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January 2013

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Gianluigi Palombella

GLOBAL LEGISLATION AND ITS DISCONTENTS

Summary: *1. Premises and frames. 2. The recognition of legality. 3. The issues of legislation. 4. Legislating goods. 5 Law, administration and legitimacy. 6. The spectrum of legislation. 7. Responsibility v accountability. 8. Concluding remarks: 'legalities' and the legality of their relationship*.

1. Premises and frames

There is an inherent uneasiness in furthering the idea and prospect of "legislation" in the international and supranational environment, typically lacking a common central authority, endowed with final say and representative legitimation. But it is plain fact that norm production has been a massive and persistent reality, in a variety of forms and objectives as well as from a large number of sources.

The recurrent attempt at 'constitutionalising' the entire setting speaks for an ideal of ordering most times reminiscent of State- system's archetypes or at least points to the construction of reassuring borders: either by virtue of a hierarchical, Kelsenian structure of norm-delegations, or by enhancing fundamental values-principles, that should control rules' validity as a matter of 'material' coherence, that is, on a content-dependent basis.

However framed the solution, the issue about legislation is to be seen in the light of relatively recent international law transformations, building on the core of a general community interest as well as revolving around regulatory governance. While the trend from the 1948 new beginning has actually pointed to shape something close to a *super partes law*[1], on the other side the emergence of processes of international and supranational *governance,* characterised by administrative tasks, regulatory rule making[2], has become equally dominant on the scene. This last

[1] See the expression in A Cassese, *International Law,* II ed., OUP, Oxford 2005, p. 217 . It is connected with the prospect of a *community law*, even under the label of "humanity" as its focus. Cf. A. Cassese, *The Human Dimension of international law* (2008). A. Peters, "Humanity as the A and Ω of Sovereignty", *EJIL* (2009), Vol. 20 No. 3, 513. See the early opening by R. Teitel, "Humanity's Law", 35 *Cornell International Law Journal* (2002) 355. Cf. also B Simma and AL Paulus, 'The "International Community": Facing the Challenge of Globalization' (1998) 9 Eur J Intl L 266.

[2] See J. H.H. Weiler, "The Geology of International Law. Governance, Democracy and Legitimacy", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 547; on the global administrative law (GAL) see B. Kingsbury, N. Krisch and R. B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemporary Problems 15 (2005); S. Cassese, *Administrative Law*

occurrence appears like a kind naturalised machine running of itself, and its outcomes show an overwhelming intrusiveness shaping the realm of global intercourses.

It is mainly the latter transformation to trigger theoretical attempts at reconceiving the scope and rationale of legislation, especially under the label of a global administrative law: invoked at the same time as a reality and a project itself, centred upon the aspiration to grant *accountability* of a plethora of dispersed global deciders through procedural provisions, intended to foster transparency, revisability, reason giving, hearing of the interested parties and so forth.[3] In the project vein, that is tantamount to *taming massive substantive rule-making power through further (independent) rule-making*. It is the latter that is seen to both legitimise and grant some legislative quality to the former.

Eventually, the reframing of a new dimension of "global" legislation is at times seen as a new *constitutional adventure*[4], recomposing disparate changes, sources-authorities, rules, structures, under some common criteria. There is quite an oscillation over the meanings and import of naming such an endeavour in constitutional terms: a potential candidate is a weak form of constitutionalism[5], that revolves around principles widely

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Without the State? The Challenge of Global Regulation, 37 *New York University Journal of International Law and Politics* 663 (2005); S. Cassese, et al. (eds), *Global Administrative Law: Cases, Materials, Issues,* third edition, (IRPA-IIJL), Rome and New York, Creative Commons, 2012.

[3] For ex. see S. Chesterman, "Globalisation rules: Accountability, Power and the prospects for Global Administrative Law" (2008), 14, *Global Governance* 39; A. D. Mitchell and J. Farnik, "Global Administrative Law: Can it bring Global Governance to account?" (2009) 37 *Federal Law Review* 237.

[4] For some of these prospects, see the chapters by Ulrich K. Preuss, "Disconnecting Constitutions from Statehood" or by M. Kumm, "The Best of Times and the Worst of Times", and N. Walker, "Beyond the Holistic Constitution?" in P. Dobner and M. Loughlin eds, *The Twilight of Constitutionalism,* OUP, Oxford 2010. Critical stances are taken by M. Loughlin, "What is Constitutionalisation?" and by D. Grimm, "The Achievement of Constitutionalism and its Prospects in a Changed World", *Ibid*. And see also D. Grimm, "The Constitution in the Process of Denationalizaton" (2005) 12 *Constellation*s 447-463.

[5] To this regard it is normally evoked the traditional 'document based' constitutionalism *versus* the image of constitutionalism as a shared set of values, and likewise the option between a "big C" and a "small-c" constitutionalism. For them in the context of the supranational setting, and in particular of the European Union, cf. N Walker, 'Big "C" or small "c"?' (2006) 12 *European Law Journal*, 12-14. See also Cormac Mac Amhlaigh "The European Union's constitutional mosaic: big 'c' or small 'c', is that the question?" in Neil Walker, Jo Shaw, Stephen Tierney, eds, *Europe's Constitutional Mosaic,* Hart, Oxford 2011. For some references and uses of these alternatives in the American bibliography see for example Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations,* Cambridge CUP 1998 (in particular ch. 3, by

accepted, from due process to reasonableness, from hearing to reasons giving, from subsidiarity to proportionality, and respect for human rights. Constitutionalisation is often hoped for as compensation for the fading of States' constitutional control over global intercourses[6]. But these or other principles in larger or thinner list tend to be invoked however also outside constitutional thinking, as necessary for the very *legality* of global *rule making*[7]. The importance of law as a requisite-dependent notion, is seen to both qualify and constrain entities as law-makers- be they of private, public or hybrid nature.

At any rate, the quest for *legality (and 'legislation')* has to respond to important questions itself, starting from the existing state of the art: the absence of global government and power's organisation, the issue of the mediation between rule-giving and the political sources of public autonomy, the need for new criteria shaping the relation between constituencies and decision making. In the absence of a central *Grundnorm,* on the forefront of the question about 'legislation' are decentralised entities-institutions developing their regulatory nature, whether the Security Council or the World Trade Organisation, the Codex Alimentarius Commission or the ICANN, the Convention for the Law of the Sea, and so forth. Although it should be said that they take care of the *community* interest on a *global* scale, paradoxically they would do so by pursuing their separate and segmented rationalities. They are seen to forge a global stage, beyond the inter-national one, and they appear to be coordinative, 'universal' players, whose borders are not defined by territoriality but through thematic, issue-specific, that is, functional limits.

If one takes this perspective, the wider notion of 'global' law surfaces, one that re-conceives and enlarges the inter-States processes focused upon by more traditional international law.[8]

2. The recognition of legality

Michael J. Perry, "What Is 'the Constitution'? (and other fundamental questions)".

[6] Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" (2006) 19 *Leiden Journal of International Law* 579-610.

[7] Tellingly, R. Stewart and M. Ratton Sanchez Badin, "The World Trade Organisation and Global Administrative Law, *IILJ Working Paper,* 2009/7, write 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"; nonetheless "[C]urrent conditions however, are compatible with and indeed call for development of a global administrative law, which can be applied to particular global regulatory bodies, and their relations with domestic administrations to enhance regulatory governance without positing an encompassing global legal order" (p. 2).

[8] Nico Krisch & Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 *European Journal of International Law* 1-13.

As a consequence, the legislating capacity developed in global governance, including a non-Treaty law mode, is hardly recognised as included in some other pre-existing "system". Thus, questions do not arise as to its sheer validity, but more radically about its basic legality. From this angle, it should suggest a wider notion of legality that neither international law nor national law encompasses.

According to the answer that Benedict Kingsbury has proposed, the notion of law can be restated as one requiring a practised rule of recognition (concerning sources), plus further criteria of 'publicness' that have to be met. 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, which embody the general legality principle, rationality, proportionality, the Rule of law and respect for basic human rights.[9] The reasoning partakes both of a principle-based acknowledgment of law as such and of a source-based delimitation of it. As a matter of fact, and unsurprisingly, the view from global administrative law theory ends up proffering this definition not only as an answer to the question about *legality*, but also as one drawing the border of a legal *order in itinere:* that is, shaped incrementally in so far as common criteria of recognition are progressively shared and practiced by judicial authorities and other institutional actors. Such a legality is thus seen since the start as more than a loose set of rules[10]. The dual, descriptive and normative, stances of the discourse, are inherent to a state of affairs that is ever evolving.

Addressing similar concern, Jan Klabbers has enriched the picture of law, himself selecting the conditions of legality in order to make sense of the complexities and thickness that the notion has reached in the extra-state transformations.

Thus, even if, as we can agree upon, a generalised conviction that some norm is law (a socio-legal criterion) is considered in itself a decisive threshold of legality[11], effectiveness must be integrated with the authentication of *procedural* requirements enunciated by Lon Fuller[12], a guarantee of legality in its very nature, that does not depend on sheer attitudes and behaviour of the people. Thirdly, being

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9 B. Kingsbury, " The Concept of ' Law ' in Global Administrative Law", in *EJIL* (2009), Vol. 20 No. 1 , 23, esp pp. 31 ff. Moreover, "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."Ibid. at p. 56.

10 See this expression for example in H.L.A Hart, *The Concept of Law*, II ed. 1994, p. 233.

[11] See to the contrary R. Cotterell, "Transnational Community and the Concept of Law", in *Ratio Juris*, 21, 1, 2008, pp. 1-18. Cotterell disagrees on the idea that legality is simply reduced to a matter of social belief.

[12] L. Fuller, *The Morality of Law*, Revised ed, Yale University Press, New Haven1969, pp. 33-38.

law different from morality, it is relevant that it is posited by a legitimate *authority*. Here the Hartian- Razian conundrum resurfaces, and the question of *sources* is raised: but for an authority's rule-making recognition, evidence of an even indirect consent is recommended, one that can be somehow traced back to the participants, or the affected, the interested people, registered in some participatory mode, either through States themselves or outside their representative channels.

Each of these three different paths have been otherwise claimed as self sufficient, epistemically ultimate, and mutually exclusive. Klabbers does not concede much to such a self understanding of the respective underlying legal theories: they function though even separately - as I would grasp the argument- like a ground from which to invert the burden of proof: they cast a *presumption* of legality on issued norms. Thus, "a Security Council resolution should be presumed to be binding; any agreement between states, whether given the name 'treaty', 'convention' or anything else, should be presumed to be binding between them; standards adopted by the ISO should be presumed to be law; decisions of the G7 or G8 are presumed to create law; the *lex mercatoria* is presumed to be law; even resolutions of the General Assembly are presumed to be law".[13]

What Klabbers calls *presumptive legality*, means that different parameters of legality truly work if they can actually concur or converge. In fact, when such a largely eclectic assessment of legality is to be made, the outcome would depend on the *resistance* of a *presumption o*f legality *vis à vis* a potential rebuttal, whose bases perhaps are ultimately the good reasons that can be found from the perspective of the countervailing approaches[14]. Or at least so I would take the point.

The focus on legality and on those paths to its identification that transcend the States' legal order is unsurprisingly resolving (or conflating) two questions into one: the requirements of *legality* are implicitly and at the same time requirements of *validity* of a normative utterance. But validity, that cannot be predicated of a system in its entirety, *presupposes the borders of one order* and refers to a 'candidate' norm, in relation to it. In turn, as to the nature of legality, the criteria of identification, so to speak, must be necessarily typological, and relatively abstract: legality may be made

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[13] J. Klabbers, "Law-making and Constitutionalism", in J. Klabbers A. Peters and G. Ulfstein, *The Constitutionalisation of International Law*, OUP, Oxford 2009, pp. 115-6

[14] If it were not properly so, then we would need an autonomous theory of the grounds of rebuttals. Klabbers suggests however contents, context, origins, procedure, topic (from the recognisability of the issuing authority to its connection to the addressees, from respect for procedural Fullerian requisites to the nature of contents etc.), cf. Klabbers, ibid., pp. 116-21. As I think, the list of exemplifications might be considered to be relatively open.

to depend on social sources claiming legitimate authority, or on requisites of justice, and the like. The more the contents of one rule of recognition ('what the Queen enacts is law', 'what the Security Council decides is law') get concretely determined, the more such determination holds --not as a parameter of legality, of whatever norm in whichever realm but- as a parameter of validity (that is, within a certain predefined order). Now, we have seen in the above recalled theoretical proposals that identification of *legality* is updated so to orient us toward enlarging our received view on the requisites of *validity:* ISO standards can be presumed to be law (purpose for which the general notion of legality has been aptly adjusted): they are considered at the same time to be *valid* law within an international or global (administrative) *legal order*. But the latter inasmuch as it opens the door to formal and informal, public and private, State and non State norms, is far from being 'ordered', like a system, hosts no hierarchies, not yet a unitary rule of recognition or a *Grundnorm.*

The point has invariably to do with a new international/global legal order which in its either constitutional or publicness- focused (Kingsbury) forms, as I think, can be described as itself *in progress*, thus resulting from the dual descriptive-interpretive efforts of theorists, legal experts, judges. Not only as regards *normative utterances*, to be presumed law, the vocabulary of presumption has to be extended to a *legal order*[15]*,* thus, itself *presumptive.*

Much in the endeavor enlarging the requisites of legality beyond those recognizable within the State- based legal theory, includes an implicit relaxing of the cultural, or logical, presupposition, according to which making sense of law is tantamount to making sense of it as a "system". And most attempts to "constitutionalise" the global law, try and compensate for the uninvited system's obsolescence.

Yet, questions like those concerning transnational rule of law and justice, the plurality of regulatory regimes, the segmentation of international law, the emergence of non State rule makers on a massive scale, interdependence among legal orders could not be[16] reflected upon in the lessons of the most illuminating and influential legal theorists of the last century, like Kelsen, or Hart. Speaking about legislation meant to refer to the *strictly related unity* of law: whether reducing the law to the State or *vice versa*, the concept of law is essentially connected with the "hardware" notion of "a system"[17].

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[15] I have exposed the hypothesis of a global law as a specific layer or a kind of incremental legal order as a consequence of the Global administrative law premises, in my *The Rule of Law in Global Governance: Its normative construction, function and import*, The Straus Institute for the Advanced Study of Law and Justice, 2010/5 .

[16] A similar point is made by William Twining, *Schauer on Hart*, 119 *Harvard Law Review Forum*, 119: 122 (2006).

[17] Truly, the argument went, "the compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of th[at] centralizing will (...) a true and proper subject (...) the

Although dogmas have been abandoned, still [18] the connection with the *hard structure* of a "system" shows some resistance in association with law, and after all both in Kelsenian and Hartian representations it marks at least the passage from primitive to mature law. It allows for identity and stability, for more or less functional relations among norms, for the unending effort of border drawing.

What characterizes the building of global legislation is that the virtuous circle between *legality* and *validity* is interrupted, until the frame of something like a global legal order is clearly defined and, more importantly, practiced. Somehow, the former gets an autonomous life. The legal software –global legislation- flourishes on the lack of its *hardware*, a structured machine that once upon a time it was intended to serve and make to work.

As it has been repeatedly recognized, such a legal *software*, that thrives on a missing design, is increasing, differentiating and perfecting itself around the kernel of many distinctive rationalities; it flourishes in multi-centered spaces, and enables to perform, in diverse "windows", highly complex regulations, assessments and dispute resolutions, from trade to environment, from the law of the sea to internet domains, from labor to telecommunications, energy, human rights, security.

In coping with these coupled phenomena, that is, system fading and regulatory proliferation, we are thus witnessing *software* self expansion at the expense of some final *hardware* capability, or at least we have to realize once more that it is now *the former to determine the latter*: we cannot proceed from the available hardware (state-system structure) to the permissible software (law & rules) as it was in XIX and XX century legal positivism. We have to run after the available software instead, come to terms with it, as a matter of legality (precisely what has been discussed above), and then try to conceive, maybe, of some suited, ever changing, and so far 'presumptive' or 'pluralist' frame.

In such a state of affairs, through diverse avenues (the idea of 'publicness'[19], the ideal of the 'rule of law'[20], the architecture

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State". It follows that juridical relations however created by individuals' transactions or groups' agreements are still dependent of the State's will, one granting for itself that "exclusiveness rendered necessary in order to assure the unity of the system" (Giorgio del Vecchio, "On the Statuality of Law", *Journal of Comparative Legislation and International Law,* Third Series, Vol. 19, No. 1 (1937), pp. 1-20, at p. 8 and p. 9.

[18] For this consideration, I am drawing on my "Global Threads: The Rule of Law and the Balance of Legal Software", in G. Martinico, F. Fontanelli, P. Carrozza (eds.), *Shaping the Rule of Law through Dialogue*, Europa Law Publisher, Leiden 2009.

[19] B. Kingsbury, "International Law as Inter-Public Law" in *NOMOS XLIX: Moral Universalism and Pluralism* (Henry R. Richardson and Melissa S. Williams, eds., New York University Press, 2009)

of common 'principles'[21]) legality is re-launched because of its constitutive function[22], as I would suggest[23], *vis à vis* a state of nature, *ie* a state of affairs merely devoid of legality and thus, in a Kantian vein, of the very, transcendental possibility of justice[24].

Whereas the "system" might be out of sight, the *rule of law* might increase its relevance and role, up to becoming the closest thing to a post- "Babel" legal understanding[25].

3. The issues of legislation

Once arrived at the more comprehensive recognition of legality in the wider global setting, despite the appealing implication of a common code or shared pre-understanding of law, nonetheless new questions are ahead, that inhere in the nature of such a 'legislation', its features and circumstances, and possibly its discontents. The background question is how can the couple law & legislation respond to the uneasiness generated by its very redefinition in the 'new' environment.

In the arena enlightened by the Global administrative law focus on self-observing regimes[26], the mode surfaces of a kind of

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[20] This is the path I have tried to articulate in my "The Rule of Law as an Institutional Ideal", in L. Morlino, G. Palombella (eds.), *Rule of Law and Democracy. Internal and external issues,* Brill, Leiden 2010, ch. I.

[21] For ex. Armin von Bogdandy, "General Principles of International Public Authority: Sketching a Research Field", 9 *German Law Journal,* 2008, pp. 1909-1938, *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1048.

[22] Significantly, Jan Klabbers writes: " if the label 'constitutional' is to have any meaning beyond the rhetorical, it stands for placing a premium on law, over power, but also over other normative orders" (Klabbers, cit., *ibid.*, p. 124). For a development of this function of law, in turn connected to its inherent public nature, I have treated the issue at length in my "The (re-) Constitution of the Public", in C. MacAmlaigh, C. Michelon, N. Walker, *After Public Law?* OUP, Oxford 2013.

[23] Palombella, *Ibid*.

[24] For Kant law must be resorted to conceptually in order to avoid the ("state of nature") condition in which the abuse of personal liberty and external possession is *unobjectionable.* Albeit the state of nature need not be unjust, it is devoid of justice: so that men "do one another no wrong when they feud among themselves"(I. Kant, "Metaphysical First Principles of the Doctrine of Right", in *The Metaphysics of Morals*, [1797] Mary Gregor trans., Cambridge, Cambridge Univ. Press, 1996 (repr. 2003) 33, § 42, p. 86.

[25] The metaphor became 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

[26]See also A. Fischer-Lescano and G. Teubner, "Regime Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law", *Michigan Journal of International Law*, Vol. 25 (2004), pp. 999-1046; A.

managerialism[27], whose administrative and efficiency-driven imperatives become self-serving, missing a vital root-connection with political determinants in ordinary social life, or with some coherent vision of the well-being of the 'community'[28]. Kingsbury has written that the "real question might be whether it is possible to identify a determinate public at all"[29], and thus, if the law speaks "in the name of the whole society", here it is often unpredictable "how far the whole society extends"[30].

A few aspects and discontents that I shall choose to stress here are not among those than can be reframed just by 'readjusting' our criteria of legality. It is not that type of matter easily faced through definitional revision, as suggested in the following: "if international law does not fit the criteria of the concept of law used at the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory"[31]. It is the very structure of the wider and restated legality – beyond both state and more traditional international law- that detaches not only from state-based criteria (that is in itself rather obvious) but also from the sense, function and scope of legislation as we know it.

4. Legislating goods

A peculiar trait that spreads throughout governance style 'legislation', albeit not detracting from the above, concerns the ready-made appearance of fixed goals (whether entrusted to global regimes, regional authorities, or supranational organisations), that are dictated as objectives and targets for lower levels of rule-making and politically elected governments. This does not hold just for World Bank prescriptions concerning, say, requisites for the Rule of law, or conditionality for access/ partnership of candidate countries in the European Union, and can extend to fiscal and economic measures

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Paulus, "Commentary to Andreas Fischer-Lescano & Gunther Teubner: The Legitimacy of International Law and the Role of the State", *Michigan Journal of International Law*, Vol. 25 (2004), pp. 1047-1105.

[27] On *managerialism* (and on instrumentalism) Martti Koskenniemi focuses in many places of his book *The Politics of International Law*, Hart Publishers, Oxford, 2011. But see esp. chps 13 and 14.

[28] Of course almost any theorisation of the global law registers this point, and responds somehow to it: the main channel is the enhancement of accountabilty devices that should rebuild some communicative line between interested parties and decision makers.

[29] B. Kingsbury, "From bilateralism to publicness in International Law", in *Essays in Honour of Bruno Simma*, (U. Fastenrath, R. Geiger, D. –E. Khan, A. Paulus, S. von Schorlemer & Christoph Vedder, eds.), Oxford University Press, Oxford 2011 p. 85.

[30] Kingsbury, *ibid.*, refers to the ban on shrimps, affecting India without previous communication, and to all WTO decisions that intrude into an unpredictable number of states, peoples, groups, and interests.

[31] S. Besson and J. Tasioulas, "Introduction", to *The philosophy of international law* (Besson and Tasioulas, eds.) , Oxford, OUP, 2011, p. 8.

that dramatically reduce self-determination or reallocate social priorities in a country. Along these lines, the distinctive feature of legislation here is not best caught by the much celebrated characters of 'soft law', but through what inclines toward a self reproductive paternalism of the 'good goals'.

That translates into a 'legislative governance' style: norm making is exposed into end-setting, standards and benchmarks. Accordingly, indicators[32] surface as the core of normative enterprise. As it is known starting from the European experience, this governance develops by defining *goods*, rather than envisioning a politically elaborated notion of the *good*. In the European scene, that stems mainly from the Commission's hard work in furthering European Union necessities and effectiveness in the intermittent presence/absence of political will: thus mirroring precisely what is often complained about, that is, the permanent shift of the EU from *politics* to *policies*. In what the EU, despite its unparalleled peculiarities, can represent an advanced template of an increasingly global style, politics is replaced by creating 'levels of criticism', the practice of analyzing and solving concrete problems, involving those 'interested' (or pre- chosen as those interested), experts, fragments of peripheral public administrations, etc. When what is "an informed consumer choice" like has been defined, as well as, say, a healthier style of life, the selection of *means* is free for institutional actors required to take measures pursuing established policies[33]. It has been aptly said that this is a European *Eudaimonia*, one that relies on a Durkheimian organic, not mechanical, solidarity[34]: the model of equilibrium of *inter*dependence, the division of labor among mutually functional parts.[35]

If we take this *Eudaimonia* seriously, it is then *legislation by goals* that surfaces as its norms-building arm. But it is hard to discover which sovereign dictates or underpins this administrative drive. From the point of view of institutional subsequent actors, like national legal orders, governments and addressees, this generates a chain of double-edged consequences: empowerment, of further rule giving, as well as limitation and disempowerment *vis à vis* frameworks & goals largely presupposed. Policy making

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[32] Lastly, K. E. Davis, B. Kingsbury, S. Engle Merry, "Indicators as a Technology of Global Governance" in *Law & Society Review*, Vol. 46, no. 1, pp. 71–104, March 2012).

[33] It generates self corrective, revisable standards and objectives that internalize criticisms and failures within recurrent assessments and evaluative procedures. It also purports to manage the anxiety arising from uncertain risk regulations: a claim that is founded "partly on the authority of expertise" but also on the limits of scientific knowledge: D. Chalmers, 'Gauging the Cumbersomeness of EUI Law', LSE WP 2/2009, p. 31.

[34] Chalmers, *ibidem,* p. 18 ff.

[35] Chalmers stresses rightly this point as connected to EU governance, *ibidem,* p. 19.

without politics[36] as well as governance without government are flags of the new legislation, and despite the many narratives evoking mutual learning, the deliberative, participatory, revisable nature of this experimental new world[37], I am inclined to agree that even "participation within the governance-paradigm is no sufficient guarantee against the tyranny of goals"[38]. The emphasis upon construction of consensus on "substantive values and aims" often recognizes the centrality of the point, but significantly "it is assumed that if the right information is provided and if the right context is created for ongoing discussion, consensus on goals and values may gradually emerge" [39]. Likewise proportionality, subsidiarity, transparency and accountability work only on a predefined spectrum of granted ends, that in the global setting rests on the discrete field related regimes. The latter are hopefully committed to reasonableness, investigation, discussion, but within the self referential ambit "devoted to a specific goal or aim"[40].

If we may add a further presumption, beyond those regarding the legality of normative utterances, and as I suggested, the existence of a further legal order, we may turn to goals: as it seems, goals are themselves largely presumed (and taken for granted).

5 Law, administration and legitimacy

5.1 The core 'good goals' of UNCLOS, ECHR, WTO, UN Security Council, are hardly objectionable and factually are not open to contestation, despite the appearance of these and many similar authorities as devoid of location, and in themselves so far from life worlds as to be politically deracinated.

Somehow since the start, it has been clear that global legislation thrives on blurring the line that States, in the XIX century experience (let us think of the development of the 'administrative state' and works like that of Otto Mayer[41]), had drawn between (political) legislation and (technically discretionary) 'administration'. First, while administration rests within the State in some means-related implementing function, in the global arena it is instead

[36] Of course I am not endorsing some mythical apolitical nature of policy choices. I am pointing instead to the elusivity of such choices from the point of view of the organised representation of the political communities.

[37] See Ch. Sabel and J. Zeitlin, "Learning from Difference: The New Architecture of *Experimentalist* Governance in the EU", *European Law Journal*, vol.14, no. 3, May 2008.

[38] Pauline Westerman, "Governing by goals. Governance as a Legal Style", in *Legisprudence*, 1, 51, 2007, p. 68.

[39] P. Westerman, cit, p. 60

[40] Truly, "health care organizations might still struggle between competing interests (…) but they are not fighting over the priority of hospitals versus the standing army or of a clean environment versus the national symphonic orchestra" *Ibidem*, p 62

[41] *Deutsches Verwaltungsrecht*, 2 Bände, 3. Aufl., 1924.

political legislation (for example from the States) that has to yield to the requests and conditions of global administration, now raised to an independent or self authorised level. Second, jurisgenerative authorities at the global level can hardly speak for a compact political community, but ironically they expose their *raison d'etre* as unencumbered with sheer particularism or localisms; they can resort to principles of impartial administration that displace the 'political question' from the global management of power.

Although constitutionalisation and the search of consent on common general principles[42] of a global legislation might be seen as a road to recast the equilibrium between administration and politics, it works with no less success in removing decision making from the reviled quicksand of the political arenas[43].

5. 2. The increasing desire for a more stable ethical floor on which the action of a wide range of international organisations has to rest, is not only highly respectable in itself, but points to better support the *acceptability* of power exercise, be it of public or private origin[44]. Yet, the issue of legitimacy inevitably resurfaces through

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[42] On such a problem, see Carol Harlow, "Global Administrative Law: The Quest for Principles and Values", *Eur J Int Law* (February 2006) 17 (1): 187-214.

[43] This has been- for example- a watermark in Majone's construction of the regulatory Europe. Cf. for instance G. Majone, "Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach." J*ournal of Institutional and Theoretical Economics,* 2001, 157:57-78. See also G. Miller, "Above Politics: Credible Commitment and Efficiency in the Design of Public Agencies." *Journal of Public Administration Research and Theory,* 2000, 10:289-328. In the same sense one can read the theoretical imposition of requirements of publicness to the function of legality beyond the States, in the proposal drafted by Kingsbury, that has been dubbed as privatization of the 'public' (rather than viceversa). (Ming–Sung Kuo, "Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism", in 44 *N.Y.U. J. Int'l L. & Pol. 55* (2011). In truth, the ambiguities of the theoretical schemes are nonetheless inevitable in a global space that cannot be governed, described, controlled either in theory or in practice through some unequivocal scientificity. It is as well telling, as it was written in a different context, more than a decade ago, that an entire array of legal institutions working on this mode shall possibly translate politics into the "politics of procedure, a struggle for the power to define, for jurisdiction: the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to make the weighing" (M. Koskenniemi, 'The Effects of Rights on Political Culture' in P. Alston (ed.), *The European Union and Human Rights,* OUP, Oxford 1999, p 114).

[44]P. Muchlinski, 'International Business Regulation: An Ethical Discourse in the Making?' in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations*, Kluwer, Leiden 2004, p. 99

new peculiarities. Our received views in conjunction to law, have been modelled on a State perspective, and in two moves: the first is centred upon legality, the second on substantive consensus. The former is based on the inherent service of formal rationality that law provides by channelling the exercise of power as depicted in the analyses of Max Weber. The latter in turn conveys the importance of material soundness of legislation, the pursuit of shared substantive values. According to Weber, material judgment could have only weakened the legitimating strength of legal formality[45], undermining the grounds achieved by the modern state, dispersing its unity under law, and making its order prey to values' polytheism[46].

The significance of formality/ rationality of law had become the new reason why power is obeyed: however, it has been increasingly superseded or enriched by the experience of subsequent times, where the State needs to nurture as well the *belief* of its legitimacy by responding to material/normative claims. Now, it is true that legitimacy, as in the Weberian narrative, has nothing to do with truth. And likewise it turns to be true that ultimately, as Koskenniemi has noticed, "[L]egitimacy is not about normative substance. Its point is to avoid such substance but nonetheless to uphold a *semblance* of substance "[47]. And this objective is tantamount to accepting "Hobbes but sound like Grotius": this being the function of legitimacy, in such a context, that is, "to ensure a warm feeling in the audience"[48].

5.3. If something more ought to be included in the same picture, it is the price and costs of the global *Eudaimonia*, be it either a sheer production of the 'semblance of substance', or on a perspective, the top-down paternalism of the good. Such a global 'juridification' is often felt to revert into 'colonization', and the

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[45] Max Weber defined "formal rationality" as that which maintains an absolute indifference "towards all substantive postulates" (M. Weber, *Economy and Society*, edited by G. Roth and C. Wittich, vol. I, Berkeley 1978, p. 108); he identified the "formal" character of law in the modern State and understood the *material* rationality of law to be that rationality that takes rules derived from ethical aims or connected to utilitarian objectives into consideration, rather than legal principles (cf. ibidem, vol. II, pp. 656 ff.). I have dealt with this issue at greater length in my *Legittimità, legge e costituzione*, in "Sociologia del diritto", 2, 1993, pp. 123-70.

[46] According to Weber, in any case, it is a question "not only of alternatives between values but of an irreconcilable death-struggle, like that between 'God' and the 'Devil' " (M. Weber, "The Meaning of 'Ethical Neutrality' in Sociology and Economics", in Id., *On the Methodology of the Social Sciences*, translated and edited by E.A. Shils and H.A Finch, Glencoe 1949, p.17).

[47] Koskenniemi, *The Politics of International Law*, cit,. p. 322.

[48] Ibid. and p. 323.

instrumental side of legal form[49] is dominating. In truth, it reminds us the 'dilemmatic structure' that Juergen Habermas attributed to legalized welfarist and interventionist policies of last century: juridification introduced into previously free domains of social life *both* pervasive regulation *and* new opportunities. Its irruption into life spheres was said to overwrite the pre-existing contents of social interactions[50]. Policies obeying at functional imperatives and implementing regulatory measures jeopardize the realms of life world, by re-interpreting their relations through the lens of external rationalities and furthering one sided ideas of the good. But only life world elaborates basic social links, and remains the sole "reservoir" and source of meaning[51].

For Habermas, the "point" was "to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation: and to protect them from falling prey to the system imperatives of economic and administrative subsystems that grow with dynamics of their own. And finally to defend them from becoming converted, through the steering medium of the law, to a principle of socialization which is for them dysfunctional"[52]. In other words, the risk of "colonization": and the dilemma whether an external legal imperative offers in case a "guarantee" or a "withdrawal" of freedom, can only be responded "from the viewpoint of the lifeworld"[53]. *Mutatis mutandis*, in the scope of global legislation, and its pursuit of the good (s), the deep question of legitimacy remains attached to the shortcomings of such a dilemmatic structure.

6. The spectrum of legislation

However, legality and legislation are affected by a further fundamental change that deserves some scrutiny. The new legislation, among its significant innovations, downplays the reassuring modern enterprise of law as inherent in the full circle of human activities. It weakens increasingly the *holistic* frame of

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[49] I have at length reconstructed the *non instrumental* side of law as a predicate of the *Rule of law*, in my *The Rule of law as an institutional ideal, cit. supra.*

[50] Juergen Habermas, "Law as Medium and Law as Institution"[trans. from *Theorie des kommunicativen Handelns*, Frankfurt: Suhrkamp, 1981, bd. II, pp. 522-47 and in the English ed., by Beacon Press., *Theory of Communicative Action*], in *Dilemmas of Law in the Welfare State*, Gunther Teubner ed., Berlin, Walter de Gruyter, 1986, see 209-11. As Habermas noted, law had to enter deeply in the detailed daily, personal and social sphere once left outside of legal control, in order to accompany an assisted individual life from birth to death (*Ibid.*, pp. 203-20).

[51] *Ibid.*, 206. All the more so in the domain of 'autonomous' relations (like in the realms of school law, social security, cultural reproduction, fields of moral sensitivity which extend to legal areas, such as criminal law or constitutional law).

[52] *Ibid.*, p. 220.

[53] *Ibid.*, p. 214.

public interest, and the political control of complex issues.

Take again the WTO specific 'regime': no serious questions are undermining its authority and the legality of its rules and decisions; moreover, it is universally recognized the coordinative and dispute-resolution capacity to "speak in the name of the whole society" of its members at least, and so also in the interests that they have subscribed to. State legislation has often- depending on places, epochs, and political structures- worked with even less entitlement or authoritativeness.

There is something missing though. It is often ambiguous, as already noted, which or whose public should be relevant, given the chain of side effects affecting people largely far away from the core deciders. But even leaving this concern aside, we would not call the WTO, nor would we make the Security Council, the global legislator, despite their global reach and effectiveness. At the same time, we know that we entrust instead the State in its own right, and within its domain, as the legislator. The contrast does not rise from the chronic democracy deficit of supranational organizations. At stake is not the albeit dramatic lack of reflexivity circle in legislation outside the State, the fact that there is no clear demos, that democracy, if any, means at best government *for*, instead of *by* the governed, and the like. At stake, rather than a matter of democracy, is the even prior question of the *public* nature of law[54]: the pre-understanding that "law", as far as we trust it, is rooted in the totality of the 'public'.

One cannot credit inherent 'publicness' to norm production in a superficial way, and its requirements are to be focused upon carefully. Legislation should- *à la* Rousseau- concern the generality of the people (the *subjective side)*[55]: that, however, should not be strictly taken as a necessary condition of each legislative act, or rule, or decision. Otherwise it would exclude not only most of minute administrative rule making, within or beyond the State, but also a certain amount of statute law as well. The quality of universality must be rescued though and assessed as a property of a *sum* of laws[56] as well as in its *orientation* to the *public good*, the common, general interest.

In our received understanding of legislation, it includes an inherent connection to the *objective side*- the comprehensive fate & ends of the community[57]. We are used to think that however

[54] More at length in my "The (re-) Constitution of the Public", cit. *supra*.

[55] B. Kingsbury has straightforwardly relaxed or forfeited the requirement of generality: "Generality is not a necessary requirement for a general concept of law applicable to all law as such, and as indicated above there are good reasons why it is not necessarily part of the particular jurisprudence of the law of global administration". (Kingsbury, "The Concept of 'Law' " cit., p. 52)

[56] The same as in Kant: I. Kant, "Metaphysical First Principles of the Doctrine of Right", cit. supra n. 24, § 42 ff., pp. 86 ff.

[57] And we shall see, the ultimate responsibility for it.

disparate goals, divergent or separate projects and purposes, conflicts among legitimate ends, all are to be (politically) organized or resolved *along the diachronic axis of* a *full-blown development* of legislative decision-making; and the latter in its entirety remains a choice-driven interpretation of the *whole* life of the public, of the addressees.

Of course, WTO can instead decide about trade in its own 'segmented' administrative mode: matters of, say, security, are beyond its power and purview, and therefore under some other entity's responsibility. Accordingly, we can hardly deny that the decoupling of State/legislation has brought us before a new figure of legislative power, let us call it legislation 'with limited responsibility'.

7. Responsibility v accountability

That shift is substantive, and as far as I see, it cannot be compensated by improving requisites of accountability[58]. There is in truth a conceptual watershed between accountability and responsibility that is worth of a brief clarification. Put it concisely, "responsibility" (evoked with a 'responsible person') projects a sensible, and self involving, consideration of as many relevant factors (be they facts, interests, intentions, consequences) and personal expectations, as possible. It exceeds the view of a required task (which is self-limiting and leaves aside any concern beyond the task itself). As Hans Jonas once aptly defined it, responsibility, like the one we associate with the figure of a statesman, bears a significant relation with the notions of *totality, continuity* and *future:* because the responsible person (here, bearing in mind the State) cares for the "total being" of its object, with no possible interruption in time, and "beyond its immediate present"[59].

Although responsibility is mainly related to virtue and ethics, the notion sheds light on our understanding of the State as a 'general ends' entity. Within the State borders, on the one hand, the bond between law and the State protects the self limiting domain of a polity's social practices; on the other hand, it is so because the State is not just any "public" entity whatsoever, but the fullest image/archetype of the existent "public" and-- what is highly defining its very nature--, the only public entity entitled to all

[58] See for 'accountability' in a huge bibliography, R. W. Grant and R. O. Keohane, "Accountability and Abuses of Power in World Politics", 99 *American Political Science Review* 29 (2005) and E. de Wet, "Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review", in Armin von Bogdandy et al., eds. *The Exercise of Public Authority by International Institutions, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* , 2010).

[59] H. Jonas, *The Imperative of Responsibility,* University of Chicago Press, Chicago Ill.1984, pp. 98-105.

encompassing reach: the one that can by definition embody the entirety of potential ends[60]: what requires the State to be conceived of as the ultimate shelter for any sort of common objectives "deserving" care, protection, regulation, control, and the like. Thus, law as (State-) legislation factually entails at the same time the *responsibility* to cover the full circle of *publicness* and public problems: i.e. a background belief of those that are subject to it, that the latter stems from a responsibility for the "whole", and is concerned with coherence as a "general" result. It is the simple objective *raison d'etre* of the State, affecting thereby our idea of law and legislation.

The perceived fading of the ultimate connection between law and the burden of the whole in the extra-state environment is inevitable. Regardless of the difficulty to circumscribe its precise borders, the notion of 'being responsible' points, beyond accountability, to the overall state of affairs, and the problematic equilibrium among separate rationalities. Such a notion is premised on a general interpretation of ideas, needs, values, and priorities, dictated by a situated perception, encumbered with a kind of meta-concern (so to speak) that is not institutionally required through the perspective of holding "accountable" organs, entities, powers acting within predefined imperatives.

In principle, accountability can work effectively as much as the imperatives to be accountable for are well defined, limited, and feasible. However transparent and revisable, communicative and consented on, WTO rule making can become[61], that shall be working with reference to the provided tasks, already embedded in the *raison d'etre* of a trade regime[62].

And it would be rather fancy, if not illusory, to hold each in the array of global norms producers, accountable for indeterminate and further, far reaching ideals, from Human Rights[63] to environmental protection, security and the like. The separate

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[60] 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", and even less so as regard each minute act of legislation. This is possibly linkable, but clearly a different concept.

[61] See R. Stewart and M. Ratton Sanchez Badin, "The World Trade Organisation and Global Administrative Law, *IILJ Working Paper,* 2009/7, and also N. Woods, *Holding Intergovernmental Institutions to Account*, 17 *Journal of Ethics and International Affairs* 69 (2003).

[62] For to take account of the existence of other issues, while reducing the un-conditionality of its means, shall not be mistaken for the pursuit of different – or external-goals. A collection of analyses can be found in S. Griller (ed.) *International Economic Governance and Non-Economic Concerns*, Springer, Wien-New York 2003.

[63] This holds true, unless one elevates the economic regime to a comprehensive conception of the world. The metaphysical elevation of the ideal of market autonomy as a human right, through the lens of the new economic liberties of free trade, is sometimes endorsed.

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allocation of functional control over thematic issues is a basic and valued strategy of coping with complexity: a *divide et impera* that gives us some chance to disentangle necessarily interconnected matters.

On the contrary, if we think back of legislation in the State based self understanding, the pregnant point that qualifies it, had- and still has- much to do with such a irreducible mutuality between the subjective and the objective side, between the capacity to speak *in the name of the public*, and the capacity to realise and represent some interpretation- in their entirety- of the issues at stake in the comprehensive well being of a community. The two traits are not easily met in the global legislation 'circumstances': respectively, because of the elusive and unseizable nature of its *'public'* and because of its field-related pursuit of *special goods.* The combined consequence makes the universality of legislation strikingly absent despite the global capacity of the "legislator".

8. Concluding note: 'legalities' and the legality of their relationship.

In so far as it focuses on the emergence of a wider legality, the present image of the global scene adds to the already rich plurality of levels of law, national, regional, international, transnational-private ordering.

Peculiarities, limits and discontents in the new appearance of a 'global' legislation not necessarily detract from the worthy pursuit of its 'legality'. Nonetheless, they should prompt a further reflection – one that would be impossible to detail in this paper- over the *relations among legalities* that interact on the globe. They can suggest some caution as regards, for instance, the *unconditional* primacy over other, lower or less-than-global levels of ordering. Despite the attempts to organize supranational legality as a compact whole, the plural nature that dispels hierarchical designs, generates a caveat, mindful of the autonomy of different levels of legalities, their functions, roles, as well as supervened and apparent limitations.

Unlike the domestic setting, the 'global' law does only work through impinging upon other legalities, requiring mostly States cooperation, 'external' implementation 'on the ground', by political, judicial, and administrative entities: in the mode once described as holding (even) for the European Union, that is, a supra state unity for which it was true that "it does not do, it does cause others to do"[64].

The authority of global legislation depends on its ways of interaction and interfacing *vis à vis* legalities otherwise persisting, State and regional legal orders especially. Its goal-oriented

[64] S. Cassese, *Democrazia e Unione Europea*, 2002, 11 at http://www.storiacostituzionale.it/doc/Cassese.pdf (last visit May 2011)

pretensions ironically must rely on *polities' independent existence* and penetrate them despite being incommensurably distant from their social and political allegiance; they work as transmission belt of efficiency imperatives or global governance technocracies regardless of domestic equilibrium, replacing rights interpretations, overwriting 'internal' meanings of regulated polities. In some instances a similar trend is seen to reflect the fading (or "the liberal undermining") of "republican legitimacy".[65] The notion reminded in the foregoing, of *presumptive* normativity, might actually be extended to the treatment of the relationship among legalities: the vantage point of general coordination, beyond localism and national self interest, has a *presumptive*, or *prima facie* priority that should not be construed only through unconditional authoritative terms. It is here that in fact the devices of subsidiarity, proportionality, equivalent protection, scope of manouvre have been widely allowed and used either in argumentative or programmatic terms. In truth, on the one hand, States or regional authorities resorting to them are often suspected of instrumental strategy, serving protectionist objectives. But on the other hand, the *global* character of normative utterances in extra-states legislation is just a *factual* judgment: contrariwise, their *universalizability* should depend upon satisfaction of *normative* conditions[66], that must be met for its viability.

What legality brings with itself, as a matter of its *formality,* has to do with its birth in the natural struggle toward the very 'possibility of justice', and it is what is hinted at when we try and rescue its service in the global stage. As Habermas wrote, when Max Weber regarded modern Western societies as forms of "legal domination", he sidelined the potential that his recognition of formal/rational law embodied: *ie*, at the same time an appeal to rational practical morality, that was the "moral core" or the other face of the otherwise instrumentalist bourgeois notion of formal law[67].

That *duality* of law is still of value[68]. If a confrontational stage can be improved where the normative conditions of

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[65] The trend is focused upon by F. Scharpf, "Legitimacy in the Multi-level European Politiy", in P. Dobner and M. Loughlin eds., *The Twilight of Constitutionalism?,* OUP, Oxford 2010, p. 111.

[66] As I would take it, Jan Klabber's suggestion about 'presumtive legality' can be located at the intersection between globality and universality, it expresses the tension (rather than the coincidence) between the two.

[67] J. Habermas, *Law and Morality*, The Tanner Lectures on Human Values (1986), University of Utah Press, Salt Lake City 1988, vol. VIII, pp. 217-279, esp. § 3.

[68] An elaboration of the "duality of law" within a reconstruction of the rule of law ideal is in my *The rule of Law as an Institutional Ideal*, in L. Morlino, G. Palombella (eds.) *Rule of law and democracy. Internal and External Issues*, Brill, Leiden 2010.

universalizability can be discussed, resorted to and made to matter depend on our vision of law. Mutual claims among diverse legalities can be confronted on the basis of an ever developing legal public reason: a further manifestation of a pluralist frame of legislation controlled by the *rule of law* as a common code of interactions among ordering visions with different depth, allegiances, social embeddedness and political salience, and all in all different concerns as to the good. All of them have a 'right' to contribute the *outcomes* of law on the globe. Although the problem of the relations among legalities and the function of the *rule of law* in this very intersection is an inevitable consequence of the new frontiers of legislation, it cannot be spelled out in these concluding remarks[69]. But it can be hinted at as a problem stemming from the conceptual difference between *global* legality and *universality*. In the shaping of a common 'public' dimension of law on the global layer one can remind the Kantian rationale of law: that is, overcoming a state (of nature) where one sidedness, abuse, domination of unilateral ideas of the good cannot be discussed or objected against.

[69] For further elaboration om that point, cf. my *The rule of law in global governance. Its normative construction, function and import*, Straus Institute Publications, NYU, 2010/5.