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Global Threads: Weaving the Rule of Law and the Balance of Legal Software

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Global Threads: Weaving the Rule of Law and the Balance of Legal Software

Summary

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1. Hardware to Software

Among the diverse reactions raised through the debate on “fragmentation”, the issue at stake in the International Law Commission 2006 Report¹, there certainly were worries that the international environment could neither be depicted nor grasped anymore from *one* overarching *view*. Admittedly, the views from one single regulatory regime (think of NAFTA, or WTO, the WB or the IMF, UNCLOS and the like) in spite of its global reach, are after all “self observing”, looking at the world as an “internal” space, depending on the regime’s own functionalities. The general proliferation of normative legal fabrics jeopardises the reassuring belief that differentiation develops under *one and all encompassing frame* of law. Indeed, it does endanger the dogma of the *system* unity of law².

¹ “Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law”, Adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/61/10, para. 251). Available at <http://untreaty.un.org/ilc/reports/2006/2006report.htm>

² In his introduction to the 2006 International Law Commission Report on Fragmentation, Martti Koskenniemi signaled that the problems lurking in cases like Mox Plant- nuclear facility at Sellafield, UK (involving three different institutional procedures, the Arbitral Tribunal at UN Convention on the Law of the Sea, the procedure under the Convention on Protection of the Marine Environment of the North-East Asiatic Atlantic, and under the European Community and Euratom Treaties within the European Court of Justice) are both substantive and procedural: they involve questions as to competence of diverse institutions and the hierarchical relations among them: an issue that the commission decided to leave aside (See *ibid.*, M. Koskenniemi, *Introduction*, § 13, p. 11)

All the more so, if some less institutionalised processes of global governance are taken into account that are following straightforwardly “alternative” paths, cutting themselves free of traditional legal ties, basing on private autonomous pragmatism, or “self made” normativities (if not legalities)³.

In our more traditional mindset, we need to come to terms with the loss of such cultural, or logical, presupposition, according to which making sense of law is tantamount to making sense of it as a “system”. And most attempts to “constitutionalise” the global law, or alternatively, to recognise the thin threads that draw some trans-system connections, do simply try and compensate for this 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, communication among legal orders were barely unknown⁴ and not reflected upon in the lessons of the most illuminating and influential legal theorists of the last century, like Kelsen, or Hart. European thought and practice as well had been imbued with the material and conceptual dominance of the State and, what is more, with the *strictly related unity* of law: whether reducing the law to the State or *vice versa*, the concept of law is essentially connected with the “hardware” notion of “a system”. Truly, the argument went, “the compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of th[at] centralizing will (...) a true and proper subject (...) the State”⁵. It follows that juridical relations however created by individuals’ transactions or groups’ agreements are still dependent of the State’s will, one granting for itself that “exclusiveness rendered necessary in order to assure the unity of the system”⁶.

Although much of this narrative is now flawed, and some dogmas have been attenuated or definitely abandoned, still the connection with the *hard structure* of a “system” shows some resistance in association with law. Properly so, however. It means the shift from a “set” of rules to an organised rational “order”, and both in Kelsenian and Hartian representation it marks at least the passage from primitive to mature law. It allows for identity and stability, for more or less functional relations among norms, for the unending effort of border drawing, for implementing a

³ In the huge bibliography, see at least Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society’ in G. Teubner (ed), *Global Law Without a State*, Dartmouth, Aldershot 1997; KP Berger, *The Creeping Codification of the Lex Mercatoria*, Leiden, Kluwer Law International 1999; G. Teubner, ‘Hybrid Laws: Constitutionalizing Private Governance Networks’, in R Kagan, M. Krygier and K Winston (eds.), *Legality and Community*, Lanham, Rowman and Littlefield 2002).

⁴ A similar point is made by William Twining, *Schauer on Hart*, 119 Harvard Law Review Forum, 119: 122 (2006):

⁵ Giorgio del Vecchio, “On the Statuality of Law”, *Journal of Comparative Legislation and International Law*, Third Series, Vol. 19, No. 1 (1937), pp. 1-20, at p. 8.

⁶ *Ibid.*, p. 9.

selective notion of “validity” as “belonging”. The idea of such a structured and stable “system”⁷ often hinges also upon a genetic configuration of law, endowed with its own grammar, language, and “anatomic” morphology.

To put it differently, law has been mainly conceived of as endowed with its *hardware*, one that insures its basic existence, pointing to predefined typology of rules, their formal hierarchical bonds, and the like. Of course, the *hardware* is, as much as computers are (at least for us “normal” users), a pre-given capability and a constitutive support, and yet it is simply silent and empty, without its enabling *software*. The latter allows us to make sense of the thing, giving meaning and value, transforming some structural or technological potential into a working machinery, imbued with life⁸. Law resembles as well the idea of such a *software*⁹, generated by real world practice, and developed around principles and rules, regulations, legislation, custom, contracts, treaties, judicial decisions, and so forth.

When we face the multiple normative entities inhabiting the global sphere, we are, so to speak, bewildered with such a legal *software*, that thrives on the whole in lacking pre-given and all harmonising devices. Despite being very often produced by institutionalised authorities, it has fragmented our territorial law in the vertical supranational and in the horizontal transnational modes: it generates a *pluralism*¹⁰ of *self contained orders*, whose “separability” is itself all but neatly construed: with the unintended effect that their field- scopes¹¹ actually *overlap* in controlling practices and cases¹².

When at issue is global law, we therefore realise that *software* is increasing, differentiating and perfecting itself around the kernel of many distinctive rationalities, enabling to perform, in diverse “windows”, highly complex regulations, assessments and dispute resolution, from commerce to

⁷ The best work on this issue is due to J. Raz, *The Concept of a Legal System*, Clarendon Press, Oxford 1980 (II ed.), repr. 2003.

⁸ This metaphor is suggested by the Yale law professor Jack Balkin, who elaborated through it upon his concepts of culture and ideology in his book, *Cultural Software*, Yale Un. Press 1996. I am responsible for adapting the suggestion to law.

⁹ Needless to say, I am not referring here to the so called soft-law, but to law *sans phrase*.

¹⁰ In the literature about pluralism and trans-nationalism, cf. David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, in “New York University Review of Law and Social Change” 31: 641 (2007).

¹¹ It is this overlapping that is held to define legal pluralism, in the path breaking work of Sally Engle Merry, *Legal Pluralism*, in “Law and Society Review” 22: 869 (1988).

¹² This generates of course the well known phenomena of regimes collision, uncertainty, forum shopping and so forth. See *infra*.

environment, from the law of the sea to internet domains, from labour to telecommunications, energy to human rights, to the law of war.

In coping with this coupled phenomena, that is, system fading and regulatory proliferation, we are thus witnessing *software* self expansion at the expense of some *hardware* capability. This prompts legal reasoning to realise once more that it is *the former to determine the latter*: we cannot proceed from the available hardware (-system structure) to the permissible software (law & rules) as it was in XIX and XX century legal positivism. We have to run after the available software instead, come to terms with it, and then try to conceive, maybe, of some suited, ever changing, hardware.

One of the compensating strategies has been focussing on the judicial side: judicial work could advance, so to speak, some additional *software*, one of a distinctive kind though: shaped “through cases” but providing for gap bridging criteria and connective texture, not directly found in the “primary” rules that it is for judges to apply or enforce. Even Courts indirect “communicative” strategies might either reflect or produce interfacial rules, purport to develop some shared working idioms helping coexistence and connections in the absence of the “grand box”. One of the threads, one fundamental on the legal plane, is the rule of law. And whereas the “system” might be out of sight, the rule of law might increase its relevance and role, up to becoming the closest thing to a post- “Babel”¹³ legal understanding.

2. Contestability

The “rule of law” is less part of argumentative tools of legal reasoning than a concluding label generally held to encompass, support and justify its overall result. One might recall the solemn appeal to “the rule of law that prevails in this jurisdiction” as the ultimate rationale that the US Supreme Court invokes, in the whole, as a matter of legal justification¹⁴. The ECJ adopted the rule of law up to a stronger and system- building significance: by granting that every act be submitted to the principle of judicial reviewability by the ECJ¹⁵, it is the bedrock for the European Community

¹³ The metaphor has become a *topos* and is recalled as a rather favourable opportunity both in R. Higgins, *A Babel of Judicial Voices? Ruminations from the Bench* in *International & Comparative Law Quarterly*, 55: 791 (2006) and in S. Cassese, *I Tribunali di Babele*, Roma, Donzelli, 2009.

¹⁴ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), at p. 635.

¹⁵ Case 294/83 *Partie Ecologiste ‘Les Verts’ v. European Parliament* [1986] ECR 1339.

to be a “community of law”, and it equally implies ensuring that “in the interpretation and application of the Treaty the law is observed”¹⁶.

Even so, the rule of law actually lends itself to controversial results. This holds true in State legal orders as much as in the international and in the global sphere¹⁷.

Instances are plentiful. In the EU well-confined supranational order, the European Court of Justice, that works since decades under the supremacy and direct effect principles¹⁸, is recently reaffirming its original attitude toward “integration-through-law” by essentially resorting to its “rule of law” supremacy: but the latter ultimately risks boiling down to a kind of “law of rules”¹⁹. For this point to be clarified and expanded, some examples can be helpful.

In the “Volkswagen”²⁰ decision, the ECJ ruled that the 1960 Volkswagen statute violated the right to establishment, through free flow of capital, as laid down in Art. 56 (1) EC²¹. To be sure, the decision was in line with previous judgements overturning national state regulations²² and with policy inaugurated (1999- 2004) by the Internal Market Commissioner Frits Bolkestein: however, invalidating the Volkswagen law is tantamount to overturning the idiosyncratic continental Europe Social-Market Capitalism model (the “Rhenish”). The *internal* significance of the latter lies in workers’ co-determination, state involvement, social protection, while this deeply rooted and

¹⁶ *Opinion 2/94* (Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms) [1996] ECR I- 1763.

¹⁷ I should refer here to the analysis I made elsewhere of the potential and weakness of the rule of law “beyond the State”: cfr. my *The Rule of law beyond the State: Failures, Promises and Theory*, in *International Journal of Constitutional Law*, July 2009. Elaboration on the rule of law double edge goes through decisions like the European Court of First Instance *Case T-306/01, Yusuf and Al Barakaat Int’l Foundation v. Council and Commission*; *Case T-315/01, Kadi v. Council and Commission* both of 21 September 2005; US Supreme Court *Hamdan v. Rumsfeld*. (2006) (see supra n. 14), the European Court of Justice *Joined Cases C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council & Commission*, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

¹⁸ ECJ, *Case 26/62 (Van Gend & Loos)* [1962] ECR I.; and *Case 6/64 (Costa v. ENEL)* [1964] ECR 585.

¹⁹ In the rather textual and certainty- minded sense of Antonin Scalia, *The Rule of Law as a Law of Rules*, “*University of Chicago Law Review*” 56: 1175 (1989).

²⁰ ECJ, decision of 23 October 2007, *Commission v. Federal Republic of Germany*. (Case C-112/2005).

²¹ According to the Court, the statute prevented private investors from taking up shares in the company and effectively participating in its administration and control, mainly by giving the Federal government and the *Land* of Lower Saxony a veto against majority acquisition, through a special powers, privileged share (of 20%). Cfr. *supra* at note 20, ECJ, “*Volkswagen*”, Grand Chamber Judgment, par. 22, paragraphs 38-56 and *passim*.

²² See P. Zumbansen and 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), p. 1028: «a continuation and further accentuation of a line of argument that the Court has been unfolding over past few years with regard to the Member State provisions in conflict with the EC’ guarantee of free movement of capital».

socially structured pattern might end up affording *external* resistance to market integration or global liberalization.

The controversial point is of course about fair interpretation of treaties²³, but all in all, it concerns the “rule of law” and its use: whether sheer “*dura lex*” is fairly (and in the typical monist intra-european style) resorted to in pursuing some – admittedly, “functional”- straightforward European policy, dictating a uniform overall economic model²⁴, that “political” institutions are unable to agree upon. Of course, this should be reflected upon regardless of our belief (or disbelief) in an “undistorted market competition” (or of one’s policy preferences) and with reference to the technical import and *use* of a legal notion such as the “rule of law”²⁵.

On a slightly different plane, some even more telling decisions draw a rule of law interrogation mark, directly pointing, this time, to one of the most cherished rule of law ingredients, *proportionality*.²⁶ The latter can be held to convey “global” judicial dialogue just because it has obtained a recognized status among rule of law essentials, spreading through legal orders worldwide, from Europe to US, and so forth. It is literally what one might call a “global constitutional standard”. Diverse scholars connect its requirement to a possible constitutionalisation of global functional regimes, like the WTO²⁷. Thus, it should be taken seriously as a kind of universal pillar for all judicial bodies to understand each other. It is believed to be a *rule of law*

²³ See generally G.C. Spattini, "*Vere*" e "*false*" "*golden shares*" nella giurisprudenza comunitaria e la "*deriva sostanzialista*" della Corte di Giustizia ovvero il "*formalismo*" del principio della "*natura della cosa*", il case *Volkswagen*, e altro, in "Rivista italiana di diritto pubblico comunitario", vol. 18, n. 1, 2008, pp. 303-64.

²⁴ Cfr. Spattini, supra n. 23, and Zumbansen & Saam, supra n.22.

²⁵ For the traditional meaning of the rule of law in the European Communities system see Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, Kluwer Intern., London and Cambridge, Ma, 1999.

²⁶ Classical reference for an analysis of proportionality in its logical steps and functionality is Robert Alexy, *Constitutional Rights, Balancing and Rationality*, "Ratio Juris" 16 (2003), pp. 131-40.. See also Jürgen Habermas, *Between Facts and Norms*, transl. by William Rehg, The MIT Press, Boston 1996, esp. pp. 256-9.

²⁷ Review of such tendencies, and distinction between the WTO as a “constitution” v. the “constitutionalisation” of WTO, in Deborah Cass, *The Constitutionalisation of the World Trade Organisation*, Oxford, OUP 2005.

“golden rule”²⁸(Beattie) or one feasible basis for a tentative constructivism, building some rule of law constants between different actors confronted in the global setting²⁹.

The ECJ had showed in its 2003 decision, *Schmidberger v. Austria*³⁰ (in times preceding the EU constitutional failure), its inclination to a wider self understanding than the court of an “economic union”: by granting (proportionality) equal ranking to the freedoms of assembly and expression as to the free movement of goods, it was furthering its prospective role as a potential “constitutional court”. Some years later, the trend seems inverted. In *Viking*³¹ the ECJ addressed, among the rest, the question whether the Unions’ right to strike can be forfeited for the sake of art. 43 EC right of a Finnish company (*Viking*) trans-state free establishment. By submitting the right to strike to the reasonable requirement of proportionality (strictly meant) and necessity³², the ECJ actually stated that its use was unjustified, under the circumstances: thus, it turns out that it cannot be resorted to unless it is proved to be the *extrema ratio* and passes a test striking the balance with the company’s and the general interest.

The ECJ reasoning sounds at least ambiguous: although virtually nothing in the abstract can be expected to escape proportionality in the given circumstances, it is all a matter of *when (or how)* to balance, and *whose* balance (and no less, *what* is to be balanced). The ECJ (rule of law and proportionality based) argument is about to make the “right to strike” to collapse: it has been said that in some continental legal orders, like the Italian, this would hardly meet collective action’s constitutional intention, and collides heavily with the intangible³³ Unions autonomy (within legal

²⁸ David M. Beatty, *The Ultimate Rule of Law*, Oxford, OUP, 2005. See also of the same author, the chapter *Law’s Golden Rule*, in G. Palombella and N. Walker, *Relocating the Rule of Law*, Oxford, Hart Pub., pp. 99-116.

²⁹ Alec Stone Sweet and Jud Mathews. "Proportionality Balancing and Global Constitutionalism" *Columbia Journal of Transnational Law* 47 (2008), pp. 73-165. However, see as well, recently, Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, in “International Journal of Constitutional Law”, July 2009.

³⁰ Case C-112/00 *Schmidberger*, *Internationale Transporte und Planzüge*, judgment of 12 June 2003.

³¹ Case C-438/05, *Viking* 2007: A Finnish passenger shipping company, on the way of registering its ship *Rossella* under an Estonian flag, to be crewed by Estonian seafarers on lower wages, was faced by the international transportation workers (ITF) Union’s threat to strike, in defence from unemployment of the former Finnish workers likely to be replaced.

³² Case C-438/05, *Viking* 2007:§81-83

³³ This holds true, of course, in a legal frame where external *limits are fixed* (not balanced) relating to the protection of market survival potentiality of the companies or, in the public sector, to the intangible guarantee of a measure of functioning in essential public services (like health, transportation etc.).

pre-fixed limits agreed upon in advance) in interpreting the collective good and the value of conflict within it³⁴.

On a theoretical plane, it has been observed that although proportionality cannot “dictate” the only one correct answer, it “mitigates certain legitimacy problems” and it “requires courts to acknowledge and defend, honestly and openly, the policy choices that they make when they make constitutional choices. Proportionality is not a magic wand that judges wave to make all of the political dilemmas of rights review disappear. Indeed, waving it will expose rights adjudication for what it is: constitutionally-based lawmaking”³⁵. Let alone its “realist” belief about judges as “law makers” under constitutional limits, this considered statement does fail to see that the challenge, in the “global” mode, looks very different: the point is not about the shortcoming of “waving proportionality”, while a constitutional system being constant, but precisely the opposite: i.e. that such a normative production develops (even) regardless of a constitutional basis, and even where it can hardly avail itself of some premised frame, as in the global realm.

Thus, I would rather maintain that if one can imagine the rule of law as something more than a “law of rules” or “formal” judicial protection, it is proportionality that comes into the scene as first; nonetheless, one would miss the point by relying on it as the “ultimate” rule of law provider.

3. Persistence

As regards the rule of law, controversiality is definitely unsurprising. The “deconstructivist” strength of criticisms addressing the rule of law as much as human rights or democracy does traditionally stress their indeterminacy³⁶, their openness as well as their dark side³⁷. The deep reason for this to be so, is mainly in the conceptual status of the rule of law as an ideal.

If one looks at the European Union primary law and its western trinity of values, the rule of law comes to the fore with democracy and human rights, and it would be hard to deny the contested nature of each of them. Nonetheless, let us look below the surface: “essentially contested”

³⁴ For similar comments, see A. Zoppoli, *Viking e Lavall: la singolare andatura della Corte di Giustizia (ovvero l'autonomia collettiva negata)*, in “Diritti, lavori, mercati”, 2008, p. 157 ff.; and M. Rusciano, *Diritto di sciopero e diritto costituzionale*, in “Rivista italiana di diritto del lavoro”, gen-mar 2009, esp. pp. 64 ff.

³⁵ Stone and Mathew, *supra* note 29, p. 78.

³⁶ Robert Gordon, “Critical Legal Histories.” *Stanford Law Review*. 36: 57-125 (1984).

³⁷ For example, see A. Sajo (ed.), *The Dark Side of Fundamental Rights* (Eleven Intern. Publisher, Utrecht 2006). And in it, also G. Palombella, ‘The Abuse of Rights and the Rule of Law’, *ibid*.

concepts³⁸ are still playing a channelling role. Despite the slipping ground provided, they function by gathering convergence over a space of normativity, thinking and deliberation. and still the very fact of choosing such words-concepts, as a forum of debate and principled pillars of our legal orders, retains its working function. Take human rights, and the unending warning about their side effects, like the sheer justificatory use of state interventionism; similar concerns apply should we consider the model of the “rule of law”. Legal theorists know that its *importance* certainly derives from belonging in many "comprehensive" conceptions of the legal system³⁹, or dependence upon “situated” and "thick" cultural premises⁴⁰. Nevertheless, the rule of law numbers as well among the "essential", "constitutive" elements over which current diverse views of legal orders end up "overlapping": thus, its model says something, perhaps about legal and political justice, which quite disparate moral and ethical beliefs are asked to confront. As much as human rights discussion is forced to resist the allure of self reference and parochialism by resting on their inherent language of “universalisability”, the “rule of law” calls upon national communities to focus on some logic of *law* as such, at the level of fundamental features, i.e. on that plane of self understanding, where communicative codes are clarified in advance, and can be exposed to some external check, confrontation and learning. All the more so, because the rule of law lies in the middle ground (at least in scholarship and judicial records) between on the one hand, (a) the necessary requirements for the law to be functioning as the most efficient method of guiding behaviours (being stable and constant, public, retrospective, possible to comply with, and the like⁴¹), and on the other hand, (b) the further, and more demanding, ideal that in comparative constitutional history one can trace back to the Middle Ages, Dicey and current developments⁴², as encompassing some specific institutional

³⁸ J. Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, in "Law and Philosophy", 21: 137 (2002).

³⁹ I take the word “comprehensive” here in the sense (evoking different views of the “good”) made clear by J. Rawls, *Political Liberalism*, New York 1993, especially pp. 154 ff.

⁴⁰ This time, say, in the sense of M. Walzer, *Thick and Thin. Moral Argument at Home and Abroad*, Notre Dame (In.) 1994.

⁴¹ The requirements list will give us something like an “anatomy” of the rule of law (as such insufficient), as Martin Krygier writes: Id., *The Rule of Law: Legality, Teleology, Sociology*, in G. Palombella and N. Walker, *Relocating the Rule of Law*, Oxford, Hart Pub. 2009, esp. pp. 47-52. However, in my view, the anatomic conception is represented at its best by Joseph Raz, ‘*The Rule of Law and its Virtue*’, in his *The Authority of Law: Essays on Law, and Morality*, Oxford, Clarendon Press, 1979, esp. pp 214–18. and Lon Fuller, *The Morality of Law*, 2nd edn, New Haven, CT, Yale University Press, 1969, ch 2.. Fuller elaborates on: Generality, clarity, promulgation, stability, consistency between rules and behaviours, non-retroactivity, non-contradictory rules, nor requiring the impossible.

⁴² Among the references at least AV Dicey, *Introduction to the Study of the Law of the Constitution*, ed ECS Wade, 8th edn, London: Macmillan, 1915, see pp. 195-6, 268-73 and passim; George L. Haskins, ‘Executive Justice and the Rule of Law: Some Reflections on Thirteenth century England’ (1995) 30(4)

tasks (regardless of external or heterogeneous domains like, say, political democracy), that relate to legality, as a matter of liberty, balance and non-domination (in the juridical sense of non-monopolisation of legal sources)⁴³.

Thus, its tendency is explained to be versatile vis-à-vis plural, diversified incarnations, and at the same time, to be an issue on the "universal" arena. So it is that we dare to overstep the line of purely deconstructive theories, and elaborate on the "virtuous" ambivalence of the rule of law underlying meaning.

Although I will not embark here on the definitional endeavour I have pursued elsewhere, I submit that the persistence of the rule of law is relying on some core meaning, making sense, instead of just an unqualified legality, of a set of wider and more appealing normativity: one that conveys our aspiration to put legality beyond the reach of instrumental use and the whim of the ruling powers, be they sovereigns, Kings or Parliaments, democratic powers or autocracies, unassailable supranational entities (like say, the Sanction Committees of the UN Security Council) or international conventional agreements, as well as specialised or functional global regimes (say, the WTO, or the ICANN, or the UNCLOS). In the global sphere, where legal orders face the danger of clash, reliance on the rule of law has to be reframed. It is not only a matter of granting some habeas corpus, due process, judicial review to individuals under the purview of State administrations (or equivalent entities), although it is much about that⁴⁴.

One cannot deny that it comes to the fore firstly as a power of naming, or of classification: Whether *Asbestos and Asbestos Products*⁴⁵ are better classified under the chapters of human rights or health, or safety⁴⁶ will depend on a fight for law, competence, and jurisdiction, and will turn out to produce different outcomes. Is this classification power capable of falling under our concern for

Speculum 529–38, esp. pp. 535–6. and Ch. McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, CA: Cornell University Press, 1940); for the modern period, Ph. Reid, *Rule of Law. The Jurisprudence of Liberty in the Seventeenth and Eighteenth Century*. DeKalb: Northern Illinois University Press.2004.

⁴³ I have dealt with this at length elsewhere, in my *The Rule of Law as an Institutional Ideal*, in "Comparative Sociology", 2010/1.

⁴⁴ The vast literature on the CFI and ECJ cases, *Kadi* and *Al Baarakat* (see supra note 17 and *infra*) did flourish also on this issue.

⁴⁵ See *European Community – Measures concerning Asbestos and Asbestos Products* 2001, p. 61 para 168, and the comment in M. Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, paper presented at Harvard, 5 March 2005, p. 7 (available at <http://www.helsinki.fi/eci/Publications/MKPluralism-Harvard-05d%5B1%5D.pdf>.)

⁴⁶ For ex. see, Robert Howse & Elisabeth Türk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in G. De Burca and J.Scott (eds), *The EU and the WTO : legal and constitutional issues*, Oxford, Hart, 2001, p. 283-328; see also G.A. Bermann & P. C. Mavroidis (eds.), *Trade and Human Health and Safety*, Cambridge University Press, Cambridge UK 2006.

the “rule of law” ? Be aware that from the angle of the “rule of law”, though, the question does appear as a problem of legal countervailing or balancing devices, methods, not directly as a matter of social or economic power.

When, as in the famous *Swordfish* case⁴⁷, a supranational entity (the EU) and a national State (Chile), defend their claims, they happen to find their own case as one potentially relevant, or “belonging”, in more than one regulatory regime (or system), each endowed with fundamental “political” objectives, functional imperatives, scientific expertise, principles, rules, and finally, Tribunals: to this extent, the International Convention on the Law of the Sea, and the World Trade Organisation emerge as they are, separate in the space, each with an attracting and unifying force, and both can announce the rule of law *according to their own realm*.

What is of interest to us, is that their *parallel validity* has to face a crucial challenge, as a matter of Euclidean geometry, when from the point of view of the parties involved (Chile, or the Eu, in *Swordfish*, or say, Mexico and US, between NAFTA and WTO *in Soft Drinks*⁴⁸) the (parallels) *non intersection property* fails the evidence. Indeed, it is just through parties activity and their “judicial” choices, that an otherwise inexistent crossroad materialises, and functional normative settlements as well as their rationalities, construed as mutually unrelated, risk to come to an embarrassing date.

Where the rule of law emerges, then, is precisely at this normative crossroad, much less imaginary than theories of legal systems can think. There is no superior rule, no Grundnorm, and should it exist, in the Kelsenian mode, it would hardly attach to such an environment: the latter is not the traditional international legality, where states’ orders are meant to defer- and territorial sovereignties to surrender- the international rule, and to assume its wider order to be the source of their normative validity. International order in the strict sense is itself just one among the many concurring in this wider “space”. Indeed, we would hardly understand all regulatory governance from the viewpoint of the law between states.

When normative regimes and full-fledged legal orders of any typology whatsoever are about to come at some crossroad, where neither Kompetenz Kompetenz is available, nor a European Union

⁴⁷ The case: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, Chile v. Eur. Com. (Mar. 15, 2001) (available at www.un.org/Depts/los/ITLOS/Order1_2001Eng.pdf) (suspended). For a presentation of the case, recently S. Cassese, *I Tribunali di Babele*, Roma 2009, pp. 31-35. Cf. also T. Treves, *Fragmentation of International Law: the Judicial Perspective*, in “Comunicazioni e Studi”, XXIII, 2008, pp. 42 ff. M. Orellana, *The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea*, ASIL INSIGHTS (2001), available at <http://www.asil.org/insights/insigh60.htm>; M. Orellana, *The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO*, NORDIC Journal of International Law, 71(1): 55 (2002).

⁴⁸ Cfr. Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R (Oct. 7, 2005).

sui generis model of an “autonomous” multilevel community of law is in place, the problem of *authority* resurfaces, and it is here that the rule of law has to be projected. As it happens in the view of undesired “third kind encounters”⁴⁹, diverse strategies (circumstances- relative) like comity⁵⁰, mutual recognition, equivalent protection, subsidiarity, and more, hopefully begin to flourish⁵¹.

The point to be stressed, however, is that in the fragmented pluralism of legal orders we can find judges and courts as builders of a thin fabric of general principles, partly descending from the structural rules of judging, partly elaborated on dialogue, communication, and all in need to establish a common practice whose fortune will depend on their actual success in giving some stable principled lines and parameters of conflict resolutions, at least on the procedural side⁵². However, we should also refrain from asserting that the rule of law boils down to an a priori formal primacy that should be granted hierarchically to one “higher” legal order’s imperatives, as content independent. Moreover, it is to be rejected the parochial idea that the rule of law is something concerning “one jurisdiction at time” and that its meaning is therefore jurisdiction-relative. Far from narrowing itself to these two last alternatives, it is instead depending on the trans-orders weaving of potential *meta-rules*, a third chance then, possibly promising a critical measure to which global law, as much as municipal and international law, should have been subscribing as a matter of coherence⁵³

⁴⁹ I take the liberty of appropriating the metaphor, invoked to all different respect elsewhere by David Camroux and Christian Lechervy, ‘*Close encounter of a third kind?*’ *The inaugural Asia-Europe meeting of March 1996*, in *The Pacific Review*, 1470-1332, Volume 9, Issue 3, 1996, pp. 442 – 453.

⁵⁰ As the President of the Arbitral Tribunal constituted for the UNCLOS in 2003 said, in dismissing the case filed by Ireland against UK concerning the Sellafield nuclear enrichment plant in Britain, after the European Court of Justice was assumed to be competent to decide: “The Tribunal considers that a situation in which there might be two conflicting decisions on the same issues would not be helpful to the resolution of this international dispute. Nor would such a situation be in accord with the dictates of mutual respect and comity that should exist between judicial institutions deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes that arise between them” (para 11). The text is available as President’s Statement of June 13 2003 at http://www.pca-cpa.org/showpage.asp?pag_id=1148

⁵¹ In his overview, Cassese recalls primacy (in European law, and in the different version of the primacy of the “global” over the European order), the Spanish Constitutional Tribunal (largely isolated) distinction between primacy and supremacy, state constitutional doctrine of counter-limits; the doctrine of the so called “norme interposte”; the principle of equivalent protection; the functional tasks’ division; and eventually, subsidiarity. Cassese, *I Tribunali di Babele*, *supra* at note 13.

⁵² Elaboration on such question has been hugely growing since A-M- Slaughter, *A New World Order* (Princeton University Press, Princeton 2005) to Cassese, *I Tribunali di Babele*, *supra* note 13. I will only add here Chester Brown, *A Common Law of International Adjudication*. Oxford, OUP, 2007.

⁵³ I have argued along these lines elsewhere, in my *The rule of law beyond the state*, *supra* at note 17.

Persistence of the rule of law will be then due to an *externalization* function, displayed by multiple sources, while engaging in real world events and confrontation. Again, the issue of the rule of law shall not resemble the sheer respect for laws that are in force in one's jurisdiction; its layer is where legal cultures, traditions, expertise, languages, can overlap. In such an environment, where poor reliance on a system of law (and even poorer on "one" community values) is allowed, protection of pluralism might turn to be still the best practice.

4. Duality: the balance of legal software as a matter of the rule of law.

4.1. As follows from the foregoing, the controversial nature of the rule of law is coupled with its persistence, and persisting normative value. What does mark the rule of law in the transforming scene of the "global" legality is in some ways its dependence of a usable grammar that has come to transgress the borders, although bringing with itself its failures, ideology and contestability.

Cassese has rightly pointed out the habits and logic of judging as a constant resource that helps constructing some common communicative trend among peers in the global scene⁵⁴. Kingsbury has maintained that a "public" nature attaches to the entities that are producing law and regulation throughout the globe, and such a "public" nature implies definable general qualities, affecting their mode of action: as he writes, this conception would "encompass legal governance forms adopted in inter-societal relations (e.g. cross-border governance institutions of co-religionists), in transnational relations among elements of states (e.g. networks of government regulators, such as the Basle Committee of central bankers), and in the jurisgenerative work of bodies that do not depend on states" (...) I propose treating them as public entities. These entities, along with the states that are the archetypical public entities, are the actors in an inter-public order"⁵⁵. The quality of "publicness" would then entail a few conceptual consequences concerning the standard of their behaviour, namely, the principles of legality, rationality, proportionality, rule of law, human rights protection⁵⁶.

In my view, one of the premises for the rule of law to be a stable reference depends on its added value pointing to the *non instrumental* role that the rule of law itself ought to play.

⁵⁴ Cassese identifies trends in *Administrative Law without the State? The Challenge of Global Regulation*, in "N.Y.U. Journal of Int'l Law and Politics", 33: 663 (2005).

⁵⁵ B. Kingsbury, *International Law as Inter-Public Law* in NOMOS XLIX: *Moral Universalism and Pluralism* (Henry R. Richardson and Melissa S. Williams, eds.) New York, NY University Press, 2009, p. 169.

⁵⁶ *Ibid.*, pp. 178-9.

Although everything can be meant as usable to whatever pursuit, and this holds true, say, for rationality or the principle of legality for example, human rights and the rule of law appear to embody an inherent claim to be treated always as an “end” and “never merely as a means”⁵⁷. In the case of the rule of law this embraces the creation of institutional arrangements (and/or legal principles of administrative or judicial behaviour), providing that positive law be capable of some resistance to instrumental use, thereby affording subjects with a *duality* of law: that is, each actor, endowed with normative capacity, should also find himself facing “another” law⁵⁸ that from his viewpoint is not under his purview, however “dominant” his position, as a ruler, or legislator, and its equivalents, might be. The pattern should be meant to hold even for judicial organs, since they appear multiple, *per se* “ultimate”, authorities, and yet responsible for the definition of general principles underpinning the viability of legal intercourses in the interconnected fields of the global sphere: from this angle, building up sharable criteria of mutual respect and communication *is itself a rule of law requirement*, and the premise for the rule of law to flourish in a setting where an ultimate authority and the ready-made legal “system” are vague or missing.

This general precondition has a bearing on the connection of the rule of law with the idea of the “right”, of fairness in intersubjective relations, and inter-institutional “respect”. It is not a sheer matter of comity, though⁵⁹. One could find appealing and appropriate to further elaborate along the general lines of the idea that the “principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one’s good”. Principles of justice “specify the boundaries that men’s systems of ends must respect ... Interests requiring the violation of justice have no value.”⁶⁰ Although I cannot address here this background reference further⁶¹, it helps orienting toward the relevance of the idea of the “right”: the latter is to be meant as normatively implied by the rule of law as an *ideal*, and in this context it reflects a kind of Kantian requirement allowing for coexistence under circumstances of liberty,

⁵⁷ The Kantian formulation is: “Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end”. I. Kant, *Grounding for the Metaphysics of Morals* [1785], trans. by James W. Ellington, Hackett Publish. Co., Indianapolis (In.), 1993, p. 36.

⁵⁸ I am referring to positive law to be actually practiced. I am not invoking sheer morality.

⁵⁹ Although comity has its standing as an ancient principle in international law, one should also bear in mind the comments on it by M. Koskeniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought*, supra note 45, referring to “dictates of mutual respect and comity”, ironically as matters of “Victorian politeness”. As he writes: “This is a gentlemen's affair. Whatever environmental or economic interests may be involved, we must deal with this as civilised men”. (p. 2).

⁶⁰ John Rawls, *Theory of Justice*, Cambridge, MA, Harvard University Press, 1971, p 31.

⁶¹ I have dealt with justice connection to the rule of law in my *The Rule of Law as an Institutional Ideal*, supra note 43.

unmasking a power based conception of the “good”, and preventing parochial values from being imposed universally by the means of a dominant and unrivalled law.

In this same sense, a global rule of law could not be squared with only one dominating conception of the “good”, i.e. of unrestricted functional imperatives and policy goals, whether imposed by WTO regulations, or some imperial notion of democracy, and the like. Moreover, the existence of legal regimes counterbalancing with ecological concerns the free commerce oriented regulations in WTO, can imitate this logic⁶² (one can say the same thing in the reverse order, though).

4.2 A significant case should be mentioned, concerning the principle developed in recent years, the “responsibility to protect”, firstly by the International Commission on Intervention and State Sovereignty⁶³. It was then highlighted with emphasis by the UN Secretary General and re-elaborated by the “High Level Panel on Threats, Challenges and Change” created by the UN, in a report with a meaningful title: *A More Secure World: Our Shared Responsibility*⁶⁴. The Report has been interpreted as challenging the intrinsic value of the State per se⁶⁵. The principle is capable of providing a criterion of prevalence when genocides, ethnic cleaning, crimes against humanity, and possibly natural disasters are at stake.

In principle, it says more than the *limits* that apply to sovereignty: the “responsibility to protect” says that ultimately no sovereignty is justified unless it fulfils its promise and *raison d’etre*. Sovereignty, thus, is not the westphalian ultimate value, sovereignty is *conditional*.⁶⁶

⁶² However, one should also attribute relevance to the *internal* limitations: see the WTO Appellate Body jurisprudence based on GATT, art. XX, concerning trade law “permissible exceptions” to be referred to a number of issues from morals to health to conservation of exhaustible natural resources, etc.: cfr. Art. XX, General Agreement on Tariffs and Trade (GATT) Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

⁶³ Available online at <http://www.iciss.ca/report-en.asp>.

⁶⁴ U.N. Doc. A/59/565 (Dec. 1, 2004), at <http://www.un.org/secureworld>, where the report *A More Secure World: Our shared Responsibility*, is available online. Since security does not only relate to the “political” border of States but also directly to human beings. according to the *High Level Panel*, the fact of assuming the status of “signatory States” of the UN Charter redefines the meaning of their sovereignty (something that the International Commission on Intervention and State Sovereignty began to affirm in 2001 in “The Responsibility to Protect”)

⁶⁵ A-Marie, Slaughter, *Security solidarity, and Sovereignty: The Grand Themes of UN Reform*, “American Journal of International Law”, 99: 619 (2005).

⁶⁶ One can see for example what Lee Feinstein writes (in *Symposium, Commentary by Experts*, “Northwestern University Journal of Int’l Human Rights”, 4 Dec. 2005, pp. 39 ff., and esp. pp. 10-11): “In the face of the genocides of the 1990s and later the Security Council rupture over Iraq, the older ideas about sovereignty began to yield to newer ideas, in which a state’s sovereign rights are a function of its behavior. The High- Level Panel speaks to these issues very eloquently, even if some of its members may disown

In different words, and in the “rule of law” language that I suggest, one can focus on the premise that international sphere allows some other law to counterbalance the law of the state as a matter of sovereignty, by challenging not merely its scope and limits, but its very *self definitional power*, i.e. the entitlement to decide by itself what its final legitimate *rationale* must be. This holds true when other interests are allowed to get a “voice”, when “others”, subjects, individuals, peoples, are taken as inherently and independently worthy of legal protection. “Another” (tentative and *in fieri*) law has been pitted against State sovereignty: one referring to “peoples” and individuals instead of states, and deriving its validity well outside the State’s legality.

In a further representation, it bears the notion of *balance* between the law of the sovereign and the *independent* rights of the individuals that is, since its origin, inscribed in the English conception of the rule of law.

The latter is thus all but a neutral category. Sovereignty under the rule of law means that its “gubernaculum” power is as legitimate and legal as is an independent law that enshrines the rights of the (English) subjects and the countervailing entitlements of other public institutions.

Our task is to transfer such dynamics in the global sphere of legality *without a State and without an unequivocal legal system*. The responsibility to protect, as much as other principles and judicially held standards, contributes of itself to the establishment of legal threads that can represent the rule of law, as a legal service to coexistence. This applies (in the terms of “the right” allure) to a global realm where the conceptions of the “good” bear too different and strong contents to be the unifying cement of a universal community. However, the role of the rule of law is not to build up a “community of the good”, nor a global polity.

4.3 Certainly, the rule of law is also capable of being slowly tailored by the formation of judicial networks, the rise of bridges between regimes and legal orders, and even the adaptation to foreign law traditions: all involve a process of recognition that cannot be pursued on a pure authority-basis⁶⁷. For example, the communicative endeavour, and the mainstreaming of the rule of

these points. The first principle of conditional sovereignty is the idea that sovereignty entails rights as well as responsibilities. A government’s first sovereign responsibility is to its people, to protect them from grave harm, atrocities, and crimes against humanity. If a state fails to live up to this primary responsibility, through acts of omission or commission, it cannot expect to enjoy the full benefits of sovereignty. The corollary principle is that when a state fails to live up to this fundamental responsibility, other states have a duty to take action to spotlight, prevent, or stop the oppression. By action I mean everything from diplomacy to economic pressure and, if necessary, the prompt use of force”.

⁶⁷ For the role of authority and “content dependent assessments”, cfr. G. Palombella, *The Rule of Law beyond the State*, *supra* at note 17

law, interweave fairly when rules of engagement do not end up with some top-down supremacy principle, that would hardly work as a default rule in much of the trans-orders intercoursas as increasing today.

The rule of law exerts its role by playing precisely the reverse function than an authority supporting legal tool. It does constrain whatever authority on the basis of generally agreed upon criteria of action that should appear to the relevant actors out of their (legally authorised) disposal. As a further instance one can recall the idea of imperative rules in international law: it is now recognised that a new layer⁶⁸ has taken shape, a super partes⁶⁹, or a community law have developed, that cannot be simply overturned by conventional law.

The challenge of the rule of law indeed should be clear at this point. It is not only that some authority be acting within the limits of law and procedural requirements of law itself (in the standard tests). It is certainly this, but by no means just this.

One can return on the subject by observing the unassailable view of the World Bank, according to which: “While defined in various ways, the rule of law prevails where (i) the government itself is bound by the law, (ii) every person in society is treated equally under the law, (iii) the human dignity of each individual is recognized and protected by law, and (iv) justice is accessible to all”⁷⁰. This is the necessary general pattern of requirements. Separation of powers, judicial independence, equality before the law, protection of human dignity, access to justice.

However, what makes them real is their being embedded into a law that cannot be overwritten, and that on a substantive ground is capable of facing the tension against contingent legal policies (“gubernaculum”, prevailing ideas of the “good”, functional regimes’ imperatives, legislative majorities) . Moreover, most of the times, it would be impossible to check⁷¹ requirements like “access to justice” or respect for “dignity”, outside the context of the balance between procedural or formal conditions and substantive laws. Since the rule of law is meant to be something different from a sheer law of rules, it might entail a more contextual and substantial recognition.

⁶⁸ Joseph H. H. Weiler, *The Geology of International Law. Governance, Democracy and Legitimacy*, in „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“ 64: 547–62 (2004).

⁶⁹ Antonio Cassese, *International Law*. 2nd ed. Oxford: Oxford University Press, 2005, p. 217.

⁷⁰ World Bank, *Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency* (Washington, D.C.: World Bank, July 2002), 1.

⁷¹ Illuminating analyses, with empirical research, are published in Amichai A. Magen and Leonardo Morlino (eds.) *International Actors, Democratization and the Rule of Law. Anchoring Democracy?*, Routledge, London 2008.

If we export the rule of law discourse onto the global sphere, framed through these lines, the tension between different, not erasable, sides of law resurfaces.

It is of some evidence, that the rule of law becomes significant only when there is some positive law that can be opposed, say, to art. 103 UN⁷², should the SC Sanctions Committee determine anti terrorist security goals to be almost absolute: it can be some interpretation of the *jus cogens*⁷³ extension to the right of judicial review, or the right to property in the human rights system; or it can be the European Treaties fundamental principles as capable of opposing the legality of contrary internal regulations⁷⁴.

In the multifaceted global governance this is still to be proved, elaborated upon, and the construction of some confront- and- commensurability between legal arrangements generated out of diverse regimes (say the ECHR and EU market freedoms, IMF and HR, ISO standards and WTO, etc.) is slowly in search of a consistent definition.

The challenge is here to abandon a stereotyped version of the rule of law, construed around the state, and nevertheless bearing in mind the balance rationale, the English common law or the constitutional state dual (higher law based) scheme: a stable recurrence, that has made legislative law countered by a countervailing independent law, whether insured through the fabric of the common law or the aggravated authority of a constitution. The duality scheme, however implemented in diverse contextual incarnations, bears persistence, allows change and flexibility, and is meant to contrast against the mere instrumentalisation of law.

Exporting the rule of law⁷⁵ in foreign and underdeveloped countries, a matter that relates highly to the World Bank activities, or to the EU “conditionality” strategies, is in need as well of not-purely parametrical rigidities, and more sensitive adjustment: pre fixed requirements have to be measured against the general distinctive rationale that the rule of law bears (a rationale that would otherwise simply be confused either with some generic legality, rationality, or with human rights, solidarity, and so forth). And in the potential conflict between parochial or apologetic jurisdiction-

⁷² “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

⁷³ Note that in *Kadi and Al Baarakat* (see *supra* note 18) the European Court of First Instance did firstly consider the SC resolutions under the prevailing force of *Jus Cogens*, and secondly, excluded there was any evidence as to the *Jus Cogens* nature of rights to property or to defense.

⁷⁴ This happened through the reasoning of the European Court of Justice in *Kadi* 2008 (see *supra* note 18).

⁷⁵ Rachel Kleinfeld and Kalypso Nikolaidis, *Can a Post-Colonial Power Export the Rule of Law? Elements of a General Framework*, in *Relocating the Rule of law* (*supra* at note 29), pp. 139-170.

based conceptions of the rule of law, the latter can only be addressed by confirming its background essential precondition: *in pending the global legal “system”, the rule of law amounts ultimately to a matter of equilibrium between concurring authorities, institutions, and, as explained in the above, especially sides of legal production (or application and interpretation)*. The requirements, common rules and principles, that are to be chosen as essential rule of law conditions in diverse spatial and historical settings, should replicate this logic, all things considered.

The stage is settled then, for multilateral and balanced rule of law guidelines, although the performed plays may still turn to be diverse.