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The (re-) Constitution of the Public

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The (re-) Constitution of the Public

Gianluigi Palombella

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Introduction

Our received views about the public and law are deeply associated with the modern notion of the State, from whose angle there is hardly any 'public' outside its domain or the inter-States will engendered one. In truth, however, public law related, eminently, as in the Roman Law, to the community as a whole, as opposed to 'fragments' and individual interests. But in the modern age, the understanding of the 'public in law' sharply separates from private law by increasingly focusing on authority exercised by the State in its vertical relation to its citizens¹. It seems therefore possible that the alleged fading of one of the terms, that is, State's centrality, might end up proportionally undermining the 'public' in law.

An actual obsolescence of the public is meant to derive mainly from globalisation, with the pluralist, self-authorised forms of legality that exceed the frame of last centuries' *jus publicum* and the known archetypes of legitimate authority. Uncertain as well is the fate of the disciplinary distinction between public and private law². Nonetheless, albeit controversial, in many areas of debate (like on conceptions of law, pluralism, constitutionalism, international law, private law) the question of the *public* in law appears of crucial import, as the vehicle that conveys legitimacy and authority, even to normativities in search of theoretical 'recognition' and endorsement³. This reflects a general view, although often left implicit, according to which the 'public' is not (only) a branch of the law, but so to speak, the custodian and the generator of legality itself, its deep veritable root.

¹ The two-steps process in modern philosophy included firstly the institution of civil society (in contrast against a 'natural state') and then the institution of the State (other than civil society itself) (Hegel). On the public-private divide, and the further elaboration of a public sphere, among huge bibliography, N. Bobbio, *Stato, governo, società*, Torino 1980; M. Horwitz, "The History of the Public/Private Distinction", 130 *U. Pa. L. Rev.* 1423 (1982).; J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Th. Burger trans., Cambridge, Ma, MIT Press, 1992.

² Significant is the *American Journal of Comparative Law* 56, 2008, "Beyond the State: Rethinking Private Law", Special Symposium Issue.

³ Cf. B. Kingsbury, "International Law as Inter-Public Law" in *Moral Universalism and Pluralism* (Henry R. Richardson and Melissa S. Williams, ed.) New York University Press 2009.

I take account of this conjunction, *ie* the sense, be it conceptual or historical, leading us *from the public to law*. But I submit it is worth asking whether a further narrative (and an equally credible one) holds that shows an inverted direction. Albeit the dimension of ‘publicness’, in a thick sense, hosts and nurtures the constitution of legality, the other way round, the ‘birth’ of law is itself considered to be imperative for the very constitution of publicness.

This chapter shall also consider the related further question, that is, whether the *political* structuration of the public captures its complexity, or rather conceals it, if taken alone: as I see it, a *dual constitution* of the *public* law in modernity surfaces, due to the interplay that it allows between its *legal* and its *political* layers. Instead of pursuing some ‘*reductio ad unum*’, the mixed or dual perspective better conveys the multi factorial state of affairs of the public, at least as we know it.

This however would not be the whole story. Neither would this route be conclusive, because of that limiting caveat: the public ‘at least as we know it’. In fact, the transformation of the world & law mentioned above, which an extraordinary mobilization of scholarship⁴ is focusing upon, works to de-centring the State, and by parting and de-constituting such a duality, decoupling the mutuality and coherence of the two mentioned logics of the public. Symmetrically works the shift in language, that converges upon governance, administration, accountability as replacing the once pivotal notions of government, politics, democracy, or attempts at hybridizing one series with the other. Only in part such a question might reflect older controversies in disguise, and the resilience of recurrently divisive mindsets (say, between political and legal constitutionalism, institutionalist or normativist theories of law, legal positivism and natural law doctrines, and so forth). And of course they all can have a stake in shedding light on the configuration of the public. But the *dé-jà vu* could be misleading: previous views or disputes have been revolving around the dominant statist context of modern law, one affording a shared and unitary object to them all. The epistemic unity and uniqueness of *that* public is instead what observers today realise is becoming elusive.

In so far as we have embraced the *dual* dimension and its allure of balance among forces/ meanings within the public, in the wake of this “decoupling” of the legal and political determinants, we register the unbalance as a loss: one that dissolves the inherent relation between legal self assertion and the political matrix of the public.

In what follows, after recalling the notion of the public law as ‘political’ (sec. I), I shall draw the ‘legal’ nature of the public, accounting for its essential (Kantian) profile, one that can be called a “public through law” (sec. II). Thereafter I shall address the fate of their separation in the global setting (as it appears from the point of view whether of international relations or of global law), that due to such a separation in a sense presents itself as a ‘suspended public’, or better, as a suspended public law (sec. III). Once these different scenes of the public are outlined, I shall consider the problems and the available ways of their possible *re-coupling*, from the perspective of

⁴ I offered my own insight, in *The Rule of Law in Global Governance. Its construction, function and import*, in “The Straus Institute for Advanced Studies on Law and Justice” WP 05/2010.

the globe as a *multiversum* of legalities⁵ (secs. IV-VI). After all, our present question regards the construction of the public in a globalised universe, and this chapter shall suggest, as a conclusion, that the public *can* be re-integrated through pursuing a hand tailored, and case by case synthesis between different levels of orders (and their confronted pretences): some bearing socio-political embeddedness, others devoid of it and created for coordinative, regulatory, or universalisable (like human rights regimes, for ex.) safeguards.

I Public as Political Law.

1. There is a public law that does not match a doctrinal partition of the existing *positive* law, within a legal order. As Martin Loughlin has reminded us⁶, public law has a much deeper nature: it can be historically reconstructed in an essentially *political* sense and emerges as a transformation of the fundamental law (once deemed prior to the King and his rule: law that makes the King) into a secularised source of authority and legitimacy of governmental ordering. In the modern era, de-naturalization of medieval sources of legitimate authority came linked with new determinants: the autonomy of the ‘political’ sphere and the instrumental reflexivity of law as means of people’s self government. In so far as it is the law that makes the ‘body politic’, it is irreducible to the (law-) product of the government, but resembles the constitutive principles underpinning the right ordering of the State, whatever shall turn to be feasible. The notion apparently embraces law as reflecting the historical, both material and normative, constitution of reality, one which embeds factors of diverse nature, cultural connotations along with ethics of the land and rooted beliefs that John Austin, the father of legal positivism, would relegate to sheer ‘positive morality’: but for Loughlin⁷ and through a tradition of thought that spans Bodin, Rousseau and Hegel, it is instead embedded in the political right, the *droit politique*. In it Rousseau saw “the political laws, which constitute the form of Government”⁸. In the public right’s discourse, “rules, principles, canons, maxims, usages, and manners” shape an “autonomous world of the public sphere” where a prudential reconciliation is permanently attempted between the two opposite claims of individual autonomy and public authority⁹. And it is not meant to contrast power by limitation and restraint, but is co-essential to the generation of power as ‘political’¹⁰.

The distinctiveness of this construction tackles a puzzle that cannot either be isolated from tradition and custom or addressed through an abstract, transcendental,

⁵ Albeit the route taken in this chapter recognizes the merits of pluralist, global constitutionalist or administrative law theories, it purports to mend the partial and deracinated nature of the *public* that results from them. Thus it has a different purpose and articulation.

⁶ M. Loughlin, *The Idea of Public Law*, Oxford, OUP, 2003.

⁷ Lastly, M. Loughlin, *Foundations of Public Law*, Oxford, OUP, 2010.

⁸ *The Social Contract and other later political writings*, Gurevitch edition, Cambridge, CUP 1997, 81.

⁹ Loughlin, *Foundations*, 10-11.

¹⁰ This means for Loughlin that kind of power which the public sphere is inherent to, because it is founded on the consent of the people.

formal apparatus of rational morality. In this sense, we can say, the constitution of State's sovereignty is, if anything, a true manifestation of the progress of the "things in themselves", accordingly depicted as such, in the stages of development of the Hegelian "Objective Spirit"¹¹. The line of thought thus resumed has a basis in the perception of the autonomy of the 'political' in itself.

2. Notwithstanding the strength and epistemic value of the *political* view over the public, there are further issues at stake. The Rousseauian solution to the liberty-authority problem is in fact 'territorially based' and strongly dependent on the republican ethos of a community. The premise to it is a renovated culture of the individual as a citizen, that is, fully shaped and forged along the rather axiomatic rightness of the venerable 'volonté general'. Equally, thinking of the 'public' in the Hegelian concurring construction can only be premised on the superiority of the historical experience of the State as a true 'universality', where individuals and community are to appear a necessarily rational unity.

The achievement and the progress represented by the State and the 'general will' are in those views, the true idea of the public in law.

In the characterisation of political right, law follows the destiny of the State and the State-based idea of the demos; the public sphere remains within the national border of sovereign authority. The idea of public law is vulnerable to fade with the fading of couples like nation & territory, demos & State, and depends on its connection with the political history of a people and of its own 'public'.

To tell it in (post)Hegelian words, the very finality of State's synthesis is however itself exposed to the *Weltgeschichte* as a *Weltgericht*¹², when a larger world affords a further perspective than that of the State.

Now, in this line of thought, while the public gains content on the side of concreteness, ethics, territoriality and culture, it is poorly conceptualised from the legal side: the normative service of law is paid scarce attention, with its relative autonomy *vis à vis* the power structures that it sustains. The counterfactual potential of law wanes in the recurrent conflation between the factual and the normative, the rational and the 'real'. That is to say: ultimately the 'political', however principled its fabric might be, is a measure to itself, be it provided through the friend and foe or the functional power-achievement logics, or the like. Its validation is internal, and the 'political' detains the comprehensive key to the whole. But the insistence on this 'existential' allure might leave us short of legal safeguards of criticism and dissent, disarmed before the ethics of the soil, the 'tyranny of values', and related bitter experiences. In such cases, law would play none of its modern roles in resolving the puzzle- and controlling the equilibrium- between private and public autonomy; it would completely serve an instrumental function: just a tool for the sovereign's ideas of the good, that he can freely define by unconstrained understanding of the deepest political roots of its powers.

¹¹ G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox, Oxford, OUP, 1952

¹² *Ibid.*, § 340.

This criticism regards a normative weakness: it does not reject either the fact of the pre-positive political law as one empowering (not restraining)- and giving a foundation for the government-, or that actually positive law can be an instrument to it. It does claim though, that alongside with the ‘political right’, *positive* law can have a role, a foundational role, in public law; that it can be- and has been- conceived and structured differently, and even in such a way as to exercise a potential counterpoise, as we shall see in the next sections (in general, to prevent powerful rulers from achieving *legally* all sorts of ‘political’ goals).

Through the lens of the *political right* interpretation, the Schmittian ‘state of exception’ - where law and its guarantees are to be ignored- is seen as the true expression of the underlying nature of the public, that is, why public law is what it is. It is rejected the view of the ‘state of exception’ as a suspended (or undecided) state, as a ‘zone of indifference’ between law and politics: contrariwise, as the argument goes, it shows the essential and foundational source of legitimation and must be seen as the consequence of it, *ie* of “the distinction between positive law and *droit politique*, between the formal and material constitution of the State”¹³. As a further example, from the same point of view, the 1803 decision in *Marbury* (US judicial review of legislation on the basis of constitutional standards) is seen as the *transformation of the constitution*: namely, from a deep repository of pre-positive, political self understanding of power, into a legal device, higher (positive) law. From the perspective of the political view of public law, this change of a constitution from a pre-positive substrate to a legalised institution is not welcome, because it turns to be self defeating for the survival of public law as the “political right”¹⁴.

Contrariwise, we should recognise how that ‘transformation’ makes the constitution available to all, judges and citizens, no longer a sheer source of inspiration for legislatures. The legalisation’s route can be seen, indeed, as instituting a normative, legal tension, one that, in my view, shall constrain the ultimate power: the (dormant Schmittian) sovereign cannot simply appeal to obscure pre-positive materials of its legitimacy, but must follow legally framed paths, that can be procedurally and substantively monitored. The creation of a *legal* interposition (that one can see as the counterpart to the schmittian ‘authority’s interposition’) opens therefore a different path, because it determines the conceivability of *spaces* of *non-coincidence* between power (as contingent as it is) and law. When procedures, guarantees and rights can be invoked universally as a ‘positive’ juridical device, when they cannot be simply skipped by reference to the deeper soul of a nation, they are legally posited outside the legal remit of the most powerful (as constitutions attempt

¹³ Loughlin, *Foundations*, 401-2. Loughlin finds therefore insufficient Agamben’s contention (G. Agamben, *State of Exception*, K. Attell trans., Chicago, Chicago University Press, 2005), assuming the state of exception in Carl Schmitt (*Political Theology: Four Chapters on the Concept of Sovereignty* [1922], G. Schwab trans., Chicago, Chicago University Press, 2005), as a zone of indifference between law and politics. For an interpretation of Schmitt that balances material and normative meanings, C. Mortati, “Brevi note sul rapporto tra costituzione e politica nel pensiero di Carl Schmitt”, *Quaderni Fiorentini per la Storia del pensiero giuridico moderno*, 1973/2, 511 ff.

¹⁴ Loughlin seems to view this transformation as a kind of dispersal of the complex resource of the political right, see his *Foundations*, 293 ff.

to do, affording a higher law protection even *vis à vis* the otherwise legitimate exercise of democratic principle). Legal positivism, then, can be said to fairly articulate the puzzle between autonomy and authority, as well as between ‘private’ and ‘public’. Nor the public can be legally privatised by anyone in particular. This is a watershed among different conceptions of the public.

3. Albeit preserving the perspective on law’s pre-positive and enduring socio-political determinants, public in law can be ‘enlightened’ also by taking another side, one that asks about the ‘normative point’ of law itself, of the ‘legal’ in its positive nature. The ‘public’ can be grasped not only through the ontological / political dimensions that human practice contributes to the law, but also by making sense of what law itself provides to the ‘public’, to its structure and teleology.

As showed in the next sections, the constitution of the public can be considered as safekeeping what John Rawls called the two moral powers: *ie* the capacity to set and pursue a conception of the good, and the sense of justice¹⁵. The latter is essential to the fairness of social cooperation, and has been viewed in connection with the institution of law. From this angle, the tension characterising the ‘ought’ in law is equally essential to the constitution of the ‘public’.

II Public through law, or the creation of the legal category.

1. The idea of the public character of law can be followed in different places. It surfaces explicitly in positivist writings, like those of Jeremy Bentham, who admits of law as providing the ‘public’, that is, a common point of view beyond the parties, beyond individuals’ judgements (albeit sound judgments, as utility based judgements can be). Law allows for generalised and publicly followed, or mutually recognised, standpoints, that are available to all and prescribes general conditions of validity. Bentham contrasts his view against law conceived of as sets of customary rules of interaction among isolated individuals, or as he calls them, ‘monades’¹⁶. As with Kant, law does not require us to abandon the ‘right to private judgement’. Nonetheless, by providing generally accessible criteria, it aims at assuring social coordination, at facing disagreements that are stemming both from individual interests and from ideal or principled divergences over collective issues¹⁷.

¹⁵ J. Rawls, *Justice as Fairness: A Restatement*, (Erin Kelly ed., Cambridge Mass., Harvard University Press, 2001), 6-7

¹⁶ J. Bentham, *Of Laws in General*, ed. by J. H. Burns and H. L. A. Hart. London, The Athlone Press, 1970 (The Collected Works of Jeremy Bentham), 192.

¹⁷ G. Postema, “Bentham on the Public Character of Law”, *Utilitas*, vol. I, 1989, 41, addresses the problem of the public character of Law in Bentham, as a coordinative service of law, finally concluding that the very weakness of Bentham’s position is not in connecting law and coordination, but in underestimating the role that law plays after a legal solution has been reached: “To focus only on the law’s ability to put some questions beyond further debate obscures the role the law plays structuring the debate which continues. Legal arrangements, far from calming the political waters in the way Bentham’s theory predicts, often attract and even invite disagreement and contention”(Ibid., 60). Postema rightly points out that it must be taken into account that legal arrangements are often

As with Bentham, it is rather general belief that positive morality could not be sufficient. We cannot easily think of the public as simply organised through moral beliefs. If there are requisites of ‘publicness’, it would be rather impossible to imagine them outside the service provided by law. It is not simply that law overlaps with morality, but that the latter has no chance to be feasible otherwise, outside of the law that makes its pursuit possible.

As Tony Honorè pointed out, in similar terms, morality cannot dispense with law: its self-sufficiency is rather overestimated, in so far as there are plenty of irreconcilable conflicts and moral intuitions to be spelled out in concrete situations, as well as problems of distributive justice which are occasioned by societal life: all must be ‘filled’ with law and framed by legal systems, if they need to be resolved¹⁸. Law acts as “a determinant of justice”¹⁹. Thus, albeit the ‘separation’ of morality (from law) preserves critical moral thinking *vis à vis* the law, a viable morality- based on the need to coexist and cooperate with others- must have “a legal component”²⁰. And undoubtedly, this understanding requires institutions and authority claiming some legal supremacy over the community, as it is the case for States and to a certain extent for the international legal order.

However, a straightforward view of law as a *generator* of publicness, one that combines the creation of legal parameters with the problem of justice since its start, is provided by Kant. In his view, unless man “wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law”.²¹

This reference to law is conceived by Kant as the *creation* of the public, and it amounts, in short, to a “bootstrap conception” of the public, or the idea of public *through law*.

Law and justice are 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”²². Nonetheless, “in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is

legitimated by attracting principled discussion, they can be constantly an object of contention, and significantly, they matters to us as a political question (Ibid., 61).

¹⁸ Tony Honorè, “The Dependence of Morality on Law”, *Oxford Journal of Legal Studies*, 13 (1993), 1–17. Honoré also notes, correctly, that among those problems there are some created by law itself, that would not arise independently of the institutions of law (e.g. tax paying).

¹⁹ Ibid., 16

²⁰ Ibid., 2

²¹ 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, § 44, 90

²² Ibid., § 42, 86

his against violence”²³. For that reason, man “ought above all else to enter a civil condition”, and accordingly “each may impel the other by force to leave this state and enter into a rightful condition”²⁴. That results from being the imperative *to exit the state of nature* at the same time the basic moral imperative and the one basically related to the conservation of the only natural right, the right to liberty. What Kant requires for a civil state, that is, a rightful condition to be “produced” is a “sum of laws”, or better a “system of laws” that must be called “public right”. This logical necessity- relating to external legislation as a means to avoidance of violence and submission to the unilateral will of another person- applies to individuals as much as to peoples and nations (*jus gentium* and *jus cosmopolitanum*) simultaneously²⁵.

There is a fundamental reason for law to be established, that is, the necessary public nature of *justice*, that cannot be predicated from unilateral, self referential positions, but relates to equal liberty of all and independence of each from the will of the other. So, this is the route through which the law inheres necessarily in the public.

Let me remind, however, that such a route concerns *the right*, not the good or happiness. This is of importance in understanding the line of argument concerning the positivity of law. It puts an end to the shortcomings of unilateral thoughts about the ‘right’ itself, and controls the inevitably relational coexistence among peers. Divergences become soon a source of injustice, and thus cannot be left to a spontaneous and provisional convergence, the customary event among ‘monades’ mentioned by Bentham. The *positivity* of law is to serve justice because it should prevent unilateral domination: it constitutes the ‘public’ in so far as it forecloses its appropriation by a private will. It rules out the possibility that relations among persons be decided by subduing one of the parties to conceptions of what is right according to his opponent.

The institution of law, however, is not intended to encroach upon our views of the good: ideas of the good in individuals’ life cannot be imposed through the ‘public’.²⁶ As long as individuals conform to what we owe to one another, according to a universal legislation of liberty, the question of the ‘public’ is both created because of, and ultimately controlled by, issues of justice, not by issues of ethics.

Similarly, law accordingly does not pretend from us anything different from the sheer compliance of our external behavior with legislation²⁷. It is not required that we

²³ Ibid.

²⁴ Ibid., § 44, 90

²⁵ Ibid., § 43, 89

²⁶ Moral legislation requires the universal recognition of human beings as coexisting under innate equal liberty. Therefore: “No one can coerce me to be happy in his way (as he thinks of the welfare of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e. does not infringe upon this right of another)” (I. Kant, “On the Common Saying: ‘That may be correct in theory, but it is of no use in practice’ ” [1793] in Id., *Practical Philosophy*, M. J. Gregor trans., Cambridge, Cambridge University Press, 1996, 291)

²⁷ I assume that consistent to this external character of the required compliance is the liberty based justification of coercion: “if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to

should act so to limit our freedom “just for the sake of this obligation”²⁸. As Kant writes, “when the aim is not to teach virtue but only to set forth what is right, one may not and should not represent the law of right as itself an incentive to action”²⁹. Accordingly, public institutions of law make coercion possible, so that the latter cannot be exercised by private persons and must be made consistent with equal freedom. Should self (private) enforcement of our rights be possible, that would impose the will and views of the more powerful unilaterally over the sphere of right of the other. This is instead at the foundation of Kantian ideal of the rule of law: the ideal invokes law as institutionally aimed at preventing private preferences from prevailing over justice.

Admittedly, that has consequences as well over the compatible ideas of the common good: a social system must be envisaged that can grant independence, private liberties, and the necessary basis for property and freedom of contract. Consequential and consistent guidelines shall affect the exercise of political power and foster the pursuit of the republican ideal in the structure of the government. But I am not going to rephrase now this part of the Kantian project. The objective of justice is what the public nature of law is about, that is, the prevention of one sidedness --as rupture of liberty and creation of dependence. That is the moral reason why anyone can be compelled to leave the state of nature or to comply with justice: because he would otherwise submit others to his own whim.

The *systematic* aspect implies the insufficiency of private contractual intercourses without the achievement of that distributive justice, as Kant calls it, which consolidates and reshapes private agreements as common concern within the public in law.

In conclusion, the normative quality of the public is essentially “legal”, and depends on the very birth of the legal category: the formation of the civil state is not a political imperative, in the sense of Rousseau, but is legal and is backed by a moral justification. The conceptual distinction against political and ethical projects, is due to the fact that law is seen as a transcendental ideal, as the condition of coexistence through liberty, *before* any ethical objective can be actually pursued (whether through political or legal means). There is a necessary distinction, and a necessary connection, between justice and ethical/ political choices. The tension between their mutually autonomous claims must be supported by institutional devices intended to the preservation of the rule of law: that is, they drive out the possibility that the only contents of the law be those protecting dominant or majoritarian conceptions of the good.

freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it.” I. Kant, “Metaphysical First Principles of the Doctrine of Right”, “Introduction to the Doctrine of Right”, § D, in *The Metaphysics of Morals*, supra note 21, at 25

²⁸ Ibid., § C, 25. *En passant*, although it is a moral reason to justify our exit from the state of nature, it does not follow that we are obliged to comply with the law out of moral acceptance, *ie* for moral reasons.

²⁹ Ibid, § C, 24-5

That archetype of ‘public through law’ affords an always open reminder of the *right*, that cannot be encroached upon by the realization of ethical good, whichever. The structural connection between public and law, in the Kantian sense, hints at the circumstance that if law’s basis is not simply contingent on political elaboration of the good, it cannot either be conceived of as totally available to the whim of the sovereign. The ruler cannot take law as a tool completely devoted to his ideas about the shape and contents of the public. From this angle, the constitution of the public, even in Kantian terms, reminds the liberal roots of the “rule of law ideal” as it can be traced back to the medieval rationale of equilibrium between *jurisdictio* and *gubernaculum*³⁰. In institutional terms, it requires those public institutions that make it illegal for the sovereign a unilateral appropriation of all available law as a tool at his disposal. Accordingly, the constitution of the public through law impinges as well on the exercise of power. Although Kant chose to absolutely exclude any right of rebellion, the Kantian legislator still is under check of dictates of reason, conditions of universal legislation; and he has to conceive of law as though the people were ideally to legislate themselves (and on themselves). And in this path, again, one can say that these very conditions imply theoretically the non-disposability of justice (*jurisdictio*) by the rule of the sovereign as well³¹.

So far, I have sketched the two strands of the public, one of them being cast by the substantive potential of the *political*, and the other by the Kantian illustration of *law* as an autonomous generator of publicness.

In a stylized mode, the two pictures articulate diverse components of public order, by focusing on eminently different keys. Taken *together* they illuminate the essence of the public as we know it in the State’s horizon. Now, however, it is necessary to delineate the features of a transformed universe, that extends globally and raises further questions about the rationale of public law. Thereafter, the attempt must be made at realizing how their relations can be understood given that their horizon changes and projects as well onto a beyond-the-State environment.

III “Penelope’s Public”: The suspended status of the globe.

1. In seeking the rationale of the public in the global setting, we cannot escape the hurdles of phenomena flourishing in a still uncharted categorical horizon. As a matter of fact, in the political perspective, the ‘global’ is conceived of from opposite views, depending, to start with, on the position they reserve to States’ sovereignty. International relations’ studies appear themselves to be undecidedly *in limine*, back and forth across the threshold between the realist dogma of anarchy, self-defence, self-interest, on one side, and the relentlessly weaving of institutions and norms on the other, as well as between other oppositions, like in the last decades’ language,

³⁰ I proposed a reconstructed notion of the rule of law in “The Rule of Law as an Institutional Ideal”, in L. Morlino, G. Palombella, (eds.) *Rule of law and Democracy*, Leiden & Boston, Brill, 2010.

³¹ See *Ibid.* where I addressed this point at length.

unilateralism and multilateralism. Such a frequentation of the *limen* results from the contrasted reality of the global and international relations, where the very construction of something ‘common’, a common public, remains an unfinished and repeated business like the Penelope’s web.

The surfacing (and the fading) of the ‘public’ appears to be unclear especially in international relations’ views. For the latter it does not epistemically coincide with the very existence of international law, whose positive validity is still being constantly questioned. International relations, which are ever intended to the ‘real’ state of affairs³² ‘on the ground’, are permanently and at best, in the middle point between the two poles evoked in the words of Hedley Bull, that is, between a bare factual international system and an ‘international society’, where “a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions”³³. At least this is what one can draw from Stephen Krasner’s label, “organised hypocrisy”, defining recurrent examples of ‘patterns of behaviour’ that are in contradiction to “professed norms”³⁴.

Of course, on the still stable background, realist ontology and its tradition hold, with the axiom of fixed, naturalized, self interested identities of States, and they do not even lead to the Hobbesian self utilitarian imperative, *exeundum e statu naturae*. On the contrary side, “constructivist” paradigm-overturning hinted at the opposite pole: *identities* are inter-subjectively shaped (whether being this to the worst or to the best)³⁵, moreover, as famously stated by Alexander Wendt, “anarchy is what States make of it”³⁶.

For sure, international relations’ standpoint should not be disregarded either from a *legal* reconnaissance of global setting, whether international, administrative or constitutional: that standpoint’s significance rests on offering a ‘passage’ picture of a never ending, unaccomplished rise of the public, or intuitively, the lack of the full sense for the public itself. The tentative move beyond the ‘middle ground’ is nonetheless always at work, especially in the recurrent promotion and recognition of the institution of ‘multilateralism’³⁷, one that as such squares with norms that can

³² Seminal re-elaboration of the “realistic” theory by Kenneth Waltz, structuring international system as intrinsically anarchical, power-prone and focused on the “self-interested” behaviour of States (*Theory of International Politics*, New York, McGraw-Hill, 1979, esp. 79-128).

³³ H. Bull, *The Anarchical Society*. New York, Columbia University Press. 1977, 13)

³⁴ S.D. Krasner, *Sovereignty: Organized Hypocrisy*. Princeton, Princeton University Press, 1999

³⁵ A. Wendt, “Anarchy is What States Make of It: The Social Construction of Power Politics”, *International Organization*, 1992, 46, n. 2. See also Gerard J. Ruggie, “What makes the World hang together? Neo-utilitarianism and the Social Constructivist Challenge”, in Id., *Constructing the World Polity. Essays in International Institutionalization*, London -New York, Routledge, 1998, 1-39. See also A. Wendt, “Collective Identity Formation and the International State”, *American Political Science Review*, 88, 2, 384-96. In general, A. Caffarena, “Il costruttivismo”, in G. J. Ikenberry e V. E. Parsi (eds.), *Teorie e metodi delle relazioni internazionali*, Bologna, Il Mulino, 2001, 71-93 (71 ff.)

³⁶ See A. Wendt, “Anarchy is What States Make of It” *supra* note 35

³⁷ J. A. Caporaso, “International Relations Theory and Multilateralism: The Search for Foundations”, *International Organization*, 46, n. 3, 1992, at 603, writes: «Multilateralism is a belief

matter³⁸. Inquire about the role of legal norms in world relations-- not by chance- is attempted by those liberal theories that understandably believed this to be included in a prospective agenda³⁹. And by enhancing the role of normative *networks*, the epistemic value of a State centered observational logics decreases, while institutions, networks and multilevel intercoursures show, to say the least, the effect of “disaggregating the States”⁴⁰.

Before taking a closer look at the normative transformations on the globe, it is appropriate to recognize the epistemic value of calling the constitution of the public here a Penelope’s web, and a suspended one: neither the all-structured State environment (the ‘public’ which we have been familiar with) nor the unavailable ‘dry dock’ (the state of nature) for our ship.⁴¹ Now, given the sui-genericity of the extra or ultra States’ or inter-States’ domain, these changes and institutions- building endeavors are relevant to what we would perceive as resembling the surfacing of the ‘public’. Their pull toward multilateralism, regimes creation, basic justice, judicial confrontation, specialized global administrative regulations inevitably poses a challenge to unilateralism and arbitrariness: not so much because it makes them impossible but, on the contrary, because it makes them *conceivable*. These transformations can function therefore as epistemic institutions with reference to arbitrariness and unilaterality: the latter are conceptually hard to conceive unless an institutional frame is devised that ‘creates’ the category (that is, the yardstick against which something turns to be arbitrary or unilateral). Although arbitrariness and one-sidedness are thought as features of a lawless state, in the latter they are, contrariwise, not even imaginable: in a state-of-nature-like environment, as Kant would have had it, they cannot even surface, precisely because they do not rest either on some structure of naked power or on a world where no common frames for ordered coexistence are established.

that activities ought to be organized on a universal (or at least many-sided) basis for a “relevant” group».

³⁸ And less with anarchy, of course. Undoubtedly, anarchy means unilaterality: tellingly Robert Kagan notes (in his *Of Paradise and Power: America and Europe in the New World Order*, New York, Knopf, 2003, 36), that it serves best the interests of the most powerful State, who better profits from lack of social or legal ordering.

³⁹ This is one of the main contributions from liberal theories in international relations. See A-M. Slaughter, A. Tulumello, St. Wood, “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship”, *American Journal of International Law*, 92, 1998, 373, 378; e A.M. Slaughter, “International Law and International Relations Theory: A Dual Agenda”, *American Journal of International Law*, 87, 1993, 226-238 with reference to the “Liberal Paradigm”.

⁴⁰ Slaughter, *A New World Order* Princeton, Princeton University Press, 2005, 12 ff, 131-165 esp. (in the sense that they are cross-cutting States, and are able to network similarly concerned parts - institutions, administrative bodies, political entities, etc- of diverse States).

⁴¹ Our work inevitably mirrors the Neurath’s metaphor: the sailors struggle with repairing the ship, while navigating the open sea, that is, with no chance to bring it to a dry dock “We are like sailors who have to rebuild their ship on the open sea, without ever being able to dismantle it in dry dock and reconstruct it from the best components” (Otto Neurath, ‘Protokollsätze’, *Erkenntnis* (1932–3), repr. as ‘Protocol Statements’, in Otto Neurath, *Philosophical Papers 1913–1946*, ed. and tr. by R. S. Cohen and M. Neurath, Dordrecht, Reidel, 1983, 92.)

2. The representations of the extra-states' environment, from the 'governance' as much as the 'legal' perspectives, revolve around the core of multilateral phenomena, that are the currency of the constructive endeavor of an international 'public'. The growing and unstoppable proliferation of specific arrangements and transnational networks of common action, the formation of global legal regimes, can be seen also developing as a rule-making and rule-driven phenomenon. An institutional enterprise avails itself of rules. As MacCormick showed in his theory of law, its structure avails of institutive norms, consequential, and terminative rules⁴². Having focused on the whole of an 'institution', the question of temporal priority between practices and rules, could be taken as a rather abstract one. But even MacCormick apparently started from considering Searle's distinction between constitutive and regulative rules, although one that he criticizes mainly for the non-normative character attributed to the former. As it is known, for Searle, while "regulative rules regulate antecedently or independently existing forms of behavior" other rules are "constitutive" in the sense that they "do not merely regulate, they create or define new forms of behavior"⁴³.

Such a distinction, even under caveats, can help us conceiving of some concurring aspects, that converge into the idiosyncratic reality in the making, namely, the global: neither a 'state of nature' nor a modern State society, and out of their time and space.⁴⁴ 'Spontaneous' practices⁴⁵ have been recorded as the key of the transnational setting. Nonetheless, they have been increasingly flanked by supranational regimes' construction, whether State, private or hybrid: a kind of Promethean endeavor rather than a spill-over or the unintended outcome of 'lex-mercatoria'⁴⁶. Most of the cycle of spontaneous-institutionalised, government-governance processes appear to network interlocutors of originally mixed nature or status⁴⁷. Those processes locate on a degree- and changing- scale of complexity, depending on their distance from and between the two extreme poles of a built-in-practice transnational law and the 'creation' of transnational, international or supranational regimes (often centered

⁴² N. MacCormick, *Law as Institutional Fact*, in N. MacCormick, O. Weinberger, *An Institutional Theory of Law*, Dordrecht, Kluwer, 1986, 52-3.

⁴³ J. Searle, *Speech Acts*, Cambridge, CUP, 1969, 33-4.

⁴⁴ See the elaboration on this point by N. Walker, "Out of Place and Out of Time: Law's Fading Co-ordinates" (2010) *Edinburgh Law Review* 13-46, Vol. 14.

⁴⁵ Cf. the contributions of Gunther Teubner, among which, "Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors?" in K-H. Ladeur, ed., *Public Governance in an Age of Globalisation* (Aldershot, Ashgate, 2004); G. Teubner, "Constitutionalising Polycontextuality", 2010, available at http://www.jura.uni-frankfurt.de/1_Personal/em_prof/teubner/dokumente/ConstitutionalisingPolycontextuality_eng.pdf.

⁴⁶ The two aspects are interwoven, whether concurring or competing. Practices of economic actors, NGOs, social movements, epistemic communities, of lawyers, judges, arbitrators, field experts, play a constructive and domain defining role, while being essential components of whatever processes in the global scenarios.

⁴⁷ On which see *infra*.

upon organizations, regulatory and administrative bodies, judicial entities). The institutionalisation of domains of governance is increasing⁴⁸.

As much as in MacCormick's depiction of institutional facts, such institutionalization helps us making sense of the legal side through the effort to both overcoming 'provisional state', and to framing in normative terms the standards of the practice. It can be seen the mixed contribution of two different narratives: one that starts from the experience of common, private, spontaneous practices that slowly evolve as a pre-condition for the emergence of built-in-action rules of law, the other looks at the constitution of some institutional set of rules- or regime- as the precondition for newly forged practices: it is law here to ground the 'broadening' of perspective beyond individual views⁴⁹, *ie* to institute the dimension of the 'public'.

I am stressing here the second strand in order to shed light over the normative side of institutions' and regimes' building which is imbued with purported coordinative, multilaterally oriented functions, *ie*, one that, albeit being possibly urged by them, does not simply record or reflect, say, the experienced common practices of self referential competitors on the market place, and the like⁵⁰.

However, some comments apply, as to the nature of this endeavor that does not resemble the socio-political features of institutional enterprises as known within the State orbit. In truth, their salience is best captured as related to the spreading of specialized knowledge, that even within the State multiplies the need for administrative decision making through functional fields and sectors. And as properly said, "the rise of the information and of knowledge as the main resource and frame of reference for decision-making", defines functional borders, that is, generates multilayered relationships both within and beyond the State in the transnational level⁵¹. Accordingly, in the social side of the practices, collective interactions are expected to develop which not only are independent on national borders and established States, but crosscut the demos-like allegiance in transnational forms⁵². Perhaps, that might be viewed as a "deliberative representation" space⁵³, and as it is maintained for the European Union, some governance structures might afford

⁴⁸ A good example is in the regional ambit of the European Union: the formalisation in the Lisbon Treaty of the Open Method of Coordination, and the now long standing governance structures like Comitology and Agencies.

⁴⁹ *En passant*, one can see the mirroring of two essential narratives of law, the first is a Humean narrative, the second is the function of law in Bentham's terms. Among others, on this distinction, as related to the two thinkers, G. Postema, *Bentham on the Public character of Law*, supra note 17, 58.

⁵⁰ Again, what Bentham would have equated with the customary interaction among 'monades', one that, though, in his view was still too far from resembling the service of law (J. Bentham, *Of Laws In General*, supra note 16.

⁵¹ K-H. Ladeur, *The Emergence of Global Administrative Law and Transnational Regulation*, IILJ Working Paper 2011/1

⁵² They gather stakeholders, interested groups, public or private regulators, experts, judges, arbitrators, economic actors, as much as fluid social movements, NGOs, advocates or pressure groups On their role in constructing the global space and stabilising normative expectations, Robert Keohane, *Social Norms and Agency in Global Politics*, Straus Institute WP, 07/2010.

⁵³ J.S. Dryzek, S.Niemeyer, "Discursive Representation", 2008 *American political science review*, 102 (4), 481-93.

deliberative experimental forms⁵⁴. In such a view, the *functional* division is called upon to replace *territorial separation*⁵⁵. But especially as far as specifically the *global* regimes are concerned, it is clear that either inherent political quality, or full control of States, let alone the drive of the ‘governed’ and of the ‘affected’, fade quickly⁵⁶. Proceeding on politically unfinished or unresolved segments, self disseminating through specialization and clusters, they do not appeal to the pre-condition of democracy, and work by sidelining for the sake of viability, the resilience of less treatable questions (like traditional democratic participation, self legislative or democratic devices available to addressees). I shall return later on this essential scarcity of political fabric. However, it is precisely such a state of affairs, this nature of global governance, to have consequentially prompted accountability and responsiveness concerns and questions, and the search for legal devices for transparency, control, revisibility, protection of affected people, procedural parameters for decision makers’ control, as the rise of dense scholarship on ‘global administrative law’⁵⁷ can show.

Nonetheless, they can also be seen as attempts at crossing the line, the *in limine* status, between disorder and order, between private or unilateral and ‘public’, although in a primitive *segmented* manner. World Trade Organisation or the European Union, not more than the United Nation Convention for the Law of the Sea or the European Convention for Human Rights, the Codex Alimentarius Commission, or the International Standard Organization (and the impressive number of equivalent entities of diverse nature and status) draw our attention beyond the traditional epistemic realist fulcrum of international political relations, and beyond the frame of States’ restricted ‘public’.

From this perspective then, it cannot suffice to assume that global governance should consider “international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorised to define, as a public interest”⁵⁸. This definition conveys most of the grain in the traditional trend tracing

⁵⁴ C.F. Sabel, J. Zeitlin eds, *Experimentalist Governance in the European Union; Towards a New Architecture*, Oxford, Oxford University Press, 2010

⁵⁵ Although in the specific domain of the EU, it is more properly seen as a *hybrid* system, where governmental- or governing- and governance structures play complementary roles P.Kjaer, *Between Governing and Governance*, Oxford, Hart, 2010.

⁵⁶ Among others, full acknowledgement of this in N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford, Oxford Univ. Press 2010.

⁵⁷ Among the many works, see its application at WTO, in R. Stewart, M. Raton Sanchez Badin, “The World Trade Organization and Global Administrative Law”, forthcoming in Christian Joerges, Ernst-Ulrich Petersmann, eds *Constitutionalism, multilevel trade governance and social regulation*, Oxford, Hart.

⁵⁸ Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, IILJ Colloquium Working Papers, 2009, 11. The authors are well aware of the need to integrate such starting point, though, and envisage an eclectic approach, one that shall have to combine “constitutional, administrative and international institutional law approaches to global governance (and, thus, international institutions)” since they all “share the aim of understanding, framing and taming the exercise of international public authority in the post-national constellation”(*Ibid.*, 24-5)

publicness back to sources otherwise defined as in themselves and already ‘public’ in nature, like States, provided that they converge to forging common interests. The generation of public on the globe is here still seen as a *derivative* and State deferential process.

The point is rather that the proliferation of global regimes gaining substantive governance autonomy, detaching from the actual persistence of States will, the often non-State nature of their generative components (or their public-private, that is, hybrid constitution, or the informal process that often engender some of them), all make it rather tortuous to trace back the validity of their norm-production only to the chain of empowerment and delegation of States’ treaties as acknowledged public entities. The transnational networking, the incremental attempt to build bridging meta-rules or principles of legality within and between them⁵⁹ all explain that theoretical work on global governance is more reliant on the promise of the *form of law*, than on the *form of State* as controlling. In other words, the issue might well be reversed, so that instead of appealing to the public as a precondition of legality, *it is the claim to legality that appears to support the potential generation of the public*.

This explains the claim of global administrative *law* project on global governance. However, its theoretical underpinning is worth recalling. Benedict Kingsbury accredits global regimes as *legal* regulators, and assumes that their production can be considered as law, provided that they satisfy some requisites: he identifies *criteria of legality*, first, social sources’ (‘liberalised’ since they embrace States or not States entities as jurisgenerative); second, legality of rule production is made to depend as well on further requirements of ‘publicness’ (that is, rationality, proportionality, the rule of law, the principle of legality and basic human rights deference)⁶⁰. The latter should curb the self legitimated drive of global regimes and are introduced from the outside, so to speak, as borrowed from the way the public is conceptually envisaged in State related contexts, domestic or international. Here the connection between legality and publicness is construed by making legality to depend on publicness’ requirements (or those that are recommended as such).

From my discussion above, I suggest that this dependence of legality *on* publicness is, at a closer look, to be turned upon its head. The proposed requisites of publicness are in fact extrapolated from other existing contexts of *legality*. And indeed, the enumerated components, when seen as a whole, that is, requirements of publicness, *depend on law*. They hardly form a complex that stands as a whole anywhere else but inside (and through) law itself: they indeed belong in the domain of legal factors. And in truth, they are best seen (*à la* Kant) as part in the construction of the ‘right’ through law, are part in the process of creation of the *public through law*. It is thus clearly our *commitment to a vision of legality* that shall ground the institution

⁵⁹ See G. Della Cananea, *Al di là dei confini statuali. Principi generali del diritto pubblico globale*, Bologna, Il Mulino, 2010 and S. Cassese, *Il diritto globale*, Torino, Einaudi, 2009 or Id., *The Globalization of Law*, 2006, see it at <http://www.iilj.org/GAL/documents/CasseseGlobalPaper.pdf>

⁶⁰ Such requisites of publicness are thus made part of the rules of recognition (through a kind of inclusive positivism). See B. Kingsbury, “The Concept of ‘Law’ in Global Administrative Law”, in *EJIL* (2009), Vol. 20, No. 1, 23, at 25

of the public law in global sphere, not vice-versa (notwithstanding the attempt to depict some self-standing idea of ‘publicness’ to be subsequently transposed into a criterion and premise for shaping our notion of legality).

IV Public decoupled and the two tiers of multilevel law

1. As from the above, where hundreds of bodies of global governance issue normative directives, the legal perspective is a challenge of decisive value. But as I shall submit, the construction of the public in the widest environment, cannot get rid of the fact that unlike domestic setting, the ‘global’ level of legality, if any, shall always work by impinging upon other legalities: requiring mostly States cooperation, ‘external’ implementation ‘on the ground’, by political, judicial, and administrative entities, and all in all, in the mode of supra- states unities, like the European Union, for which it is true that “it does not do, it does cause others to do”.⁶¹

If one takes this perspective, *mutatis mutandis*, the very authority of global legality level cannot stand alone and the consequential construction of the corresponding ‘public’ can only depend of the interaction and interfacing among *legalities*, belonging in different legal orders. The *public through law* perspective is in this context of an *interfacial* nature, and it is *incomplete* until such interaction takes place. If there is a global administrative law, for example, it is not by itself: as I shall explain soon, farther legalities’ components have to close the circle. This cannot be mistaken with the lack of external binding force over the subjects, the blueprint of ‘real’ law. The point is the *composite nature of global* legality, one that must be conceived as in need of being ‘completed’, waiting for confrontation with discrete and distinct legalities placed on different levels.

Even considering the network of global regimes under the requirements of an updated concept of law as the one suggested by the project of Global Administrative Law, such a legality shall still be *other* in respect to otherwise persisting State, regional legal orders, and given its structure (the shifts of power from state to global regulatory substantive autonomous governance) it misfits as well international law, *stricto sensu*. Even if taken as a legality of itself, Global regulatory law cannot determine conditions of validity pertinent to *other* legal orders⁶², despite its relation to them being unavoidable, and its working through orders’ penetration, affecting objects, fields, practices, peoples and individuals in both local and global spaces. Thus there is a double dimension: in the first, the global legality (in the sense of regimes in global administrative law, where discrete rules of recognition are in progress, and further common principles –bridges- are slowly being devised and

⁶¹ See the point in S. Cassese, *Democrazia e Unione Europea*, 2002, 11 at <http://www.storiacostituzionale.it/doc/Cassese.pdf> (last visit May 2011)

⁶² More at length in my *The Rule of Law in Global Governance. Its construction, function and import*, supra note 4.

practiced, firstly through judicial impulse⁶³) from whose standpoint pluralism of multilevel institutions and legal orders falls under its scope and authority (as its implementation- effectiveness chain). In the second dimension, a competing reality of the different legal orders as standing *per se*, which persist and vindicate their own criteria of recognition. Overlooking this bi-dimensionality can undermine globalist, whether constitutionalist or administrative law attempts⁶⁴.

The two dimensions intersect permanently and raise mutual prescriptive claims, whether in interpretative, compliance, implementation intercourses or in the event of controversies' arbitration and judicial assessments, and the like. From the standpoint of the global legality this intersection provides the opportunity to 'complete' the 'composite' of the legal public by legalities' mutual plugging in.

2. Indeed, such inevitable *relations* take place between a *deracinated* global law and legal orders bearing different degrees of political and social embeddedness. The global regimes' legality is of course a legal-technical artifice aimed at coping with complexity, and its formal isolation from the life of real affected 'public' in real politics resulted into its *operational* dependence upon them. The status of its legality is one that bears a kind of pre-arrangement awaiting to- be- *completed*. Global legality level, therefore, can be seen at the same time as still *unsaturated*⁶⁵.

Thus, the second prong surfacing in the matter is that of the political circle: sources, 'players' or actors, means, addressees are flesh in the existential domain of the practice, and their involvements call for political concerns.

On this basis, the further 'regulative' aspects, the massive amount of regulatory norms for, say, standard-setting, trade liberalization, or with further moral impact, human rights, environmental protection, global security, climate financing, are too far and detached from constituencies, addressees and affected life worlds, that can claim a 'located' space⁶⁶. That notwithstanding, their normative pretensions ironically must rely on *polities'* *independent existence* and penetrate them despite being incommensurably distant from their social and political allegiance.

It is here that the global legal public surfaces as an arrangement in need to-be-completed: that is, one that can only work by way of being joined by sub-global legalities whose veil it pierces. Thus, the global suspended *status quo* is expression of an unsaturated legality decoupled from the political components of the public (that

⁶³ S. Cassese, *I Tribunali di Babele*, Roma, Donzelli, 2009; and Ch. Brown, *A Common law of International adjudication*, Oxford, Oxford University Press, 2007

⁶⁴ Theoretical constructions revolve mainly around one of the two dimensions: in the first dimension, either by drawing the architectures of full global primacy through legal schemes (substantive or formal), or by attenuating it in light of enhancing internal contestation or constitutional pluralism; in the second dimension, by supporting the discrete nature of legal orders, pluralism, and socio-political irreplaceable embeddedness.

⁶⁵ I used this notion earlier, in my "Politics and Rights: The Future of the EU from a European Perspective", *Ratio Juris*, 2005, Vol. 18, No. 3, 400-409.

⁶⁶ Another example for this criticism for ex. Ming-Sung Kuo, "The Concept of 'Law' in Global Administrative Law: A Reply to Benedict Kingsbury", *European Journal of International Law*, 2009, Vol. 20, No. 4, 997-1004.

happen to be positioned on separated shelters) *and at the same time* of the two-steps-legality profile. The *public through law* in the global setting stands alone, until reconnection to the affected and /or governed is provided, be it through ‘deliberative’ governance structures or through the States’ legalities mediation, or through the hybrid functional-territorial, horizontal-vertical, governance-governments interplay.

As much as the Kantian imperative of public law remains a necessary criterion of coexistence, it works as a *transcendental scheme*, that is, one that is *necessary* but is made *to be ‘applied’*: the ‘bootstrap’ of legality points to a provisional scheme of ‘publicness’, whose self driven currency lacks its coupling with *political* generators of law. It is in need of being filled in by social, and therefore, ethical and political processes. It draws conditions of justice among diverse ‘goals’, the ideas of the good, elaborated within the domains of discrete legalities (included the fabric of self referential goal-functional regimes), rationalities that inevitably, even if not always visibly, are to interfere against each other. Otherwise, it is an empty public.

Evidently, we are now back to the question concerning the *dual* constitution of the public, its legal and political nature and how to redefine it in the context of plural legalities, how to mend the detachment of the legal and the political that are, as things stand, located on different planes of order.

Let us resume the argument. In the Kantian pattern of the public, the birth of law connects to the systematic care for interference, out of the pursuit of liberty and independence. Central to it is certainly coordination, but here it is well linked to the *moral* justificatory support for being under the law, for its very birth⁶⁷ (*ie* justice). All in all, the positivity of law is required in order to make explicable the ‘rawlsian’ two moral powers, the sense of justice and the readiness (and freedom) to devise conceptions of the good.

The (global) public through law model cannot find the “political right” counterpart which it couples in the dual constitution of the public of the modern State. But given the legalities interweaving, it is due to them that a double result should be sought: first, the *activation of the justice related function of the public through law*, as governing fairness and independence in the relations among mutually recognized orders; second, at the same time and through that very relation, the incremental and *discrete re-coupling of the legal and political generators* of the public, as they are contributed by socially and politically well ‘rooted’ legalities interacting on the beyond-the-State dimension. What happens is consistent with the notion of the global public through law, as described above, that is, as a pre-arranged *unsaturated* legality in constant tension toward its “being-completed”.

V The social question of juridification.

⁶⁷ Postema (supra note 17) considers coordination essential part of Bentham’s law- as- public, defends it from the charge of being unrelated to matters of principle, and eventually recalls that law does not simply fix disagreements in a once for all move, but plays its role in allowing for further argument, improvements and change (what Bentham was not ready to accept).

The de-coupling of legal and political public is caused by the absence or the evaporation on the distinctive global level of the *social*/community-bordered fabric that is used to host the public within life worlds. Despite the emerging social movements of transnational extension, the networks of institutional State-disaggregating intercourses, the emergence for some of a global civil society, still the creation of *meaning* belongs in discrete life worlds, can be hardly located elsewhere, and even the openness of borders and the mobilization of allegiances do not seem to displace the logic of communities and polities based on their framed social basic links. Our concern *vis à vis* deracinated global regulatory law stems from its being transmission belt of, say, specialised regimes' efficiency imperatives irrespective of the needs and claims of societal orders that they affect: such 'external' imperatives are capable of disturbing domestic equilibrium, overriding social concerns, replacing rights interpretations, overwriting basic needs, 'internal' meanings of regulated polities. All the more so, given their claim to a primacy due to their incomparably (e.g. beyond States' particularism) comprehensive standpoints.

Clearly, this shows a trend reflecting the fading (or "the liberal undermining") of "republican legitimacy"⁶⁸.

An even cursory look at case law here would let the question to materialise in more concrete terms. Doubts have been raised even *vis à vis* some recent decisions of the European Court of Justice, despite being this Court, unlike global regimes' Tribunals, part of a well tightened, autonomous legal order. Cases like *Volkswagen*⁶⁹, or *Laval*, *Viking*, *Rüffert*⁷⁰, have triggered essential questions regarding the very acceptability-- from both the EU and the Member States points of view-- of a (pan-European) homogeneous socio-economic model debunking diversity in internal national assets and settings: e.g. by undermining an idiosyncratic and deeply cherished 'social market' capitalism model⁷¹, in *Volkswagen*), or redefining the content, exercise and scope of a fundamental right (as the right to strike, that in *Viking*, results in a conflict with Member States' constitutional traditions). In Fritz Scharpf's diagnosis, the straightforward supremacy of European Law, through the known activism of the ECJ⁷², has had "the effect of transforming the hierarchical

⁶⁸. The trend is focused upon by F. Scharpf, "Legitimacy in the Multi-level European Polity", in P. Dobner and M. Loughlin eds., *The Twilight of Constitutionalism?*, Oxford, OUP, 2010, 111. Such legitimacy in turn rests on a political, republican, conception of the constitution, as lastly recalled by M. Loughlin, "What is constitutionalisation?", *ibid.*, 47-69 and see also D. Grimm, "The Achievement of Constitutionalism and its prospects in a changed world", *ibid.*, 3-22.

⁶⁹ ECJ, decision of 23 October 2007 *Commission v. Federal Republic of Germany* "Volkswagen" (Case C-112/2005).

⁷⁰ ECJ, Case C-341/05, *Laval un Partneri Ltd*, ECR 2007, I-11767, Case C-438/05, *Viking*, ECR 2007, I-10779., Case C-346/06, *Rüffert*, ECR 2008, I-1989.

⁷¹ See in general Ch Joerges, F Rodl, *Social Market Economy as Europe's Social Model?*, EUI WP Law 2004/08. On Volkswagen, see for example, P. Zumbansen, D. Saam, "The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism", in *German Law Journal*, vol. 8, n. 11, 1028-1051.

⁷² Even in areas onto which EU competencies are excluded or in others where unanimous votes are required, still judicial ordering appears viable if construed so to protect Treaty entrenched liberties. In particular this observation by F. Scharpf, *Legitimacy in the Multi-Level European Polity*, cit., 116.

relation between European and national law into a hierarchical relation between liberal and republican constitutional principles”⁷³.

Such perplexities about overlooking diversity become telling for the purpose of this chapter, precisely because the European Union sets a scene far different from the global one. The commitments of Member States cannot be taken as the template of the global sphere, because they partake in a much closer and structured community, a legal order of a regional union that has established a sui generis constitution including goals and means unparalleled outside the EU.

However, further concerns surfaced routinely *outside* the EU, say, in the ways that the ECtHR undertakes to protect the rights enshrined in the Convention (think for ex., of the case of the Crucifix, *Lautsi*, first decision 2009⁷⁴, and the conflict it generates *vis à vis* domestic understanding of freedom from religion). Conversely, one often finds a ‘filtered’ legal confrontation: the EU stably denies direct effect to WTO rules⁷⁵; with reference to Security Council resolutions, the ECJ refused to forfeit its commitment to its own primary norms, arguing its reasoned disagreement against the disregard of fundamental rights *vis à vis* global security imperatives (in the *Kadi’ and Al Barakaat* case⁷⁶). Even more significantly, some ‘return of the State’ is recorded in the trend of traditionally market-driven (and akin to regime building) *Bilateral Investment Treaties*. On the one hand, the general resort to Investor-State Arbitrations is considered part and object of a global administrative law agenda, aiming at improving their legal quality, their procedural fairness, and their legitimacy⁷⁷. On the other hand, some reluctance to only rely on the Investors-States *Arbitration* surfaces because States wish to better exercise a *direct* control, reinforce their own legal safeguards, and to decrease investors favouring conditions. The change follows here the “lost faith in deregulation, privatization, the un-abashed protection of property, and wholly unrestricted capital flows”. This goes with some emphasis on “the negative externalities often accompanying incoming capital flows, including more unequal income distribution, politically disruptive dislocations of people, and adverse social or environmental effects”⁷⁸.

A theoretical pattern for the understanding of those aspects, *mutatis mutandis*, can be taken from the issue (debated in the ‘80s) of external *juridification* of ‘authentic’ social fabric: Juergen Habermas addressed the shortcomings of welfarist interventionist policies introducing into previously free domains of social life new

⁷³ Scharpf, *Legitimacy in the Multi-Level European Polity*, supra note 68, at 112.

⁷⁴ ECHR, *Lautsi v. Italy*, no. 30814/06 (Sect. 2) (fr) – (3.11.09).

⁷⁵ Claudio Dordi (ed.), *The absence of direct effect of WTO in the EC and in other countries*, Turin, Giappichelli, 2010

⁷⁶ ECJ, 3 september 2008, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*.

⁷⁷ B. Kingsbury and S. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, IILJ WP, 2009/6, 6 ff, and *passim*.

⁷⁸ J. Alvarez, “The Return of the State”, *ASIL*, 19-20 at www.law.nyu.edu/ecm_dlv2/groups/...law.../ecm_pro_067586.pdf

conditions for legalised opportunities and entitlements. As he contended, the “dilemmatic” structure of juridification of life spheres overwrites the pre-existing contents of social interactions⁷⁹ even when providing for new distributive rights. Tellingly, that was to raise legitimacy problems with reference to those ‘autonomous’ relations that for Habermas naturally avail themselves of communicative interactions (like in the realms of school law, social security, cultural reproduction, fields of moral sensitivity which extend to legal areas, such as criminal law, constitutional law, bioethical concerns), spheres that are in need of consensus-based law, supported by *substantive* (id est not merely procedural) legitimacy. What was considered *systemic* integration- through policies obeying at functional imperatives and implementing regulatory measures- jeopardises the realms of life world, by re-interpreting their relations through the lens of external rationalities. But only the life world remains the “reservoir” of meaning⁸⁰. The solution to this problem would have been, as then was said, to stop at the “external constitution” of those sensitive areas, avoiding the risk to assimilate them. The dilemmatic character of juridification is thus visible: as Habermas wrote, the “point is 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”⁸¹. In other words, the risk of “colonization” of the life world. The question 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”⁸².

One can see how this elaboration can be illuminating as well on the interfacial intercourse among global regimes of law-making and discrete polities (the level of life worlds), as I have recalled it above. This holds also for Habermas’s contention, that there are areas of a law-as-institution (linked to deeper pre-existing normative social practices), where law *reflects*, and does not *constitute*, follows but does not create *ex nihilo*, practices of coexistence or cooperation.⁸³ Outside the State domain, such a *caveat* translates into the quest for an interactive equilibrium among legal orders, bearing mutual normative claims, especially when the force of external imperatives falls upon pre-given domains of an essentially basic social nature. It should not be a surprise, therefore, that a reasoning substantively mirroring the

⁷⁹ Juergen Habermas, “Law as Medium and Law as Institution”[trans. from *Theorie des kommunikativen Handelns*, Frankfurt: Suhrkamp, 1981, bd. II, 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., 203-20).

⁸⁰ Ibid., 206.

⁸¹ Ibid., 220.

⁸² Ibid., 214.

⁸³ Compare this sociological view with the Searle’s distinction and its use in legal theory: see supra note 43.

Habermasian *caveat* and his recognition of ‘sensitive’ areas of the life-world (*law-as-institution*), resurfaces after decades, in a rather different context, with regard to the EU, in the German Constitutional Court ‘Urteil’ on the Lisbon Treaty. Regardless of the rest, it is reaffirmed that the externalization of European competences should be cautious “particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required“. Accordingly, the Court states, that among such sensitive areas are to be included „substantive and formal criminal law“, fiscal decisions especially those related to „social policy considerations“, the „shaping of living conditions in a social state“ and all those „decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities“⁸⁴.

In the coordinates drawn so far in this chapter, the juridification in the top down mode, or reversely, the resistance of States to global coordination, are in constant search of a balance, and from such a balance the construction of the ‘public’ in the global sphere shall have to depend.

VI Models, prospects, and conclusions

As mentioned above, although different rationalities accommodate themselves on a plurality of levels and legal orders, they are not self contained, and even “technical” administrations, whether legally or informally developed, generate unavoidable outcomes of ethical, social, and political value. The models for the re-coupling of the public in law can be varied, but all must refer at crosscutting and mutual intercourses among legal claims. In one sense, the pursuit of the self referential ideas of the good in each global clusters (regimes of environmental protection, energy, security, human right, trade, health and the like), and the self protective stances of confronted orders, are to be seen in the view of reconciling their viability, be it through political communication, judicial dialogue, contestation, and the weaving of schemes of interfacial nature, some of which have been in many instances already resorted to in the reciprocal attitudes mainly by judicial bodies, constitutional courts, the European Court of Justice, the ECtHR ⁸⁵. It is important *to add*, however, that theoretically the general rationale can be explained as accomplishing a double move: that is, on one side they work, in fact, in the interfacial zone of the re-coupling of the legal and socio-political generators of the public, because they address the balance among

⁸⁴ BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421),

http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html , see §§ 251-2, and ff.

⁸⁵ In the variety of such methodologies, relevant examples, largely emphasized in European Union law scholarship, were offered by the Italian Constitutional Court “counter-limits” doctrine or by the “Solange” doctrine of the German Constitutional court. Others are found in the case law of the ECtHR, like the criteria of *equivalent protection*, or the *margin of appreciation*. As to the state of the art on the relations among jurisdictions, and the emerged patterns, Y. Shany, "Regulating Jurisdictional Interactions between National and International Courts", Oxford, Oxford University Press, 2007.

‘lower’, discrete, legal orders and global international/administrative law. On the other side, they only can do so through abiding by legal requirements in a wider ‘public’ area, where legal reasons are invoked that purport and claim to reach beyond the confines of each legal orders: what presupposes the transcendental idea of, and the potential resort to kantian universals of co-existence.

In the setting of the European law, Joerges (with Neyer) developed a pattern that albeit concerning the EU, bears a rationale that is better suited to hold *beyond* the regional unity of Europe, and be applied in the global scenario. The argument emphasises that while *diversity* of levels and orders deserves recognition, supranational governance, oriented to technical efficiency, is not unencumbered by distributive or redistributive outcomes and objectives⁸⁶, and often deals “with politically quite sensitive issues”⁸⁷. Nonetheless, political redistributive issues should rest on States, while coordinative institutions (with interests’ representatives and scientific experts) locate on the different “transnational” level⁸⁸. Disputes across the different levels have to be arbitrated, for Joerges, through rules of a conflict of laws methodology. In this construction, ‘supremacy’ of European law is legitimate because it voices ‘foreign’ concerns by constraining a Member State whose action unfairly affects peoples outside its own borders. Rules and principles of “co-existence” and “compatibility” of different “constituencies” are to be framed under their “common” (European) link⁸⁹. Interdependence is a matter resolved under principles of justice, fairness and coherence within the supranational frame⁹⁰.

This view sets a revealing scene of discussion. It considers Europe and the transnational level as operating in the service of taming national democracies selfishness and curing the external failures of states, who have limited reach on problems of extra national nature, and whose political decisions affect other states and people, out of the knots of interdependence. But it does not reject the *positive* direction either, that in the EU refers to the other side of ‘integration’.

The point to be enhanced here concerns the general scheme, *ie* that convergence among legalities in the global setting should be negotiated, and carefully tested in

⁸⁶ Ch. Joerges, “European Law as Conflict of Laws”, in Ch. Joerges and J. Neyer, “ ‘Deliberative Supranationalism’ Revisited”, part. II, EUI Working Paper LAW No. 2006/20, 16: and G. Majone, “Regulating Europe: Problems and Prospects”, 3, 1989, *Jahrbuch zur Staatsund Verwaltungswissenschaft*, 159-177.

⁸⁷ Joerges, *supra*

⁸⁸ As “neither purely European nor purely national”, and “neither genuinely legislative nor purely administrative ‘political’ activity”: Joerges point is to ask which conditions are to be satisfied for this level of activity to “deserve recognition” (ibid., 17).

⁸⁹ Such a “Conflict of laws” methodology “is about the recognition of foreign law, the adaptation of domestic law to the co-operative needs and legal commitments and principles furthering co-operative problem-solving. Co-ordinated problem-solving in the European constellation requires a further step, namely a cognitive opening of the legal system for scientific and other expertise” (Ibid., 27).

⁹⁰ Conflicts are categorised in the three dimensions of vertical, horizontal and diagonal (see ibid. 24 ff). In diagonal conflicts, where the same question appears to be differently regulated at different levels, a final superior answer cannot be given in the absence of a omnilateral competence principle of supremacy. As to the normative hypothesis, it might spur disappointment of more communitarian political aspirations in the EU. Nonetheless, its scheme bears an interesting potentiality of projection in the less demanding global setting.

case by case tailoring, so to be reached through incremental self amending political deliberation: each legal communities can be called upon to elaborate normative claims advanced by ‘others’, that is, by other legalities: and the latter, as said above, are not seen as mere *facts*, but equally entitled to the legal stage of reasons. The direction is not that of reframing structural conditions of democracy (as one might wish in the different- EU context) but the premise is akin, and concerns the very fact that supranational legality appears to be detached from political fabric.⁹¹

I would take this level-relative viewpoint of the “division of tasks” in itself, as one that has relevance (not to the aim of European democracy but) for re-coupling the diverging drive of global regulatory law *vis à vis* the socio-political load of legitimated claims imbuing State legal orders.

The problems at stake are bi-directional: one cannot either disrepute the endeavour of supranational rule-making (at least given its *prima facie* coordinative primacy), or disallow in principle possible good reasons that States’ life worlds might properly represent. I am inclined to see interconnections from the perspective aptly hinted at by Robert Howse: we should not simply see the “good” of say, WTO norms, and simply from that very point of view (*e.g.* as one enhancing market freedoms and entrepreneurs autonomy *vis à vis* States’ self protective activism), but should equally view the other side of the coin, *ie* that “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”⁹².

It is a potentially fruitful perspective here, I would submit, to assume that justice concerns among legalities, require models of balanced interfacing. In analysing the implementation of rights in the European Convention HR, Judge Lech Garlicki has considered the communication among courts, both horizontally and vertically, an essential aspect of rights protection, in a triangle of cooperation, to be carefully cherished: “there is always a potential for collisions, and then the triangle of cooperation may degenerate into a ‘Bermuda triangle’ in which individual rights and liberties might simply disappear”⁹³. However, examples of ongoing refinements and

⁹¹ With regard to the EU, for example, Joseph Weiler writes: “The fact that so regularly the European construct is approved without a serious challenge to its questionable democratic quotidian praxis represents the invasion of a market mentality into the sphere of politics whereby citizens become consumers of political outcomes rather than active participants in the political process. It represents the process whereby we come to cherish the closeted deliberations of civil servants because of the quality of their dialogue and the merit of their outcomes, but in which citizens or their representatives are at best partially informed consumers of such deliberative paradise. In this respect Europe seems to produce a negative moral “spill over” effect. Even in our Member States we are moving to result legitimacy rather than process legitimacy”. (JHH Weiler, *Values and Virtues in the Process of European Integration*, at ILLJ, Website, NYU. Law School, 2010 draft)

⁹² As Howse goes on: “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 fulfil 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.)

⁹³ Lech Garlicki, “Cooperation of courts: The role of supranational jurisdictions in Europe”, *International Journal of Constitutional Law*, 6, 2008, 512

dialogued assessments come also from the practice of the ECtHR, as one can learn, for instance, from the instructive saga of Polish rent-control cases concerning property rights under rent control legislation, that involved in some years an ongoing process of moves and dialogues among the Polish Constitutional Court, the ECtHR and the Parliament⁹⁴.

On the confrontational stage, legalities with different depth, allegiances, social embeddedness and political salience bring their claims from opposite views of the (*ir*) common good, but must bring reasons of universalisable nature on the coordination and compatibility level of global intercourses. Here they must find a grammar that, as we have seen, different models of interaction are generally *already* relying on. The public dimension at this meta-level can be construed under the criteria of avoiding one sidedness, and reconcile independence as a basic premise to inescapable interdependence and attempts at coordination.

This can only happen under the condition of a premised claim to the rule of law as a common, not merely parochial or internal, measure⁹⁵. It is not an automatic consequence of liberal legalistic utopia, but an outcome that can only be triggered by civilised commitment to treating the ideal of the rule of law, as itself incompatible with arbitrary choices, unjustified dogmatic hierarchies among interlocutors located on the globe (as a legal public space, in the Kantian sense). The mutual enterprise of a public universalisability-test curbs unjustifiable interferences, regardless of the direction they take. As stated above, each legality, each State or ultra State sphere of order, in our interconnected world, elaborate self-referential normative instruments for the pursuit of their worldview, the protection of their internal environment, the viability of their ideas of the good. The legal enterprise on the global setting repeatedly tends to the weaving of the *public through law*: the global ‘condition’ though has to recompose, on a case by case basis, the *duality* of the public, rescue the political salience of the public, what it can do only by availing itself of the full recognition of both discrete legalities’ autonomy and their interdependence. The lesson coming from the *public through law* model is thus not at all the self sufficiency of its disembodied law, either in the Kantian theoretical model or in its global legality’s deracinated appearance. On the contrary it originates on the premise that its positive function oriented to fair coexistence, bears an ever *unsaturated* nature, one that can only complete itself by coming to terms with normative orders bearing different constitutional thickness. Of course, however, it is the capability of the *legal public to constitute the scene* that is to be valued here, that is, the legal claim to non domination and disallowance of *arbitrary* ‘closure’. Material behaviour that does not face tests of rationality, proportionality, and ostensible justifications beyond self interested motivations, would simply downplay the necessity of the ‘right’, imposing on the globe an unsupported, unilateral conception of the good. And this holds as well

⁹⁴ On which Garlicki, *ibid.*, 514 ff.

⁹⁵ On this point, see my “The Rule of Law beyond the State: Promises, Failures, Theory”, *International Journal of Constitutional Law*, 2009, Volume7, Issue3, 442-467.

when rejection (or deception) of largely agreed upon standards takes place on behalf of States out of self protecting and self-contained attitudes. No doubt, even the Global administrative law project of submitting rule-makers activities to procedural principles, transparency, revisability, and deference to basic human rights, can advance both the pursuit of fairness and mutual recognition. But the slow weaving of a rule based progress toward fairness, control, accountability, and related accepted ideals, shall mainly shape the global administrative law *in itself*, by improving, for example, the general principles that global regimes should follow in discharging their tasks. The re-constitution of the *dual public* should concern a different plane: in the composite form of the inter-legalities' construction, it recalls the further problem of balancing with due care the legal, deracinated, and the socio-political generators of the law in public.

As I have maintained elsewhere, the coordinates of legal relations among orders, can be construed as well as an extension beyond the state of the historical normative ideal of the rule of law. Although expressed in different terms, through the Kantian legal 'bootstrap' of the public, the path I have taken in this chapter is to be seen as another rule of law based itinerary. But as I just recalled, the different route that links the supranational stage to justice and reconnects it to communities by voicing the thickness of their political claims via a legal confrontational stage (be it through conflict of laws methodologies or otherwise), hints at the same logic in a different fashion. Through the complex itineraries of our present world, the challenge in re-coupling the 'public' can be faced, to start with, by the rationale of that public *through law*, with the consequent duty of abandoning the kind of (ideally 'natural') state where injustice is *not objectionable*.