

**University of Parma**

---

**From the Selected Works of Gianluigi Palombella**

---

Summer July 3, 2013

# GLOBAL LEGISLATION AND ITS DISCONTENTS

Gianluigi Palombella, *University of Parma*



Available at: [https://works.bepress.com/gianluigi\\_palombella/17/](https://works.bepress.com/gianluigi_palombella/17/)

Gianluigi Palombella

## GLOBAL LEGISLATION AND ITS DISCONTENTS

### 1. Premises & frames

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

Relatively recent international law transformations have been building on general *community interest* as well as revolving around *regulatory governance*. The post-war trend from 1948 has actually shaped a *super partes law*<sup>1</sup>, beyond bilateral States’ interests. Moreover, transnational/supranational *governance*, through regulatory rule making<sup>2</sup> and administrative regimes emerged intensively. This last occurrence shows an overwhelming weight shaping the realm of global intercourses.

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

---

<sup>1</sup> A Cassese, *International Law* (2nd edn, Oxford University Press, 2005), at 217. Cf. Id., *The Human Dimension of international law* (Oxford University Press, 2008). A. Peters, ‘Humanity as the A and Ω of Sovereignty’, 20 *European Journal of International Law* (2009), 3, 513-544; R. Teitel, *Humanity’s Law* (Oxford University Press, 2011); B Simma and AL Paulus, ‘The “International Community”: Facing the Challenge of Globalization’, 9 *European Journal of International Law* (1998) 266-277.

<sup>2</sup> J. H.H. Weiler, ‘The Geology of International Law. Governance, Democracy and Legitimacy’, 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) at 547-562; on global administrative law (GAL), B. Kingsbury, N. Krisch, R. B. Stewart, ‘The Emergence of Global Administrative Law’, 68 *Law & Contemporary Problems* (2005) 15-61; S. Cassese, ‘Administrative Law Without the State? The Challenge of Global Regulation’, 37 *NYU Journal of International Law and Politics* (2005) 663-694; Id., (ed), *Global Administrative Law* (IRPA-IIJL, Creative Commons, 2012).

<sup>3</sup> For ex. S. Chesterman, ‘Globalisation rules: Accountability, Power and the prospects for Global Administrative Law’ (2008), 14, *Global Governance* (2008) 39-52; A. D. Mitchell and J. Farnik, ‘Global Administrative Law: Can it bring Global Governance to account?’, 37 *Federal Law Review* (2009) 237-261.

Eventually, the reframing of a new dimension of “global” legislation underpins the recurrent attempt at ‘constitutionalising’ the entire setting, one that reflects an ideal of ordering most times reminiscent of State-system’s archetypes. It points to the construction of some ‘global’ reassuring borders: either by forging a hierarchical, Kelsenian structure of norm-delegations, or by enhancing universal values-principles, that should control rules’ validity on a content-dependent basis (*ie* as a matter of ‘material’ coherence). A new *constitutional adventure*<sup>4</sup>, if any, should thereby recompose disparate changes, sources/authorities, rules, structures, under some common criteria. There is quite an oscillation over the import of naming such an endeavour in constitutional terms: a potential candidate is a weak form of constitutionalism<sup>5</sup>, that revolves around principles widely accepted, from due process to reasonableness, from hearing to reasons giving, from subsidiarity to proportionality, and respect for human rights. Constitutionalisation is often hoped for as compensation for the fading of States’ constitutional control over global intercourses<sup>6</sup>. But these or other principles in larger or thinner list tend to be invoked however also outside constitutional thinking, as necessary for the very *legality* of *global rule making*<sup>7</sup>. The importance of *law* as a requisite-dependent notion, is seen to both qualify and constrain entities as law-makers - be they of private, public or hybrid nature.

At any rate, the quest for *legality* (*and* ‘*legislation*’) has to respond to important questions itself, starting from the existing state of the art: the absence of global government and power’s organisation, the issue of the mediation between rule-giving and the political sources of public autonomy, the need for new criteria shaping the relation between constituencies and decision making.

---

<sup>4</sup> Cf. chapters by Ulrich K. Preuss, ‘Disconnecting Constitutions from Statehood’, by M. Kumm, ‘The Best of Times and the Worst of Times’, and by N. Walker, ‘Beyond the Holistic Constitution?’ in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism* (Oxford University Press, 2010). Critical stances are taken by M. Loughlin, ‘What is Constitutionalisation?’ and by D. Grimm, ‘The Achievement of Constitutionalism and its Prospects in a Changed World’, *Ibidem*. Also, D. Grimm, ‘The Constitution in the Process of Denationalization’, 12 *Constellations* (2005) 447-463.

<sup>5</sup> Constitutionalism as a shared set of values v. traditional ‘document based’ constitutionalism; likewise the option between a “big C” and a “small-c” constitutionalism. In supranational setting cf. Neil Walker, ‘Big “C” or small “c”?’ 12 *European Law Journal* (2006)12-14; In the American bibliography, Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998) (esp.ch. 3, by Michael J. Perry, ‘“What Is the Constitution”?’ (and other fundamental questions)’).

<sup>6</sup> Anne Peters, ‘Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures’ 19 *Leiden Journal of International Law* (2006) 579-610.

<sup>7</sup> Tellingly, R. Stewart and M. Ratton Sanchez Badin, ‘The World Trade Organisation and Global Administrative Law’, *ILLJ Working Paper*, 2009/7, at 2, write that aside from “a constitutionalist paradigm” nonetheless “[C]urrent conditions however, are compatible with and indeed call for development of a global administrative law”.

In the absence of a central *Grundnorm*, on the forefront of the question about ‘legislation’ are decentralised entities-institutions developing their regulatory nature, whether the Security Council or the World Trade Organisation, the Codex Alimentarius Commission or the ICANN, the Convention for the Law of the Sea, and so forth. Although it should be said that they take care of the *community* interest on a *global* scale, paradoxically they would do so by pursuing their own separate and segmented rationalities. They are seen to forge a *global* stage, beyond the *inter-national* one, and they appear to be coordinative, ‘universal’ players, whose borders are not defined by territoriality but through thematic, issue-specific, that is, functional limits.

If one takes this perspective, the wider notion of ‘global’ law surfaces, one that re-conceives and enlarges the inter-States processes focused upon by more traditional international law.<sup>8</sup>

## 2. The recognition of legality

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

According to the answer that Benedict Kingsbury has proposed, the notion of *law* can be restated as one requiring a practised rule of recognition (concerning sources), plus further criteria of ‘publicness’ that have to be met. The rule of recognition admits a varied typology of very diverse source entities, states or not states (including those producing specialised rule making, and of an administrative nature), provided that, however, they comply with the principles of publicness, which embody the general legality principle, rationality, proportionality, the Rule of law and respect for basic human rights.<sup>9</sup> The reasoning partakes both of a *principle*-based acknowledgment of law and of a *source*-based delimitation of it. As a matter of fact, and unsurprisingly, the view from global administrative law theory ends up however proffering this definition not only as an answer to the question about *legality*, but also as one drawing the border of a legal *order in itinere*: that is, shaped incrementally in so far as common criteria of recognition are progressively shared and practiced by judicial authorities and other

---

<sup>8</sup> Nico Krisch & Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ 17 *European Journal of International Law* (2006) 1-13.

<sup>9</sup> Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’, 20 *European Journal of International Law* (2009), at 31 ff. esp. Moreover, “what it means to be a ‘public’ entity would routinely be evaluated by reference to the relevant entity’s legal and political arrangements, which may derive from national law, inter-state agreement, self-constitution, or delegation by other entities.” (*Ibidem* at p. 56).

relevant actors. Such a legality is thus seen since the start as more than a loose set of rules<sup>10</sup>. The dual, descriptive and normative, stances of the discourse, are inherent in a state of affairs that is ever evolving.

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

Thus, even if, as we can agree upon, a generalised conviction (i) that some norm is law (a socio-legal criterion) is considered in itself a decisive threshold of legality<sup>11</sup>, effectiveness must be integrated with (ii) the authentication *via procedural* requirements enunciated by Lon Fuller<sup>12</sup>: a guarantee of legality in its very *nature*, one that does not depend on sheer attitudes and contingent behaviour of the people. Thirdly, being law different from morality, it is relevant (iii) that it is posited by a legitimate *authority*. Here the Hartian-Razian conundrum resurfaces, that is, the question of *sources* is raised: but for an authority's rule-making recognition, evidence of an even indirect *consent* is recommended, one that can be somehow traced back to those affected, the interested people, registered in some participatory mode, either through States themselves or otherwise outside their representative channels.

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

That points to inverting the burden of proof: what Klabbers calls *presumptive legality*, means to me that different parameters of legality work as provisional validation, but are thereafter expected to actually concur or converge. In fact, when such an eclectic assessment of legality is to be made, the outcome would depend on the *resistance* of a *presumption* of legality *vis à vis* a potential

---

<sup>10</sup> See H.L.A Hart, *The Concept of Law*, (2nd edn, Oxford University Press, 1994) at 233.

<sup>11</sup> *Contra*, Roger Cotterell, 'Transnational Community and the Concept of Law', 21 *Ratio Juris*, (2008) 1-18 (against legality being reduced to social belief).

<sup>12</sup> Lon Fuller, *The Morality of Law* (revised edn, Yale University Press, 1969) at 33-38.

<sup>13</sup> Jan Klabbers, 'Law-making and Constitutionalism', in Id., Anne Peters and Geir Ulfstein, *The Constitutionalisation of International Law* (Oxford University Press, 2009) at 115-116.

rebuttal, due to the good reasons that countervailing approaches<sup>14</sup> can provide.

It must be noted that diverse theoretical efforts on the identification of legality- through paths transcending States' legal order- unsurprisingly resolve (or conflate) two questions into one: the requirements of *legality* are implicitly at the same time requirements of *validity* of a normative utterance. In truth, as to its nature, legality can be identified through necessarily typological, and relatively abstract criteria: legality may be made to depend on (whatever) social sources claiming legitimate authority, or on requisites of justice, and the like. But validity, that cannot be predicated of a system in its entirety, *presupposes the borders of one order* and refers to a 'candidate' norm, in relation to it. The more the specific contents of a rule of recognition are determined ('what the Queen enacts is law', 'what the Treatise decide is law'), the more such a definition holds -- not as a parameter of legality, of whatever norm in whichever realm but- as a parameter of validity (that is, *within* a certain order).

Now, as we have seen, the theoretical insights mentioned in the foregoing, while widening the definition of legality (opening the door to formal and informal, public and private, State and non State norms) end up proposing their features also as requisites of *validity*: as the argument goes, ISO standards can be presumed of legal nature and due to the same requirements, they are considered as *valid* law within an international/global (administrative) *legal order*. This means that the question of some new all-encompassing unitary rule of recognition is being addressed as well, for a realm still far from being 'ordered' like a system.

Invariably, this 'new' international/global legal order, in its either constitutional or publicness-focused forms, can only be described as itself *in progress*: resulting mainly from the dual descriptive-interpretive efforts of theorists, legal experts, judges, and variable further actors. As a consequence, the vocabulary of presumption has to be extended, as I think, not only as regards *normative utterances*, to be presumed law, but also to a *legal order*<sup>15</sup>, thus, itself *presumptive*.

**2.2.** Much in the endeavor enlarging the requisites of legality beyond those recognizable within the State-based legal theory, includes an implicit relaxing of the cultural/logical, presupposition, according to which making sense of law is

---

<sup>14</sup> Otherwise we would need autonomous theory of the grounds of rebuttals. However, Klabbers considers contents, context, origins, procedure, topic (from the recognisability of the issuing authority to its connection to the addressees, from respect for procedural Fullerian requisites to the nature of contents etc.), *ibidem* at 116-121. As I think, the list of exemplifications is relatively open.

<sup>15</sup> For global law as a specific layer- incremental legal order, see my *The Rule of Law in Global Governance: Its normative construction, function and import*, Straus Institute for the Advanced Study of Law&Justice WP, 2010/5 .

tantamount to making sense of it as a “system”. And most attempts to “constitutionalise” the global law, try and compensate for the uninvited system’s obsolescence.

Yet, questions like those concerning transnational rule of law and justice, the plurality of regulatory regimes, the segmentation of international law, the emergence of non-State rule makers on a massive scale, interdependence among legal orders could not be<sup>16</sup> reflected upon in the lessons of the most influential legal theorists of the last century, like Kelsen, or Hart. Whether reducing the law to the State or *vice versa*, the concept of law was essentially connected with the “hardware” notion of “a system”<sup>17</sup>.

The connection between legislation and the *hard structure*<sup>18</sup> of a “system” showed its significance and after all both in Kelsenian and Hartian representations it marks at least the passage from primitive to mature law. It allows for identity and stability, and the unending effort of border drawing.

What characterizes global legislation is thus the interruption of the virtuous circle between *legality* and *validity*, until the frame of something like a global legal *order* is clearly defined and practiced. Somehow, the former (legality) gets to an autonomous life, despite the latter (system/validity) is wanting. The legal *software*—global legislation—flourishes on the lack of its *hardware*, the system, a structured machine that once upon a time it was intended to serve and make to work.

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

In coping with these coupled phenomena, that is, system fading and regulatory proliferation, we are thus witnessing *software* self expansion at the expense of some final *hardware* capability. We cannot proceed from the available (state-)system structure (the *hardware*) to the permissible law & rules (the *software*) as it was in XIX and XX century legal positivism. We run after the spreading of norms-generation instead, come to terms

---

<sup>16</sup> Similarly William Twining, ‘Schauer on Hart’, 119 *Harvard Law Review Forum* (2006) 122-130.

<sup>17</sup> “The compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of th[at] centralizing will (...) a true and proper subject (...) the State”, granting for itself “exclusiveness rendered necessary in order to assure the unity of the system” (Giorgio del Vecchio, ‘On the Statuality of Law’, 19 *Journal of Comparative Legislation and International Law* (1937) 1-20, at 8 and 9.

<sup>18</sup> For this I am drawing on my ‘Global Threads: The Rule of Law and the Balance of Legal Software’, in G. Martinico, F. Fontanelli, P. Carrozza (eds.), *Shaping the Rule of Law through Dialogue* (Europa Law Publisher, 2009) 413-430.

with it, assess the issues of their legality and then presuppose some suited and so far ‘presumptive’ frame.

In such a state of affairs, through diverse avenues (the idea of ‘publicness’<sup>19</sup>, the ideal of the ‘rule of law’<sup>20</sup>, the architecture of common ‘principles’<sup>21</sup>) legality is re-launched because of its basically constitutive function<sup>22</sup>, as I will restate later on, *vis à vis* a state of nature: *ie* a state of affairs merely devoid of law and thus, in a Kantian vein, of the very, transcendental possibility of justice<sup>23</sup>.

Whereas the “system” might be out of sight, nonetheless the implicit expectation is that the *rule of law* might increase its relevance and role, up to becoming the closest thing to a post-“Babel” legal understanding<sup>24</sup>.

### 3. Introducing the further issues of legislation

Despite the appealing implication of a common code or shared pre-understanding of law, new questions are ahead, that inhere in the nature of such a ‘legislation’, its features, and its discontents. The background question is how can the couple law & legislation respond to the uneasiness generated by its redefinition in the ‘new’ environment.

Through plenty of global administrative (and “self-observing”) regimes<sup>25</sup>, a kind of managerialism<sup>26</sup> surfaces, whose

---

<sup>19</sup> Benedict Kingsbury, ‘International Law as Inter-Public Law’ in *NOMOS XLIX: Moral Universalism and Pluralism* (Henry R. Richardson and Melissa S. Williams, eds.) (New York University Press, 2009) 167 ff.

<sup>20</sup> This is the path in my ‘The Rule of Law as an Institutional Ideal’, in Leonardo Morlino, Gianluigi Palombella (eds.), *Rule of Law and Democracy. Internal and external issues* (Brill, 2010), ch. I.

<sup>21</sup> For ex. Armin von Bogdandy, ‘General Principles of International Public Authority: Sketching a Research Field’, 9 *German Law Journal* (2008), 1909-1938.

<sup>22</sup> For a constitutive function of law and inherent public nature, at length in my ‘The (re-) Constitution of the Public in a Global Arena’, in Claudio Michelson, Neil Walker (eds), *After Public Law?* (Oxford University Press, 2013). Significantly, though in a different ‘constitutional’ sense, Klabbers writes: “ if the label ‘constitutional’ is to have any meaning beyond the rhetorical, it stands for placing a premium on law, over power, but also over other normative orders” (Klabbers, ‘Law-making and Constitutionalism’, *supra* footnote 13, at 124).

<sup>23</sup> For Kant, the state of nature being devoid of justice, law must be resorted to conceptually in order to avoid that condition in which the abuse of personal liberty and possession is *unobjectionable* (I. Kant, ‘Metaphysical First Principles of the Doctrine of Right’, in *The Metaphysics of Morals*, [1797] (Mary Gregor trans., Cambridge Univ. Press, 1996, repr. 2003) 33, § 42, at 86.

<sup>24</sup> The metaphor was recalled both in Rosalyn Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’, 55 *International & Comparative Law Quarterly* (2006) 791-804 and in Sabino Cassese, *I Tribunali di Babele* (Donzelli, 2009)

<sup>25</sup> See also Andreas Fischer-Lescano and Gunther Teubner, ‘Regime Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* (2004), 999-1046; and the ‘Commentary’ by Andreas Paulus, *Ibidem* 1047-1058.



efficiency-driven imperatives miss a vital root-connection with political realities in ordinary social life and with some coherent vision of the well-being of any situated ‘community’<sup>27</sup>. Kingsbury wrote that the “real question might be whether it is possible to identify a determinate public at all”<sup>28</sup>, and even if the (global)law claims “in the name of the whole society”, here it is unpredictable “how far the whole society extends”<sup>29</sup>.

A few aspects/discontents under stress here are not among those that we reframe only by ‘readjusting’ our criteria of legality: not detracting from the above efforts around legality’s notion, some matters cannot be managed through definitional revisions, as the following suggests: “if international law does not fit the criteria of the concept of law used at the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory”<sup>30</sup>. The structure of the restated legality – beyond States and inter-States law- detaches from the rationale and scope of legislation-as-we-know it.

#### 4. Legislating goods

A peculiar trait throughout governance-style ‘legislation’ concerns the ready-made appearance of fixed goals (whether entrusted to global regimes, regional authorities, supranational organisations) dictated as objectives to ‘lower’ level orders and politically elected governments. This holds true for World Bank’s prescriptions concerning Rule of law requisites as well as for EU conditionality strategies to access/ partnership of candidate countries, and extends to fiscal/economic measures imposed by ‘external’ orders: dramatically reducing self-determination in the allocation of social priorities in a country. Along these lines, the distinctive feature of legislation here is not best caught by the much celebrated characters of ‘soft law’, but by looking at its self-authorized paternalism of the ‘good goals’, one that characterises much of this ‘legislative governance’ style: namely, norm-making is exposed into end-setting, standards and benchmarks. Accordingly, *indicators*<sup>31</sup>

<sup>26</sup> On *managerialism* (and instrumentalism) Martti Koskenniemi focuses in his book, *The Politics of International Law* (Hart Publishers, 2011, esp. chps 13 and 14).

<sup>27</sup> Theorisations of the global law respond somehow by recommending accountability devices, between interested parties and decision makers.

<sup>28</sup> Benedict Kingsbury, ‘From bilateralism to publicness in International Law’, in *Essays in Honour of Bruno Simma*, (U. Fastenrath, R. Geiger, D. –E. Khan, A. Paulus, S. von Schorlemer & Ch. Vedder, eds.), Oxford University Press, Oxford 2011, at 85.

<sup>29</sup> Kingsbury, *ibidem*, refers to the ban on shrimps, affecting India without previous communication, and to all WTO decisions intruding into an unpredictable number of peoples, groups, and interests.

<sup>30</sup> Samantha Besson and John Tasioulas, ‘Introduction’, to *The philosophy of international law* (Idd, eds.) (Oxford University Press, 2011) at 8.

<sup>31</sup> Lastly, K. E. Davis, B. Kingsbury, S. Engle Merry, ‘Indicators as a Technology of Global Governance’ in 46 *Law & Society Review* (2012) 71–104.

surface at the core of normative enterprise.

As known, starting from the European experience, this governance develops by defining *goods*, rather than envisioning a politically elaborated (all-encompassing) notion of the *good*. In the European scene, that stems mainly from the Commission's work furthering EU interventionism and effectiveness, given the difficulties of political cohesion: thus mirroring precisely what is often complained about, *ie* the permanent shift from *politics* to *policies*. Despite its unparalleled peculiarities, the EU can still represent an advanced template of an increasingly global regulatory style: politics is replaced by creating 'levels of criticism', by problem-solving pragmatism, involving those 'interested' (or pre-chosen as such), experts, fragments of peripheral public administrations, etc. When what is "an informed consumer choice" like is 'technically' defined as well as, say, a healthier style of life, it becomes a rather incontrovertible 'end'. The selection of the *means* is left free for institutional actors required to take provisions pursuing established policies<sup>32</sup>.

It has been aptly said that this is a European *Eudaimonia*, and one that relies on a Durkheimian *organic*, not mechanical, solidarity<sup>33</sup>: *ie* the model of equilibrium of *interdependence*, the division of labor among mutually functional parts.<sup>34</sup> If we take this *Eudaimonia* seriously, it is then *legislation by goals* that surfaces as its norms-building arm.

It is hard to discover however which sovereign dictates or underpins this administrative drive. From the perspective of institutional subsequent actors, like national legal orders, governments and addressees, this generates a chain of double-edged consequences: empowerment, toward further rule-giving, as well as limitation and disempowerment *vis à vis* frameworks/goals largely presupposed. Policy-making *without politics*<sup>35</sup> as well as 'governance without government' are flags of the new legislation.

Despite the many narratives evoking mutual learning, the participatory, revisable nature of this experimental new world<sup>36</sup>, I am inclined to agree that even "participation within the governance-paradigm is no sufficient guarantee against the

---

<sup>32</sup> It generates self corrective standards internalizing criticisms through recurrent assessments and manages risk-related anxiety: a claim founded "partly on the authority of expertise" but also on the limits of scientific knowledge: Damian Chalmers, 'Gauging the Cumbersomeness of EUI Law', LSE WP 2/2009, at 31.

<sup>33</sup> Chalmers, *ibidem*, at 18 ff.

<sup>34</sup> Chalmers stresses rightly this point as to EU governance, *ibidem*, at 19.

<sup>35</sup> I am not endorsing some apolitical nature of policy choices, but the elusivity of such choices from the perspective of the political communities.

<sup>36</sup> Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of *Experimentalist* Governance in the EU', 14 *European Law Journal*, (2008) 271-327.

tyranny of goals”<sup>37</sup>. The emphasis upon construction of consensus on “substantive values and aims” often recognizes the centrality of the point, but significantly “it is assumed that if the right information is provided and if the right context is created for ongoing discussion, consensus on goals and values may gradually emerge”<sup>38</sup>. Likewise proportionality, subsidiarity, transparency and accountability are, so to speak, frame-dependent: they work properly only within a predefined spectrum of granted ends, one that in the global setting is ultimately up to and rests on the discrete field-related regimes. The latter, again, are hopefully committed to reasonableness, investigation, discussion, of course within- in coherence with- their self referential ambit “devoted to a specific goal or aim”<sup>39</sup>.

If one may add a further presumption, beyond those regarding the *legality* of normative utterances, and as I suggested, the existence of a further legal *order*, one can turn to goals: to be themselves presumed by those asked to take them for granted.

## 5 Law, administration and legitimacy

**5.1** The core ‘good goals’ of UNCLOS, ECHR, WTO, UN Security Council and so forth are far from being objectionable and hardly open to contestation; apparently these and other issuing authorities remain politically deracinated from ordinary life-worlds and devoid of location.

Somehow global legislation thrives on blurring the line that States, in the XIX/XX centuries experience<sup>40</sup>, had drawn between (political) *legislation* and (technical-discretionary) *administration*. First, while administration within the State kept a means-related, implementing function, in the globalised scenario instead it is political legislation (eminently State-based) that must yield to the requests of global administration, now raised to independent, self-standing level. Second, global jurisgenerative authorities can hardly speak for a compact political community, but ironically expose their *raison d’etre* as unencumbered with sheer particularism or localisms; they can resort to principles of impartial administration that displace the ‘political question’ from the global management of power.

Through the prospect of constitutionalisation and of common general principles<sup>41</sup>, some views might attempt at recasting the

---

<sup>37</sup> Pauline Westerman, ‘Governing by goals. Governance as a Legal Style’, 51 *Legisprudence* (2007) at 68.

<sup>38</sup> Westerman, *ibidem*, at 60.

<sup>39</sup> “[H]ealth care organizations might still struggle between competing interests (...) but they are not fighting over the priority of hospitals versus the standing army or of a clean environment versus the national symphonic orchestra” (*Ibidem*, at 62).

<sup>40</sup> Think of the development of the ‘administrative state’ and works like Otto Mayer, *Deutsches Verwaltungsrecht* (2 Bd, 1895) (Kessinger Legacy Reprints, 2010).

Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’, 17 *European Journal of International Law* (2006) 187-214.

equilibrium between administration and politics; but global legislation works with more success in removing decision making from the reviled quicksand of the political arenas<sup>42</sup>.

**5.2.** Here comes the delicate issue of legitimacy, and subsequently the role of ‘legality’ in furthering its prospect.

The increasing desire for a more stable ethical floor on which the action of international organisations should rest points to better support the *acceptability* of power exercise, be it of public or private origin<sup>43</sup>. Yet, the issue of legitimacy inevitably resurfaces through new peculiarities.

We need to recall our received views about legitimacy though. They have been modelled in conjunction to law, on a State perspective, and in *two* moves: the first is centred upon the very form of legality, the second on substantive consensus. The first is based on the inherent service of *formal* rationality that law provides in vesting the exercise of power (as taught by the analyses of Max Weber). The second in turn conveys the importance of *material* soundness of legislation, the pursuit of shared substantive values.

According to Weber, ‘material’ scrutiny and the quest for substantive consensus could have only weakened the legitimating strength of legal formality<sup>44</sup>, undermining the grounds achieved by the modern state, dispersing its unity under law, and making its order prey to values’ polytheism<sup>45</sup>.

---

<sup>42</sup> That conviction underpins Majone’s “regulatory Europe”. Cf. G. Majone, ‘Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach’, 157 *Journal of Institutional and Theoretical Economics* (2001) 57-78. See also G. Miller, ‘Above Politics: Credible Commitment and Efficiency in the Design of Public Agencies’, 10 *Journal of Public Administration Research and Theory* (2000) 289-328. Political criticism of Kingsbury’s requirements of publicness, dubbed ‘privatization of the ‘public’, Ming-Sung Kuo, ‘Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism’, 44 *N.Y.U. Journal of International Law & Politics* (2011) 55-102. In truth, even legal institutions possibly translate politics into the “politics of procedure, a struggle for the power to define, for jurisdiction: the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to make the weighing” (M. Koskeniemi, ‘The Effects of Rights on Political Culture’ in P. Alston (ed.), *The European Union and Human Rights* (Oxford University Press, 1999) at 114.

<sup>43</sup> P. Muchlinski, ‘International Business Regulation: An Ethical Discourse in the Making?’ in T. Campbell and S. Miller (eds), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Kluwer, 2004) at 99.

<sup>44</sup> With Max Weber “formal rationality” maintains an absolute indifference “towards all substantive postulates” (M. Weber, *Economy and Society*, edited by G. Roth and C. Wittich, (University of California Press, 1978) vol. I, at 108; the *material* rationality of law instead refers to ethical aims rather than legal principles (cf. *ibidem*, vol. II, at 656 ff.).

<sup>45</sup> For Weber it is a question “not only of alternatives between values but of an irreconcilable death-struggle, like that between ‘God’ and the ‘Devil’ ”

Certainly legality/rationality of power in the modern State had become the ultimate reason why it was obeyed. However, such a reason for obedience was increasingly superseded in subsequent times: the XX century's State needed to nurture the belief of its legitimacy also by responding to material/normative demands.

Now, it is known that legitimacy, as in the Weberian narrative, has nothing to do with truth: it works regardless of whether the spread of belief can be founded on something being 'true'. Likewise it turns to be right that ultimately, as Koskenniemi noticed, "[L]egitimacy is not about normative substance. Its point is to avoid such substance but nonetheless to uphold a *semblance* of substance"<sup>46</sup>. And yes, this objective is tantamount to accepting "Hobbes but sound like Grotius": this being the function of legitimacy, in such a context, that is, "to ensure a warm feeling in the audience"<sup>47</sup>. As I shall submit, this note bears on the legitimacy problem of 'global legislation' as well.

**5.3.** If something more ought to be included in the same picture, it is the costs of the global *Eudaimonia*, be it either a sheer production of the 'semblance of substance', or the paternalism of the good. Can legitimacy be generated by global 'juridification', in the top-down mode, using the legal form<sup>48</sup> as an *instrument for producing* social ordering?

In truth, one can reflect upon this by way of similitude. It reminds us the 'dilemmatic structure' that Habermas attributed to legalized interventionist policies of last century: 'juridification' by the Welfare State, as he wrote, introduced into previously free domains of social life *both* pervasive regulation *and* new opportunities (rights and other entitlements). Nonetheless, its irruption into life spheres overwrote the pre-existing contents of social interactions<sup>49</sup>. Policies obeying at functional imperatives (of economic or administrative nature) and implementing regulatory measures, jeopardized the realms of 'life world', by re-interpreting their internal relations through the lens of external rationalities and imposing one-sided ideas of the good. But only the 'life world',

---

(Max Weber, 'The Meaning of "Ethical Neutrality" in Sociology and Economics', in Id., *On the Methodology of the Social Sciences* (transl. and edited by E.A. Shils and H.A. Finch, Free Press, 1949) at 17.

<sup>46</sup> Koskenniemi, *The Politics of International Law*, *supra* footnote 27, at 322.

<sup>47</sup> *Ibidem*, at 322 and 323.

<sup>48</sup> I reconstructed the *non instrumental* side of law as a predicate of the *Rule of law*, in my *The Rule of law as an institutional ideal* (*supra* footnote 20).

<sup>49</sup> Juergen Habermas, 'Law as Medium and Law as Institution', in *Dilemmas of Law in the Welfare State*, ed. by Gunther Teubner (Walter de Gruyter, 1986) at 209-11. As Habermas noted, law enters deeply the personal and social sphere once left outside of legal control, in order to accompany an assisted individual life from birth to death (*Ibidem* at 203-20).

where basic social links are woven, is the “reservoir” and source of meaning for human individuals<sup>50</sup>.

For Habermas, the “point” was

“to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation: and to protect them from falling prey to the system imperatives of economic and administrative subsystems that grow with dynamics of their own. And finally to defend them from becoming converted, through the steering medium of the law, to a principle of socialization which is for them dysfunctional.”<sup>51</sup>

In other words, the risk of “colonization”: the dilemma whether an external legal imperative offers in case a better “guarantee” or a “withdrawal” of freedom, can be responded only “from the viewpoint of the lifeworld”<sup>52</sup>.

Now, *mutatis mutandis*, in the scope of equally top-down global legislation, and its pursuit of the good(s), the deep question of legitimacy remains attached to the shortcomings of a similarly dilemmatic structure.

## 6. The spectrum of legislation

However, legality & legislation are affected by a further fundamental change. Legislation- in the State context- revolved around modern law felt as all-encompassing device, coping with complexity and covering the *full circle* of human activities. Global legislation downplays this venerable profile, it weakens increasingly the *holistic character of law* which represented the public interest under political control.

Turning to the WTO ‘regime’ can explain such a point: no serious questions undermine its authority, it is universally recognized the capacity to “speak in the name of the whole society” of its members at least, and in the interests that they have subscribed to. State legislation has occasionally- depending on places and times- worked with even less authoritativeness. Nonetheless, something is missing. It is ambiguous, as noted, which or whose public should be relevant, given the chain of side-effects affecting people so far from the core deciders. Even leaving this aside, we would not call the WTO, nor would we name the Security Council, the ‘global legislator’, despite their global reach and effectiveness.

Contrariwise, we entrust instead the State in its own right,

---

<sup>50</sup> *Ibidem*, at 206. All the more so in the domain of ‘autonomous’ relations (that is, the realms of school law, social security, cultural reproduction, fields of moral sensitivity which extend to legal areas, such as criminal or constitutional law).

<sup>51</sup> *Ibidem* at 220.

<sup>52</sup> *Ibidem* at 214.

and within its domain, as the legislator. The contrast does not rise from the chronic democracy deficit of supranational organizations. At stake is not the albeit dramatic lack of political reflexivity in legislation outside the State, the absence of one demos and the like. At stake, rather than a matter of democracy, is the even prior question of the *public* nature of law<sup>53</sup>: the pre-understanding that “law”, as far as we trust it, deals with the *totality* of concerns related to what is of ‘public interest’.

Legislation should- *à la* Rousseau- concern the generality of the people (the *subjective side*)<sup>54</sup>. This requirement is not necessary condition for each legislative acts or rules.<sup>55</sup> The quality of generality/universality is referred to as a property of a *sum* of laws<sup>56</sup> as well as its *orientation* to the common, general interest.

Our received understanding of legislation includes an inherent connection to the *objective side*- *i.e.* the comprehensive fate & ends of the community<sup>57</sup>. We are used to think that however disparate and divergent goals, all are to be (politically) organized or resolved *along the diachronic axis of a full-blown development of legislative decision-making*; and the latter in its entirety remains an interpretation of the *whole* life of the public, its constituencies and addressees.

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

## 7. Responsibility v accountability

That shift is substantive, and as far as I see, it cannot be compensated by improving requisites of accountability<sup>58</sup>. There is in truth a conceptual watershed between accountability and responsibility that is worth of a brief clarification. Put it concisely,

---

<sup>53</sup> More at length in my ‘The (re-) Constitution of the Public in a Global Arena’, cit. *supra* footnote 22.

<sup>54</sup> B. Kingsbury forfeited the requirement of generality: “Generality is not a necessary requirement for a general concept of law applicable to all law as such, and as indicated above there are good reasons why it is not necessarily part of the particular jurisprudence of the law of global administration”. (Kingsbury, ‘The Concept of “Law”’ (*supra* footnote 9) at 52

<sup>55</sup> Otherwise it would exclude not only most of minute administrative rule-making, but also a certain amount of statute-law.

<sup>56</sup> The same in I. Kant, ‘Metaphysical First Principles of the Doctrine of Right’, (*supra* footnote 24) § 42 ff., at 86 ff.

<sup>57</sup> And we shall see, the ultimate responsibility for it.

<sup>58</sup> Ruth W. Grant and Robert O. Keohane, ‘Accountability and Abuses of Power in World Politics’, 99 *American Political Science Review* (2005) 29-43; Erika de Wet, ‘Holding International Institutions Accountable: The Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review’, in Armin von Bogdandy et al. (eds.) *The Exercise of Public Authority by International Institutions* (Springer, 2010), 855-882.

“responsibility” (evoked e.g. with a ‘responsible person’) projects a sensible, and self involving consideration of as many relevant factors (be they facts, interests, intentions, consequences) and personal expectations, as possible. It exceeds the view of a required task (which is self-limiting and leaves aside any concern beyond the task itself). As Hans Jonas once aptly defined it, responsibility, like the one we associate with the figure of a statesman, bears a significant relation with the notions of *totality*, *continuity* and *future*: because the responsible person (here, bearing in mind the State) cares for the “total being” of its object, with no possible interruption in time, and “beyond its immediate present”<sup>59</sup>.

Although responsibility is mainly related to virtue and ethics, the notion sheds light on our understanding of the State as a ‘general ends’ entity. Within State’s borders, on the one hand, the law protects the domain of a polity’s social practices; on the other hand, it is so because the State is not just any “public” entity whatsoever, but the fullest image/archetype of the existent “public” and-- what is highly defining its very nature--, the only public entity entitled to all encompassing reach; the one that can by definition embody the entirety of potential ends<sup>60</sup>: what requires the State to be conceived of as the ultimate shelter for any sort of common objectives “deserving” care, protection, regulation, control, and the like. Thus, law as (State-)legislation factually entails at the same time the *responsibility* to cover the full circle of *publicness* and public problems. The background belief of those subject to law-making presupposes some coherence as to its “general” result and importantly an implicit responsibility for the “whole”. This last presupposition is the simple objective *raison d’etre* of the State, affecting thereby our idea of law and legislation.

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

In principle, accountability can work effectively as much as the imperatives to be accountable for are well indicated, limited, and feasible. However ‘accountable’, that is, transparent and

---

<sup>59</sup> H. Jonas, *The Imperative of Responsibility* (University of Chicago Press, 1984) at 98-105.

<sup>60</sup> It should be avoided the misunderstanding, however, that for the State to embrace “general ends” points to the requirement that “law be general”: possibly linkable, but different concept.



revisable, communicative and consented on, WTO rule making can become<sup>61</sup>, that shall be working with reference to the provided tasks, already embedded in the *raison d'être* of a trade regime<sup>62</sup>.

And it would be rather fancy, if not illusory, to hold each in the array of global norms producers, accountable for indeterminate and further ideals, from Human Rights<sup>63</sup> to environmental protection, security and the like. The separate allocation of functional control over thematic issues is a basic and valued strategy of coping with complexity: a *divide et impera* that gives us some chance to disentangle necessarily interconnected matters.

On the contrary, if we think back of legislation in the State based self understanding, the pregnant point that qualifies it, had- and still has- much to do with such a irreducible mutuality between the *subjective* (generality) and the *objective* (the whole of potential aspects deserving care) side, between the capacity to speak *in the name of the public*, and the capacity to represent some interpretation- *in their entirety*- of the issues at stake in the comprehensive well being of a community. The two traits are hardly met in the *global* legislation 'circumstances': respectively, because of the elusive and unseizable nature of its '*public*' and because of its field-related pursuit of *special goods*. The combined consequences make the *universality* of legislation strikingly absent despite the global capacity of the "legislator": an issue bearing further profiles as well.

#### **8. 'Globality'<sup>64</sup> v 'universality' (and the *relation among orders*).**

The emergence of a wider legality, distinctively 'global', adds to the already rich plurality of levels of law, like national, regional, international, transnational and private ordering.

Peculiarities, limits, discontents, in the appearance of a specifically 'global' legislation not necessarily detract from the worthiness of pursuing its 'legality'. At the same time though, they should prompt a further reflection – to be only hinted at in this concluding section- over the *relation among legalities* that interact on the globe. As the issue can be concisely outlined, the reason why the relationships between different legal orders, regimes, and generally, 'legalities', should be themselves

---

<sup>61</sup> Richard Stewart and Mary Ratton Sanchez Badin, 'The World Trade Organisation and Global Administrative Law, *IILJ Working Paper*, 2009/7, and also Ngaire Woods, 'Holding Intergovernmental Institutions to Account', *17 Journal of Ethics and International Affairs* (2003) 69-80.

<sup>62</sup> To take into account other issues, reducing the un-conditionality of precepts, shall not be mistaken for the pursuit of different—or external-goals. Some analyses in Stephan Griller (ed.) *International Economic Governance and Non-Economic Concerns* (Springer, 2003).

<sup>63</sup> The metaphysical elevation of market autonomy as a human right, through the lens of the new economic liberties of free trade, is sometimes endorsed.

<sup>64</sup> I use the term drawing simply on "a state or condition of worldwide relevance or impact".

arbitrated by the guarantee of legal means, lies in the fact that on the one hand, *global legislation* is just one among the legalities competing on the globe; and on the other that, as I shall submit below, ‘globality’ and ‘universality’ do not match.

Unlike in the domestic setting, the ‘global’ law does only work through impinging upon other legalities, otherwise persisting, and requires mostly States’ cooperation. Its goal-oriented pretensions ironically must rely on *politie*s’ *independent existence*<sup>65</sup> but penetrates them. When it works as transmission belt of efficiency imperatives (through benchmarking, debt control, rules for ‘undistorted competition’, and the like) it often alters domestic equilibrium, replaces rights interpretations, overwrites ‘internal’ meanings within the polities it regulates. Nonetheless, it remains incommensurably distant from their social and political allegiance.<sup>66</sup>

The notion *supra* reminded, *presumptive* normativity, might actually be the case here: the vantage point of *global* regimes, general coordination’s entities, beyond localism and national self-interest, claims just a *presumptive*, or *prima facie* authority: one that cannot pretend *unconditional* primacy. For something being ‘global’ is just a matter of fact, related to its scope and reach. Contrariwise, its *universalizability* (*-universality*) can only result from a value judgment, and should depend upon satisfaction of *normative* conditions<sup>67</sup>.

The present experience in the relations among supranational, regional, national orders and Courts, reveals the resilience of legal notions and argumentative tools that work to the effect of attenuating the unobjectionable power of ‘global’ legislation (Not necessarily to the effect of weakening other substantive achievements, say, of common international law). Arguments of subsidiarity, proportionality, margin of appreciation, equivalent protection, scope of manouvre, rule of law (and more) have been widely allowed and resorted to<sup>68</sup>. Such arguments are not

---

<sup>65</sup> In the mode once described as holding (even) for the European Union, that is, a supra state unity for which it was true that “it does not do, it does cause others to do”. S. Cassese, *Democrazia e Unione Europea*, 2002, 11: online at <http://www.storiacostituzionale.it/doc/Cassese.pdf> (last visit May 2012)

<sup>66</sup> In some instances a similar trend is seen to reflect the fading (or “the liberal undermining”) of “republican legitimacy” (Fritz Scharpf, ‘Legitimacy in the Multi-level European Polity’, in P. Dobner and M. Loughlin (eds.) *The Twilight of Constitutionalism?* (Oxford University Press, 2010) at 111.)

<sup>67</sup> As I would take it, Jan Klabber’s suggestion about ‘presumptive legality’ can be located at the intersection between *globality* and *universality*, it expresses the tension (rather than the coincidence) between the two.

<sup>68</sup> In truth, on the one hand, States or regional authorities resorting to them are often suspected of instrumental strategy, serving protectionist objectives (e.g. resisting world trade regulations), or of avoiding some more ‘internationalist’ deference by the pretext of internal democracy (e.g. making reservations to human rights regimes, ignoring supranational Courts’ decisions). On the other hand, the duplicity of the matter is apparent, and the difference has a *normative* quality.

necessarily miserable comforters, at least within the limits of what the service of law offers in favor of non-unilateral, non-arbitrary legal scrutiny. Their space originates because of the space that separates/distinguishes the ‘global’ and the ‘universal’. Appealing to legality and confronting juridical arguments ought to work in keeping that gap visible<sup>69</sup>. *Legality* with its albeit procedural and argumentative tools, includes the chance of normative, substantive confrontation, even in the global stage, thereby justifying the Kantian idea that it can bring about the ‘possibility of justice’, out of a sheer state of nature<sup>70</sup>.

In explaining the legitimacy of the modern State, Weber himself undervalued a further import that his recognition of *formal/rational* law embodied. Law does not *only* entail the possibility of ‘legal’ domination<sup>71</sup>: it allows— along with governing means — for an inherent invocation of practical reason, the reverse, ‘moral’ face of the instrumental, formal law.

Such a *duality* of law is still of value<sup>72</sup>. If a confrontational stage can be established where the normative conditions of *universalizability* can be discussed and made to matter (as they should), that shall depend firstly on our ideal about the Rule of law, and the recognition of that dual potential.

A picture of legislation needs to consider the pluralism of legalities on the globe, without ignoring either questions of ‘weight’, difference in social embeddedness, political legitimacy, or substantive justice, and providing a legally generated guarantee of voice and standing. As in the Kantian peroration of the ‘imperative of public law’ (or the reason for abiding by the law), even in the extra-State environment the point is overcoming a state (of nature) where abuse, domination of one-sided ideas *cannot* be discussed or objected against. The problem of the relations among legalities<sup>73</sup> and the function of the *rule of law* in this very

<sup>69</sup> And to make it possible for the parties involved to advance normative arguments, that have been progressively entrenched either in international law achievements or in constitutionalism, and so forth.

<sup>70</sup> See supra footnote 22.

<sup>71</sup> Habermas wrote that, regarding the formal rationality of law in the Western State as source of (legitimacy and) ‘legal’ domination, Weber sidelined the inherent potential of the ‘positivity’ of law, its moral—albeit thin— service of non-arbitrariness (J. Habermas, *Law and Morality*, The Tanner Lectures on Human Values (1986), (University of Utah Press, 1988), vol. VIII, 217-279, esp. § 3.)

<sup>72</sup> This statement does not entail a dismissal of legal positivism, precisely as the Kantian philosophy of law does not. Such a view, in fact, does not impinge upon the problem concerning the criteria of legal validity. An elaboration of the “duality of law” within a reconstruction of the rule of law ideal is in my *The Rule of Law as an Institutional Ideal* (supra footnote 20).

<sup>73</sup> For further elaboration on that point, cf. my *The rule of law in global governance. Its normative construction, function and import*, Straus Institute WP, NYU, 2010/5.

conjunction is an inevitable consequence of the new frontiers of legislation (s).