GLOBAL LAW AND THE LAW ON THE GLOBE. LAYERS, LEGALITIES AND THE RULE OF LAW PRINCIPLE.

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1. Introduction.

The emergent 'global law' and global governance are often evoked as a multiversum in the absence of a controlling principle, or alternatively as a complex set of normativity to be encompassed by a holistic constitutional architecture[1]. In what follows, I shall not pursue a further guiding "meta-principle" but shall refer to the Rule of law: this ideal, cherished in our most solemn legal documents, can be elaborated upon and promises to shed some light on the essential role of legality in the extended beyond the state space. Before dealing with this issue, a recognition of the current transformations in the global setting shall be due, and a narrative that should understand

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[1] Truly, the variety of theoretical patterns is even richer. For their elaboration and the issue of their failure to provide a controlling meta-principle, one with overarching epistemic function over the globe, see N. Walker, *Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders*, 6 Int. J. Const. L. 373 (2008).

them in terms of legality's structures and of their interactions. Thus, I invite to carefully follow some subsequent steps: I shall account for what is to be meant with 'global law', the nature and questionability of its own 'legality' and its difference and connections with non-global forms of legality and legal orders.

Thereafter I shall point to rescue a sounder definition of the rule of law- on which the paper turns more than once (and in a special section IV), one that can be made relevant precisely to the relations among legalities on the globe. Subsequently, further examples of interactions among normative legal orderings- through real world cases- are offered, and eventually the general function of the principle of the Rule of law shall be accounted for as the contribution that comes from law to preservation of the right (and of legal non-domination premises) in those global intercourses. This work aims at showing, first, what the legal configuration of plural orders on the globe consists of. While it shall endorse the narrative of an emerging and distinctive global law of mainly administrative and regulatory nature, it shall consider it as a layer of law on the globe, one that does not replace either international law or other regional legal orders; second, the role the Rule of law principle can play in civilizing the confrontation among legal orders' imperatives, preventing their relations from both monistic interpretations of the global universe on one side and dogmatic closure of self referential ("self-contained") systems on the other.

One can readily assume that the Rule of law is not a system-relative, or jurisdiction-related notion, i.e. a 'parochial' shield. As I submitted elsewhere[2], it means more than compliance with rules, certainty and predictability[3]. I will return on it and offer a more precise definition (*infra* at para. IV) as an ideal asking for legal structures to counter the possibility that the whole extent of available law be reduced to a sheer instrument in the hands of those in power

[2] To this regard it is a background chapter to the present paper G. Palombella, *The Rule of law as an Institutional Ideal*, in L. Morlino & G. Palombella (ed.), *Rule of law and Democracy. Internal and External Issues* (2010). See also, G. Palombella, *The Rule of law and Its Core*, in G. Palombella & N. Walker (ed.), *Relocating the Rule of law* (2009).
[3] For such a view, see instead A. Scalia, *The Rule of law as a law of rules*, 56 U. Chi. L. Rev. 1175 (1989). Naturally, I am not assuming anything against the importance of compliance with rules, domestically and of international law (and nothing against welcoming that most States "almost all of the time" do comply with rules of international law). See also L. Henkin, *How Nations Behave: Law and Foreign Policy* (1979).

(a rule by law) [4]. This definitional standard should be born in mind in the development of the issue at stake in this work. Its principle can be shared externally, outside the limits of domestic self-legitimation. I shall maintain as well that its place in a global setting is the relationships in the complex transformative multiversum of legalities. If taken consistently, it allows them to mutual confrontation, causing claims to be heard, differences to be considered, without supporting the image of the world relations as devoid of legal counterpoise.

Making that point, however, is based on a peculiar description of orders' plurality: it is consequential to a recognition of the 'global law' as a distinctive layer of order among others, incapable of replacing or 'englobing', due to its nature, contents, commitments, and 'limits', the normative universe which many other levels of legal ordering embody. I shall look at the 'global law' especially from the empirical and theoretical observation angle refined from the 'global administrative law' approach. As a matter of legal theory, the autonomy of the global normative space needs to be examined, and it must be assessed whether or not its status as law and as a legal order is plausible. Even answering in the positive though, as I shall submit, what can be seen as necessarily 'global', does not necessarily enjoy a kind of hierarchic unconditional primacy over the array of legal orders on the globe.

As a matter of fact, diverse orders, multiple normativities keep separate and disconnected even in the face of substantive problems which- mainly due to globalisation- are instead mutually interconnected. Thus, the theoretical recognition of plurality, autonomy and distinctiveness covers only one side of the issue. The other side discloses the matter of interconnections, and has to do with how to handle with them, while a project of global, legal or 'substantive' overall control seems out of reach.

In the complex interplay among different orders, and along with the slow, case by case construction of judicial confrontation, I shall unfold the role that the normative assumption of the Rule of law is to play, one that is crucial to legal viability of global governance: it concerns the framing of a (non substantively pre-determined) scheme of coexistence and the incremental weaving of further rules of recognition. Out of the inevitable interaction

[4] See *infra* par. 5.

and interdependence, this ideal, regarding the quality of legal matrix, works as well as a template of the (desirable) tension among countervailing needs and expectations and points to preventing one sidedness and unilateral conceptions of the good from being shielded "globally" by a merely instrumental code of legality.

In the general reasoning, and essential to the understanding of the view that I propose here, some further concepts shall be taken to matter, like accountability and responsibility, non domination, the "right" and the avoidance of injustice.

2. Legalities and layers, fragments and wholes.

Metaphors can be illuminating. The metaphor of international law as a progressive formation, in vertical cross section, of "geological" layers, has revealed that the flat view from the surface would miss, and waste, the actual complexity. Joseph Weiler [5] has looked into how layers developed, and conventional law, community law, regulatory law, have consecutively enriched the significance and spectrum of international law. The metaphor holds together parts that would be otherwise divergent and meant to embody different logics, nature, fundamental rules. The suggestion is that we cannot make sense of the same thing unless through the layers of which it still consists, that is, which its "consistence" is made of.

Other views have a different dynamic concern: mainly they see one of the layers above as explaining the others, to reveal the real fulcrum, the governing principle. The *clavis universalis* is rather elusive though: is the "human dimension" [6], the development of a *super partes* law, or is the holding of the Masters of the Treaties, the conventional nature, still ultimate, and explaining, for instance, as its generative root, the imagined autonomy of international, transnational or supranational institutions? or is rather the further engine of regulatory and administrative rule making, one that is spreading through disseminating entities with an unparalleled self authorizing jurisgenerative power?

[5] J. H. H. Weiler, *The Geology of International Law. Governance, Democracy and Legitimacy* (2004).

[6] A. Cassese, *The Human Dimension of international law* (2008).

It has been said that the progressive transformation of old concepts towards the meta-rule of "humanity" clarifies the trends and the hierarchy of "contents": redefines sovereignty[7], or trade law maybe[8]. On the other side, from the other "regulative" layer, even stronger claims can be implied. It interconnects, horizontally and vertically, traditional and new entities developing rule making and administration in all fields of peoples' and individuals' life (from human rights to commercial standards, from sport agencies to forest conservation, from environment to agriculture, form cultural heritage to energy, trade, security). For the very fact of progressively tuning its own viability among diverse imperatives and concerns, it purports to shed the only light through which things are visible. And by considering its processes as inexplicable through the lens of the 'conventional' layer, the scholars of regulatory international governance see how the law they are working on, rather than the traditional *inter gentes*, is instead the 'global' law. This is a paradigm shift, for one general reason at least, that what was a layer of the same whole becomes the whole of the same layers.

But what a 'global' law can be like[9] is rather controversial and uncertain.

Global regulatory law for some can be still included within a revised international law sphere, whence it has taken mostly its start. But the point is that it alters the distinction between "domestic and international law", the legitimacy of the latter, and gradually undermines sovereign equality among states[10]. For global regulatory law should be meant here the norm-production mainly deriving from sources of diverse nature, beyond the legal realm of States. Different entities generate clusters of norms related to the regulation of specialised fields, define their own rules of production, internal powers and competences, and avail of dispute settlement bodies, so that they build up governance regimes. Specialized regimes' imperatives appear often to

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[7] A. Peters, *Humanity as the A and Ω of Sovereignty*, 20 Eur. J. Int'l L. 513 (2009). See also the early opening by R. Teitel, *Humanity's Law*, 35 Corn. Int'l L. J. 355 (2002).

[8] See E. Petersmann, *Human Rights, International Economic Law and Constitutional Justice*, 19 Eur. J. Int'l L. 4 (2009).

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

[10] See B. Kingsbury and N. Krisch, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 Eur. J. Int'l L. 13 (2006).

eventually detach from the root of international law, or hardly to be explainable by its legal chain. Even the law of UN hosted institutions (UNCHR, FAO, ILO, WHO, WIPO, etc.) or of further entities generated by global authorities of public nature, like the Codex Alimentarius Commission (by FAO), express substantively autonomous governance. And albeit born through traditional treaty-making, the most outstanding, the World Trade Organisation, is taken to exemplify "the pervasive shift of authority from domestic governments to global regulatory bodies". Such a "shift of authority" also includes "transnational networks of domestic regulatory officials, private standard setting bodies, and hybrid public-private entities"[11]. The relevance of other "informal" entities of supranational nature like the Basel Committee (on Banking Supervision) or of the IAIS (the International Association of Insurance Supervisors) is undoubted. There are not only public entities: ISO or ICANN reach global actual effectiveness despite lacking formal public authorization processes behind their birth. ISO, by standards affecting any kind of productions, also undermines the ultimate effectiveness of national authorities on the same issues, and achieves worldwide respect, having been adopted in WTO TBT (Technical Barriers to Trade Agreement). Due to its general acceptance and viability it has lost de facto its voluntary character[12].

Given the more and more refined account of the different types of regulatory authorities producing "non treaty law", traditional state and interstate understanding "are inadequate to ensure that these diverse global regulatory decision makers are accountable and responsive to all of those who are affected by their decisions"[13]. In fact, most functional regimes address more often private actors rather than simply states[14]: as with the international

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[11] R. B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law*, 7 Int'l L. J. 1 (2009).

[12] An exhaustive analysis of ISO and of its legitimacy pillars, beyond traditional concepts of authority, is in E. Shamir-Borer, *Legitimacy without authority: Explaining the Pre-Eminence of the ISO in Global Standardisation governance, A Global Administrative Approach* (2009).

[13] As R. B. Stewart and M. Ratton Sanchez Badin, *The World Trade Organization and Global Administrative Law* cit. at 11 add: "At the same time, we believe that the divisions and differences in regimes, interests and values are too wide and deep to support, at this point a constitutionalist paradigm for global governance".

[14] See the GAL manifesto, B. Kingsbury, N. Krisch and R.B. Stewart, *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2005). See also

climate regime, regulations take effect "behind the national borders, within the national societies", and the ultimate addressees in various fields of global regulatory institutions are consumers, companies, and societal actors[15].

The compensating effort - *vis à vis* self-referentiality of global regimes - has been to focus on and to harden measures of accountability[16]. And the s.c. Global Administrative Law project (GAL) has elaborated on a model of normative requirements based on transparency, participation, reasoned decision and review. These should affect "the accountability of global administrative bodies" [17], and their albeit limited existence can already be exemplified in various cases[18].

On the one hand, such a global law works on the premise of the existence of sub-global legal orders that can grant compliance and implementation; on the other hand it can neither replace them nor possess the authority of determining their validity (in this sense, it is not the case of the Kelsenian unity of a universal legality, where States' legal orders are seen as dependent on the higher international order's authorisation). It would be impossible to show that the trade rules of WTO, for instance, define the conditions of validity/existence of the multiplicity of orders that instead it takes for granted. The regulative global law at issue here simply performs a peculiar jurisgenerative practice that refers to fragments (-fields) of human action, extends beyond territorial borders, and locates nowhere in particular.

S. Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 33 N.Y.U. J. Int'l L. & Pol. 663 (2005)

[15] M. Zuern, *Global governance and Legitimacy Problems*, in D. Held & M. Koenig-Archibug (ed.), *Global Governance and Public Accountability* (2005).

[16] See also S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, 68 L. & Cont. Prob. 109 (2005).

[17] B. Kingsbury, *International Law as Inter-Public Law*, in H. Richardson & M. Williams (ed.), *Moral Universalism and Pluralism* (2009) "in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make".

[18] In the exemplary Shrimp-Turtles case, the WTO Appellate Body found USA banning decision arbitrary for failing to provide India with notice in advance and opportunity to contestation, that was due since USA Turtles policies were affecting a public other than its own. B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 Eur. J. Int'l L. 37 (2009), also S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, cit. at 16.

At the same time, the about two thousands global regimes, but also transnational legal rules developed among private actors, produce a state of uncertainty due especially to the lack of a single frame of common reference and to the fact that each field-related single regime purports to achieve its objectives potentially engendering regulative conflicts. Obviously, concerns are raised precisely because of the supervened epistemic insufficiency of our grids, in the face of circumstances of so called "fragmentation"[19]: and the latter, be it pathology or physiology, means not just the lack, but properly the (ontological) loss of a reassuring unified legal world. So it tells us more about our cognitive premises or pre-understandings than about the world itself.

As an indicator of the uneasy environment, the increasing number of international tribunals is so often mentioned, whose proliferation is neither curbed nor hierarchically controlled by the International Court of Justice. As famously confirmed from the ICTY (Appeals Chamber, in Prosecutor v. Tadic), international law lacks a centralized system "operating an orderly division of labour among a number of tribunals" so that "every tribunal is a self contained system (unless otherwise provided)"[20].

However, at stake is mainly a metamorphosis of law in the emergence of a global normative space: the ICTY statement reflects it but in an unsatisfactory way, because of the frustrating effects and irrationality of self-contained tribunals as part of a space where different clusters of specialized regulation define functional areas and subject matters (energy, human rights, climate change, security,

[19] A as a preliminary study report had already stressed: G. Hafner, *Risks ensuing from the fragmentation of international law*, in Official Records of the General Assembly, 566 session, Supplement n. 10, 321 (UN Doc A/55/10) and G. Hafner, *Pros and Cons ensuing from Fragmentation of International Law*, 25 Michigan J. of Int'l L. 849 (2004).

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

trade, agriculture, etc.) that are nonetheless highly interconnected: ironically they address the complexity of interconnected issues by a divide et impera, through artificial separation of technical treatment. In fact, diverse kinds of law end up overlapping or blurring their mutual borders when impinging on the 'real' world: a domestic policy regulation letting pharmaceutical production flourish outside the established system of patents (in India for facing HIV, for ex.), overlaps with and conflicts against World Trade Organization rules and TRIPS Agreements (on "Trade-related Aspects of Intellectual Property Rights"); the latter, in turn, by defending the trade interests of States and powerful industrial companies in the patent system, do hardly concur with the goals of the World Health Organisation: developing countries especially must raise the life expectancy of the people, and of course, wider availability of medical treatment unrestrained by patents would facilitate the task[21]. In this and a myriad of similar cases, one can take different "internal points of view" (as judges respectively do), that of the WTO, the Constitutional Indian order, the World Health regime, bearing different accent on trade, health and human rights, and involving different participants and addressees. But none would be fully and exclusively adequate. It cannot be denied that different formats of law are pretending their share in the resolution of a single, concrete affair. And one can hardly ignore the conflicts between diverse priorities and the overlapping on the same object of more than one legal discipline: some pluralist, medieval, puzzle, where different regimes appear like fragments, 'pieces' in a sense orphans of a whole. The real thing—think it as a whole-- lies somehow beyond each of the concurring/competing perspectives.

It is at this point that our mindsets come to the fore. Our highest idea of unity, on which the perception of fractions is premised, is placed mainly in the general conception of law as associated with a "system". If we focus on the global regulatory layer, it is made by regulations, that is substantive norms, issued by institutions looking at functional tasks, ie specialized regimes, whose reach is fully circumscribed and that are often assisted by internal (quasi) judicial organs. Although they do not stand alone and seem to work on the premise of the international order, still they are

[21] Cfr. N. Torbisco, *Beyond Unity and Coherence: The Challenge of Legal Pluralism in a Post-National World*, http://www.law.yale.edu/documents/pdf/SELA

largely irreducible to it and exceed its unification attempts. In this sense they are fragments, far from the "wholes" that 'traditional' legal orders are held to encompass.

3. The law as a whole and the law on the globe.

Legal systems have been explicitly or implicitly considered to be a premise for law itself, a kind of transcendental condition for it, i.e. a condition of conceivability. The capacity of law to build itself as a unity and as an object of knowledge is often premised on the conception of law itself as an epistemically and ontologically "whole" object[22]. As a matter of fact, it has been, however, mainly construed on the premise of the modern State.

The connection between legal system and States is all but an irreversible conceptual one. Even with the Hartian union of primary and secondary rules, nothing prevents the acceptance of the rule of recognition to be made by officials that are not State officials [23]. But in the general understanding, it is somehow presupposed, implicitly or explicitly, that they are.

Now, if the bond between law and the State protects, rather than a formal consistency, the self limiting domain of a polity's social practices, it is so because the State is not just any "public" entity

[22] The construction of the epistemic unity or the self-creation, etc. as a separated object have been reflected by different speculations and theories. On the more general question recall Kelsen's Grundnorm. See H. Kelsen, *The Pure Theory of Law* (1934) or Hart's rule of recognition in H. L. A. Hart, *The Concept of Law* (1994) and see J. Raz, *The Concept of a Legal System* (1980); M. Van de Kerchove and F. Ost, *The Legal System between Order and Disorder* (1994).

[23] R. Cotterrell, *Law Culture and Society. Legal Ideas in the Mirror of Social Theory* (2007). J. Waldron, *No Barking: Legal Pluralism and the Contrast between Hart's Jurisprudence and Fuller's*, http://law.anu.edu.au/JFCALR/Waldron.pdf reminds us of the thesis of Cotterrell, and recalls hartian openness to customary law, but also recognizes that it was accompanied with the idea that the autonomy of customary law was harboured in the same central recognition of it as part of the valid law for the wider legal system. As Waldron writes, resuming Hart "his interest in custom as a form of law does not really extend beyond situations where custom is fully integrated into a state-dominated legal system--integrated in the sense that there are clear principles for its subordination as well as for its recognition. Even though the legal status of custom is not necessarily created by the sovereign's (tacit) command, still legal customs are subject to the system's overarching rule of recognition, and that rule will determine what the relation is between custom and other forms of law such as statute and precedent".

whatsoever, but the fullest image/archetype of any existent "public" and-- what is highly defining its very nature--, the only public entity entitled to all encompassing reach: the one that can by definition embody "general ends"[24]. The entirety of ends, one might say, overlaps with the law as "entire", as a system. Law- as- a- system is therefore deeply associated with a "general ends" capability: which requires it to ultimately shelter any sorts of common objectives "deserving" care, protection, regulation, control, and the like. This couple, to which territory is premised, factually entails at the same time the pre-understanding of a responsibility to cover the full circle of publicness and public problems, i.e. a responsibility for the "whole", and coherence as a "general" result. Its format works the dimension of time, both reflecting some premised "verfassung", the past and the "tradition", and projecting or ruling its 'common' future. Its institutional legality bears on the notion of custom, constitution, legislation[25].

The breaking in of global governance spells out a format of law detached from that ground, also due to its rootless standing, and its reference to partial, field- related regulations. It hardly can draw the full circle of political projects over the future: at least the old way to conceive of the time dimension tails off increasingly while the space expands itself. WTO or ISO rules are rather global as to their reach, but limited as to their content, task, function (trade). Indeed, global governance reference to an unlimited space goes with the incapability of each acting regulatory institutions to resume the internal self-understanding of a polity, its future-related commitments or its ideals, preferences and needs. Indeed they do not live with a polity, although they affect polities from outside. But this is not yet the whole story.

The obsolescence of the whole in the global law is linked to the obsolescence of the connection between law and responsibility. The geometric fractures of which it consists, have been addressed by a legitimacy-authority building attempt intended to construct conditions of procedural accountability, and mainly based on the latter. Procedures by decisions makers in institutions-regimes, like

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

[25] See for example, and for this last point, M. Van de Kerchove and F. Ost, *The Legal System between Order and Disorder* cit. at 22, 147-76.

WTO or the UN Security Council, are not always transparent, and fail to connect with the affected publics. Therefore, they must be made more and more accountable, work through pre-fixed rules of fairness and transparency. Accountability is thus an important asset of some civilizing progress in global governance. This is something different though from the idea of responsibility that was linked to the pre-understanding of law as a matter related to the State. So, the actual setting, as to the emergence of a global law, has some bearing on the relational shift between responsibility and accountability.

Put it briefly, "responsible" (as with a "responsible person") here projects a sensible self involving consideration of as many relevant factors (be they facts, interests, intentions, consequences, and the like) as possible or necessary regardless of accomplishment of single discrete obligations or objectives. It would exceed[26] the view of a required task (which more or less neatly circumscribes the field of relevance, and is called upon to leave aside any further concern), one that is instead entailed by accountability. Responsibility of this kind has a whole-related sensitivity and concern; it turns to be implied in the pre-conception of a simple objective raison d'etre of the State: it hints at the abstract ultimate "capacity" or all-encompassing capability of a legal order as a State related concept. It does not replace, and it is not replaced by, either 'accountability mechanisms', meant to operate "after the fact"[27] or by other procedural accountability requirements in relation to global governance: the latter are those suggested to compensate for the lack of true democratic control, and operate on various grounds, of which the legal one is seen as minor[28]. In some way, global

[26] As to the general meanings of responsibility, among others, M. Villey, *Esquisse Historique sur le mot 'responsible'*, 22 Archives de Philosophie de Droit, 45 (1977). Suited to the notion here exposed, one can recall as a significant example, Hans Jonas's insight in "political responsibility" (meant as the responsibility of the State felt through the role of the Statesman and in analogy with parental responsibility), which in his words bears am essential relation with *totality, continuity and future*, because it encompasses the "total being" of its object, with no possible interruption in time, and beyond its immediate present. See H. Jonas, *The Imperative of Responsibility* (1984).

[27] R. W. Grant and R. O. Kehoane, *Accountability and Abuses of Power in World Politics*, 99 Am. Pol. Sc. Rev. 29 (2005).

[28] In R. W. Grant and R. O. Kehoane, *Accountability and Abuses of Power in World Politics*, cit. at 27, however, accountability divides in two strands: in the participation model, the performance of power wielders is evaluated by those who

regulatory entities, structures and procedures can be progressively integrated with legal counterweights and hopefully be made accountable. Yet global law obviously cannot help downplaying the reassuring modern enterprise of law as one all-encompassing human activities. It weakens increasingly the old holistic frame of 'public interest', and the political control of complex issues. Administration, somehow the intermediate legal form between particular and general, has thereby transformed itself from the instrumental arm, the bureaucratic or technical apparatus, as it was within the State, into a self standing form of sectoral or self referential global regulations.

In conclusion, segmented law, of itself, is unsuited to shoulder "responsibility" for the "whole". The "whole" looks, all the more now, clearly a metaphysical concept, too far to be conceived, and its very width, depth and complexity are here out of sight. On the other hand, such a situation, the intuition of which is also enhanced by the accountability/responsibility divergence, is a case for re-considering the autonomy of and the relation between legal orders.

4. On the legal character of global legality and its external environment.

In such a state of affairs many compensatory overall designs have been elaborated, most with 'constitutional' aspirations, but at first glance circumstances call into question before anything else the very idea of a Rule of law: more basic a question which appears to concern directly legality in itself. Beyond the general notion of the Rule of law (that I have also spelled elsewhere) [29], we certainly need to further focus on its import within the new setting of global governance: as I submit, in this realm it concerns the relations among diverse legalities that actually populate on different layers, and with different extension, the "multiversum" of our "globe". Before taking issue with the Rule of law itself, though, I shall firstly try to assess the legal nature of global legality, drawing a profile of it as a discrete member of the 'association' of legalities that dwell on the globe. Such preliminary assessment shall display the frame and pave the way to the question of the Rule of law.

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are affected by their actions. In the delegation model, by contrast, performance is evaluated by those entrusting them with powers.

[29] See G. Palombella, *The Rule of law as an Institutional Ideal*, cit. at 2.

Admittedly, often our views have to represent such legalities regardless of the different patterns and thickness, nature, legitimacy, and of institutional and social features. Notably, ILC 2006 Report worked out a de-fragmentation apparatus based on the topoi of legal reasoning[30], a question of rules, deliberately leaving out the "beyond" issue concerning the structures of the institutions, the allocation of authorities, and the novelty of self- authorized entities in the global space. We fail to see a unique format, one matrix covering, in the last instance, the diverse generators of normativity (that range from sub-national, State, the transnational and "merchants" law, conventional or customary *inter-gentes* law to "humanity" *jus gentium*, regional supranational orders, global administrative law, and the like). And finally, we are far from the pre-understanding of law as ultimately coherent.

A universalized coherence would be premised on a kind of internal point of view to the globe itself as an entirety, that, put in Hartian terms (aside from the insuperable "situatedness" of our angles and the abstractness of a view from "nowhere") is unavailable for the time being: for a "practiced" common rule of recognition cannot be empirically described as existing[31].

If we acknowledge that regardless of upholding universal standards of morality, the ultimate conditions of validity in our systems are those spelled out by social sources[32], we should accordingly assume that different legal orders depend on different domains of social practices. This holds true for each of the layers of the globe recalled, from State, or regional law to international law, or global (administrative-regulatory) law.

The latter represents a telling Sonderweg indeed, whose interpretation is still in progress, and that shall be instructive to

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

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

[32] On this, and also on the separability thesis, there is well known and vast legal theory literature. One shall recall however that for Hart this does not exclude a role- in questions of validity- for principles: the latter may also be identified by virtue of their " pedigree, " much as in the case of " norms " if those principles are created or adopted by a recognized authoritative source, see H. L. A. Hart, *The Concept of Law*, cit. at 22, 266. Moreover, a strong contribution on this point has come from strands of "inclusive" legal positivism.

follow, by the appraisal of its pretenses and claims of normativity. Not by chance, its scholars have had to consolidate firstly its normativity as "legal", by re-framing a concept of law, that in fact has been proposed as specifically tailored to accommodate it, given its mismatch with international law and national law[33].

Of course, should global (administrative-regulative) law be felt to belong in some other pre-existing "system" one would not ask what wider and better-suited conception of law could be envisaged: it would simply undergo the test of one given system's criteria of validity. The question of whether GAL is law and under which concept of law, can emerge because it is believed to unfit the parameters of validity of the known legal orders. Now, as far as this premise holds true, if it is law, then it shall also be a legality of its own, that neither international (and supranational) law nor national law encompasses.

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

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

As it is theorised, GAL is law because law essentially presupposes a) a rule of recognition and ordinary rules, b) that the rule of recognition admits a varied typology of very diverse source entities, states or not states (including those producing specialised rule making, and of an administrative nature), provided that, however, they comply with the principles of publicness, as further elaborated, and referred to the nature of entities, not to the involved publics. According to the argument suggested by Benedict Kingsbury, their legal nature reflects the inherent "public" character

[33] See B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, cit. at 18, 26.

of law, one which embodies the general legality principle, rationality, proportionality, the Rule of law and respect for basic human rights[34]. 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"[35]. The reasoning partakes both of a principle-based re-cognition of law as such and of a source based delimitation of it.

One might observe that such a definition already frames the nature of the sources, and embeds criteria that beyond the 'notion' of law, could prompt lineages and the pattern of a rule of recognition[36] to be practiced globally: and if only some further step or the regulative and administrative nature of candidate norms were spelled out, that would easily fit as a test of validity, within the peculiar (albeit open) realm encompassed by GAL, of which it rationalises the practiced standards. Thus, somehow, it has to oscillate, so to speak, between legality and validity[37].

The reason is that GAL has been identified and studied from the start as more than a loose set of rules[38]. The dual, descriptive and normative, stances of the discourse, are inherent in the actual way of being of GAL itself, thereby turning it into a legal order of incremental nature, within a predefined scheme. The further specification of a unitary rule of recognition might be considered an endeavour that is certainly in progress: but its lineages under a public chain are partially spelled out already and partially deferred to the practices of the classified sources under the requirements of publicness. This is developed out of the need to make sense of this matrix of law under the constraint of tackling a visible puzzle: that is, on one side, its premised lack of belonging (to any other single system), on the other its consequent need to qualify otherwise as

[34] *Ibidem*, 23.

[35] *Ibidem*, 56

[36] As Hart writes, the "rule of recognition," unlike other rules and norms (which are " valid " from the moment they are enacted and even " before any occasion for their practice has arisen "), is a " form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts". See H. L. A. Hart, *The Concept of Law*, cit. at 22, 256.

[37] The statements relating to sources say already about their typologies, and these are drawn on existing sources, that are implied and can be listed in further detail or incrementally identified by what appears to be a kind of "cooptation".

[38] See this expression for example in H. L. A. Hart, *The Concept of Law*, cit. at 22, 233.

"law". In a positivist and Hartian attitude, the general characters of law are a theoretical 'essentialist' predicament. If the question about 'what is law' is addressed in order to fix whether something in particular is law, it can be answered in the positive only if that something has already self defined its internal conditions of validity by a specified social practice, i.e. is- or refers to- a legal order.

Naturally, the incremental definition of GAL's rule of recognition cannot determine the conditions of validity pertaining exclusively to other legal orders: upon them it can make no claims. What counts as law in international law, in a State legal order, or in the EU, is determined through their own secondary rules[39]. Accordingly, they cannot pretend to define some global legality as a whole, since this would be, ceteris paribus, as imaginary as the other way round unless the respective practices take that very role in displacing one another.

Otherwise, it would imply a monist conception of the global order, where no relation/ interaction is possible among legalities, all of them being hierarchically contained as part of one single system, under its rule of recognition. This matters definitely because as we know, the rules and regulations generated by global regimes are typically meant to impinge on the domains controlled by other legal orders: GAL is itself and works as an interconnection among actors and layers, international institutions and transnational networks, domestic and global, with vertical and horizontal kinds of transitivity[40].

This said, the subsequent question has to do with the intersections and coordination among legalities. The scholars that have focused on the law that actually develops precisely on the specifically global layer of law, and that they consider overflowing the coordinates of sources and systemic pedigree of international

[39] At it is obvious, what counts for GAL as criteria of recognition might well be different from what counts for some candidate norms to be conceived of as legal norm, say, in the UK legal order.

[40] B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, cit. at 18, 25: "For instance, national courts may find themselves reviewing the acts of international, transnational and especially national bodies that are in effect administering decentralized global governance systems, and in some cases the national courts themselves form part not only of the review but of the practical administration of a global governance regime".

law, see that legality as vertically penetrating States' order [41]. But the point remains that different systems persist separately, and the confrontations among them have, normatively, a double dimension: within the confined realm of the rules of recognition of the GAL legality, all the involved entities, and those actors, mainly judges, domestic or supranational, and institutionalized bodies with decisional entitlements, should work theoretically within its criteria of validity: at least conflict of rules techniques and others, like principle of hierarchy, harmonization, systematic interpretation, etc. apply. From this point of view, the normative claims are all to be considered "internal", and the different regimes or the States' orders, are all seen from the perspective of the operationalization of GAL. The practice of the rule, as a social source, i.e. a factual datum, shall be ultimately controlling.

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

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

It is thus the normative question that must be raised. What is the "why" all actors should behave so to fairly interact in a

[41] S. Cassese, *Il diritto globale* cit. at 9. thanks also to material interaction, and institutional penetration: for example by way of taking in their operating members, officials belonging in diverse States' corresponding administrative fields. On the horizontal plane, diverse legal regimes have in common the progressive development of principles of administrative law.

heterarchical order of autonomous partners? and how can they construe their relations without fading under one overarching system of the globe?

As a matter of fact, kind of interactions are factually inevitable, and many indicia show the role of law as an independent tool. But, to this regard, it is helpful to contrast this setting with the analogies in the medieval pattern[42]: with the latter, legal scholars, arbitrators, and "*jurisperiti*", in a multileveled set of legalities operated in the view of the "case" at stake, without further implications as to the weaving of a frame of interactions among orders: at least in the sense that a final unity was to be searched at the bottom in the "*convenientia rerum*"[43] and at the top in fidelity to an overarching transcendent order shaped by theological concepts. The contemporary globe is orphan to such a final unity, while would not be satisfied with leaving pluralism of legalities as an anarchical setting, at the mercy of the material forces of globalization. Accordingly, the work of judges and jurists appears to contribute something different. As institutionally held to lack (or at least, to reason without) political bias, their task is seen to increase in framing a texture that[44] enhances accountability and endeavors to compensate for dis-order. The value of this work is high, not just because courts and other jurisdictional bodies treat conflicts, but because they weave the lines on which States and other supranational actors start making sense of some normative mutual commitments, and try and reason on the principled ways in which they can be articulated [45].

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[42] One of the most authoritative scholars of the medieval universe, describes it as ordered through law where no focus was on the political (modern) conception of law as sheer (political) *instrumentum regni*. See P. Grossi, *L'ordine giuridico medievale* (2000).

[43] *Id est*, in the relations among things in themselves under standards of doctrinal legal institutes and formulas tracing back to Roman Law and common law. On connections with the substratum of *aequitas* see P. Grossi, *L'ordine giuridico medievale* cit at 42 and. E. Cortese, *La norma giuridica. Spunti teorici nel diritto comune classico* (19629. On the centrality of *jurisperiti* see P. Grossi, *L'ordine giuridico medievale* cit. at 42, 54.

[44] S. Cassese, *Il diritto globale* cit. at 9, 26. Cassese also enhances the Shrimp-Turtle case. See S. Cassese, *Shrimp, Turtles and Procedures: Global Standards for National Administrative Procedure*, cit. at 16

[45] See also G. Palombella, The Rule of law beyond the State, 7 Int'l J. Const. L. 432 2009, and also G. Palombella, *Global Threads: Weaving the Rule of law and the Balance*

Now, even behind such a work, there must be a supporting choice, one that however suggested by real world constraints, nonetheless is needed to build normative bonds among legal orders, otherwise not provided by a premised world legal system, bonds that can only be traced back to the normative commitments that legal orders autonomously take.

5. Enhancing the Rule of law.

One such commitment that I purport to enhance is the Rule of law. At one level of meaning the Rule of law, in the sense promising certainty through generalised compliance with existing rules, may be intended to protect the linkage between constituents and the law, ethos and legal order. One can say that this conception reflects conservatively the State based law matrix. One of its versions in the "Burkean" mode, speaks of the Courts as reflecting the whole experience of a nation [46].

This kind of task is accomplished also externally, as one of the functions of interfacial constitutional rules defining legal force and status that domestic law can assign to conventional or customary international law, to Treaties and general principles. It falls, in brief, within the "Rule of law in this jurisdiction" as solemnly the Supreme Court (in the US) calls it.

Equally, in global governance, beyond the State, the appeal to the Rule of law has, first of all, an 'internal' function, that is, it is apparently worked out more as related to the 'quality' of each governance entity, to certainty of rule-following in the diverse clusters (in different regimes of norms, from WTO to ECHR, ICLOS, etc.) than to channel inter-legalities concerns. It is serving the teleological ambition to enhance accountability. Abiding by the rule of law, in this sense, helps making such power-exercising bodies and institutions, more transparent or accountable. This can be justified. It can be said that accountability means the way through which law production process can be controlled, made visible, and eventually kept in tune with the interest of its addressees: and the Rule of law, conceived of in terms of a set of

of Legal Software, in P. Carrozza, F. Fontanelli & G. Martinico (ed.), Shaping *the Rule of law through Dialogue* (2009).

[46] Oliver Wendell Holmes, in Missouri v. Holland, 252 U.S. 416, 433 (1920). and see R. Post, *The Challenge of Globalization to American Public Law Scholarship* (2001).

definitional requirements for the law (like those envisaged by Fuller, or by Raz, for example), has also been thought of as implying a legitimating relation to its addressees[47]. In a different vein, the Rule of law is counted among the criteria that a sound conception of legality should embody, if global governance entities and functional regimes must embed the quality of "publicness", as recalled above. And publicness ties authorities to "accountability" as well [48].

We equally can recognise that the Rule of law is a recurrent ideal belonging as well, at least theoretically, in most of the layers that we take here into account as populating the world. It is in most of them an internal principle, constantly cherished in regional, international and supranational documents as well. But the import and ideal of the Rule of law need a sounder definition, also given the question of its use outside the State.

There can be a second level of meaning beyond the reference to single legal orders, be they national or supranational ones, and I shall focus on that in the next section. What the infinite interactions between autonomous orders do, among other things, is evidently opening the field beyond the strict normative tasks inherent in each single domain, in other words making systems and "fragments" to fairly relate to and 'magnetize' each other. If the Rule of law commitment plays a role beyond each confined platform within which it is elaborated, and thus in the global context, it does more than structuring the quality of public rule-making entities; in the metaphor, it not only bears directly on the fragments, but also affects the legal quality of a potential (and indeed inescapable) interaction.

[47] See Lon Fuller's "internal morality of law," as one made up of eight features, so that rules have to be general, public, non-retroactive, comprehensible, non-contradictory, possible to perform, relatively stable, administered in ways congruent with the rules as announced. L. Fuller, *The Morality of Law* (1964). See also the elaboration by J. Raz, *The Rule of law and Its Virtue*, in J. Raz (ed.), *The Authority of Law (*1979), D. Dyzenhaus's, Accountability and the Concept of (Global) Administrative Law, 7 Int'l L. J. Working Paper (2008) insists on the legitimating connection to the addressees fostered by the Fullerian idea of law's requisites as granting 'accountability'.

[48] This happens in the guises alternative to those participatory channels otherwise available in constitutional democracies, by implying review, transparency, reason-giving, participation requirements, legal accountability and liability B. Kingsbury, *The Concept of "Law" in Global Administrative Law*, cit. at 18, 34.

In this sense, it overflows the question of each regime's accountability [49], but, yet, it operates on weakening self-referentiality and kinds of normative monism. Both in the global specialized regimes and in the even wider global space of orders, our image of law as linked to the States' general ends, is naturally missing. This I have described above as the shift from "wholes" to "fragments". In a loose and "aspirational" sense, it can be said that taking care of the legal quality of the interactions themselves is premise to the fostering of a background and "regulative" idea of responsibility [50]. It might be so in some indirect way on which I shall return later.

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

In the view that I shall resume here, the Rule of law is originally concerned with the quality and structure of law in a defined environment. First of all, as an ideal, its import, once taken consistently, without a double standard, can be naturally externalised. It is a kind of ideal that does not only control each legal order's quality of law, but has implications in the legal intercourses among legal orders. Now, what this ideal looks like can be answered as a matter of historical and institutional reconstruction.

In the modern history, rule of law's structures boiled down to institutionalise forms of legal counterpoise of power. They contributed to this achievement by the separation of powers, an independent judiciary, legal protection of other principles (and rights) even vis à vis legislation (and the democratic or sovereign principle itself), and by fixing pre-given rules for the exercise of legitimate power in a non-arbitrary way. The last aspect, though,

[49] I am not submitting here that matching accountability requirements should have no consequences on mutual confrontations or on the nature of a public entity.

[50] On this concept see *supra* par. 3 and *infra* par. 7.

wouldn't tell the whole story, and if taken alone would be misleading. As the pre-constitutional (XX and XIX) European *Rechtsstaat* (or *Stato di diritto*) proved, power's formal steps can be non-arbitrary, rule-based, hierarchically rigorous, and still an ultimate source, legislation (let alone the whim of the Executive) can monopolize the social available normativity in a legally dominating way. This is why the pre-constitutional model of *Stato di diritto/Rechtsstaat* -albeit 'non arbitrary'- is still far from the English Rule of law rationale[51]. Contrariwise, a dual structure of law was factually developed in the English tradition (where common law and judge made law developed): such a dual structure is a reason why the power, from the legal point of view, is neither " unlimited " nor " unbridled "

Seen through its historical trajectories, rooted in the medieval England , the point of the Rule of law is to prevent the law from turning itself into a manageable servant to political monopoly and instrumentalism, a sheer tool of domination. It requires that, besides the laws that bend to the will of governments, 'another' positive law should be available, which is located somehow outside the purview of the (legitimate) government, be it granted by the long standing tradition of the common law or by the creation of a 'constitutional' higher law protection, and so forth.

The Rule of law endows legal order with a peculiar 'duality' that positively protects, since ancient roots, the right (*jurisdictio*) from being overwhelmed by rulers pursuing the ends of government (*gubernaculum*). In all these the ruler's law is constrained by something that is truly law but not his to rule. Such a duality[52] is appealed to when in the face of the law of the most powerful, the sovereign's gubernaculums, some other legal guarantees, liberties and rights, principles and safeguards are provided elsewhere in the fabric of the existing valid law that are

[51] Theoretical and historical treatment of the issue more at length in G. Palombella, *The Rule of Law as an Institutional Ideal*, cit. at 2.

[52] It is something clearly missing in Continental Europe (until 20th century's spread of constitutions) from the European *Rechtsstaat* (in its pre-constitutional form),which was, nonetheless, an example of non-arbitrariness as its *form* of rule. At a closer look, though, it lacked any overarching constraint that rendered anything beyond its power: its sovereign ideas of the good could be pursued even cancelling safeguards of liberty and individuals' rights, and that could be unilaterally legislated as *legal*.

hardly overwritten by ordinary legislation. Accordingly, it refers to respect for law in the two sides. It can hold in diverse historical experiences, and diverse domains, be it the judge made law, the common law, the constitutional law principles or, in our centuries extra-state setting, the international *jus cogens*, the '*erga omnes*' rules, the human rights charter of the European Convention on Human Rights, the humanitarian peremptory status of the common art. 3 of 1949 Geneva Conventions, and the like. The latter, again, are held to be out of the 'legal' reach of those who, from time to time, within or without the limits of a territorial power, or of a field related global authority (the global functional regimes), intend to play a monopolizing law- productive role. Of course, one of the main mirrors of totalitarian attitudes and orders (not Rule of law-based orders) is the elevation of the goals of the most powerful to the dignity of the unique interest of a community, the transformation of some ethical majoritarian (or forcefully imposed) aspiration into the only "legally" permissible contents, by overwriting individual justice concerns and de-legalizing any other law capable of granting legal standing and protection to the weakest and least powerful.

Once this definition is given (according to which absent such a duality the Rule of law is itself missing), then, on the extended setting beyond the State, the Rule of law has still to do with this duality of law as a scheme aimed at the equilibrium between existing normativities; if uphold, it purports to avoid the absorption of all available law under the purview of one dominating source, thus keeping alive the tension between -as it was said once upon a time- *gubernaculum* and *jurisdictio*. Paying attention to the profile of the Rule of law, as a matter of interactions, means to pay due respect to the legal arguments and legal circumstances that are held by different legal orders coming to terms in a definite case at stake; it means to accept that a cross cutting and shareable legal reasoning takes place without assuming that hierarchical, argumentative stops shall prevent it from being disclosed.

The equilibrium between the parties involved- be they the European Union and the Security Council, the European Convention on Human Rights and Russia or Italy, the WTO and the European Court of Justice- traces back to the original root, as a constant *fil rouge*, from the medieval English traditions to our contemporary constitutions, and has been and can be realised in diverse incarnations, in different times and institutional settings,

placing the "ideal" as the benchmark concerning the quality of legality[53].

In the global context, the new globe-encompassing regulative layer of law is firstly a transmission belt of an instrumental efficiency, simply because it is the law issued to pursue their own imperatives by authorities born for the regulation of a specialized realm; and the increasing importance finally assigned to accountability devices is itself meant to avoid that such an exercise of power be either inconsistent with the field or issue related imperatives of each regime (delegated or self created competence limits) or mindless of some basic "moral" constraints or other requisites borrowed from the elsewhere developed administrative law principles (procedural fairness and basic human rights). The unilateral (i.e. following only functional internal objectives) character of the regulations issued by authorities with mainly administrative roles (nonetheless exercising full power over the fate of individuals and peoples) is structural to each regime, it is not contingent. And regimes of norms, mainly defined through primary rules, established treaties, 'covered agreements' are considered as defining also the basis on which controversies can be assessed: they make their own rules the one parameter for arbitrating interests of different parties, up to the point that arbitral tribunals are contested if they make 'external' references, such as, for example, to international law customary rules[54].

The Rule of law indeed should work so to enlarge the common ground that constitutes the basis for a full fledged legal reasoning, by sticking to the principle that the available law should not be completely monopolized or produced by one of the parties, and that for examples, otherwise recurrent principles of 'civilised nations', general human rights protection, cannot be ignored simply because placed outside the regime that is relevant to the controversy.

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[53] This definition of an institutional scheme of the kind here suggested does follow a different path from both the thick and the thin conceptions of the Rule of law on which P. Craig, *Formal and Substantive Conceptions of the Rule of law: An Analytical Framework* (1997).

[54] In cases Sempra Energy, Enron, CMS, ad hoc Committees had to scrutiny arbitral awards based on the relevance of state of necessity as a general principle of international law, to be considered as outside the applicable law of the regime. See A. Singh, *Necessity in Investor State Arbitration: the Sempra Annulment decision*, http://www.ejiltalk.org/necessity-in-investor-state-arbitration-the-sempra-annulment-decision; and P. Nair and C. Ludwig, *ICSID Annulment awards: the fourth generation?*, 5 Gl. Arb. Rev. 5 (2010).

The Rule of law, in this sense, not only bears on an internal level, but by institutionally imbuing our notion of a qualified legality, affects our understanding of a legal code, and determines how are we to conceive of the juridical character of the Globe, as made of multiple legalities. The implications bring the subsequent fostering of mutual recognition (and competition) among legalities as peers, and should countervail unifying "ethical" constructions of a material order of the global good i.e. via a simply a priori legal hierarchy.

This shall lead us to manage the issue, mentioned in the above section, that from within each legal order normativity, only a purely external stance can be taken towards any other. It is the question of bridging the gap between the self referred claims of internal legal validity made by opposing interlocutors. It amounts to the choice for the assumption that a normative order is prima facie a bearer of a respectable legality, that is tantamount to recognizing that someone else's order is not a manageable instrument, and is out of the whim of external players. However, this is a potentially productive standpoint. Yet, we need to focus a bit more on this through a closer observation of legal realities.

6. Legal realities, Global tolerance? [55]

"Self observing" specialised regimes do normally interfere inter se as much as with State or regional legal orders. As Koskenniemi recalled, institutional and procedural questions are lurking in cases like Mox Plant- nuclear facility at Sellafield, UK, which involved three different institutional procedures, the Arbitral Tribunal at UN Convention on the Law of the Sea, the procedure under the Convention on Protection of the Marine Environment of the North-East Asiatic Atlantic, and under the European Community and Euratom Treaties within the European Court of Justice [56].

One of the compensating strategies, as often suggested in the foregoing, has been focussing on the judicial side: judicial work could advance, so to speak, some additional software, one of a

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

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

distinctive kind though: shaped "through cases" but providing for gap bridging criteria and connective texture, not found in the "primary" rules that it is for judges to apply or enforce, often borrowed from general principles of law, or background international law general rules, or even from the most advanced legal tools of national orders[57]. Even Courts indirect "communicative" strategies (circumstances-relative, comity, reciprocity, equivalent protection, margin of appreciation, scope of manoeuvre, subsidiarity, proportionality, and more) might either reflect or produce interfacial rules, purport to develop some shared working idioms helping coexistence and connections in the absence of the "grand box". And whereas the "system" might be out of sight, some criteria of mutual reference might increase their relevance and role, up to becoming the closest thing to a post- "Babel"[58] legal understanding. But as remarked in the sect. above, the question was why should judges on a legal plane do so?

When, as in the Swordfish case[59], 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. But their parallel validity

[57] A thorough examination of the threads of global public law general principles, as well as the discussion of their theoretical basis and promises, has been recently provided by G. della Cananea, *Al di là dei confini stauali. Principi generali del diritto pubblico globale* (2010).

[58] 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*, 55 Int'l & Comp. L. Quart. 791 (2006) and in S. Cassese, *I Tribunali di Babele* (2009).

[59] The case: at WTO: Chile- WTO Doc. WT/DS193; at the ITLOS, Chile v. Eur. Com. (available at www.un.org/Depts/los/ITLOS/Order1_2001Eng_pdf). For a presentation of the case, recently S. Cassese, *I Tribunali di Babele*, cit. at 58, 31. Cf. also T. Treves, *Fragmentation of International Law: the Judicial Perspective* (2008) and M. Orellana, *The European Union and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea*, 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*, 71 N. J. Int'l L. 55 (2002).

has to face a crucial challenge, when from the point of view of the parties involved (Chile, or the EU, in Swordfish, or say, Mexico and US, between NAFTA and WTO in Soft Drinks[60]), as a matter of Euclidean geometry, the (parallel) non intersection property fails the evidence. The transcendental answer cannot be traced back to a large system, there is no *Grundnorm*, and should it exist, in the Kelsenian mode, it would hardly attach to such an environment.

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

As a well known example, the European Court of First Instance appealed to the rule of international law in order to state that the Security Council resolutions (in particular those listing AlQuaeda suspects, and deciding the freezing of their funds, without providing them information, right to defence, and review, and infringing their right to property) are binding not only on UN member states (UN Charter, art.103) but also on the European Community[61], which should be held responsible for compliance. Thus, harmonization between states, Community, and United Nations system is thereby achieved, so that scholars who look at the decision with a view to a more unitary or even "monist" account of international legality believe that the court "is to be congratulated … for accepting the primacy of the UN system without any general restrictive caveats"[62] . However, it has been likewise and again the appeal to the Rule of law to provide a basis for ECJ to reverse the first decision. What is significant is the connection between the quest

[60] Cf. Panel Report, Mexico–Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R (Oct. 7, 2005).

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

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

for legality as compliance and the system-relative nature of the Rule of law. The ECJ decision did reason by introducing a new level of discussion: even if there were an hierarchy under international Rule of law, the primacy over Community law "would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part"[63]. This means, first of all, that the primacy of the international order is never content independent. It coexists with the autonomy of legal orders, each pursuing their own review of their own decisions, even those depending, as in this case, on resolutions issued in the international order.

Of course this relative autonomy holds true even within the EU, where supremacy and direct effect have been established, along the years when the construction of the common order and the subsequent vertical relationships were in progress, and possibly each time a step forward is required to find a stable ground. Even more notably because the ECJ normally adopts of itself an internal monist attitude towards the Member States. Thus, the Italian Constitutional Court wrote in Frontini v. Ministero delle Finanze[64], that the limitations on sovereignty, even within the European Communities, have to be connected with the pursuit of legitimate and valued objectives, and, notably, it must be done so coherently with "fundamental principles" of the member states constitutional orders.

In general, it holds with the famous "Solange " interplay between legal orders, according to which the German Constitutional Court did subordinate domestic compliance so long as an adequate substantive and procedural system of fundamental rights protection was working in the European legal order[65]. Eventually, a similar attitude concerns other confrontations between legal orders, for example as to "direct effect" of WTO norms within the EU: "It is established case law (from Portugal to FIAMM)" that the WTO norms according to the ECJ are not "parameters" for reviewing the legality of normative acts adopted by Community institutions. In

[63] ECJ, Kadì at §§ 316 – 317, that also adds that " the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the Rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement. "

[64] Corte Costituzionale, 27 dec. 1973, n.183..

[65] The two "Solange" decisions are BVerfGE, May 29, 1974, 37, 27; BVerfGE, Oct. 22, 1986, 73, 339 – 388.

other words, WTO norms do not have "direct effect", i.e. cannot be invoked "by private parties and Member States in proceedings before the EU judges, unless an act of implementation has been adopted"[66]. Reasons for this to be so have been given more than one. In Portugal all started with enhancing a still relevant matter of horizontal symmetry, i.e. that direct effect is not granted by other Members, thereby the condition of "reciprocity" and the functional advantages from homogeneous behaviour are missing. Thus, internally, the margins left for legitimate negotiation, would be cancelled: "Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners"[67].

Generally, in these and other cases judges are called upon to "vertically define the relationships between diverse legal orders and horizontally integrate diverse specialised regulatory bodies" [68]. Admittedly, on the one hand, some kind of fuller integration might strengthen the coherence of global (administrative) law, as a peculiar legality in itself. But this should not be thought of as an unconditioned attitude or presupposition of 'monism'. Further relations among that level of legality and States' legal orders, or others like the EU, and between them and international law, are better drawn along lines of (what I would call) a respectful recognition of autonomy, responding to a logic of confrontation in which transparency, openness and "giving reasons" are required. As I shall comment later, such a general frame would foster a civilised equilibrium, better reflecting the underlying principle of the Rule of law, as I have developed it so far.

Despite judges weaving growing threads of legal reasoning, still they are operating between recognition and the internal point of view. They assess mutual relations from within their own order. Precisely this recurrent judicial attitude toward the "internal"

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

[67] Judgment of the ECJ 23 November. 1999, Case C-149/96, Portuguese Republic v Council of the European Union, par. 46.

[68] S. Cassese, *Il diritto globale*, cit. at 9, 138. The Italian Constitutional Court Judge, Cassese, suggests instead that the best direction would be different from the route taken by the ECJ, i.e. it would be that of recognising fuller integration among the relevant orders.

questions of validity, which otherwise is considered to be backward looking, has to play a role as important as the forward looking attitude in "opening" and linking "external" legalities.

In many ways, for the sake of categorizations, that should be called a dualist stance. Diverse strategies of interaction are ways of addressing the fact of plurality. But if we line up the possible 'relations' along an axis of "engagement", we can here stipulatively simplify [69] that a strict pluralist view might signal the overlapping on the same field of two or more different "systems" controlling it: systems that in a pluralist understanding see the things from their own perspective, and irrespective of one another. Monism might also end up with simply asking for the supremacy of one legal order over the other (conceived as internal part), while dualism as an equilibrium point, entails the recognition of the "others" within the domain that they regulate (e.g. global trade or international human rights law) and normally provides for interfacial norms as to their domestic validity, internal applicability, direct effect, elaborated by courts or included in constitutional or legislative texts. Relations towards external legalities emerge as a matter of legal principle[70].

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[69] I am not going to assess here the viability of different conceptions of pluralism, I am suggesting an heuristic scheme along which the Rule of law consequence on the "communicative" level can be understood.

[70] I have mentioned the role of different interfacial rules, *vis à vis* the relevant transformations and the increment of *super partes* norms of relevance to the general international community (in my "The Rule of law, democracy and international law. Learning from the US experience", supra at note 26. No doubt many difficulties can be recognized for ex. as to the status of general international law "codified" through treaties in the absence of incorporation: a crucial matter in dualist systems that do not allow for some supra legislative force either general principles or at least some conventional international law (see instead Art. 25 German Const.; art. 10 and 117 Italian Const. and see also C. Cost. dec. n. 348 and n. 349 2007: according to the Italian Const. Court, art. 117 of the Italian Const. determines for International treaties (or the "adaptation rules" for them) "una maggior forza di resistenza rispetto a leggi ordinarie successive". Thus they are ranked higher than ordinary legislation, albeit under the Constitution). Remarkable before 1998, the article by R. Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law", in 18 Common Law Bulletin (1992), 1268 . On dualism, monism and multilevel constitutionalism (esp. in the EU), I suggest, in an unlimited literature, only some: for ex. I. Pernice, *Multilevel constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 Common Mkt. L. Rev. (1999), E. Scoditti, *Articolare le Costituzioni. L'Europa come ordinamento giuridico integrato*, in VV. AA. (ed.), *Materiali per una storia della cultura*

7. The onus of communication and the substantive import of the Rule of law.

A "communicative" attitude should be, theoretically, at odds with exclusion, arbitrariness, and dominance. As Habermas wrote, when committed to 'comprehension', the "interpreter cannot understand the semantic content of a text if he is not in a position to present to himself the reasons that the author might have been able to adduce in defence of his utterances under suitable conditions". But these reasons cannot be taken to be "sound" unless the interpreter takes a "negative or positive position on them"[71]. By suspending accordingly the 'application' and the acceptance into our context of someone else's claims of validity and rightness, we simply abstain from crediting our interlocutor with an a-priori superiority, be it based on authority, power, faith, or tradition.

Turned toward the relation among competing legal orders, mutatis mutandis, this shall concern for example the justification and limits of some primacy of supranational law, beyond some prima facie general viability. However, and conversely, it shall mean as well the unacceptability of, say, domestic impermeable closure, out of unjustifiable attitudes or generally untenable reasons. It also resembles, schematically, some of the stances taken (externally) for example by judges in European context: one can think of the mentioned "Solange" dialogue, between Germany and the ECJ; but also of the change, albeit slow, triggered in the Security Council procedural safeguards concerning its "listing" of individuals allegedly suspected of terrorism: an advancement started by resistance in diverse fora, that the above recalled decision of the ECJ finally confirmed. Communication implies on the other hand more than simple dissent: it imports some degree of clarity in framing a coherent countervailing stance, taking account of both legalities concerned, and of their mutually referred claims. It is based on the premise that parties can both learn from each other, only if the 'interpreter' is allowed to make his own claim and his own argument (provided that he has got one capable of meeting the constraints of legal reasoning on the external fora). Learning is

giuridica (2004), E. Cannizzaro, *Il pluralismo dell'ordinamento giuridico europeo e la questione della sovranità*, 31 Quad. Fior. St. Pens. Giur. Mod. 245 (2002).

[71] J. Habermas, *A Theory of Communicative Action* (1987). It is useful to recall that Habermas is thus developing his criticism of Hans Georg Gadamer hermeneutics.

an essential benefit of communication, and if it applies to both parties it grants fairness.

Complex interplays require considered and multiple-steps intercourses. Ongoing step-by-step assessments between Parliaments, legislation and ECtHR have developed in some cases and can be considered [72]. Trenchant solutions are not always the best option by the Courts[73].

However, confrontation among legal orders is in a sense a fruit of a general allegiance to the Rule of law. It is relatively open a practice, to which the Rule of law provides a "negative" condition of equality, while it is unable to predetermine the merits. Nonetheless, the 'external' or global function of the Rule of law does not work only as communication's empowerment, with no import whatsoever

[72] See the article by the ECHR judge, Lech Garlicki, *Cooperation of courts: The role of supranational jurisdictions in Europe*, 6 Int'l J. Const. L. 509 (2008).

[73] See the recent *Lautsi* case at the European Court of Human Rights (ECHR, Lautsi v. Italy, no. 30814/06 (Sect. 2) (fr) – (3.11.09). and *Grand Chamber*, 18.3.2011). The Grand Chamber fully reversed the previous decision of the Court concerning the display of a crucifix in public schools. The ECtHR had upheld the right to be free "from" religion (and freedom of education), the Grand Chamber rejected the assumption that such a right's infringement was occurring. One can say that the problems underlying the case are of even deeper import than the sheer display of the Crucifix can suggest, and both decisions seem to be unsatisfactory, as a matter of reasoning, even to the winning parties. This uneasiness might depend on the very fact that not always a zero-sum game, the unconditional yes/no solution, is the best option. It should be noted, however, that regardless of the answers in the merits, the religious symbol's display in the public school amounts to a sheer practice in Italy, supported only by a couple of Decrees of the King in the 20s of last century (art.118 of the R.D. n.965, 1924 e art. 19 R. D. n. 1297, 1928) while no contemporary legal frame- be it through legislation or a relevant Constitutional Court's decision- has been provided in order to elaborate and confirm the point as to the freedom of, and from, religion, a version of domestic elaboration, whether of the publicness of religious sphere or of secularization, in the totally changed social and religious environment of a century later. Regardless of the Grand Chamber verdict being right or wrong, a mature liberal democracy can dialogue with a Court of Human Rights by structuring in its legal order relevant frame provisions, an even sui generic pattern, yet capable of interpreting with reflective equilibrium the elements of its choices, in between traditions, constitution, fidelity to the EHR Convention, that is, proposing a reasoned model of reconciliation of competing needs and rights, instead of leaving this space, so far, empty. The King's decrees are a sub-legislative source, and like in a surrealistic chain, despite their substantial hold on the issue, the Italian Constitutional Court, which is "only" the judge of laws, had to dismiss the question (referred to the Court by an administrative Tribunal, Tar Veneto, Ord. n. 56/ 2004: and see C. Cost. Ord. n. 389, 2004).

as to what the standards themselves shall be about: certainly, on one side (i), in a loose communicative model like the one developed by Habermas himself, constraints, implied by the mutual recognition of peers, the rationality and universalisabilty of the argumentation, are channeling the process, affecting the viability of respective claims. But on the other side (ii), the standards of such a legal discoursive elaboration, that is well known to juridical experience, are themselves provided by the parties, in so far as they are generated from within the Rule of law as an ideal already cherished domestically, i.e. as the interpretive claim from the angle of the legalities involved. The meta-legality (i.e. global) level of the Rule of law does ask for the projection on the global confrontation fora of 'internally' generated conceptions of the Rule of law, whose not simply parochial nature has to be defended externally.

In fact, a notion of the Rule of law is to be presupposed in a number of ways. First, it is to be assumed as the fabric itself of the confrontational stage, because the willingness to argue on a legal, not purely power based plane, is by definition implied within (i) above, as a qualitatively different path, alternative to the logic of sheer negotiation and bargaining[74]; second, that is premise to the conceivability and the very possibility of claiming a conception of the general Rule of law notion: no such conception can be claimed 'globally' unless it is a legal and cultural benchmark within the horizon of one of the parties, i.e. unless it figures somehow in its normative universe; third, a conception can be proposed by a commitment to consistency, that is, by abandoning any dual standard in the internal/external interplay[75]. The confrontational legal stage is one where the Rule of law needs to be brought by someone. This is because-- like human rights or democracy – it can easily be missing; because it is itself an ideal, one which hints at something other than the sheer respect for rules whatever, other than the existence of any law whatsoever. As I have often reminded here, more than that, it is the normative ideal that in our western civilization has slowly constructed and protected the duality of positive law, that is, the tension between the two sides of *jurisdictio*

[74] See J. Elster, *Deliberation and Constitution-Making*, in J. Elster (ed.), *Deliberative Democracy* (1998).

[75] I insisted on the question of internal/external consistency in G. Palombella, *The Rule of law, democracy and international law. Learning from US experience*, 20 Ratio Juris, 456 (2007).

and gubernaculum, the right(s) and the good, their balance, and their liberty and non domination import[76]. Needless to say, while compliance with rules is very far from being the whole story, the existence of the Rule of law requires social and institutional constructions, and cannot descend from heaven.

Accordingly, where there is no Rule of law and no commitment to it, it shall not resurface. The dialogue between two legal orders uncommitted, say, to internal democracy, and sharing aberrant uses of instrumentalist law, shall hardly be a confrontation about the role of fundamental rights, democracy and the Rule of law. Contrariwise, for instance, the commitment of the international legal order to human rights or the provisions of the European Convention on Human Rights are a historical and institutional achievement whose normative force affords substantive contents to the global arena. The legal universe obtains thereby a different quality on the international plane, as a matter of tension *vis à vis* the Master-of-Treaties conventional way, the legal force of states' will, the ideas of the good that might be propounded through it. In the interplay between State legal order and external legalities, be they ECHR or the WTO, opposite contentions might arise which are to be measured among the rest on a Rule of law better argument: the resulting elaborations potentially contribute in incrementally forging a sharable thread of common reference [77].

One can also get beyond, framing further "rules of engagement", suggested as including the international legality, subsidiarity, procedural legitimacy and "outcome legitimacy": this hypothesis[78] or similar further criteria can be certainly laid down, but cannot be expected in a sheer top down foundationalist way, which is largely out of reach, but yet through different processes, bearing on the available actors that shall perform on the global scene (the new and old concurring legalities, with different publics, social embeddedness, legitimacy, addressees, etc, as described supra; the s. c. trans-judicial dialogue, in the slow resort of courts, tribunals, and

[76] See supra par 5. and G. Palombella, *Rule of law as an institutional ideal*, cit. at 2.
[77] I have provided further analyses in G. Palombella, *Global threads: Weaving the Rule of law and the balance of legal software*, cit. at 45 and in G. Palombella, ***The Rule of law beyond the State: failures, promises and theory***, cit. at 45..
[78] M. Kumm, *Constitutional Democracy Encounters International Law: Terms of Engagement*, in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2007).

other types of judging authorities in the global sphere, to techniques of confrontation).

To this last regard, it is to be noticed at any rate that the often celebrated judicial communication, evidently, is not simply good will, and it seems to be, on the long run, a global crossroad. If global governance develops control through its field-functional separations, if its original sin is ignoring relatedness, then judicial communication is also a compensatory process. It has to cope with an inescapable reality: regimes are "already" related and sometimes even managed so to take account of some relevant relations[79].

When this can happen, the question, I believe, can be posed precisely in terms of giving 'voice' to different self referred elaborations of the 'good' in order to make them compatible with the respect of the 'right' among all; giving voice to the distinctive depth, social embeddedness, publics, and functional imperatives, the 'orders' relate to, and accordingly, granting justified harmonization and prevalence as well as contrasting a straightforward colonization or "homogeneisation" (regardless of the direction it takes: be it of some imperial domestic law over international law, of Security Council over the EU, of the WTO over the ICLOS, or State non-compliance, and so forth). A commitment to the Rule of law non domination import, works toward this direction. While it is mirrored

[79] M. Koskenniemi, *Global Legal Pluralism: Multiple Regimes and multiple modes of thought*, at http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d%5B1%5D.pdfhas written, for example: "A better place to start would, therefore, not be their separatedness but their connectedness, not their homogeneity but heterogeneity. Every regime like every State is always already connected with everything around it. We know this from practice. Environmental law may be best supported by market mechanisms through introducing pollution permissions. For the market to fulfil its promise, again, a huge amount of regulation is needed, not merely on conditions of exchange or the terms of ownership or banking. A market with no provision for social or environmental conditions will fail. Human rights may be best advanced by giving up strict human rights criteria and, for example, insisting on early accession of Turkey in the European Union. Critical lawyers have long rehearsed arguments about the porosity of the limit between public and private, political and legal, the national and the international. Extended to a world of multiple regimes and multiple modes of thought such arguments would highlight the contingency of the limits of individual regimes, their dependence on other regimes, and the politics of regime-definition. Here there is room for much ingenuity. A regime of trade may always be re-described as a regime for human rights protection while any human rights regime is always also a regime for allocating resources.".

internally as the balance between two legal sides of the fabric of law (jurisdiction and *gubernaculum*, the right and the good), externally it emerges not only through the latter, but also by valuing the distinct contribution from different legal orders. The concurrence or intersection between these two overlapping levels shall allow for the pursuit of the Rule of law on the global scene.

This is all the more important, since in the real world of global governance one can find the dominance of power and exclusion as the substantive state of affairs. Rule of law contrasts the abusive elevation of the particular to the universal, and operates towards providing a formal right to make sound arguments legally equal. This has to do with dialogue as much as dissent[80]. Of course, one must know that the Rule of law cannot prevent material power from violation of, say, fundamental rights, but it can prevent this from being thought of as "legal".

8. Responsibility and the inherent tension between justice and the good.

The last and related point that I wish to make comes now at hand. It has to do with the constructive weaving which might help addressing, without metaphysical *hybris*, the lack of a global law as an overarching and unified architecture. It appears to be a consequence of the RoL on this meta-level, to indirectly activate a process that mimics, in the background, the possibility of the (inevitably obsolescent) "responsibility" dimension I sketched earlier (§ II). By allowing for a juridical interlinking on a content dependent basis among "legalities" with heterogeneous reach, extension, nature, and depth, the RoL can objectively trigger a re-circulation of needs, ends and claims that surge elsewhere. Being allowed to a forum should shape tools for ideally harboring as wide legal claims and ends as possible, i.e. pointing to the "regulative" idea of reflecting the "whole" (as if it could really "exist"). Moreover, as said, the legal treatment of such interconnectedness, as far as it is concerned, shifts the actors' medium of confrontation from a power-

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

based one, in the realm of autonomous contracting, bargaining and negotiations, to one based on public arguments and universalisible legal reasoning, that is, not only a constraining, but also a non- self referential channel. From a legal point of view this can be thought of as working also indirectly, and admittedly through deploying and showing the civilizing role of hypocrisy[81].

All the more so because the idea of general ends and responsibility for the whole on a legal plane, is hard to be credibly advanced as a substantive pretension that can be made in itself, it doesn't apply to any of the participants, and cannot reasonably be the claim of anyone in particular, although a prima facie common-to- all concern must be credited as an essential *raison d'etre* of, say, supranational institutions and even of global regimes[82]. Although the latter is not in question of itself, in a Rule of law vein it is to be avoided precisely the elevation of one to the role of representing the whole beyond- legal- scrutiny. Thus the Rule of law perspective recognizes to legalities their discrete role in composing the general puzzle, contributing in the overall scene. The responsibility for the whole is, firstly, a prospective horizon: against its background are to be considered of value the multiple processes of confrontation in an unlimited run. It is a potential inherent in the objectivity of these dynamics in their entirety. Secondly, as recalled above, it is a quality of the process itself, as a matter of framing arguments in a required universalisable guise.

Thus, one does not have to credit the Olympic rationality [83] of a full scale global control of law's general ends, that would easily risk to legitimate one-sidedness. It is instead the case of paving the way to an incremental (step by step) reasoned conjunction of operating rationalities and normativities, which often are bound to interact and overlap.

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[81] J. Elster, *Deliberation and Constitution-Making*, cit. at 74, 97.

[82] It is in fact not a matter of dissolving the institutional division of labour on the globe. But even global regimes work on a fragment of real life, by focusing on functional imperatives and discrete areas like trade, security, environment and climate, energy, and so forth. The question has indeed to do with the recognisability and justifiability of the goals that are to prevail, of the means preferred, of the respect for the voice of those affected, of the balance with countervailing interests, rights, needs, of the overall results, all of which can benefit from letting others and other normative orders involved to have a say.

[83] H. A. Simon , *Reason in Human Affairs* (1983).

By operating in the relation between them, the Rule of law works, as in the foregoing, on non domination and balance. Thus it deals more with "equilibrium" along the coordinates of the right and the good, than by upholding a clear cut definition of the content of justice and of well being. One is brought to the corresponding scheme as reflected in the words of John Rawls as much as in those of Immanuel Kant, for example: the two notions can be distinguished, and the idea of right has a priority function over the contending conceptions of the good[84]. The "right" concerns the status of our social coexistence according to freedom, i.e. as free and equal individuals. In principle it should be preserved in any cases, against any conception of the common good that would undermine it. The "transcendental" view of rational law is deemed (with Kant) as granting such conditions, regardless of particular realms of action and ethical convictions. All the more so, in the global environment, where legal imperatives, generated at different levels, each appeal, ultimately, to an internal conception of the good, say, to domestic social welfare, to democratic self determination, to a religious faith, to the regulative necessities of free trade or to the protection of environment: each of them carrying a full load of ethical and political choices as to our well being. Needless to say, each of them potentially or actually interferes with one another (the appeal to democracy might prevent from respecting human rights or humanitarian laws, managing global environmental priorities does interfere with some people's welfare, for example). Should the law be turned to serving the (one) ultimately unique "good", this would certainly throw us into a one dimensional universe, where such a full monopolisation would have overcome any legal standing, albeit not any concern, for the "right"[85]. The Rule of law point is here to prevent the silencing of the opposite sources of validity and meaning.

The most impressive shortcoming of globalisation is the impossibility of preventing interference: the latter, even unintended, can be arbitrary, and the first concern therefore to start with has to

[84] See J. Rawls, *A Theory of Justice. (*1971); and the further specification in J. Rawls, *Political Liberalism* (1993), at 209. For I. Kant, *Critique of Practical Reason,* (1788) and I. Kant, *On the Common Saying: "That may be correct in theory, but it is of no use in practice"* (1793).

[85] Apparently, this is also a political problem. One can say that it is the contribution from the Rule of law to prevent such political shortcomings.

relate to avoiding injustice from one-sidedness and domination. To this extent, as much as one can say [86], that we are not envisaging any "perfect justice", we are, in the background, aware that there are comprehensive state of affairs related to people lives and 'social realizations" , "wholes" beyond fragments; that our operating standard can be a civilized accountability, while our regulative ideal should hopefully be responsibility. This paper should not have a further conclusion than that: it has mainly tried to describe and interpret some deep albeit general directions taken by a complex reality, and has given more than one suggestions in normative terms. Whether we shall build on those interpretations shall depend, again, on the evolution of a fast running global world.

[86] With A. Sen, *The Idea of Justice* (2009). Tellingly, and beyond the scope of this paper, Sen not only elaborates from injustice but develops the quality of 'responsibility' as inherent not to the pursuit of some specific 'just' result, but to the concern for avoiding injustice, in the overall state of affairs, in the "outcomes in their comprehensive form" considered by measuring "social realizations". This belongs in Sen's critique of utilitarian ethics, even updated to taking account of utilities, welfare and sum ranking.