heterarchical legalities, in the lack of a modern will-based political culture; we see hints of law balancing power, both serving and constraining its reach onto societal autonomies. In this environment, the role of legal science was an interconnecting one, but by renouncing the hubris of non-context sensitive assessments, simply based on the instrumentalisation of legal (or scientific) technical formulas.

Of course, we live elsewhere, and so far as to find us uneasy (not just with medievalism but) with modernity. Needless to say, the latter shaped our legal mindsets, developed our further realms of law, like the public law of the State or international law, and categories, the universal reach of rationality, new struggles between will and reason. After Grotius's "*etiamsi daremus non esse Deum*", and Kantian separation of law from empirical reality, being orphans of any *deus ex machina* was the price of modernity.

¹⁵⁸ H. Kantorowicz, *La lotta per la scienza del diritto*, (Italian Ed. 1908), 93.