

## Interlegality - Symposium

### Inter-Legality: On Interconnections and ‘External’ Sources

Gianluigi Palombella\*

#### Abstract

The development of legal governance interweaves a number of layers of legalities mutually exclusive and reluctant to partake in a global overarching and harmonising architecture. An array of legal ‘software’, self contained legal regimes pierce the veil of State systems. This article explains, also through a number of judicial cases at the Italian, European and International Courts, what a theory of inter-legality can contribute to the understanding of and how it can cope with inter-systemic issues and the overlapping of self-related normativities. It looks at the uneasiness of State legal orders *vis à vis* external sources and draws the lines of inter-legality as a method in adjudication and legislation, eventually turning to the inter-legal character of human rights.

#### I. Setting the Scene: Coping with Legal ‘Software’

In introducing the issue of ‘global law’ Neil Walker observed that using such an expression is ‘not only rhetorical and structural’ since it conveys a deeper epistemic import: after all, ‘global law (...) indicates a new mood. It registers as a state of contestable becoming rather than corrigible achievement’.<sup>1</sup>

Taken from there, the perspective of global law hints at transformations that might have well changed our attitude toward legality and its limits. The features that legality shows bear a variety of typologies, or *formats*: the State-centered law, as much as the transnational regulatory law, the *jus-gentium* type (evoked today through trans-states general principles, jus cogens norms, common legal traditions, common codes of legality, and so forth), as well as a neo-medieval overlapping of laws, orders, regimes all endowed with simultaneous validity. Those formats of law<sup>2</sup> are born in different histories, and yet they seem to resurface simultaneously, all and at the same time, in our legal universe. Of course, none of them features in its pure original setting and none would bring, of itself, the key vault. To think of a return of medievalism would be rather inapposite, mistaken, if not naïve; and the persisting and effective law of the State would

\* Full Professor of Applied Legal Theory, Sant’Anna School of Advanced Studies.

<sup>1</sup> N. Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014), 26, 27.

<sup>2</sup> G. Palombella, ‘Formats of Law and their interweaving’, in J. Klabbers and G. Palombella eds, *The Challenge of Inter-legality* (Cambridge: Cambridge University Press, 2019), 23-41.

play its role in proving such a mistake. Nonetheless, the dense regulatory and community layers in extra-state law, the flourishing of the threads of norms and jurisgenerative entities beyond the State – years ago named ‘Global Administrative Law’<sup>3</sup> – are part of the reason why even State law would hardly be the icon of the present legal world. And we should agree that to evoke some ‘global law’ seems to question ‘many of our state-centric or otherwise jurisdiction-centric premises about law as a settled form and about the grounds of its authority and legitimacy’.<sup>4</sup>

Questions concerning transnational rule of law and justice, the plurality of regulatory regimes, the segmentation of international law, communication among legal orders were barely known<sup>5</sup> and not reflected upon in the lessons of the most illuminating and influential legal theorists of the last century, like Kelsen, or Hart. The concept of law was (and still is) essentially connected with the ‘hardware’ notion of ‘a system’. Truly, as the argument went,

‘the compulsory nature of the rules in force, whatever their remote origin may be, appears henceforth as the effect of th(at) centralizing will (...) a true and proper subject (...) the State’.<sup>6</sup>

It follows that juridical relations however created by individuals’ transactions or groups’ agreements are still dependent of the State’s will, one granting for itself that ‘exclusiveness rendered necessary in order to assure the unity of the system’.<sup>7</sup>

The idea of such a structured and stable ‘system’<sup>8</sup> often hinges also upon a genetic configuration of law, endowed with its own grammar, language, and ‘anatomic’ morphology.

To put it differently, law has been mainly conceived of as endowed with its hardware, one that ensures its basic existence, pointing to predefined typology of rules, their formal hierarchical bonds, and the like. Of course, the hardware is a legal but ‘given’ structure and the primary facility: yet it is simply silent and empty, without its enabling software. The latter allows us making sense of the thing, transforming some structural potential into a working machinery. Law

<sup>3</sup> The seminal works being B. Kingsbury et al, ‘The Emergence of Global Administrative Law’ 68 *Law and Contemporary Problems*, 15-62 (2005); S. Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ 37 *New York University Journal of International Law and Politics*, 663-694 (2005).

<sup>4</sup> N. Walker, n 1 above, 26.

<sup>5</sup> A similar point is made by W. Twining, ‘Schauer on Hart’ 119 *Harvard Law Review Forum*, 129, 122-130 (2006): ‘Contemporary legal theory needs to tackle issues related to legal traditions, non-state law, pluralism, multiculturalism, human rights, transnational justice, diffusion of law, problems of comparison and generalization, and our collective ignorance about other traditions and cultures. Until recently, hardly any of these topics were dreamt of in Hart’s legal philosophy or those of most of his followers’.

<sup>6</sup> G. del Vecchio, ‘On the Statuality of Law’ 19 *Journal of Comparative Legislation and International Law*, 8, 1-20 (1937).

<sup>7</sup> *ibid* 9.

<sup>8</sup> Classic theoretical work on this issue J. Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 2<sup>nd</sup> ed, 1980, reprinted 2003).

resembles, as well, the idea of such a software,<sup>9</sup> generated by real world practice, and developed in conjunction with a typology of hard system through principles and rules, regulations, legislation, custom, contracts, treaties, judicial decisions and the like.

When we face the multiple normative entities inhabiting the global sphere, we are bewildered with such a legal software, that – unfortunately – thrives on lacking pre-given, all-harmonising devices and missing a corresponding system-facility of reference. Despite being often produced by institutionalised authorities, it has broken into functional spheres our territorial law, now crossed by vertical supranational and horizontal transnational lines: as often noted, all that generates a ‘pluralism<sup>10</sup> of self contained regimes’,<sup>11</sup> aimed at controlling sets of specialised issues, despite the fact that their field/scopes<sup>12</sup> actually ‘overlap’ due to the interconnections and mutual interfering among their objects and subject-matters.<sup>13</sup>

When at issue is global law, meant as the dis-ordered array of jurisgeneration sourced from uncoordinated entities at sub-State, State, regional, international and supranational levels, we therefore realise that software is increasing, around the kernel of many distinctive rationalities, highly complex regulations, from commerce to environment, from the law of the sea to internet domains, from labour to telecommunications, energy to human rights, intellectual property to the law of war. Tellingly, at that level, the very divide between public and private law fades away.<sup>14</sup>

In coping with these coupled phenomena, ‘system fading and regulatory proliferation’, we are thus witnessing ‘software’ self-expansion at the expense of traditional ‘hardware’ (that is, system-related) premises.

This prompts legal reasoning to run after – and to focus upon – the former, at times also in the vain attempt to find the latter. Any positivist understanding of law in the XIX and XX centuries would have moved the other way round,

<sup>9</sup> Needless to say, I am not referring here to the so called soft-law (whatever it is taken to mean), but to law *sans phrase*.

<sup>10</sup> In the literature about pluralism and transnationalism, see D. Kennedy, ‘One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream’ 31 *New York University Review of Law and Social Change*, 641 (2007).

<sup>11</sup> Literature on ‘self-contained regimes’ developed adopting the expression coined in the 80s of last century within international relations studies: S.D. Krasner, ‘Structural causes and regime consequences: regimes as intervening variables’, in S. Krasner ed, *International Regimes* (New York: Cornell University Press, 1983), 1-21; B. Simma, ‘Self-contained Regimes’ 16 *Netherlands Yearbook of International Law*, 111-136 (1985). See also B. Simma and D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’ 17 *The European Journal of International Law*, 483-529 (2006).

<sup>12</sup> It is this overlapping that was held to define *legal pluralism*, in the path breaking work of S.E. Merry, ‘Legal Pluralism’ 22 *Law and Society Review*, 869 (1988).

<sup>13</sup> This generates of course the well-known phenomena of regimes collision, uncertainty, forum shopping and enhanced judicial discretion.

<sup>14</sup> Early study and still relevant, J. Resnik, ‘Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21<sup>st</sup> Century’ 11 *International Journal of Constitutional Law*, 162 (2013).

from the available hardware (system structure) in order to validate every permissible software (law & rules). But that would be fit to the traditional patterns of legality, based mainly on constitutional law in national polities. We are forced to make sense of the available software instead, sourced by 'external' and heterogenous entities, come to terms with it, and then try to conceive, maybe, of some imagined hardware.

It is worth noting that the metaphor can help understanding what a decoupling of the terms in its pair entails. The layers of normativities bear different features: State law perpetuates the hardware/software pairing, its political and social embeddedness, building on formal coordination and hierarchic logics, so to reflect the unity of State's tasks as a general-ends entity.<sup>15</sup> Contrariwise, self-contained regimes, like the World Trade Organisation, or regulatory hybrid entities like the International Commission for Assigned Names and Numbers, are dis-embedded. In principle, their deracinated nature reflects the lack of the structured facility of a system of law(s), as we know it.

The pursuit of a compensatory,<sup>16</sup> overarching containment of such self-replicating *software* sourced by thousands of regulatory spheres points to draw threads of coherence:<sup>17</sup> it does so by building on some meta-constitutional device (the law of the laws,<sup>18</sup> the constitution of the constitutions, *et cetera*). Aspirational coherence, then, would be artificially created by simply writing down the codes of a further meta-software (the software of the software(s)), one that might avail of some 'kelsenian' organising form. However, it implies as well – and is 'allegedly' justified by – a number of 'substantive' underpinning assumptions working as the fundamental norm of a world legal system (like for example the primacy of environmental values in the world order).<sup>19</sup>

Needless to say, a further all-encompassing software can only replicate its

<sup>15</sup> As I have submitted elsewhere, a state is a 'general ends' entity, and accordingly it bears the responsibility for the entire comprehensive safety of the community (G. Palombella, 'Theory, Realities and Promises of Inter-legality: A Manifesto', in J. Klabbers and G. Palombella eds, n 2 above, 369. Supporting similar point: J. Raz, *Practical Reasons and Norms* (Oxford: OUP, 3<sup>rd</sup> ed, 1999), 150.

<sup>16</sup> A. Peters, 'Compensatory constitutionalism: The Function and Potential of Fundamental International Norms and Structures' 19 *Leiden Journal of International Law*, 579-610 (2006).

<sup>17</sup> For criticism about it, see R. Deplano, 'Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry' 6 *European Journal of Legal Studies*, 67-89 (2013).

<sup>18</sup> Full awareness of the array of complexity and variety in the present legality setting, K.C. Culver and M. Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford-New York: Oxford University Press, 2010), that is however considered to point to some 'law of the laws' by W. Waluchow, 'Legality's Frontier' 1 *Transnational Legal Theory*, 575-585 (2010).

<sup>19</sup> L. Ferrajoli, *Perché una costituzione della Terra?* (Torino: Giappichelli Editore, 2021). For the wider thread of world constitutionalisation, see the manifesto of the journal *Global Constitutionalism*, A. Wiener et al, 'Global constitutionalism: Human Rights, democracy and the rule of law' 1 *Global Constitutionalism*, 1 (2012). On an internationalist view, cf Ph. Allott, 'The Emerging of a Universal Legal System', in A. Nollkaemper and J.E. Nijman eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007), 63.

dis-embedded and deracinated nature, let alone the ungranted status of its substantive premises. At the same time, each of the involved legalities (be they national, regional, international or ‘global’) would be (and have actually been) reluctant to some once-for-all forfeiture of their ultimate authority within their own functional/territorial sphere. For instance, ‘resistance’ by State high Courts to international norms or decisions has become a recurrent issue, in a large and increasing number of cases<sup>20</sup> in recent years.

On another hand, by advancing their rational regulation of different sectors of global issues, concerning, say, trade, environment, human rights, intellectual property, extra-state regimes’ jurisgenerative outputs get presumptive primacy over local idiosyncratic interests. State polities are hardly capable of preventing entities like the International Standardisation Organisation from defining the requirements that must be complied with, and in truth the associative nature (consent-based) of many global regimes has become fictitious to the eyes of those who cannot afford to be left out.<sup>21</sup> In many ways regulations crosscut legal borders and in fact work as part of the ‘law’ to be applied inside a legal system, without the exit choice being an option. The overwhelming software affects the hardware, then, without being invited to do so.

## II. The Problem of External Source

Phenomena of interference from external regulators are simply part of ordinary reality, where along with international law, European law, a bulk of supranational entities are endowed with a *de jure* or *de facto* authority, either resting on States’ agreements or on private or hybrid (if not also self-authorized) sources. In general, compliance with ‘external’ rules is an ordinary request that

<sup>20</sup> Even inside the European Union, that is not just a problem due to ‘illiberal’ states (like Hungary and Poland: on which see G. Palombella, ‘Illiberal, democratic, non arbitrary? Epicentre and circumstances of a rule of law crisis’ 10 *Hague Journal on the Rule Law*, 5-19 (2018)). Reluctance and resistance have been voiced traditionally by the Federal Constitutional Court of Germany, since Maastricht and Lisbon, and up to the latest disruptive decision concerning the unconstitutionality of Quantitative Easing mechanism decided by the European Central Bank, and considered to be fully legitimate under European Law by the European Court of Justice: see Public Asset Purchasing Program (PSPP) judgment (Bundesverfassungsgericht 5 May 2020, available at <https://tinyurl.com/yxcd7nsw> (last visited 31 December 2021)).

<sup>21</sup> It is to be noted that, increasingly, global governance avails of rationalization functions that are partially changing its previous landscape, making, for example, prominent the role of epistemic authorities (see M. Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford: Oxford University Press, 2018)). Critically against this view, V. Pouliot, ‘Global governance in the age of epistemic authority’ 13 *International Theory*, 144-156 (2021). In some ways resistance looks rather unreasonable when an issue appears de-politicised: the chain of responsibility in decision-making vanishes when some scientific or similar evidence is taken to neutralize alternatives. On that cf G. Palombella, ‘Two threats to the rule of law: Legal and Epistemic (between technocracy and populism)’ 11 *Hague Journal on the Rule of Law*, 383-389 (2019).

might jeopardise rooted fundamental beliefs or interests of a country. In that very sense, external software, devoid of the mentioned 'democratic' legitimacy, might happen to turn dysfunctional *vis à vis* the addressed system (hardware), to which it does not belong. The dynamics of such tensive, or 'irritating' encounters resembles the one described in the 80s of last century by Jurgen Habermas with regard to the colonising dysfunctional regulatory intrusion of the welfare state into some basic areas of the community: the welfare state did work by over-writing social relations and social interactions by purposive programs, implementing constitutional commitments to equality, and prompting legal interventionism: by introducing into previously free domains of social life new conditions for legalised opportunities and entitlements,<sup>22</sup> and even by providing for new distributive rights, such a juridification re-writes the pre-existing contents of social interactions.<sup>23</sup> According to Habermas,<sup>24</sup> precisely in order to introduce new social protections' programs into spontaneous life world, law had to enter deeply in the detailed, daily, personal and social sphere once left free from legal control.

In his words, when law is functioning as a regulative *medium*, it purports to optimise 'system integration' through imperatives of administrative efficiency, performance driven protocols, which jeopardise life world values, in spheres like school law, social security, cultural reproduction, fields of moral sensitivity which extend to criminal law, constitutional law, bioethical concern, and so forth.

As Habermas wrote, the 'point is to protect areas of life that are functionally dependent on social integration through values, norms and consensus formation: and to protect them from falling prey to the system imperatives of economic and administrative subsystems that grow with dynamics of their own. And finally to defend them from becoming converted, through the steering medium of the law, to a principle of socialization which is for them dysfunctional'.<sup>25</sup> In other words, the risk of 'colonization' of the 'life world'.

It should not come as a surprise then, that the Federal Constitutional Court of Germany, some decades later – although on an altogether different setting – raised an argument whose logic is impressively the same. The Court reacted to the Lisbon Treaty of the European Union by arguing that some areas of social life are to be held immune from European 'juridification' and be kept under the State competence:

<sup>22</sup> To take an example, codification of industrial relations in labour law could both enhance opportunities and powers of the workers (eg as to labour unions, co-determinations, strike), and at the same time could be felt, as it was said by Kirchheimer since the 30s, as a de-politization of social classes relations, channelling them within disciplined operational processes (O. Kirchheimer, *Funktionen des Staates und der Verfassung* (Frankfurt am Mein: Suhrkamp, 1972), 79.

<sup>23</sup> J. Habermas, 'Law as Medium and Law as Institution', in G. Teubner ed, *Dilemmas of Law in the Welfare State* (Berlin: De Gruyter, 1986), 209-211. [Original in *Theorie des kommunikativen Handelns* (Frankfurt am Mein: Suhrkamp, 1981), bd II, 522-47.]

<sup>24</sup> *ibid* 203-220.

<sup>25</sup> *ibid* 220.

‘The principle of democracy as well as the principle of subsidiarity, (...) require factually to restrict the transfer and exercise of sovereign powers to the European Union in a predictable manner, particularly in central political areas of the space of personal development and the shaping of living conditions by social policy. In these areas, it is particularly necessary to draw the limit where the coordination of cross-border situations is factually required. Particularly sensitive for the ability of a constitutional state to democratically shape itself are decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping of living conditions in a social state (4) and decisions of particular cultural importance, for example on family law, the school and education system and on dealing with religious communities (5)’ (para 251-2).<sup>26</sup>

The German Court objected against *ultravires* acts and against the violation of state ‘identity’. Moreover, in the mentioned areas, the stance taken was to make democracy prevail as a sovereign right of the German people.

To return to our metaphor, that is another and even clearer way to say that the basic, material structure of the State legal system, its hardware, are held to be protected from the rationalising, coordinative, and finally technocratic strength of extra-state sourced legal ‘software’.

Of course, albeit controversial in the case of the European Union, it is a common place that current extra-states normativities and regulations lack democratic and substantive legitimacy. Although that kind of legitimacy is *not* essential to their function, especially with regard to global legal regimes, the issue might often become relevant when overlapping and conflicts emerge, and cases arise where the substantive outcomes are contested by the addressees or are met with ‘resistance’ by States or their highest courts.

### III. What Inter-Legality Stands for?

Such problems are not a question of the European Union order only. They are just part of the evolving setting of law into its inter-legal character. When the case arises, the resolution of a global authority like the Security Council might well be at odds with the norms protecting individual human rights by the European Convention. A similar case would not be under the United Nations system more than it would be controlled by the European Court of Human Rights and the Convention’s law. Likewise, when a State (Italy) was asked to

<sup>26</sup> Bundesverfassungsgericht 30 June 2009 (2 BvE 2/08, paras 1-421), available at <https://tinyurl.com/2p8hpr47> (last visited 31 December 2021).

accept a decision of the International Court of Justice<sup>27</sup> stating the immunity of another State (Germany) in cases of war crimes, the inter-legal nature of the tussle emerged: the Italian Constitutional Court's answering decision<sup>28</sup> rejected its international obligation (Art 94 UN Charter) in order to preserve supreme principles<sup>29</sup> protecting, in its constitutional order 'and' in the inter-states system, human rights and access to justice. The regulatory obligations sourced in World Trade Organization (WTO) rules, decades ago, preventing India – due to its obligation to comply with the pharmaceutical patent system – from providing cheap pharmaceutical remedies against HIV spreading, was clearly at odds with the constitutional right to health protection. The WTO rule was then dysfunctional to the substantive interest of Indian population and its constitutional commitments.<sup>30</sup> Even in the relations between the EU and WTO rules and between the latter and EU member States the strength and the effect (whether direct or otherwise) of WTO arrangements might be uncertain, contested, and somehow open to a variable assessment, where in context considerations might be more valuable than pre-fixed and rigid parameters. As has been noted, some

<sup>27</sup> International Court of Justice 3 February 2012, *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, available at <https://www.icj-cij.org/en/case/143> (last visited 31 December 2021).

<sup>28</sup> Corte costituzionale 22 October 2014 no 238, available at <https://tinyurl.com/yeykke4a> (last visited 31 December 2021).

<sup>29</sup> The reference to 'supreme principles' is considered by a Harvard Note: 'Constitutional Courts and International Law: Revisiting the Transatlantic Divide' 129 *Harvard Law Review*, 1362 (2016), not a rejection of International Law (in the American-style exceptionalism), but a unique kind of exception, justified by the alleged 'supreme' character of those very principles.

<sup>30</sup> See the comment written in 2000, R. Gerster, 'How WTO/TRIPS threatens the Indian pharmaceutical industry' *Third World Network*, available at <https://tinyurl.com/5wr4ufzw> (last visited 31 December 2021). For resolutions reached later, see E. 't Hoen, J. Berger, A. Calmy and S. Moon, 'Driving a decade of change: HIV/AIDS, patents and access to medicines for all' 14 *Journal of International AIDS Society*, 15 (2011) available at <https://tinyurl.com/4fumyu2y> (last visited 31 December 2021). Notably, the article recalls that the Doha Declaration made clear that the TRIPS Agreement 'can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all' (ibid). See the Declaration on the TRIPS Agreement and Public Health. WT/MIN(01)/DEC/2, Ministerial Conference. 2001. At the present time, prompted by the COVID emergency, in October 2020, South Africa and India submitted a proposal to the WTO for a temporary waiver, allowing Member States not to apply some Intellectual Property rules with regard to medicines and technologies associated with the fight against COVID 19; in May 2021 the US announced they will support and partake in the negotiations. However, the TRIPS agreement (Art 73, security exception) has established 'flexibilities' allowing some intellectual property rights to be suspended on national basis. The situation remains highly complex, though. As has been noted, 'Article 73(b)(iii) is not a realistic option for a number of states': the point has been made that 'in the absence of domestic manufacturing capacity, most of the flexibilities in the TRIPS Agreement (including the most extreme one ie the national security exception) may not be useful to some countries during a pandemic such as COVID-19'. Beyond intellectual property rights, some least developed states should better be helped so 'to boost their domestic manufacturing capacity' (E. Kolavole Oke, 'Is the National Security Exception in the TRIPS Agreement a Realistic Option in Confronting COVID-19?' *European Journal of International Law: Talk!*, 2020, available at <https://tinyurl.com/2p989fzj> (last visited 31 December 2021).



years ago,

‘it appears that the ECJ is locked in its own reasoning about direct effect, cannot renounce its power, but just restrain itself on an *ad hoc* basis and therefore remain ambivalent in its reasoning and at risk of being criticized as inconsistent or activist. If this is so, it is because (...) direct effect is itself an ambivalent tool which can be used either as a sword to open legal orders or as a shield to keep them closed, and the Court uses it both ways’.<sup>31</sup>

The mentioned cases, and a longest and ever-increasing series of others, are inter-legal by default.

The overlapping of two or more legal disciplines (eg Security Council resolutions v primary rules of the European Union and fundamental rights; constitutional norms banning prisoners’ right to vote v rights enshrined in the European Convention on Human Rights;<sup>32</sup> environmental protection and right to information v construction of nuclear plant eg in the Irish Sea as in Mox Plant cases,<sup>33</sup> to recall a few) concerning the same subject-matter, which creates a situation of objective inter-legality, is the case in point where regulations from other equally ‘valid’ sources are to be assessed, given that hierarchical solutions or formal primacies, if any, are hardly working. In a nutshell, that is what the descriptive import of the concept of inter-legality amounts to.

Private international law is sometimes invoked for its alleged capacity to manage such or similar circumstances through venerable ‘conflict of laws’ doctrines and canons. However, that would be highly misleading, since they ultimately revolve around the applicable state system of laws, making for second-order rule determining the mutually exclusive jurisdiction-based norms. Even compared with the increasing need for overarching global and inter-regimes frames, ‘conflict of laws’ remains somehow a parochial understanding – as Neil Walker aptly puts it – ‘of boundary maintenance separately sponsored by each

<sup>31</sup> H. Ruiz Fabri, ‘Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?’ 25 *European Journal of International Law*, 162, 151-173 (2014).

<sup>32</sup> K. Dzehtsiarou, ‘Prisoner voting saga. Reasons for challenges’, in H. Hardmand and B. Dickson eds, *Electoral rights in Europe* (London: Routledge, 2017). With special regard to the UK branch of the saga – started with the decision ECtHR, *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41 – see E. Adams, ‘Prisoners’ Voting Rights: Case Closed?’, *U.K. Const. L. Blog* (30<sup>th</sup> January 2019), available at <https://tinyurl.com/2p8vxseh> (last visited 31 December 2021).

<sup>33</sup> The case (concerning Ireland’s complaints with reference to radioactive emissions and right to information regarding the UK Nuclear Plant at Sellafield – the Irish Sea) was famously contended upon among a number of jurisdictions and fora of adjudication, including the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the UN Convention for the Law of the Sea, the European Union law and the European Court of Justice. ‘Mox Plant’: Case C-459/03 *Commission v Ireland*, judgment of 30 May 2006, available at [www.eurlex.europa.eu](http://www.eurlex.europa.eu); United Nations Convention on the Law of the Sea (UNCLOS) Arbitral Tribunal, Order no 6 of 6 June 2008. See N. Lavranos, ‘The Epilogue in the Mox Plant Dispute: An End without Findings’ 18 *European Energy and Environmental Law Review*, 180 (2009).

domestic legal order according to its own standards of fairness and propriety'.<sup>34</sup>

To inter-legal contest the conception of law as system-based is unprepared. Its categories are shaped in order to face intra-systemic issues: it starts from the current notion of the validity of norms, to be 'recognised' through the fundamental norm – or the rule of recognition – of the legal order, which is thereby a bordered and exclusive device, unable to account for the legal value of 'external' legalities. However, what if a single object is disciplined by a plurality of legalities, which no further, comprehensive system of law encompasses? What if the issue is precisely 'in-between', as an inter-systemic problem, that would not be solved, given its material and legal complexity, from either of the relevant legalities alone?

We are used to think that 'monism' or 'dualism' – traditional doctrines of the relationship between domestic and international law<sup>35</sup> – might do the job. But such doctrines would beg the question: through different avenues, they would both answer by translating one legality into the other, that is, by some kind of assimilation or incorporation: the inter-systemic point would simply be domesticated to the known one-system logic or otherwise through the assumption that what happens in one system remains irrelevant to the other. Admittedly, doctrines of legal pluralism were born to amend monism and dualism and their weakness, making for the recognition of the plurality of legal systems.<sup>36</sup> Unfortunately, once the plurality comes to the fore, pluralism provides for no legal means through which the relations among systems can be treated. The tussle among different and self-related legalities can only be addressed through negotiations – which they have no legal duty to start – that are managed on the political stage. Pluralism gives no 'legal' answer to the enmeshing of laws on the ground.<sup>37</sup>

A deeply different prescriptive rationale is brought about instead by a theory of intra-legality. The tasks of inter-legality as a prescriptive method is to attenuate jurisdictional self-containedness, opening the path to a full consideration of the reasons stemming from the diverse legal perspectives involved. An inter-legal perspective does not simply 'arbitrate' contestations among different legalities, by reference to their self-related and inward-looking arguments. It shifts its attention toward their (dys)functionality in the given context of the case.

A theory of inter-legality would shift the focus from the tussle among different systems to the function of delivering justice – or avoiding injustice – in the issue

<sup>34</sup> N. Walker, n 1 above, 108.

<sup>35</sup> See J.E. Nijman and A. Nollkaemper eds, *New Perspectives on the Divide Between National and International Law* (Oxford: Oxford University Press, 2007).

<sup>36</sup> Among the huge literature, see for example, M. Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, translated by N. Norberg (Oxford and Portland: Hart Publishing, 2009). R. Michaels, 'Global Legal Pluralism' 5 *Annual Review of Law and Social Science*, 243-262 (2009). N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

<sup>37</sup> See G. Palombella, 'Theory, Realities, and Promises of Inter-Legality' n 15 above, 363.

at stake. Although the things in themselves might well be suggesting some justice-related way out, the point of justice should not be overestimated as a ‘substantive’ resolution key. There is no substantive conception of justice required here: the methodological thrust of an inter-legal perspective only consists of a fundamental obligation of fairness meant as a due consideration of all the normativities involved, and disallowing formal shields capable of preventing such consideration of the plurality from taking place. The methodological justice-related premise of inter-legality amounts to avoiding one-sided decision making, to accounting for the full range of legal claims raised, and to abiding by a culture of justification, all things considered, through the focus of the given context. As a prescriptive method, it assumes that the plurality of legalities disciplining the case must be taken into account, as a whole. Looking at the law of the case simply means to accept that multiple and even uncoordinated sources fall into the same place, making for a composite interweaving of norms as a third ground irreducible to any of its contributing, and separate, legalities. Such a plurality sheds light upon different rationales deserving a balanced consideration: they are all generative of the resulting normative fabric, which constitutes the composite law of the case. The law of the case should emerge out of, say, a global regime regulation and of a state domestic law, and the like. It can be assessed not by answering the recurrent question (itself related to the well known gate-keeping<sup>38</sup> attitude of high courts) as to which legal system, or legal regime, must prevail, but by asking which normative claim, on the ground, can be provided with a better in-context-justification of a legal character.<sup>39</sup> Again, the tussle is not to be addressed through some kind of further morality, but by the positive law made available through the different legalities relevant for it. The implications of such a method are premised upon a mixed notion of law, one that can easily account for a pattern of legality based on the idea of legal system, but along with the recognition of other formats of law equally relevant. The rationale of inter-legality lies in the understanding of law even if deprived of systemic clothes, and in treasuring, after all, the variety of formats of law<sup>40</sup> that have presently come to the forefront, whether newly generated, as those associated with the label of ‘Global administrative law’ or emerged through centuries, much beyond the single – and relatively limited in time – experience of the State.

#### IV. About Rights and Inter-Legality

<sup>38</sup> See, for instance, F. Snyder, ‘The Gatekeepers: The European Courts and WTO Law’ 40 *Common Market Law Review*, 313 (2003).

<sup>39</sup> See more at length on the problem G. Palombella, ‘Senza identità: Dal diritto internazionale alla corte costituzionale tra consuetudine, *jus cogens* e principi supremi’ 35 *Quaderni Costituzionali*, 815-830 (2015).

<sup>40</sup> See n 2 above.

Some fields of law have been better vehicles than others in offering food for thought to inter-legal assessments. The series of controversies around security and access to justice has been quite instructive. Courts' decisions whether giving priority to human rights or to security concerns should be appraised not just due to the agreeability of their choice, but even more than that, due to the legal reasoning and justification, that is, the legal road they have taken. The path breaking and milestone case, that works as a revealing example where inter-legality was clearly at stake, was brought by Mr Kadi<sup>41</sup> at the Court of Justice of the European Union. Making a long story short, the Court declared that the rights to judicial protection and to property had been infringed by the EU regulation freezing his assets in compliance with a resolution of the UN Security Council (Sanction's Committee), issued against him as included in a black list of Al Qaeda affiliates. While the effect of the Court's decision was the protection of fundamental rights in the EU, the price of that was the disregard of art 103 of the UN Charter that imposes upon the EU the obligation to implement United Nations Security Council (UNSC) resolutions. The Court took a 'dualist' stance, upon the pretension that what happens in one order (the EU) does not interfere against the international legal order.<sup>42</sup> The logic of the two legalities being like two separate circles,<sup>43</sup> was clearly contrasting against the reality, and the case at stake, in its concrete structure, proved the interconnection between the Security goal on one side and the protection of fundamental rights in the EU, on the other. The balancing and comprehensive consideration of the two sides would have been a more credible and better justified reasoning.

As I have submitted elsewhere,<sup>44</sup> one can easily compare such a reasoning with another case, itself involving rights to defence against security concerns. At the European Court of Human Rights,<sup>45</sup> Switzerland was held responsible for infringing the convention, although it was under the obligation Art 25 UN Charter) to do so due to a resolution of the UN Security Council concerning the global fight against Islamic terrorism.<sup>46</sup> According to the Court apparently conflicting

<sup>41</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi & Al Barakaat International Foundation v Council & Commission*, judgments of 8 September 2008, available at [www.eurlex.europa.eu](http://www.eurlex.europa.eu).

<sup>42</sup> Criticism against this decision because of its disregard for international law: G. de Burca, 'The Road Not Taken: The EU as a Global Human Rights Actor' 105 *American Journal of International Law* (2011), 649-693.

<sup>43</sup> H. Triepel, *Vo lkerrecht und Landesrecht* (Leipzig: C.L. Hirschfeld, 1899), 111.

<sup>44</sup> G. Palombella, 'The principled, and winding, road to Al-Dulimi. Interpreting the interpreters' 6 *Questions of International Law*, 15-29 (2014).

<sup>45</sup> Eur. Court H.R., *Al-Dulimi v Switzerland*, judgment of 26 November 2013, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it). But see also, three years later, Eur. Court H.R. (GC), *Al-Dulimi and Montana Management Inc. v Switzerland*, Judgment of 21 June 2016, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>46</sup> The Swiss Federal Tribunal (Schweizerisches Bundesgericht, 2A.783/784/785/2006, judgments of 23 January 2008) had maintained that it was not entitled to revise the legality of Security Council resolutions except in the event (it was not) of violation of a *jus cogens* rule (as

obligations from the UN Charter and the ECHR must be at their best harmonised and reconciled (Art 31 (3) (c) VCLT) (para 112). The Court engages in a revision of the legality of the Security Council resolution and in a ‘proportionality’ judgment, that is, a contextual evaluation between two different international regimes, beyond the limits of its strict jurisdiction, since both and mutually independent sources had to be accounted for as the law of the case. Importantly the Grand Chamber decision substantially confirmed the reasoning on 21 June 2016. The reference to Art 31.3 (c) of the Vienna Convention may be found in para 134 of the Grand Chamber’s judgment. Moreover, paras 138 of the Grand Chamber’s Judgment reads as follows

‘(...) when creating new international obligations, States are assumed not to derogate from their previous obligations. Where a number of apparently contradictory instruments are simultaneously applicable, international case-law and academic opinion endeavour to construe them in such a way as to coordinate their effects and avoid any opposition between them. Two diverging commitments must therefore be harmonised as far as possible so that they produce effects that are fully in accordance with existing law’.

Although endowed with different priorities, trade law, security law, environmental law, humanitarian law are so often entangled as to require an inter-legal method to be developed. Predictably human rights especially have been generating the need for a better understanding of a novel notion of the law. Their straightforward primacy is not the relevant point in this issue: valuable arguments might be raised to justify the safeguard of countervailing goals. But, admittedly, human rights controversies might often trigger more careful appreciation of the complexity of overlapping legal sources. The traditional understanding of rights as negative freedoms *vis à vis* the public, governmental power, has been largely reshaped through decades, not only including ‘positive’ rights to well-being, social protection, and even to a healthy environment, but also by extending the responsibility to private parties and allowing for constitutional rights’ horizontal effect.<sup>47</sup> The announced universality and indivisibility of human rights<sup>48</sup> implies legal interconnections both among the levels of protection granted to all individuals (equality), and among different categories of rights (mutual

in the reasoning of the CFI in *Kadi v Council EU and Commission EC* (n 1) n 39 above).

<sup>47</sup> Although mainly with reference to the US constitutional system, still important S. Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’ 102 *Michigan Law Review*, 387-459 (2003). With reference to EU law, E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union. A Constitutional Analysis* (Oxford: Oxford University Press, 2019).

<sup>48</sup> For example, see C. Norchi, ‘Human Rights: A Global Common Interest’, in J. Krasno ed, *The United Nations: Confronting the Challenges of a Global Society* (Boulder: Lynne Rienner, 2004). Interestingly, E. Daly and J. R. May, ‘The Indivisibility of Human Dignity and Sustainability’, in A. Sumudu Atapattu et al eds, *The Cambridge Handbook of Environmental Justice and Sustainable Development* (Cambridge: Cambridge University Press, 2020), 23-38.

implication of rights), and finally the blurring of the conceptual separation (opposition) between public goals and individual rights.<sup>49</sup>

Demanded universality and indivisibility of rights are coexisting with their thick, local, and at times idiosyncratic particularity. The extraordinary increase of demands for rights' protection,<sup>50</sup> as for example at the European Court of Human Rights, shows clearly the transnational strength of deontology and universalism. Nonetheless, the adjudication of rights in national contexts has to meet further conditions, which are connected with the cultural and legal interpretation of their concrete content and scope.<sup>51</sup> This brought the margin of appreciation doctrine, since years adopted by the European Court, to be eventually established by Protocol 15<sup>52</sup> of the Convention. A margin of appreciation is to be left to a Member State especially when consensus among (the majority of) member states is unreachd.<sup>53</sup> In any case no margin of appreciation can be granted should the State have failed the proportionality test, that the Court itself would always purport to control.

While substantive divergences arise<sup>54</sup> and at issue is the interpretation and the protection of a right, the Court can acknowledge or deny a margin of appreciation. Criticisms as to the discretionary use of the margin are understandable.<sup>55</sup> Moreover, at times, Judges voice their thoughts, concerning the need to leave some room to signatory States, under the label of 'democratic' contributions.

<sup>49</sup> A. Sen, 'Elements of a Theory of Human Rights' 32 *Philosophy and Public Affairs*, 315 (2004).

<sup>50</sup> A. Stone Sweet, 'A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe' 1 *Global Constitutionalism*, 53-90 (2012).

<sup>51</sup> How this would suggest a conceptual distinction between right as 'human' rights and rights as 'fundamental' rights is explained in G. Palombella, 'Arguments in favor of a functional theory of fundamental rights' 14 *International Journal for the Semiotics of Law*, 299-326 (2001).

<sup>52</sup> Art 1: At the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

<sup>53</sup> On the use of the premise of consensus and the margin of appreciation see more recently, N. Vogiatzis, 'The Relationship Between European Consensus, the Margin of Appreciation and the Legitimacy of the Strasbourg Court' 25 *European Public Law*, 445-480 (2019).

<sup>54</sup> Think of Eur. Court H.R., *Hirst v the United Kingdom (no 2)*, judgment of 6 October 2005, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it), and the ample follow up in the vexed question of prisoners' right to vote. And also the crucifix in the public schools: Eur. Court H.R., *Lautsi v Italy*, judgment of 3 November 2009, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it); and the reverse in Eur. Court H.R. *Lautsi and Others v Italy*, judgment of 18 March 2011, available at [www.hudoc.echr.coe.it](http://www.hudoc.echr.coe.it).

<sup>55</sup> G. Itzcovich, 'One, None and One Hundred Thousands Margins of Appreciations: The Lautsi Case' 13 *Human Rights Law Review*, 306 (2013); S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006).

Accordingly, the complexity of the issue becomes an interesting setting for understanding what an inter-legal conception implies.

The Italian Constitutional Court engaged on a disputed issue *vis à vis* the European Court, in order to decide about a challenge to the Italian legislation modifying the arrangements applicable to the calculation of pensions for workers who have spent part of their working life in Switzerland. The enactment required that the Italian pension was to be calculated on the basis of the actual level of Swiss contributions, thus resulting in lower amounts. The Constitutional Court had to face the previous ECHR decision in the *Maggio and others v Italy* case (May 31, 2011) according to which with the mentioned legislation the Italian State had infringed Art 6 (1) of the Convention and the applicants' rights by intervening in a decisive manner in ongoing proceedings so to insure a desired outcome, notwithstanding the absence of reasons of compelling general interest.

The Italian Constitutional Court<sup>56</sup> maintained – and justified – a different view according to which a Convention's right can only be seen and adjudicated through an 'in-context' perspective. In the Court's reasoning, the doctrine of the 'margin of appreciation' concerning the content and scope of a right should be upheld here because 'the protection of fundamental rights must be systemic and not piecemeal across a series of uncoordinated provisions in potential conflict with one another' (para 4.1). Being the 'systemic' assessment relevant here, a public and compelling interest can well be taken into a balancing exercise, as possible justification of a retrospective legislation. Accordingly,

'a law which takes account of the fact that contributions paid in Switzerland are four times lower than those paid in Italy, and hence applies an adjustment in order to bring the contributions into line with disbursements, to equalize treatment in order to avoid inequality and to strike a sustainable balance within the pension system in order to guarantee those who receive disbursements, is inspired by the principles of equality and proportionality' (para 5.3).

In this very sense, rights are capturing inter-legality concerns, due to their mixed belonging in different legalities. But, more in depth, it should be noted how human rights, as part of international law commitments, appear to be exposed to a double-level understanding, in between a thin or universalizable overlapping consensus among the international community and a thick<sup>57</sup> and

<sup>56</sup> ICC, Judgment no 264/2012.

<sup>57</sup> M. Walzer, *Thick and Thin. Moral Argument at Home and Abroad* (Notre Dame-London: University of Notre Dame Press, 1994): Minimalism 'consists in principles and rules that are reiterated in different times and places, and that are seen to be similar even though they are expressed in different idioms and reflect different histories and different versions of the world. (...) In context, everyday, they provide contrasting perspectives; seen from a distance, in moments of crisis and confrontation, they make for commonality'. (ibid 16). For Walzer, 'with thickness comes qualification, compromise, complexity, and disagreement' (ibid

'situated' determination in national contexts. The very fact that rights are not referred to States as such, but to 'individuals' living in separate communities, generates the need for such a second-level comprehension, which also depends on the normative bases in each polities' legal system. Given the lack of its own constituency in terms of a corresponding polity, second-order legalities, regional or global regimes are always and structurally wanting as regards their effectivity.

However, that would be too heavy an argument, undermining the deontological strength of human rights obligations and their *raison d'être*. It is in fact their valuable function that of countering majoritarian disregard of human rights, wherever it takes place: it would be senseless to renounce the critical force of human rights due to sheer deference to those very legal systems that are allegedly responsible for their infringement. Democracy and sovereignty should not have their 'pound of flesh' here. This is, by the way, a moral reason for an inter-legal assessment to be pursued.

Notably, when the inter-legal perspective is taken to matter, the epistemic focus shifts from the question about which legality has to prevail, or the question whether democracy is enough a good to cancel a human right, toward the deeply different question concerning what can be the interpretive choice that prevents the core meaning of that right – eg enshrined in the European Convention – from being misconceived and nullified in the context of a given community (eg the Italian polity and its legal system).

I would uphold the doctrine of the margin of appreciation insofar as it can potentially foster such an inter-legal perspective and due to the methodological attention it purports to pay to the reasons-giving from *both* legalities involved. It is to be born in mind, however, that interpreting the margin of appreciation this way would not be consistent with justifying it as a democracy-protecting shield, that is, a kind of price to be paid to institutional (international) relations among Member States and the need for (*political*) legitimacy of the European Court. The gist of inter-legality is in fact to bridge the gap among different legalities through *legal* means, and due to respect for the normative pretensions brought about by them. If the tussle concerns how to understand the relation between rights of an individual to due process guarantees on one side and equality in a given context, on the other, this is not to be addressed in terms of institutional deference nor in the view to displace one legality for the sake of the other.

After all, the thrust of inter-legal theory lies in avoidance of unilateral, one-sided decision making: its holistic vein upholds the whole of the normative stakes at issue. But its all-things-considered assessment rests on the available legal setting in the composite context of the case. From that point of view, 'holism' is

18). The way in which some ideals (of truth or justice) exist is already in context, they were born 'thick', although those ideals are commonly shared at their thin (less defined, specified) level. Minimalism allows for 'encounters', but 'these encounters are not- not now, at least-sufficiently sustained to produce a thick morality' (ibid 18).



contingent upon the legal arrangements (as the positive law) relevant in context: a monist, substantive, global order of law is not premised to it.