Wagner Artur de Oliveira Cabral

LEGITIMACY, AUTHORITY AND PUBLIC REASON

A case for international stability for the right reasons

Tese de Doutorado

Orientador: Professor Associado Dr. Alberto do Amaral Júnior

UNIVERSIDADE DE SÃO PAULO

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To my sister

The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts. Aristocratic and caste societies are unjust because they make these contingencies the ascriptive basis for belonging to more or less enclosed and privileged social classes. The basic structure of these societies incorporates the arbitrariness found in nature. But there is no necessity for men to resign themselves to these contingencies. The social system is not an unchangeable order beyond human control but a pattern of human action.

- John Rawls, A Theory of Justice (1971)

Life is short and truth works far and lives long: let us speak the truth.

- Arthur Schopenhauer, The World as Will and Representation (1818)

ABSTRACT

The objective of this research is to assess how International Law is influenced by challenges of legitimacy and authority. Drawing from the recent outbreak of a number of social and political movements questioning globalization worldwide, this research attempts to understand how institutions of international governance are related to the lives of the people. By canvassing the traditional sources of International Law and how they are shaped by interpretation, and also by inspecting various existing instances of international administrative control, we try to delineate the complicated outlook that jeopardize public awareness and involvement, raising issues of legitimacy. As na answer to this situation of detachment, this work delves into the writings of John Rawls in order to propose how a well-ordered society could be structured from the active participation of its citizens, striving for a social balance that can be sustained at a distance. For this purpose, not only Rawlsian theory is presented, but also its historical antecedents in contractarian theory. Finally, we propose a discussion on how international institutions could be designed with an aim at accommodating concerns about democracy, transparency and inclusiveness.

RESUMO

O objetivo desta pesquisa é avaliar como o Direito Internacional é afetado por questões de autoridade e legitimidade. A partir da recente irrupção de vários movimentos sociais e políticos mundo afora rechaçando a globalização, esta pesquisa tenta entender como as instituições de governança internacional estão relacionadas à vida das pessoas. Examinando as fontes tradicionais do Direito Internacional, e como elas são moldadas pela interpretação, assim como também inspecionando várias instâncias existentes mas pouco conhecidas de controle administrativo internacional, tentamos delinear o panorama complexo que põe em desafia a conscientização e o envolvimento do público, levantando assim questões de legitimidade. Como resposta a esta situação de distanciamento, este trabalho investiga os escritos de John Rawls, a fim de propor como uma sociedade bem ordenada poderia ser estruturada a partir da participação ativa de seus cidadãos, lutando por um equilíbrio social que seja estável e sustentável. Apresenta-se não só a teoria Rawlsiana, como também seus antecedentes na teoria contratualista. Finalmente, propomos uma discussão sobre como as instituições internacionais poderiam ser projetadas com o objetivo de acomodar preocupações sobre democracia, transparência e inclusão.

CONTENTS

1. FAST TIMES AT INTERNATIONAL LAW

Introduction

To say that International Law is at a time of crisis has been a frequent understatement and a literature cliché that, however, must be faced once again, bearing the usual calls of distress and confusion, amid bleak descriptions of the unknown future. Reality presents itself with several challenges that perplex and amaze international lawyers, unable to predict developments such as the electoral victories of Brexit or Trump, both championing political platforms rooted in the vocal disdain for a globalization project strengthened and deepened throughout the 20th century. Economical debates defending liberalism and international trade have migrated from academy and international institutions such as the International Monetary Fund (IMF), World Bank (WB) or World Trade Organization (WTO) to take part of what is currently understood as "common sense", at least under a Western perspective. A world with freer trade is, in general, a freer world. For some reason, or more likely a confluence of them, the citizens of those democracies seem to reject that notion as an evident truth, choosing to protect some other values deemed as more important for them. It is relevant to underscore that those voices don't necessarily come from countries that are marginalized, or widely perceived to be injured by economic liberalization. In fact, Great Britain and United States are usually recognized as champions of liberalization and reapers of its profits. Cohen suggests an explanation for the relation between that effect (anti-globalization movements) and its supposed cause (international integration): that the former reflect the successes of the latter[1].

> The great multilateral institutions of the post-World War II world—the General Agreement on Tariffs and Trade (GATT) and the WTO, the United Nations, human rights treaties, the Rome Statute of the International Criminal Court—reflected efforts to increase and spread global wealth, stability, and peace (among other goals). And while much work remains to be done, these institutions have in many ways succeeded. Wealth and power are now widely dispersed across

[1] Harlan Grant Cohen. Multilateralism's Life Cycle. The American Journal of International Law. Vol. 112. Issue 1. 2018. p. 48-49.

> the world. Human rights remain under serious threat (in some places, more than before), but institutions have developed tools that can be effective, at least some of the time. Success, however, has fundamentally changed the calculus of individual states, and in turn, their views of global goals and multilateral strategies. The success of multilateralism may have made that strategy more difficult over time.

The international political and legal regime that blossomed in the 20th Century has, also according to Cohen, proceeded into fostering a "true global multipolarity", that multiplied the number of States that aren't so small as to strategically depend on a traditional power, neither are relevant enough to act as hegemons[2]. In this context, alliances get even more circumstantial, with several issues ascribing different relative values to States, whereas no countries are relevant enough to emanate a gravitational pull towards a policy convergence, thus producing an overall diminishing value of issue linkages. At the same time, international organizations, a policy tool for both the weakest combined and the strongest acting in a coordinating role, started losing a distinct usefulness. Other regional and local arrangements slowly started gaining traction, sometimes dehydrating global regimes. In the end, the distribution of power across the global power seems to have been changing the course of international relations towards uncharted waters. A recent example of the new dynamics in play was the withdrawal of the candidacy of Sir Christopher Greenwood, a British national, to a seat on the International Court of Justice in 2017. He was replaced by Indian national Dalveer Bhandari, making it the first time a UNSC permanent member failed to secure a member at the bench of the World Court[3].

Consequences of recent developments are complex, and their analysis would benefit from a thorough various assessments of the impact of behaviors of international actors. One could argue that we stand before an international arena of crescent activity and integration – especially fostered by cultural and economic convergence – that is developed in two levels. The first and foremost level is the institutional, where norms and standards are set in a myriad

[2] Harlan Grant Cohen. Multilateralism's Life Cycle. The American Journal of International Law. Vol. 112. Issue 1. 2018. p. 49.
[3] The Guardian. "No British judge on World Court for the first time in its 71-year history". November 20, 2017. Link: https://www.theguardian.com/law/2017/nov/20/no-british-judge-on-world-court-for-first-time-in-its-71-year-history.

of discursive fora, following several different processes, which constitute an ecology of diverse organisms that have themselves been established and developed through time.

The other level of operation of this international system is the one that affects its indirect subjects which exist in the world, albeit in a different legal capacity. Natural persons, or other physical subjects (such as wildlife or flora), are subject to international norms without directly participating in their creation. Human beings, especially, may be singled out as indirect participants of the international normative process under liberal theory. Theories of political representation affirm that those subjects participate in international dealings inasmuch as they take part into a social contract via a political society that has a representative structure usually organized by periodic displays of priorities and/or consent – the electoral processes. Upon the practice of consultations, consent is established and renewed, and the mandate bearers are supported or rejected, based on their performance at the task of attending to the desires of the electorate. This cycle of empowerment and evaluation is a basic feature of any self-proclaimed democratic regime to the extent that even authoritarian regimes usually try to present the government as being for the people and by the people.

This research will delve into the aforementioned cycle, raising some questions about its adequacy as a description of theory and practice for international relations, especially in International Law. It starts from a feeling of disquiet about how democracies behave towards International Law. What is the extent of the ingrained practices and underlying rationales into this process? Bearing in mind the evocation of principles of the Charter of the United Nations, which proclaim a determination not only to "save the succeeding generations from the scourge of war", but also "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained", a pivotal role is played by the presence and promotion of international stability.

In this scope, the United States of America (USA) have recently begun a strong march for the modification, reversal or annulment of international legal and diplomatic positions, thus presenting an interesting demonstration of quick policy variations. For this reason, we shall proceed to recall some of the main events which occurred on the first semester of the Trump administration[4]. Some of the acts are legally binding and some are

[4] I am greatly indebted to professor's Jack Goldsmith's account of the chronology of these facts. See Jack Goldsmith. "The Trump Onslaught on International Law and Institutions". March 17, 2017. Link: https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions.

not, but all of them communicate valuable information about perceptions of Law that differ from *status quo*. This brief exercise shall exemplify how far and wide acts of authority (in a sense, acts of vested authorities) can reach. For this reason, the official acts performed by the Trump administration will be, accordingly, referred as acts performed by USA. This interplay between public officials' behavior and a State's recognizable stance is of relevance for this research, so it should be watched closely. Afterwards we shall return to the subject, discussing the relations between the two levels of that previously alluded political cycle.

A working sample: The Trump Administration and foreign policy reversals

a) Soon after the presidential inauguration, USA formally abandoned the **Trans-Pacific Partnership (TPP)**[5]. The twelve-nation mega regional trade agreement (RTA) was negotiated across seven years and constituted the largest trade treaty ever drafted. According to a World Bank study, this treaty would raise member countries GDP an average of 1.1 percent by 2030 and increase trade in 11 percent in the same period[6]. While the North American Free Trade Agreement (NAFTA) countries would attain more modest gains (around 0.6 GDP), smaller countries such as Malaysia and Vietnam would receive larger increase in GDP (8 and 11 percent, respectively, at the same time frame of 2030). Some non-party countries might be adversely affected, though (mostly South Korea, Thailand and some other Asian countries, who might be affected in a region of 0.3 GDP loss). Members of the TPP amount to 40 percent of global GDP, and 20 percent of global trade. Nevertheless, the USA has decided to abandon it, just three days into the new administration.

b) Not many days later the press leaked a memo from the Trump administration detailing an Executive Order (EO) which imposed a moratorium on new multilateral treaties[7]. This executive order was aimed at tackling the "proliferation of multilateral treaties that purport to regulate activities that are domestic in nature" whereas "these treaties are used

[5] New York Times. "Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal". January 23, 2017. Link: https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?_r=0.
[6] World Bank Group. "Global Economic Prospects, January 2016: Spillovers Amid Weak Growth". 2016. Link: https://openknowledge.worldbank.org/handle/10986/23435.
[7] New York Times. "Moratorium on New Multilateral Treaties". Link: http://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/.

to force countries to adhere to often radical domestic agendas that could not, themselves, otherwise be enacted in accordance with a country's domestic laws". Exemplifying this phenomenon, the EO text singles out two of such problematic treaties: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[8] and the United Nations Convention on the Rights of the Child (UNCRC)[9]. While the former could be interpreted to "prohibit the celebration of Mother's Day and require the decriminalization of prostitution", the latter could also be interpreted to "prohibit spanking". Multilateral treaties would only be admitted after a review by a "high-level executive branch committee". There is, however, a similar procedure already in force, called Circular 175, in which a commission thoroughly evaluates all the commitments entailed by any given treaty modification (accession, modification or termination)[10]. An exception to the moratorium is granted for treaties about "national security, extradition, and international trade", which are, according to the explanatory text, of "international concern". Reinforcement of the evaluation procedure for new treaties, as the designated reevaluation of already signed and effective treaties, signal the recent position from the USA to both abstain from new commitments and put the current obligations under the stress of uncertainty.

c) This feeling of uncertainty is not uncalled for. President Trump has quickly called **the Joint Comprehensive Plan of Action**, the Iran nuclear deal woven by the previous Administration in 2015, "a failure"[11]. While the USA at first certified the maintenance of the deal[12], it has later denied to do so, withdrawing[13] from the Joint Comprehensive Plan of Action on May 8th, 2018. This ambivalence reflects poorly on the investments in the region, prone to security issues. NAFTA has also been similarly called "a catastrophe[14]" by

[8] Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Link: http://www.un.org/womenwatch/daw/cedaw/.
[9] United Nations Convention on the Rights of the Child (UNCRC). Link: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx.
[10] Circular 175 Link: https://www.state.gov/s/l/treaty/c175/.
[11] ABC News. "Trump administration keeps Iran deal alive, but with new sanctions" May 17, 2017. Link: http://abcnews.go.com/International/trump-administration-iran-deal-alive-sanctions/story?id=47466388.
[12] Bloomberg. "Trump Just Came Very Close to Killing the Iran Deal". July 18, 2017. Link: https://www.bloomberg.com/view/articles/2017-07-18/trump-just-came-very-close-to-killing-the-iran-deal.
[13] New York Times. "Trump Abandons Iran Nuclear Deal He Long Scorned". May 8, 2018. Link: https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html.
[14] CNN. "Trump wants to 'speed' up NAFTA talks, calls deal a 'catastrophe'". February 2, 2017. Link: http://money.cnn.com/2017/02/02/news/economy/mexico-nafta-negotiations-90-days/index.html.

President Trump and is up to what seems to be a strong overhaul according to the USA new priorities published by the US Trade Representative[15].

d) Additionally, the USA has recently decided to withdraw from the Paris Agreements, at a public statement in which the President determined immediately to "cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country"[16]. Most of the impact data provided as a justification for the withdrawal comes from the National Economic Research Associates (NERA)[17], from a report titled Impacts of Greenhouse Gas Regulations on the Industrial Sector[18]. This research, while conducted by a prestigious private consulting firm, was financed by the American Council for Capital Formation, a private think-thank, in turn funded by undisclosed private corporations, enterprises and associations. When citing another research institution, the Massachusetts Institute of Technology (MIT), the President Trump was criticized as being outright misleading[19]. President Trump mentioned in the speech that "even if the Paris Agreement were implemented in full, with total compliance from all nations, it is estimated it would only produce a two-tenths of one degree Celsius reduction in global temperature by the year 2100". Conversely, an MIT researcher added that "If we don't do anything, we might shoot over 5 degrees or more and that would be catastrophic". While full compliance may not do much to redress the present damage to environment, choosing to neglect climate change may amount to a catastrophe far worse. Such unclear junction of studies and interpretations of studies led the USA to reject the Paris deal.

e) Regarding International Organizations (IO), another memorandum was leaked, titled "Auditing and Reducing U.S. Funding of International Organizations"[20]. This EO, also still unissued at this point, likewise created a commission, this time aiming to improve allocation of public funds to IOs, to "help identify and eliminate wasteful and

[15] United States Trade Representative. Summary of Objectives for the NAFTA Renegotiation. Link: https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf.
[16] White House. Statement by President Trump on the Paris Climate Accord. June 1, 2017. Link: https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord.
[17] National Energy Research Associates. Link: http://www.nera.com/.
[18] NERA Economic Consulting. Impacts of Greenhouse Gas Regulations on the Industrial Sector. Link: http://www.nera.com/publications/archive/2017/impacts-of-greenhouse-gas-regulations-on-the-industrial-sector.html.
[19] Reuters. "Trump misunderstood MIT climate research, university officials say". June 1, 2017. Link: http://www.reuters.com/article/us-usa-climatechange-trump-mit-idUSKBN18S6L0
[20] Auditing and Reducing U.S. Funding of International Organizations. Link: https://assets.documentcloud.org/documents/3424650/Read-the-Trump-administration-s-draft-of-the.pdf.

counterproductive giving". This commission must recommend "strategies to reform international organizations of which the United States is a member in such a way the international organizations transition from a funding mechanism derived from mandatory assessments to one derived from voluntary contributions", bearing in mind that "the United States could selectively fund the specific parts of an international organization that align with U.S. interests" coupled with an outright 40 percent decrease on overall voluntary funding. The committee shall pay special attention to funding of practices that may involve, among several other elements of national interest, "resolutions or sanctions that single out the State of Israel", or "the International Criminal Court". There are also some activities directly excluded from receiving American funding, such as institutions that enable "the performance of abortion or sterilization as a method of family planning or the provision of incentives to motivate or coerce any person to undergo an abortion or sterilization", or "any United Nations affiliate or other international organization that grants full membership to the Palestinian Authority or Palestinian Liberation Organization". All the findings of this committee would be reported to the President.

f) Despite that EO never coming to be issued, several IOs have been in some manner recently disqualified or criticized by the USA. In late May 2017, at the occasion of the unveiling of memorials dedicated to NATO Article 5 and to the Berlin Wall, President Trump made strong comments about the Alliance, especially on the matter of funding[21]. He declared that "NATO members must finally contribute their fair share and meet their financial obligations, for 23 of the 28 member nations are still not paying what they should be paying and what they're supposed to be paying for their defense". That situation, according to the President, "is not fair to the people and taxpayers of the United States". The shared burden of 2 percent of GDP spent with defense is actually more of a guideline, since it can mean more or less depending on the performance of the economy of the country. Those remarks are representative of an uncharacteristic diplomatic speech with a scolding tone towards allies, which failed to mention Article 5, the cornerstone of the shared burden of collective defense that is crucial to the NATO collective security system. Secretary-General Jens Stoltenberg quickly declared that NATO does not interpret such omission as significant,

[21] White House. Remarks by President Trump at NATO Unveiling of the Article 5 and Berlin Wall Memorials - Brussels, Belgium. May 25, 2017. Link: https://www.whitehouse.gov/the-press-office/2017/05/25/remarks-president-trump-nato-unveiling-article-5-and-berlin-wall.

whereas his address at the unveiling of the memorials sent a strong message of commitment to the Atlantic alliance[22].

g) Similarly, Ambassador Nikki Haley, Permanent Representative at the United Nations, spoke at the United Nations Human Rights Council in early June[23]. At that occasion, the Ambassador also signaled a change of stance towards the organ, stating that "the United States is looking carefully at this Council and our participation in it". Also in strong terms, the representative declared that "it's hard to accept that this Council has never considered a resolution on Venezuela, and yet it adopted five biased resolutions in March against a single country, Israel. It is essential that this Council address its chronic anti-Israel bias, if it is to have any credibility"[24].

h) Budget cuts should also cause impactful changes to American international policy. According to the Budget Request for the Fiscal Year 2018, several international programs will be diminished or totally cut[25]. These cuts are distributed in several areas such as global health programs (2bi, p. 70); IOs contribution (0.7bi, p. 71); Food aid (1.7bi, p. 73); Peacekeeping (1.6bi, p. 74) and Climate change (1.5bi, p. 75).

i) Funding, however, is not the only relevant contribution of USA to IOs. International Criminal Court's (ICC) Prosecutor, Fatou Bensouda, has voiced concern for the lack of cooperation from USA, and the hindrance it may represent for the functioning of the ICC[26]. Although not a member of the Rome Statue, USA has been instrumental in bringing suspects to justice, with cooperation in programs like Rewards for Justice, where money is awarded to those who present relevant information regarding international criminal or investigation targets. In the occasion of the distancing between the USA and the ICC, the Prosecutor Office would probably be seriously affected.

Several other contributions could be presented, but I believe we've already covered much ground regarding the public impact of actions by a given government, in a very limited

[22] NATO Press Conference. May 25, 2017. Link: http://nato.int/cps/en/natohq/opinions_144098.htm.
[23] Ambassador Nikki Haley Addresses the U.N. Human Rights Council. Link: https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-address-to-the-u-n-human-rights-council/.
[24] Idem
[25] White House. Major Savings and Reforms - BUDGET OF THE U. S. GOVERNMENT - Fiscal Year 2018. Link: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/msar.pdf.
[26] Voa News. "ICC Urges Supporters to Rally if Trump Pulls Support". January 26, 2017. Link: https://www.voanews.com/a/international-criminal-court-urges-supporters-rally-trump-pulls-support/3695055.html.

period, raising doubts about the source of authority of such decisions, its legitimacy and consent. There may be more relevant events – in both number and impact, such as the Executive Order No. 13780, titled "Protecting the Nation From Foreign Terrorist Entry Into the United States", also infamously known as "Travel Ban", which arguably violates individual rights from both Americans and foreigners[27]. For now, however, let us focus on acts of public policy that do not amount to a direct effect on domestic individual rights – which are, naturally, more closely protected by judicial review. Those events, although international in nature, can be settled in domestic processes. Suffice to say that our attention will be mostly directed at those actions that present a necessary relation between the two levels of the cycle, with international institutions and authority relaying norms and obligations that impact other subjects, largely non-participant of the process of elaboration of these norms.

One could possibly describe the occasions recollected above as a *tour de force* of Executive Power without needing to assess the merits of each single measure adopted or envisaged. The sheer variety of explorations on limitations of the executive branch is, by itself, impressive, especially given the short span of time when it all took place. We shall now try to succinctly evaluate how legitimacy takes place in each occasion[28]. There is no necessity to delve deeper at this point, since it is not an extensive exploration, but an exposition of the degree of complexity resultant of several uncertainties laid bare.

The most striking case comes from the events **(a – TPP), (c – Iran deal)** and **(d – Paris Agreement)**, in which the Executive Branch has decided to reverse the course set recently by previous administration, despite the existing (though obviously disputable) evidence of the benefits of the deal. Given the fact that the decision was carried out so early in the mandate (without time for additional research or public consultations) one could interpret the act as meaning one of the following: **i)** The previous administration was acting against public interest, and the electoral process corrected it; **ii)** The previous administration was acting according public interest, but that changed in the electoral process, meaning that keeping that policy was now against public interest; **iii)** The previous administration was acting according public interest, and the current administration decided against public

[27] White House. Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States. Link: https://www.whitehouse.gov/the-press-office/2017/03/06/executive-order-protecting-nation-foreign-terrorist-entry-united-states.

[28] It is not necessary, at this point, to elaborate on the concept of legitimacy, employing its common usage. The argument here is presented just as a token of the complexity at play, without need of conceptual refinement.

interest by reversing the policy; and **iv)** The previous administration was acting against public interest, as does the current administration, both unconcerned by legitimacy issues. We do not have enough information, at this point, to assess which was the case. Either way, such a sharp policy turnaround raises questions about whether a reasonable portion of the American electorate could be persuaded in a short space of time to change their convictions. This leaves us with the possible conclusion that the electorate either did not consent to what was going on before, does not consent to the new direction taken after the election, or even worse, that their consent is irrelevant to the matter – which is, as already stated, of great economic and social importance. Furthermore, it is important to underscore that such change of convictions will strongly impact all other treaty signatories, to whom the obligations prescribed by the norm were settled and expected as an important commitment.

Event **(b – Moratorium on Multilateral Treaties)**, in turn, signals the disposition of the Executive Branch to disregard long established treaty commitments (CEDAW[29] was ratified in 17.7.1980, while UNCRC[30] was signed in 16.02.1995 and is yet to be ratified by USA). However, it is not a full rejection of the treaties in their entirety, but of possible interpretations of their text. Given that multilateral norms require a collective interpretive effort by their parties – interpretation which might possibly have been misconstrued –, they merit an additional safety procedure, one that, given Circular 175, is arguably redundant. At this point, the Executive Branch chooses to both reevaluate previous agreements (several of which have been already ratified in Congress) and impose a new burden to future ones. It is important to point out that the claimed disputed interpretations have not come from judicial bodies, but from regular international bureaucracy. Although that understanding shared by diplomats and others bureaucrats may affect obligations assumed by the USA, it will most probably be at a non-binding level. This situation also presents complications concerning the assessment of legitimacy variations through time and the perception of precisely what the State is bound to. What is the level of consent (and maybe legitimacy) that needs to be present in order for a norm to be considered binding? Can a unilateral declaration of the interpretation of a treaty, or rejection of a specific interpretation, be used to delineate Law, even without recourse to the usual instrument of reservations or interpretive notes?

[29] United Nations Treaty Collection. Status of CEDAW members. Link: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en.

[30] United Nations Treaty Collection: Status of UNCRC members. Link: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en.

Meanwhile, at events **(e – Funding Audit)**, **(f – NATO shared burden)**, **(g – UN behavior)** and **(i – ICC)** the Executive Branch shows willingness towards revising its collective commitments to international institutions. In general, the USA has recently signaled that the country does not feel indebted to commitments the Executive Branch perceives as unjust, entailing inadequate burden of financing or insufficient performance of these IOs. These perceived shortcomings do not result from a collective assessment inside the institutions, but from one member. Although such vision may be echoed by other members, save from event **i)**, its debates weren't originated in regular bureaucracy.

Finally, in event **(h – Budget cuts)** a set of programs and policies of international reach have been diminished or completely scraped. Of all the elements noted, this is certainly the commonest. It represents the frequent practice of unilateral non-binding commitments that affect citizens from several countries, but do not entail an obligation from the investing country. While this is a legally valid change of policy, the amount and chosen areas for cessation of projects could also be subject to public scrutiny and evaluation.

All these events have in common the fact that they signify changes of foreign policy resulting from shifts in domestic political landscape. Brazil, for instance, has recently witnessed several changes to its foreign policy upon the victory of Jair Messias Bolsonaro at the 2018 Brazilian Presidential Elections. The appointed foreign minister has publicly stated "anti-globalist" views, though is not clear, at this point, what exactly that means. He has, however, voiced strong pro-Christian ideals, denounced concerns of climate change as a "Marxist plot", among other accusations[31]. Moreover, Bolsonaro administration has, at the time of this writing, already supported major changes such as: The withdrawal from United Nations' Global Compact for Safe, Orderly and Regular Migration[32]; The renunciation of the fight against climate change[33]; and the relocation of Brazilian embassy to Israel from Tel Aviv to Jerusalem[34]. Those are all significant reversals of foreign policy that represent a

[31] The Guardian. "Brazil's new foreign minister believes climate change is a Marxist plot". November 15, 2018. Link: https://www.theguardian.com/world/2018/nov/15/brazil-foreign-minister-ernesto-araujo-climate-change-marxist-plot.

[32] Al Jazeera. "Bolsonaro threatens to withdraw Brazil from UN migration pact". January 9, 2019. Link: https://www.aljazeera.com/news/2019/01/bolsonaro-threatens-withdraw-brazil-migration-pact-190109190423306.html.

[33] Foreign Policy. "Brazil Was a Global Leader on Climate Change. Now It's a Threat". January 4, 2019. Link: https://foreignpolicy.com/2019/01/04/brazil-was-a-global-leader-on-climate-change-now-its-a-threat/.

[34] Reuters. "Brazil moving its embassy to Jerusalem matter of 'when, not if': Netanyahu". December 30, 2018. Link: https://www.reuters.com/article/us-brazil-israel/brazil-moving-its-embassy-to-jerusalem-matter-of-when-not-if-netanyahu-idUSKCN1OT0G5.

departure from established policies, will probably receive closer inspection from researchers from Brazil and abroad.

On the outskirts of Democracy

The way the States behave is widely understood as both a demonstration of intentions (it is one of the elements of the establishment of international custom) and an indication of what the future will be. However, it is unconventional to witness an impetuous and drastic policy realignment so widespread, especially from an important international player such as the United States. More interestingly, this specific case represents a development originated in a country with democratic credentials in accordance with its political processes, which raises issues about how foreign policy is domestically rooted and, to a level, justified. It even begs the question of whether it is possible to expect stable commitments from countries with weaker institutions and fragile public political discourse, apart from the leadership of autocratic leaders. Furthermore, one might wonder what the connection is between democratic accountability and the development and nurturing of international agreements.

On the domestic level this is already a thorny issue, presenting a considerable challenge of passing the baton of State policies from one government to the next, and maintaining commitments from one generation to the following. As Mark Button recalls;

> One of the central insights of the social contract tradition, as I read it, is the recognition that the making of a compact or promise is one (fairly easy) thing, keeping a promise – in the face of the vagaries and uncertainties of time, the opacity of human motives, and the perpetually unfinished character of human becoming and identity – is another. As Benedict Spinoza declared, "the preservation of the state chiefly depends on the subjects' fidelity and constancy," yet he admitted that "how subjects ought to be guided so as best to preserve their fidelity and virtue is not so obvious.[35]"

[35] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 3.

This is far from a new problem, ancient as the idea of States itself. But it has been aggravated by the rising complexity of global interactions, given that the concept of society has been tweaked with enlarged socioeconomical boundaries, managed by increasingly sophisticated institutions, wherein the usual structures of representation – and, concurrently, oversight – have not fully developed. One could easily argue that the very idea of inclusiveness and transparence is deemed foreign to international affairs[36].

Democratic accountability and stability are prolific research topics, but seldom in a clear connection to studies in International Law, an area more frequently than not identified as too specific, technical, or even elitist. In this sense it is worth recalling an important research conducted by the **Brazilian Center for Planning and Research – CEBRAP** entitled "Brazil, Americas and the World – according to the public and leaders' opinion[37]", part of the international project "Las Américas y el Mundo[38]" coordinated by the Mexican institution **Centro de Investigación y Docencia Económicos – Cide[39].** In the 2014-2015 edition of the project, those institutions, among a few others[40], surveyed public opinion using the same basic questionnaire, which encompassed questions on 13 international issues such as: interest for international issues; proximity to the exterior; identity; political culture; foreign policy and government performance; international economy; migration, international rules and international organizations; Latin America; United States and other regions and countries of the world; and Human Rights[41]. The aim is to make a comparison not only among those participant countries, but also in different points in time, using data gathered in different electoral years.

[36] A summary of the main criticisms in that direction has been presented at: Robert O. Keohane, Stephen Macedo, and Andrew Moravcsik. Democracy-Enhancing Multilateralism. International Organization. Vol. 63. Issue Winter. 2009.

[37] Research information ca be found here: https://cebrap.org.br/pesquisas/brasil-as-americas-e-o-mundo-opiniao-publica-e-politica-externa/.

[38] See: https://www.lasamericasyelmundo.cide.edu/.

[39] See: https://www.cide.edu/.

[40] In addition to CEBRAP and CIDE, that edition also included participation of researchers from Instituto de Relações Internacionais da Universidade de São Paulo (IRI-USP) from Brazil, Universidad de Los Andes from Colombia, Facultad Latinoamericana de Ciencias Sociales (Flacso) from Ecuador, Instituto de Opinión Pública y la Escuela de Gobierno da Pontificia Universidad Católica de Peru and Universidad de San Andrés, from Argentina.

[41] Every participant research group was allowed to supplement that basic survey with country-specific questions.

The respondents were screened using two reference questions[42] in order to evaluate their interest and knowledge, and then allocated in two groups: those interested and informed about international affairs (PII) and those not interested and uninformed about international affairs (PDD). One of the topics was the interest for domestic and international issues[43]. Among the respondents, the interest for domestic issues was found to be great on 39.3% on PDD, and 62,1% on PII. On international issues the survey found that great interest was declared by 22.1% of PDD and 41.6% of PII. Those are far from negligible results, and merit further study. Moreover, the research also indicates a high perception of great relevance of international issues on everyday life (31.2% PDD, 26.9% PII), and an also high perception of great relevance of international issues for Brazil as a country (60.7% PDD, 63.4% PII)[44]. Especially remarkable are the results of the question regarding the influence of the United Nations over human rights in Brazil, considered to be very good by 35.4% PDD and 43.1% PII[45]. Researches such as the project "Las Américas y el Mundo" represent a promising avenue for inquiry, improving our overall understanding of International Affairs and International Law through a methodology of quantitative analysis.

While the research on public opinion and foreign policy progresses, and the ways the interconnection of the global society happens get progressively more evident, there are plenty of avenues to explore. Recent events – as represented by those already mentioned, though not limited to them – suggest international instabilities in liberal democracies, amidst incoherence between public opinion and globalizing liberal projects, as developed by international instances for drafting and upholding commitments.

One possible research question is that of how international obligations are currently understood – not only how they are agreed upon, but how (and when) their content is defined. The emergence of new participants in the processes of norm drafting and interpretation may lead to altered outcomes and require new evaluation strategies. This leads to an enticing debate among the stakeholders in International Law and in International Society in general on who gets to have a say, and under which power and influence. Another interesting area of discussion is that about which mechanisms are currently in place to make sure these

[42] The reference questions were the interest on international affairs and the capacity to recognize the meaning of the acronym "UN".
[43] CEBRAP. O Brasil, a América e o Mundo - Segundo a opinião do público e dos líderes. Universidade de São Paulo, 2017. p. 15.
[44] Idem. p. 24.
[45] Idem. p. 159.

interpretations and interpreters are known to the public. Conversely, how many institutions have been designed according to the democratic principles of democratic inclusiveness, participation and transparency? Furthermore, is such influence of democratic principles even desirable in international relations? What do they have to offer? Is that even a goal worthy seeking?

Delineating the research problem

The present research tries to answer some of the questions above, and it does so throughout an examination of aspects of the inner workings of International Organizations (in the broadest sense) and of International Law itself.

Our working hypothesis is that there are obstacles between the final recipients of international laws (the public) and norm creators (drafters and interpreters) that could be at least attenuated vis-à-vis a more stable and transparent international society. We, therefore, aim to contribute to the International Law scholarship by developing a study on how institutions could overcome these informational obstacles and therefore contribute to an increase in the legitimacy of International Law.

This research explores the path of a qualitative analysis of institutions and their suitability to democratic governance, as the means to a stable equilibrium. It does so with support of existing scholarship of different focuses, hoping to propose a workable convergence. We stand over a tripartite foundation, with each pillar also representing a gravitational field of correlating research.

Our first pillar is represented by the research proposed by Armin von Bogdandy and Ingo Venzke, among other scholars from the Max Planck Institute for Comparative Public Law and International Law. This scholarship delves into the Theory of International Law providing valuable insights regarding its current applications, while also drawing attention to issues of legitimacy and authority present in norm drafting and, more importantly, interpretive acts.

The second pillar is expressed by the scholarship united under the banner of the so-called Global Administrative Law (GAL), mainly a collective work developed under New York University's Institute for International Law and Justice (IILJ), which focuses attention

on the legal challenges presented by a plethora of administrative actions taken by several international actors, most of which lack proper transparency and accountability.

Lastly, the third pillar is represented by the work of John Rawls, inasmuch as his scholarship presents normative guidance, investigating the role of principles in social mechanisms capable of bringing them to reality in the framework of the "Justice as Fairness" theory. Rawls' work interrogates the role of institutions into developing a Well Ordered Society, which is in turn a community of free and equal citizens, capable of fashioning a cooperation scheme that achieves stability for the right reasons, not just a basic *modus vivendi*. Rawls follows a long tradition of scholars focused on the idea of social contract as a guideline for the political community, most of them conferring specific responsibilities and concerns to the citizen in order to maintain a good society. Some of these antecedents will be presented along with their impact on Ralwsian theory.

It's important to stress that the concept of Legitimacy will be based on the writings of Max Weber, as understood and developed by John Rawls, and will be associated with the concept of Authority as proposed by Ingo Venzke[46], in the sense that it is not enough to analyze whoever has legitimacy to establish norms, but also who, in an environment of discursive disputes, is able to infuse the norms with meaning capable of attaining adherence by other actors. While Legitimacy stands as a *sine qua non* condition to norm validity, in International Law some interpretations gather more salience than others. We'll try to grasp a better understanding of this phenomenon.

This adherence – the recognition of the authority of an argument – is consubstantiated in the Rawlsian notion of Overlapping Consensus[47], that aims to accommodate the diversity intrinsically linked to democratic societies by the collective setting of norms that can be widely accepted. The public reason acts in the sense of providing the justification for the actions developed in the public sphere, favoring dialogue and convergence. In a context where public reason has been adequately developed, there is room for greater political autonomy of the citizens, bridging the gaps between the Law and its final subjects. One way of summarizing the Rawlsian thinking on this issue was proposed by Samuel Freeman, who states that "political autonomy is only achievable when citizens act upon laws fairly and

[46] See on page 40.
[47] This will be further explained on page 83.

legitimately enacted on the basis of public reasons under conditions of equal political power"[48]. Therefore, under the influence of fair institutions and principles of justice widely recognized, it is possible to achieve what Rawls defines as a cooperation scheme superior to mere *modus vivendi*, the much more resistant "stability for the right reasons".

This demand for a stronger role for the citizens in international affairs is connected to the perception that contemporary developments in the international legal system and bureaucracy have built an institutional system that could benefit from features of domestic ordered societies, where public oversight and engagement greatly improve the efficiency and efficacy of public services, contributing to better societies in general. We hope that this research may contribute to provide answers, and, if we succeed, raise additional questions in search of a deeper understanding of International Law.

Research organization

Some questions need to be raised in order to properly assess this conundrum, and they will be offered following this proposed organization.

The first part of this analysis aims to evaluate who, in modern International Law, has the power or authority to assume obligations. This is a traditional inquiry from the Theory of Sources, specifically, where normative content can be found. The traditional role performed by the State in this matter shall be discussed, along with its limitations. Such argument must be dealt with in two parts: it is necessary to identify who is responsible for establishing the Law, and who is responsible for applying it. Given the fact that it is impossible to bring Law unto effect without interpretation, it is then necessary to entertain some ideas regarding the role of the interpretive acts and the continuous development of International Law. The objective of the first chapter is, then, to grasp some of the issues regarding rulemaking, exposing some of its limitations and anachronisms. We must assert who gets to define the content of a legal obligation and under which influencing factors, including the presence (or not) of democratic ground and/or oversight.

[48] Samuel Freeman. Rawls. Routledge, 2007. p. 401.

The second chapter will delve a bit further into the uncertainties and complexities raised on the previous section, now under the analysis of the Global Administrative Law (GAL), before exposing some of the limitations of accountability currently in effect. We will explore the question of how the Global Administrative Space can be repurposed according to democratic guidelines and investigate possible mechanisms of improvement.

In the subsequent chapter, we will step back for a while and try to entertain a more philosophical discussion, exploring the relationship between a Well Ordered society and the demands of public reason. Before proposing an application of bureaucratic practices aimed at fostering accountability and legitimacy, it is important to evaluate what is the desired concept of citizenship able to benefit from those mechanisms and practices. We thus borrow from Mark Button's insight that "contract makes citizens, never the other way around", to analyze the contributions of contractarian theory to the role of the citizen to promote and protect a just society. If citizens have a key role being active participants of the development of a virtuous domestic society, it may be said that this responsibility is connected to its acts abroad. Thus, the choice of restricting the research to institutions in democratic States was deliberate, motivated by the perplexity caused by recent events as already recalled, which produce uncertainties regarding the dynamics between international obligations and domestic conscience.

In the final chapter, we will then draw this research to a momentary conclusion, by focusing our analysis on International Courts and exemplifying ways through which these organizations aim to improve their efficiency by better informing their objectives and processes to internal and external audiences.

2. CREATING MEANING OUT OF THE NORM

Introduction

Grandiose discussions surrounding the sources of International Law have been a mainstay in scholarship, derived from several challenges imposed by limitations of the widely accepted embrace of Legal positivism. In positivist systems, the method for creation and identification of Law is relatively straightforward. In broad strokes, a legitimate authority prescribes obligations following a recognized procedure, usually via generally established institutions[49]. Those commands, crystalized in time and form, are in turn interpreted by several participants of the society, from bureaucrats to citizens, providing boundaries and safety in a zone inside of which freedom is fostered to thrive[50]. Legal systems established without this blueprint of a basic norm that informs and constrain the entirety of the system (such as a constitution or other similarly positioned fundamental norm) struggle to provide the same clarity and stability.

Such is the case of the international legal order. Common tropes of international lawyers' writings is the need to present a convincing account of the sources of International Law and, subsequently, to assert the authority of that legal system – which is, admittedly, yet far from evident.

Contemporary literature adopts as a foothold the canonical listing of sources present on Article 38 of the Statute of the International Court of Justice (ICJ):

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

[49] In opposition to *ad hoc* institutions, which would not only be oxymoronic, but also would configure a state of exception.
[50] The definition of what consists on freedom and the relations of priority among the several kinds of possible freedom may vary abruptly among nations.

b. international custom, as evidence of a general practice accepted as law[51];

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

In fact, the wording of Article 38 is almost a verbatim copy of a similar provision in the Statute of the Permanent Court of International Justice (PCIJ) – ICJ's predecessor, from which the later court inherited not only the place in the international legal system, but the actual place of seating at the *Vredespaleis* in Den Haag, Netherlands. The only difference is that in the earlier PCIJ version there is only one paragraph, which begins with a brief "The Court shall apply" and concludes with what presently consists in the second paragraph added at the end of item d. At the time of its writing (1920), that definition held similar gravitational pull as today's ICJ counterpart (from 1945, an annex of the United Nations Charter), amounting to the fact that this group of sources has roughly monopolized international legal discourse – and, arguably, practice – in the 20th century.

This selection of specific sources and their connected descriptions is far from an accidental choice. As it commonly happens with most legal provisions, the selection of sources reflects a specific period of time and a peculiar mentality. The choice of the provenance of Law is a conscious and very important decision.

[51] See also: Roozbeh B. Baker. Customary International Law in the 21st Century: Old Challenges and New Debates. The European Journal of International Law. Vol. 21. No. 1. 2010.; Stefan Talmon. Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion. The European Journal of International Law. Vol. 26. No. 2. 2015.

Lauri Mälksoo[52] recalls the importance of the 19th century, which has already been singled out by Koskenniemi[53] as a period of high intensity of international law scholarship, akin to the "distant times" of Grotius, von Puffendorf, Vattel, among others. Europe, for the internationalists of that time, was the World, for the world was European, chiseled from the economic and social relations between metropolises and colonies. This setting – or this perception of a definition of world – led to the elaboration of international law as European Law (*jus publicum europeaum),* a regional legal system of civilized nations, united by the profound ties of Christianity and deference to Natural law[54]. International Law was far from being held as universal, but was, in fact, widely seen as a language to be used among equals, while the relations with non-Christian nations would be based on common practices informed by Jusnaturalism. This tradition of a horizontal system of selected peers, Mälksoo argues, decisively shaped later practice and understanding of what treaties and customs are[55].

Another key aspect of that period is the state-centric nature of the normative world[56]. Colonization led to the expansion of the empires, and the number of countries was limited. Participation – and norm setting – was restricted to few members of an international society in which Sovereignty was the main attribute of statehood. Mälksoo points out that the states were central, with few existing International Organizations and non-State actors in the international arena, both posing no harm to States and their lawmaking monopoly. At that time actors such as *Institut de droit international* (created in 1873) and Red Cross (1863) were already operational and influential, and their work could affect International Law, but not without the endorsement of States and the necessary formalization into treaties or recognition as custom.

Since many of the (European) States at that time were monarchies, whose subjects – and private actors, in general – depended on the will of the Sovereign, it comes with no surprise that the system is thought to have been modeled in a top-down approach, without

[52] Lauri Mälksoo. Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory. In: BESSON, Samantha and d'Aspremont, Jean (ed.). The Oxford Handbook on the Sources of International Law. Oxford University Press. 2017. p. 2.
[53] Martii Koskenniemi. From Apology to Utopia – The structure of International Legal Argument. Cambridge University Press. 2005.
[54] Lauri Mälksoo. Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory. In: BESSON, Samantha and d'Aspremont, Jean (ed.). The Oxford Handbook on the Sources of International Law. Oxford University Press. 2017. p. 3.
[55] Idem. p. 5.
[56] Idem. p. 5.

any discussion of the norm's legitimacy or proximity to private interests. States were the *alpha* and *omega* of international legal discourse.

A final element underscored by Mälksoo is the limited number of international courts[57]. It might seem obvious, for a modern student of International Law, familiar with so many courts (which assess criminal cases, trade disputes, human rights violations, *inter alia*), that if there is a Law there must be someone responsible for applying it, and, by doing that, interpreting it. At that time neither the ICJ or the PCIJ existed, and no permanent body existed to adjudicate competing legal claims. Only in 1871 did the first international dispute settlement procedure take place (Alabama Claims arbitration[58]), based on a treaty provision set beforehand by the conflicting parties (United States and Great Britain), which limited the arbiters to the assessment of three rules of International Law. Again, Law was defined by the States, which were considered its main actors and interpreters – not in legal courts, but in diplomatic processes. Bureaucracy would handle the task of developing Law, which was written by few strong States. Drafters of the legal norms were their custodians.

With that context in mind, it is easy to trace connections to present theories of Sources of International Law, that anchor – and in practice coordinate – a legal system for a global society that is completely different. As Lauri Mälksoo puts it:

> Studying international law in its largely pre-judicial era is eye-opening, because it makes one aware of how relatively recent in historical terms the emergence of international adjudication has been. It also suggests that the extent of the judicialization of international law and international relations is nowadays occasionally exaggerated. Most central political questions of international life are still only seldom successfully solved in international courts. A number of such attempts fail at the jurisdiction phase. Moreover, there are important regional and

[57] Lauri Mälksoo. Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory. In: BESSON, Samantha and d'Aspremont, Jean (ed.). The Oxford Handbook on the Sources of International Law. Oxford University Press. 2017. p. 7.
[58] See Tom Bingham. The Alabama Claims Arbitration. In: The international and comparative law quarterly, vol. 54. Issue 1. Page 1-25. and Jan Paulsson. The Alabama Claims Arbitration: Statecraft and Stagecraft : United States of America v. Great Britain (Alabama Claims), Award, 14 September 1872. In: Arbitrating for peace : how arbitration made a difference. 2016. p. 7-21.

> national differences in terms of which countries accept or refuse international adjudication[59].

Furthermore, this historical comparison brings into light that to this day International Law is expressed – and developed – not only by professional diplomats and international courts, but also by the leaders of the States, that despite not being sovereigns, hold great power in defining legal obligations, though without much space for participation from other actors and relevant doubts on legitimacy. In other cases – such as the Dispute Settlement Body (DSB) from the WTO – quasi-judicial bodies are taking up the challenge of clarifying and expanding the Law, not without a great deal of criticism.

Mälksoo believes the codification of sources of International Law in the form of the PCIJ list of sources is at the same time a concession to the interests of the States to retain their Sovereignty – that could arguably be jeopardized without the monopoly of lawmaking – and an attempt to ground International Law in a Positivist system[60]. While Natural Law may still play an important part in international legal discourse, the system is supposed to function as a more traditional legal regime, developed by the nascent International Courts, even if on tight leashes. The PCIJ list prioritizes treaties and customs – both of State origin – while leaving room for more generic considerations under the guise of general principles of law, seen at that time as the most open obligations States would adhere to.

In short, the establishment of the current scheme of sources enshrined at Article 38 of the ICJ Statute is the culmination of a process of conversion from an unregulated system based on Natural Law to a tight order of monolithic States. As Mälksoo recalls[61]:

> At the *travaux préparatoires* of 1920, the concreteness and verifiability of sources of international law as well as the principle of State sovereignty gained upper hand over the philosophical and

[59] Lauri Mälksoo. Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory. In: BESSON, Samantha and d'Aspremont, Jean (ed.). The Oxford Handbook on the Sources of International Law. Oxford University Press. 2017. p. 8.
[60] Idem. p. 11.
[61] Mälksoo presents an interesting work of historical research of the meeting records for the Advisory Committee of Jurists responsible for the drafting of this provision.

> more speculative concepts of international law and justice which had occasionally also been popular earlier in the 19th century[62].

However, the Positivist victory wasn't absolute[63]. The theory and practice of treaties, at that point, had already been influenced by a legal reasoning aimed at questioning the extent to which treaties had power, wondering if there were things that should remain outside the boundaries of what is permissible, even in a contract fully dependent on the parties will. Other interests existed, and they could be held opposite to the written Law, in a manner and effect akin to Natural Law. The so called "*jus cogens*" (obligatory law) was then positioned against the "*jus dispositivum*" (facultative law), drawing limits to the sovereignty of States.

As it is suggested by the PCIJ on the Wimbledon Case, in 1923 (emphasis added):

> The argument has also been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents; for, in this wide sense, **this grant would imply the abandonment by Germany of a personal and imprescriptible right**, **which forms an essential part of her sovereignty** and which she neither could nor intended to renounce by anticipation. This contention has not convinced the Court; **it conflicts with general considerations of the highest order**[64].

Although in that case the conflict was set between a German order for neutrality and a provision on the Treaty of Versailles regarding the right of passage – a treaty to which Germany was a party, and, thus, to which it agreed – the Court hints for an exceptional value of peace. The legal principle of *pacta sunt servanda* is important, agreements cannot be freely ignored by the parties, but some values may affect prescribed obligations in such a way that what had been agreed upon cannot be rightfully sustained. Such reasoning amounts

[62] Lauri Mälksoo. Sources of International Law in the 19th Century European Tradition: Insights From Practice and Theory. In: BESSON, Samantha and d'Aspremont, Jean (ed.). The Oxford Handbook on the Sources of International Law. Oxford University Press. 2017. p. 17.
[63] For a broader analysis of Positivism, I refer to Norberto Bobbio's scholarship in Norberto Bobbio. O Positivismo jurídico – Lições de Filosofia do Direito. Editora Ícone, 2006.
[64] Permanent Court of International Justice. S.S. "Wimbledon", 1923 PCIJ Series A, n°1. p. 25.

to a twofold attack on the argument of absolute sovereignty. A State must honor its commitments, but there also may be cases in which previous commitments are simply untenable.

Hence, significant importance lies in identifying which legal obligations may be set as facultative (open to some discretion at the time of lawmaking) and which are peremptory (posing constraints unto the States choices regarding elaboration of Law). Those two angles must be harmonized in order to enable the existence of a system that safeguards at the same time the values of consent (which protects a subject from illegitimate obligations) and justice (which protects a person from unfair obligations).

Volition – or, in this case, the capacity of the State to act according its own discretion, including the power to enter into and leave agreements – is a cornerstone of International Law, a system made by and for States. The doctrine that recognizes International Law as valid only if (and as long) there is an underlying will which sustains its obligatory nature is called Consensualism[65]. Martii Koskenniemi recalls four main objections to this idea[66]: i) to equate Law with consent would entail an unbearable situation where Law descends into full apology, akin to Richard Nixon's famous enunciation, amounting to say that "when the State does it, that means it is not illegal"[67]. The whole activity of law ascertainment is compromised, since the Law will always reflect the present understanding of States; ii) Consensualism also ditches theory and practice aiming to explain how consent is achieved and expressed, leaving unanswered the question of how a State can actually consent and what does it mean; iii) It is logically impossible to fathom a legal system entirely composed of voluntary norms simply because there must be, at some point, a peremptory norm that frames the mere act of obligation itself. That leads to an infinite regression which asks, at every level, what warrants the establishment of these obligations; iv) Several doctrines accepted by consensualists, such as the belief that unexpressed consent does not possess a binding nature, oppose the main idea defended by Consensualism, which is, at large, logically and practically unfeasible.

[65] Martii Koskenniemi. From Apology to Utopia – The structure of International Legal Argument. Cambridge University Press. 2005. p. 309.
[66] Idem, p. 309-312.
[67] Nixon famously stated in an interview conducted by David Frost on May 1977 that "Well, when the president does it, that means it is not illegal." The full transcript of the interview can be read at: https://www.theguardian.com/theguardian/2007/sep/07/greatinterviews1.

The crux of the issue resides in positioning the recognition of the binding nature of a norm somewhere between consent – which is obviously important and cannot be ignored – and other ideals, that although important, cannot be left unhinged in order to prevent a dissolution of the legal system into a naturalistic utopia. There is a tension halfway between the necessities of consent and the necessities of justice. This dissonance also unfolds in time. The stretch of time from the moment any given norm is enacted until it is applied also presents trouble for legitimacy purposes, since the content that had previously been settled must be evaluated at the time of actual practice. This saves room for the natural and expected evolution of Law, that grows in different dimensions along society. Not only will the negotiator of the terms of an agreement (that was at some point the prime interpreter of the norm) probably be different, but the recipients of the norms will certainly change, involving new priorities, needs and desires. Being able to equate the tension between the past and the future is indeed a tough endeavor.

A tentative bridge: *jus cogens*

These complications are diverse, and their roots run deep inside the basic features of what is generally understood as International Law. Koskenniemi focuses this debate on the structure of sources and underlying tension between consent and justice in the institute of *jus cogens*[68]. The Vienna Convention on the Law of Treaties states[69]:

> Article 53. TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ("JUS COGENS")
>
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation

[68] Martii Koskenniemi. From Apology to Utopia – The structure of International Legal Argument. Cambridge University Press. 2005. p. 322.
[69] A very helpful contextualization of the jus cogens institute can be found in: Marjorie M. Whiteman. Jus Cogens in International Law, With a Projected List. In: Georgia Journal of International and Comparative Law. Vol. 7. No. 2. 1977.

> is permitted and which can be modified only by a subsequent norm of general international law having the same character.

At a first glance *jus cogens* proposes a non-consensualist approach, binding States despite their intentions, turning what would ordinarily be considered a legal expression of State will into a void treaty. At a second glance, though, since the recognition and acceptance of the whole international community of States is deemed necessary, it is possible to affirm that this is in fact a consensualist institute. Apparently, the notion of *jus cogens* combines both theoretical threads into an elegant solution that can work both ways by accommodating both naturalistic values and the importance of consent. Since these underlying values must be accepted it would seem the problem is resolved.

Alas, according to Koskenniemi, this possible reconciliation amounts to no more than a mirage:

> While naturalism and positivism, justice and consent, are combined in the definition, they will break separate in any attempt to oppose the *jus cogens* on a non-consenting State. For a State may argue that a norm cannot be opposed to it because it has never recognized it as *jus cogens*. To counter this, we must prefer either the consensualist or the non-consensualist strand in jus cogens. Either the State's subjective consent is necessary or then it is not. If it is necessary, then we lose the distinctiveness of *jus cogens vis-à-vis* ordinary custom, or treaty, altogether. Moreover, we seem to collapse into what seems like full apologism. If it is not, then we must accept jus cogens either as a form of majority legislation or a natural morality. The former solution seems unacceptable because it violates sovereign equality, the latter because utopian in a system premised on the subjectivity of value. Either way, our expectations of objectivity will be failed: *jus cogens* is either based on a theory of justice or it cannot be opposed to a non-consenting State[70].

In other words, although the system envisaged on VCLT Article 53 might in theory bridge the gap between the two contradictory demands of consent and justice, it would be

[70] Martii Koskenniemi. From Apology to Utopia – The structure of International Legal Argument. Cambridge University Press. 2005. p.322.

impossible to bluntly declare a treaty as void, because the recognition of *jus cogens* ultimately rests on a consent that can be revoked or denied. This provision would be, in fact, inapplicable. It doesn't matter how many peremptory norms we recognize if none can be effectively applied.

The present research only found one instance of actual judicial application of this provision, the *Aloeboetoe v. Suriname* case at the Interamerican Court of Human Rights (ICoHR), and the details of the case explain why it even succeeded in that occasion – something that probably wouldn't happen outside a very specific scenario.

This case concerns actions which took place on December 31st, 1987, in the Brokopondo district of Suriname. A group of around 20 maroons, black descendants of fugitive slaves, were at the region on their way home, returning from Paramaribo. Armed forces apprehended them under the suspicion they would be members of the Comando de la Selva, a subversive organization, and submitted them to several acts of violence. Soldiers then allowed the maroons to leave, except for seven of them, who were taken somewhere else and assassinated.

Suriname accepted full responsibility, but on the reparations trial a very specific problem arose[71]. Some of the victims were members of the Saramaka tribe, which enjoys a degree of autonomy to apply its own customs, aside from general Surinamese law. The Interamerican Commission on Human Rights and Suriname diverged about whether damages should be paid according to regular Surinamese Law or to Saramaka customs. The source of the Saramakan independent position into Surinamese society is a treaty dated September 19, 1762, between the escaping Saramakan maroons and the Dutch colonial government[72]. The ICoHR deemed it unnecessary to evaluate if this document was a valid treaty insofar as one (arguable many more than one) of its provisions was in clear violation of a *jus cogens* norm. The disputed provision reads as follows:

5

[71] Interamerican Court of Human Rights. Aloeboetoe et al. v. Suriname. Judgement of Setember 10, 1993. p. 14

[72] The Saramakan Treaty can be read in full at http://www.creolica.net/Saramaka/saramakaPC.htm

> [The Saramakas] should return all the Blacks who have escaped or run away from the Whites since the Auka Maroons came to them with Willie.
>
> In no way shall they be permitted to keep a Black belonging to the Whites, whom they shall capture or who shall run away to them.
>
> From that moment until forever they shall never keep one.
>
> The treasurer shall pay them fifty guilders in Surinamese money – that is forty-two shilling – but if they capture them close-by, on a plantation, they shall get between ten and forty-two shilling, depending on whether they will have captured them far away or close to Paramaribo.
>
> And all the run-away Blacks they return, the Governor or the Court shall be permitted to do anything they like with them.
>
> And for that reason, even if our slaves may wish to say they ran away because their master or the Whites did them harm, the Bush Saramaka should return them when they come in their hands, because only the Governor and the Court should take care of that.
>
> They swear not a single Black has come to them since Willi came to talk about this peace.
>
> If any Black comes to them, they will never keep any of them; they will bring them to the Governor.
>
> The way the Whites propose it to them, it is alright with them; they will stick to it.

It seems almost surreal to envision such candor in the description of obligations regarding slavery, even when taking into consideration that this document is over 250 years. Behind the obvious gross violations of human rights described in the text, it is not a treaty that would survive any serious evaluation regarding its current validity. Although the Court decided to strike it down on the basis of its violations of *jus cogens*, it could certainly be set aside by several different rationales. It is open to consideration whether this Court would apply the same reasoning in a similar case which dealt with a recent treaty and two

internationally recognized legal subjects. Had this dispute arisen between sovereign countries willing to sustain the validity of such dispositive in Court, the result is left for anyone to guess.

At this point in History one could debate whether such a thing would even be possible. Would any two international actors such as States agree to a formal document and a binding obligation aimed at something so heinous and widely regarded as not only undesirable but straightforwardly wrong? Nevertheless, under the light of this case's singularity, as the exception that confirms the rule, the rationale singled out by Koskenniemi seems at the same time clear cut and useless. While promising to overcome the difficulties arisen from the tensions between justice and consent, the *jus cogens* approach, as pointed out, only led us to more doubt and another dead end. The conflict remains unresolved.

Interpretation as both application and modification of International Law

We have so far identified in the Theory of Sources doctrine two main struggles that pose challenges to the fulfillment of our proposed research, i.e. to find a reliable description of who creates the Law. First, there is the problem of the rule makers. We relied on the research of Mälksoo to illustrate how the conventional set of sources, commonly equated to Article 38 of the ICJ Statute, represents a clear political disposition of States to affirm their Sovereignty. Conversely, we have covered the fact that such affirmation fell short: States eventually had to deal with the reality that their commitments weren't absolute, and limits were necessary in order to save room for interests of higher order.

According to Ingo Venzke conflictive claims as those are unsurprising. In fact, the reality is that "the making of international law is in significant parts a result of process that cannot be convincingly captured in doctrine of sources[73]". Generally, the sources discourse freezes the content of the Law in the moment of its elaboration, settling it as a reference which any one entitled to apply the Law shall refer to. After it is brought to existence in the

[73] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 30.

legal world, the obligation is set in time and space, remaining in an established form, static, for as long as it is in effect.

Current research perspectives present a very different – and much livelier – picture[74]. Norms mean whatever they mean at the time and occasion of their application. Concepts and institutes must be evaluated not in strict reference to the past, but to the shared understanding of what their terms signify and what they entail. Neither attribute is set in stone, and both are certainly prone to evolve, just as society itself.

> In Wittgenstein's solemn observation, the best that can be done is to observe and find rules that describe the use of an expression. In attempting to find the meaning of a rule it is necessary to find the rule that explains the use of that rule. The meaning of the explanatory rule is of course subject to the same fate so that one is caught in an infinite regress. Only practice can help[75].

Upon the impossibility of the predefined norm to encompass the whole of the world, with all its possibilities, the essential content of the norm, the obligatory element that commands and conforms must be assessed at the time of interpretation. Focus then changes from the source to the moment of assessment, recognizing that every act of interpretation is an act of creation, as every act of interpretation of law is, itself, an act of creation of law[76]. Since so much responsibility is laid upon this act of language, it is necessary to delve into semantic explorations.

Venzke reminds us that although the perception of Law as participant of an evolutionary process may be a useful visualization tool, it does not depict all relevant aspects of the phenomenon. While evolution is effective at describing linguistic change through time, it fails to grasp key aspects of legal change. Talking about legal discourse, there is an unavoidable component of agency that must be taken into consideration. As Venzke puts it, "interpreters speak the language of International Law with the intention of seeking acceptance for their claims about the meaning of norms."[77]. This practice-oriented approach

[74] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 30.
[75] Ibidem.
[76] Idem. p. 31.
[77] Idem. p. 37.

allows us to evaluate three different segments of legal discourse, by analyzing the interplays between: i) actors and structures; ii) form and content of interpretation; and, finally, iii) power and authority in semantic struggles[78]. These three dimensions will now be entertained.

Actors and structure

Despite the conceptual criticism voiced above, the perception of legal norm as being subject to a process of evolution is widespread, in theory and practice. "Evolutive interpretation" has been embraced by courts such as the European Court for Human Rights (ECfHR)[79], the ICJ[80] and the WTO[81] dispute settlement body. It has become an accepted perception, that must, however, be refined. Not only does this evolution happen under a common backdrop, but the agency of the actors is of key importance, since they consciously choose to frame meanings in support of their claims. Evolution, in this case, is not a passive nature, but an active desire of the actors to direct the development of language to specific aims.

> The concept of evolution highlights environmental (structural) conditions that drive selection processes and impact particular interpretations' chances of success. Yet, with this focus it blends out any bearing of actors on those same conditions. But actors in legal interpretation engage in semantic struggle with the decided interest of finding acceptance to their claims about the meaning of legal expressions and thus seek to influence what is considered (il)legal. In law, particular consequences attach to given expressions – e.g.

[78] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 37.
[79] See Case of Bayatyan v Armenia, 27 October 2009, para 63; Case Scoppola v Italy (No 2), Grand Chamber, 17 September 2009, para 104; Emonet and others v Switzerland, 13 December 2007, paras 66 and 83, among others.
[80] See Aegean Sea Continental Shelf (Greece v Turkey), judgement of 19 December 1978, ICJ Reports 3, para 77.
[81] See Apellate Body Report, China – Publications and Audiovisual Products, WT/DS363/AB/R, 21 December 2009, para 47.

> once a person is a 'combatant' he may be detained until the end of hostilities[82].

In addition to this perspective, the legal discourse presents a deep challenge due to the fact that the product of the agents' action, the language they craft and struggle to see accepted, invariably shapes their very own world and, consequently, their actions. Therefore, it becomes impossible to separate the language from the actors (who design the norms) and from the institutions (which apply those norms). Both instances share the same world and constitute themselves reflexively. Actors shape institutions that, in turn, constrain those same (and other) actors. This is an important conclusion, since it implies that any attempt to isolate of one of those factors in the search for absolute meaning will be incomplete. We will return to unfold this point later, when we discuss the consequences of the idea that not only do the citizens give form to Law, but Law also shapes those citizens[83].

Form and content

Given the configuration of a synergy of co-constructive forces influencing the Law, we can see how the international legal discourse operates as a system that tries to assemble and stabilize interpretations spread among the community of international actors. Nevertheless, this stability – a sort of convergence of perceived meaning – is not automatic. Some norms' interpretations are relatively consensual, while others are hotly disputed. Interpretation in the former case recognizes the existence of a hegemonic discourse, while in the latter the community will struggle, providing competing claims, each looking for communal affirmation of their own rationale as definitive, peacemaker. The range of these claims may be broad, but their objective is roughly the same – to achieve the end of discursive disputes.

In fact, Martii Koskenniemi[84] famously raised the case for structural indeterminacy in International Law, explaining that the interpretive meaning of the norms will always gravitate between two poles, either inclined to prioritize references of consent (and, by doing

[82] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 40.
[83] See on page 73
[84] See Martii Koskenniemi. From Apology to Utopia – The structure of International Legal Argument. Cambridge University Press. 2005.

that, serving as an apology to the State), or references of justice (in virtue of which they would assume a position of utopianism). Those are the two main stances of International Law, always oscillating between apology and utopia, despite the apparent complexity of the arguments raised by its practitioners in everyday practice. This dynamic is a practical reproduction of the theoretical tension between consent and justice, as previously explained, and will be developed further on, when we discuss semantic disputes and power relations.

Participants of this legal community try then to put forward the most convincing arguments in order to support their claims. This interplay of arguments will develop into a struggle for the strongest interpretation, which should settle in time, finally granting stability to the system.

However, to participate in this search for the superior interpretation – the one that would constitute the referential main discourse (or narrative), some criteria must be satisfied. Not all arguments can enter the discursive arena. Venzke specifies two models of practical limitations[85]. First, the argument must be accepted as a legal claim. Rules of interpretation for legal discourse provide that several distinctive features must be satisfied for the argument to be taken seriously. The foremost is the need for the claim to be anchored in authoritative elements, so that it borrows from the prestige and salience of the precedents. This is commonplace in legal practice, maintained, as described by Venzke, by "a combination of moral choice, beliefs, ethos and habitat"[86].

Secondly, and connected to the first requirement, is the fact that interpretations must be related to past uses of the concepts. Every legal practitioner takes part in a relay run where he or she receives the baton of legal institutes and arguments from preceding practitioners, carries it forward through time, and delivers it back to the legal community, where others will take it even further. There is a critical effort involved in guaranteeing that the grip on the past is solid, and the foundation for future explorations is stable. Without association of concepts – or dissonant description of those concepts – the legal claim will not be able to enter that discourse. Legal arguments must present an opportunity for comparative evaluation of ideas by adherence or divergence. If they do not relate meaningfully, that is, if they speak about different things, there is no possibility of dialogue.

[85] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 48.
[86] Ibidem.

> When actors enter legal discourses, they enter a context that is already structured by past practices and perpetuated rules. In such concrete contexts, relevant structures may be understood as the already present distribution of a legal claim's chance to succeed in the practice of interpretation. Such structures are themselves products of action and represent an aggregate of various different factors that feed into action. They are also formed by legislation and the positive legal material. Not least, they are shaped by the shifting fortunes of general approaches to international law. Practical limits on the indeterminacy of law and on the theoretical possibility of contestability in legal interpretation point to the binding force of international law. In other words, grasping this constraint approaches the normativity of law[87].

Traditional doctrine and consolidated practice recognize the text of the norm as the starting point of the interpretation process. Interpretation, thus, would involve being able to identify what the norm, hovering between what is written and what is implied, wants to say. Adherence to the chiseled obligation would guarantee protection from unwarranted interpretations, and good interpreters would be those who respect the source. In fact, the role of interpretation would not be one of creating, but of releasing the legal force entrapped in the text[88].

That proposition, part of the classic liberal thinking of international law, leaves questions unaccounted for, like what such force is and how it can be contemplated, once again inclining the legal reasoning towards a successive and indefinite quantity of regressions in order to understand what qualifies that force – the ideal norm – and what in turn qualifies this qualification.

A competing explanation, however, might have risen from the ongoing constitutionalization of International Law. Norms such as the UN Charter might be interpreted as living and developing foundation for an international community with shared values and necessities. World War II may have been the reason for the attainment of such convergence, but many more causes have been acknowledged since. This recognition of

[87] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 49.
[88] Idem. p. 52

shared necessities and desires reinforces the need for a shared language that emphasizes the communal nature of globalized society. In this regard, a sense of community seems to have been superimposed over the traditional setting of a society of equal and sovereign member states. Benedict Kingsbury recognizes in this new and crescent dimension a sense of publicness, which means that:

> The claim of law to stand in the name of the whole society and to speak to that whole society even when any particular rule may in fact be addressed to narrower groups. I argue that this quality is increasingly part of the concept of international law, and that this quality is having a transformative effect on the sources of international law, reducing the significance of voluntarism, bilaterality and opposability, and increasing the significance of generality, solidarity and the integration of international law into a conception of world public order[89].

Although a community is a far more abstract actor than the State, it still means that there may be more participants willing to engage into the legal discourse, from viewpoints yet unrecognized as legitimate. These sources of claims may be referred as relevant reference points to legal arguments, taking part of the discursive activities already described. How exactly this exogenous agent – outside the arena currently monopolized by States – could participate is something to be discussed. Once the usual requirements of the presentation of arguments in the legal form are satisfied, a dialogue would be certainly possible, maybe informative.

After having seen the role form plays in the act of interpretation, we must assess the role of content as well. Presenting an argument in the correct manner to make it intelligible to the discursive community is a necessary precondition. But how does interpretation sort out legal obligations set by valid legal arguments?

Venzke recalls two constraints on the practice of interpretation[90]. Firstly, he reckons that words exist outside the concrete instances of communications, having a meaning that does not automatically correspond to the intent or to the expectations of the speakers. To

[89] Benedict Kingsbury. International Law as Inter-Public Law. In: NOMOS, Vol. 49. Moral Universalism and Pluralism. American Society for Political and Legal Philosophy, 2009. p. 174.
[90] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 55.

correlate a word to any specific content does not guarantee that the proposed meaning will agree with the meaning previously held by the other party of the communication process. Secondly, he affirms that only the concrete use of words can shape their meaning. These propositions may seem antipodal, but that does not need to be the case.

Imagine that I am welcoming a far-flung friend in my town today. He asks me beforehand how is the weather. My reply is clear: it has been a warm day. In fact, the hottest in weeks. My friend later arrives, only to discover that the temperature is actually low, at least for him. He lives in a distant part of the country, which is used to elevated temperatures. Although we both share the same meaning for both concepts of warmth and coldness, this does not mean language automatically carries the whole extent of meanings involved. In practice, the previous perceptions of the speakers must relate to what is mutually agreed, shaping that basic notion into the intentions of the parties of the dialogue. Meaning is, then, agreed upon.

What about legal meaning? How is normativity, the sense of obligation, formed? The answers to this question are usually of a political nature, developed by different philosophical theories. Following the liberal outset proposed by the research, the explanation must come from the individual agency. That relation can actually be easily perceived in international law, where the role of consent is clear and widely recognized. However, normativity is connected to different roots in international and domestic legal order. While internationally the subjects expressly adhere to commitments, in domestic level the adherence is presumed, as presented in contractualist theories. This doesn't happen only at the foundation of the obligation, but it is confirmed (or revised) at every application of the rule, when agents revise or shape their commitments to the limits of their other assumed obligations.

> Once an actor has consented to a rule, she has committed herself in relation to others to using certain expressions. The actual content of that commitment, the meaning of the expressions, is consequently the product of a process of "negotiation" with others[91].

Such process of negotiation is crucial, since it guarantees the maintenance of the commitment through time. This process, which is essentially communicative, must then, be

[91] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 57.

taken upon a closer inspection. Which factors are relevant for a legal interpretation held by a specific actor to be taken as the final shape of an obligation? If such a position exists for the definition of an obligation – and, thus, for the constraint of liberty – it follows that this is a position of power. The next discussion will be about how the disputes of meaning and obligations can be seen under the lenses of power and authority.

Power and authority

If we accept the restrictions of form imposed to the legal argument already described as applicable (or even necessary), it follows that legal arguments must be connected to existing concepts. Consequently, new legal arguments must be held against already existing ones, to which they must relate in some way. That gives, by itself, leverage to the idea that settles in before the next, giving a constant incentive to win the battle for discursive acceptance in order to attain preemptive shaping of meaning, leaving contestants in an uphill battle to change established legal arguments.

In this sense, Venzke sustains:

> I suggest picturing the practice of legal interpretation as semantic struggles in which actors craft legal interpretations in an attempt to implement meaning of legal expressions that are aligned with their convictions or interests. Success in interpretation translates into 'winning' a semantic struggle in a particular instance by finding acceptance for one's use of legal expressions[92].

Hence, semantics reveals itself as a political battleground, insofar as it is an arena for the advancement of single or collective interests. Politics, in this case, means more than a social technique of negotiation and advancement of power, but also the space of collective assessment of the values of the good life[93]. Such values and understandings of good, aiming to achieve preeminence, will then be brought to public discourse. Supporters may try to discursively sustain their claim, while detractors try to deny it. Ideally, this discourse will be

[92] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 58.
[93] Idem. p. 60.

held in a reasonable debate environment, with alternate claims being raised with a foothold in convincing argument and relevant evidence, improving the overall understanding with time. But political discourse occasionally falls short of that constructive format, with destructive results to democracy and public life. We will return to considerations regarding the ideal state of public discourse in due time[94]. For now, let us resume the analysis of the crucial aspect of politics permeated by semantic strategies.

Legal discourse, and legal interpretation for that matter, is inherently political. It must be noted, though, that the interpretation scheme requires a two-stage process, involving the presentation of the legal claim in a specific form. Only after such form is certified can the essence of the claim be assessed. This is to say that there are two separate evaluations of an argument being legal and being valid. While legal, in this case, responds to the adherence to certain rules of interpretation, the validity or simple acceptance may be grounded on several reasons.

> Actors might see themselves simply materially forced to accept an interpretation, they might see an interpretation neatly coinciding with their interests, or they might perceive it to be morally right legal interpretation. Frequently, actors in legal discourse seek acceptance for their interpretations by inducing a belief in the rightness of the interpretation they endorse[95].

While the logic of political dispute taking place over the domain of semantics might seem clear, if not obvious, there are complications that warrant further evaluation. We will comment upon two of them. First, it is worth to comment further on something that has already been hinted at this text, the aspirations of legal claims to achieve hegemony. This means that when legal practitioners raise legal claims, they do so with the intention that those claims be accepted as the correct interpretation, settling a dispute over the content of the Law. Thus, this is a struggle to see which claim will prevail and be adopted as a product of correct legal reasoning. As Koskenniemi puts it:

[94] See on page 83
[95] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 60.

> To think of this struggle as hegemonic is to understand that the objective of the contestants is to make their partial view of that meaning appear as the total view, their preferences seem like the universal preference[96].

The usual workings of politics might be rendered inadequate before a hegemonic discourse, if they don't completely implode. The distinction of politics as a technique and as a normative debate over the good fails to be possible, since the good is evident and beyond debate, leaving no job for politics as investigation of values. Since the values are already set, what is left for us is to amass and maintain power, applying such chosen/elected values. The role of politics would then be limited to affirming the rightness of an interpretation.

This raises complications that are not, at this point, the main concern of this research. For instance: one could argue that from the moment values such as human rights and environmental protection become the hegemon, they assume a consolidated meaning that is automatically deemed as correct. Such instinctive correctness might, in practice, be used as an instrument of power to advance other interests under the guise of good will. But one could also argue that the establishment of these values as cornerstone of international legal order should not prevent the continuous debate over the extent of their meaning, never achieving a final concept, remaining open to debate. The problem is not those (or any) specific values, but the nature of the discourse itself.

The second point worth noticing is that the presence of a hegemonic discourse provides us with two paths of adherence to an interpretation. One of them was just mentioned: power that affirms correctness without engaging in the regular semantic struggle. The other would be acceptance for the right reasons, i.e. the situation in which an actor would still stand by that interpretation even without the hegemonic status. Such discursive salience might be fortuitous, but it is unnecessary for the maintenance of that position. Here the issue is that it is hard to tell the difference between these situations, to separate genuine agreement from mere adoption of the current hegemony.

> Discussing the hegemonic structuring of belief and social interaction has pointed out how power relations might constitute – or at least influence – understandings of what is right. Such an approach has

[96] Martii Koskenniemi. International law and hegemony: a reconfiguration. In: Cambridge Review of International Affairs. Vol. 17. Issue 2. 2004. p. 199.

> significant purchase and goes a long way. But its rejection of something like genuine agreement ultimately seems to rest on a metaphysical claim about the non-existence of universal morality. Such claim would be as difficult as its inverse, declaring existence of universal morality. The present theoretical perspective on the practice of interpretation is agnostic on this regard[97].

Since the meaning (and practice) of politics is different in the two mentioned cases, we might benefit from using another concept, more adequate to single out the actual acceptance of an argument from a hegemonic convergence. This is a clear research choice motivated by the fact that stopping the evaluation at the level of discerning whether a situation represents plain adherence or not, without investigating the reasons behind that, would provide us no contribution on why such judgements are made, and how to improve international legal claims in order to attain real and far-reaching acceptance. Hence, we must try to delve further and specify that there are cases in which the actors not only accept the arguments, but they do it for examined reasons.

International legal discourse operates in that area of semantic struggle, whereas meaning is proposed by the particular actors searching for acceptance. Differently from the domestic perspective, this direct acceptance is essential to the development of the norm, attributing a strong role to persuasion.

> Unlike exercising power at the point of a gun, legal interpretation seeks to induce acceptance by the way of argument or persuasion. The practice of interpretation develops the law and thus shapes the capacities of actors to determine their own circumstances and fate. It is powerful. But an actor's capacity to influence processes of communicative lawmaking hinges on their authority[98].

It is important to stress that authority, in this sense, stands for the capacity to influence an outcome. Such influence will certainly not be limited to the strength of the argument, but will also include those who propose it and those who support it, among other

[97] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 62.
[98] Idem p. 63.

elements. Legal commitments are a result of semantic negotiations in a process where some actors possess the capacity to further their claims in discursive arenas. These actors possess what is called semantic authority[99].

One of the effects of such semantic authority is the ability to create points of legal discourse that, as previously discussed, will be taken into consideration in order to present new legal arguments in future. In this sense, semantic authorities shape not only the world itself but also the context in which debates regarding the relevant issues will be held. Actors at International Organizations, for instance, will debate on the relevance of previous authoritative interpretations of the norm, and try to shape them as understandings that further their claims. The same thing takes place at international courts, where the parties will raise connections to the relevant precedents in order to affirm their case, and, by doing that, they will be shaping the context of future cases yet to be formulated as well.

Authority hinges on the acceptance that it is not a constituent element of power. This acceptance entails credibility and carries a social aspect of legitimacy. The social group understands that the authority has the correct interpretation of what must be done. Children usually abide by the authority of their families, until they grow beyond such level of justification and begin to engage in the authoritative processes of the society itself. Experience is essential to this recognition, as the provider of incorrect interpretations is less likely to be taken as authoritative, and those sources who offer accurate evaluations are more likely to be kept as a constant reference.

A position of authority is important throughout all legal discourse, but acquires singular value in International Law. The constant dispute to determine the meaning of provisions among actors, without a central authority to enunciate the final content of the Law, situates the field in an everlasting domain for semantic struggle, causing concepts and institutes to evolve across time.

> When meaning is less of a fixed attribute of words and more a product of the practice of interpretation, legal normativity becomes part of the practice. Understanding interpretative practice as the expression of power alone would run into the difficulty of being

[99] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 63.

> unable to account for why actors should follow rules thus generated. Normativity comes into the world by virtue of our attitudes. Authority takes those attitudes on board[100].

Therefore, different actors possess distinct levels of authority. Venzke suggests a list of relevant actors to be considered in addition to States, the major source of normativity in International Law[101]. These other figures contribute to the international legal discourse by virtue of interpretation of law, helping to shape its meaning, with variable degrees of success.

The first category recognized by Venzke is that of the private norm entrepreneurs[102]. These are actors that influence international legal discourse outside the State or international institutions. One example are the legal researchers. Legal scholars evaluate not only the text of norms but also the legal grounds taken to judgement, assessing the soundness of decisions and the longevity of the precedents. They train new practitioners, teaching them the form and content of legal arguments, and propose theories that will in time be used for interpretation of Law. It must be said that the authority of the individual researchers is low. They gain relevance when acting in collectives, such as the International Law Comission (ILC), Institut de Droit International and International Law Association (ILA). These organizations create networks of researchers and provide references for common debate. Furthermore, they may propose legal changes that are more easily accepted than the contributions of individuals, since they represent a collective enterprise, with greater semantic authority.

Still in the first category we may find Non-Governmental Organizations (NGO), private institutions aimed at furthering their interests internationally, mostly by pursuing public interests[103]. NGOs effectively act in two directions, since they also foster accessibility to international fora. While directing efforts to the public, these organizations help galvanize support for causes, and they have been instrumental in the development of international law

[100] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 64.
[101] There is a vast literature concerning the issue of fragmentation on International Law, a topic which is not included on the scope of this research. Nevertheless, I recommend the following articles, for its interesting take on the subject: Alberto do Amaral Júnior. O "Diálogo" das Fontes: Fragmentação e Coerência no Direito Internacional Contemporâneo. In: III Anuário Brasileiro de Direito Internacional. Vol. 2. 2008; and Camilla Capucio. A Fragmentação do Direito Internacional: entre o discurso e a realidade do sistema jurídico internacional. Revista da Faculdade de Direito da Universidade de São Paulo. Vol. 111. 2016.
[102] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 65.
[103] Idem. p. 66.

in areas such human rights and environment protection. They contribute by raising awareness to issues as well, bringing them to public debate. Another important aspect is their capacity of fundraising, which is sometimes crucial to promote this visibility. Furthermore, they also direct their efforts at international institutions, by trying to advance their interests in both the processes of norm drafting and interpretation. In the former, NGOs may contribute, *inter alia*, by providing auxiliary research or organizing preparatory debates. In the latter, they may present *amicus curiae* briefs to sustain legal claims at courts.

Finally, it is worth mentioning that the question of what the role is for individuals, not only as citizen of a country, but also as participants of the Global Bukowina – to cite Eugen Ëhrlich and Gunther Teubner[104] – is open to rethinking on the wake of recent technological advances. While it is hard to conceive that a single citizen might, on their own, by virtue of their own discretion, have enough authority to shape international legal discourse, it could be argued that the contemporary configuration of a society permeated by digital social networks opens space for ideas to become viral and attract both salience and authority, symbolizing convergence and commanding respect.

Moving down the list of actors with international semantic authority, we may find the "disaggregated state", instances of public State authority that despite taking part in the domestic discourse, do not have international legal standing. While outside the scope of the formal representation of the State, they still interact with international legal discourse. Their activity is complementary, and is not intended at substituting the regular dealings of the State.

> The fact that other domestic actors line up to challenge the lead role of official governmental representatives does not cast into doubt that the latter retain a strong role to play in international legal discourse. They interpret and argue with international law in litigation, in policy statements, in media comments, and in many other fora[105].

All government branches may have international impact. The Executive Branch could act internationally mainly in two ways. The first would be the spillover effect of domestic decisions. Such actions are a regular part of the Executive responsibility, but they

[104] See Gunther Teubner. Global Bukowina: Legal Pluralism in the World-Society. In: TEUBNER, Gunther (org.). Global Law Without a State. Dartsmouth, 1996.
[105] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 68.

may adversely affect international interests. The other effect would be the dealings of subnational entities that use international relations to foster their domestic interests, especially via international funding or technical cooperation and exchange of good practices. Legislative bodies could also take a strong role in developing international legal discourse, especially by expressing public opinion and authoritatively voicing concern.

However, the more significant of those disaggregated state actors, speaking of international legal discourse, are the domestic courts. Albeit of uneven participation among countries, several courts engage in international judicial cooperation and in the effort to interpret and further the meaning of international norms. It is worth mentioning that courts do not necessarily reflect the understanding of the Head of State or whoever defines foreign policy. Policies plagued by domestic incoherence may hinder the semantic authority of legal arguments abroad.

> The autonomy of domestic courts, their transnational relations, and a shared legal ethos all suggest looking at domestic courts as independent actors in international legal discourse rather than keeping them locked away in the black box of the unitary state[106].

Finally, the last category of actors with semantic authority encompasses those connected to bureaucratic institutions: international servants and judicial bodies. Along with the crescent importance of international organizations comes the debate on how far they influence legal discourse. While initially seen as neutral actors, IOs have been considered legal subjects of their own right, with interests that do not necessarily equal the sum of the interests of their constituents. In order to perform the duties prescribed by their constitutive mandate, many times these organizations follow strategies that differ from those States.

International Organizations such as WTO or UN have long wrestled with the extent of the scope mandated by their charter. As with any legal norm, their content is not evident, being subject to semantic struggles, especially derived from the fact that many times the procedures necessary to fulfill one mandate are not palpable beforehand. It takes experience with the real world, its complications and opportunities to better grasp the great challenges faced by these organizations. Peacekeeping operations, for instance, are a practical development of the security responsibilities of the United Nations that grew in importance

[106] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 69.

in such a way that they are currently one of the most recognizable instruments of the UN. Yet, peacekeeping finds no direct legal ground on UN Charter – although its impact is so distinctive that it is commonly referred as amounting to Chapter 4.5 of the Charter. Contributions made to the advancement of legal interpretations that stem from bureaucratic work at these institutions is immense, albeit not always recognized by legal theory. While they deeply influence the legal discourse, the lack of legal standing makes these actors invisible to those oriented by the usual theory of sources.

Finally, the most relevant institutions, regarding semantic authority, are international courts. While addressing the way Law should be applied in specific, concrete cases, they have not only helped to tackle uncertainty and gaps in norms, but also contributed to the creation of international law, expanding it by means of interpretation.

At this point it might be important to emphasize how peculiar the position of the international judge is. Under the guise of Consensualism, as explained above, the only possible judge is the drafter of the norm, who can correctly identify the full extent of the entailed obligations in any given text. Anything other than that formal process of norm-drafting is beyond the given consent, and, therefore, unwarranted. Such understanding must be put aside. While tailoring the legal argument in accordance with, but not limited to, the text of norms, judges perform an admirable role spearheading the development of International Law.

> International judicial institutions shift meanings and can establish their own interpretations as new reference points for legal discourse. The working of precedents is key in their contribution to the making of international law. In many fields, participants in legal discourse can simply not avoid relating their argument to earlier judicial decisions. They are expected to do so. This constellation makes semantic struggles in the context of judicial proceedings one of the main sites where interpretation makes international law[107].

[107] Ingo Venzke. How Interpretation Makes International Law: On Semantic Change and Normative Twists. Oxford University Press, 2012. p. 71. A deeper analysis of courts' legitimacy is present in: Armin von Bogdandy and Ingo Venzke. In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification. In: The European Journal of International Law. Vol. 23. No. 1. 2012. This research was further developed in the book by the same authors: Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press. 2014.

Conclusion

We have by now, tried to picture International Law as being created in a two-tiered process. Firstly, the more classic proposition championed by the traditional theory of sources, and secondly, a more novel approach that perceives in the act of interpretation the *locus* of the creation of law – at least the Law that is applied, which is seen as the relevant Law to practice. This vision puts foremost importance on the related actors, which sometimes play a very strong role in defining what the Law means, probably as important as the conventional drafters following the guidelines of classical theory of sources[108]. A variety of stakeholders, scattered through countries and speaking different languages, contribute to put forward compelling arguments on how the international legal system should be constituted. Given the fact that these actors lack the Authority of States, we are led to disregard their contribution as ineffective, or unable to influence Law.

Armin von Bogdandy, Matthias Goldmann and Ingo Venzke co-authored an article focusing on the contemporary crises of Authority and efficacy, proposing the study of what they define as International Public Authority:

> In a nutshell, the exercise of international public authority is the adoption of an act that affects the freedom of others in pursuance of a common interest. This understanding helps single out activities that require grounds of legitimacy that go beyond the consent of member states to the institution's foundational act. Singling out those activities is a precondition for increasing their legitimacy. It also opens avenues for more effective regulation.[109]

In the next chapter we will deepen that analysis, bringing into discussion the scholarship of Global Administrative Law that seeks to shed light on other avenues of international cooperation with legal consequences.

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[108] See Jean d'Aspremont. The Politics of Deformalization in International Law. In: Goettingen Journal of International Law. Vol. 3. No. 2. 2011.

[109] Armin von Bogdandy, Matthias Goldmann and Ingo Venzke. From Public International to International Public Law: Translating World Public Opinion into International Public Authority. In: The European Journal of International Law. Vol. 28. No. 1. 2017. p. 117.

3. EXPLORATIONS ON THE GLOBAL ADMINISTRATION

Introduction

One of the many scholarly answers to the new challenges of International Law was drafted by a group of scientists from the Research Project on Global Administrative Law, based on the NYU School of Law Institute for International Law and Justice in conjunction with the Center on Environmental and Land Use Law[110]. This enterprise arose from the perception that worldwide interactions have risen in such volume and diversity that they eventually gave room to many new spaces of regulatory action, and, especially, regulatory influence. In 2005 professors Benedict Kingsbury, Nico Krisch and Richard B. Stewart co-authored a seminal article on the matter, entitled "The Emergence of Global Administrative Law", inviting Academia to a closer inspection of this object of concern.

> Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence in such fields as security, the conditions on development and financial assistance to developing countries, environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movements of populations, including refugees. Increasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures[111].

These systems have been established by treaties or even by private regimes, amassing great importance and leading to substantial impact on other actors, public or private. Such organs provide a relevant work for the international system, helping to bring to life the bureaucratic aspects of a progressively close-interwoven global arena. But the way they

[110] Working papers, a bibliography, and project documents appear on the project website at http://www.iilj.org/global_adlaw. This website also includes links to project partners, and to other research projects around the world in related areas.

[111] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 16

function is sometimes too obscure, lacking accountability and/or transparency. In order to examine this more closely, the aforementioned project set out to study this phenomenon. It began by outlining what exactly its object of study would be:

> These developments lead us to define global administrative law as comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance[112].

Such broad description is certainly daunting, because it could be interpreted to encompass, at first glance, anything barely international. That's not the case here, and further delineation is required. The main purpose of Global Administrative Law (GAL) is to identify all incidents in international arena in which the activities performed would be considered, under Domestic jurisdiction, of administrative nature, and therefore subject to a certain degree of oversight and public control. These are not the main actions or functions performed worldwide by international organizations and other bureaucratic actors, but the inner workings (and duties) that sometimes get ignored by scholarship, let alone public scrutiny. Far from the constitutive clauses of treaties, there is a plethora of legal and political action developed in the fine print.

> Conceptually, we believe, administrative action can be distinguished from legislation in the form of treaties, and from adjudication in the form of episodic dispute settlement between states or other disputing

[112] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 17

> parties. As in the domestic setting, administrative action at the global level has both legislative and adjudicatory elements. It includes rulemaking, not in the form of treaties negotiated by states, but of standards and rules of general applicability adopted by subsidiary bodies. It also includes informal decisions taken in overseeing and implementing international regulatory regimes. As a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties[113].

In this Chapter we'll summarize some of the main features of the GAL project, starting by describing what a Global Administrative Space would be. We'll proceed to delineate this emerging GAL, with its sources and doctrinal features, opposing it to the more traditional descriptions of International Law. In the following section we'll begin a discussion on the normative bases of GAL, while raising some concerns about its limitations. Finally, we'll evaluate GAL's capacity to be used as a tool for Democracy.

The realms of the international administrative space

One of the bases for the assessment not only of the theoretical importance of a certain phenomenon, but also of its consolidation as a study topic, is that it produces effect either on volume of occurrence or vastness of impact, ideally on both. Therefore, the reality of the exercise of administrative functions in the international arena precedes the constitution of the field and must be correctly identified. The concept of GAL presumes the existence of several regulatory administrative institutions, and several subjects of those institutions. Administrative action is now a mainstay of International Economic Law (e.g. OECD committees, WTO committees, antitrust cooperation schemes, financial regulation by IMF, Basle Committee), Environmental Law (e.g. World Bank, OECD and WTO, Kyoto Protocol's Clean Development Mechanism), International Security (e.g. UNSC committees, IAEA, Chemical Weapons supervising mechanisms), among several

[113] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 17

legal regimes in which administrative bodies have created normative content on a frequent basis, amounting to a viable bureaucratic structure.

> It starts from the observation that much of global govern can be understood as regulation and administration, and that we are witnessing the emergence of a 'global administrative space': a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms[114].

In order to provide us with a better grasp of what those interplays would be, Kingsbury, Krisch and Stewart identify five forms of Global Administration. These are ideal types designed to single out specific actions that possess some administrative nature and are notwithstanding situated in an international arena. They are: (a) administration by formal international organizations; (b) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (c) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (d) administration by hybrid intergovernmental–private arrangements; and (e) administration by private institutions with regulatory functions[115].

The closest to traditional International Law is the first category, of formal international organizations (a), that perform administrative actions whilst on the pursue of their mandates, by setting sanctions (UNSC), drafting reports (UNSG, UNHCR, WHO), issuing warnings (WHO), setting standards (WB, WHO), among others. Transnational networks and coordination agreements (b), on the other hand, are arrangements that lack a binding decision-making structure, and are mostly effective by bringing State officials together in a horizontal effort for policy coordination. The Basel Committee provides an opportunity for the convergence of central banks, while WTO law is widely known for its gravitational pull on standard-setting. Concerning distributed administration conducted by national regulators

[114] Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo. Global Administrative Law and Deliberative Democracy. In: A. Orford & F. Hoffmann (org.) Oxford Handbook of International Legal Theory. Oxford University Press, 2016. p. 1

[115] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 20.

(c), domestic actors have considerable impact overseas while acting domestically, in concert with other national counterparts. The prime example of this administrative action is the environmental regime, where the sovereignties involved implement international environmental law with global consequences, in line with present challenges. Hybrid intergovernmental–private arrangements (d), in turn, are bodies that combine both public and private actors, with shared responsibilities but different capabilities, divided unevenly between those who are subject to public international law (public representatives) and those who are not (private actors). Work done by the Codex Alimentarius Commission, essential to the WTO SPS Agreement, and by the Internet Corporation for Assigned Names and Numbers (ICANN), are both exemplary of the complexity of coupling private and public actors. Finally, private institutions (e) have historically performed several regulatory functions. They have set international standards (ISO), and also devised a qualification of premium sustainable products (several NGOs and some companies).

> Despite these widely varying forms and institutions, we can observe in all these examples the exercise of recognizably administrative and regulatory functions: the setting and application of rules by bodies that are not legislative or primarily adjudicative in character. If similar actions were performed by a state agency, there would be little doubt as to their administrative character (except, perhaps, for the examples of private regulation). Classically, however, regarding them as administrative would have been difficult because of their international nature; the term 'administration' was closely tied to the state framework and could, at most, point to the domestic implementation of international norms[116]

Albeit not as far-reached, the subjects of GAL are also diverse: (a) States; (b) individuals; (c) corporations; (d) NGOs; and (e) Other Collectivities. According to traditional International Law theory, the subjects of (International) Law are States, from which all others are conformed to IL at the domestic level. That characterization fails to recognize other regulatory influences – such as those described above. For instance, when UNHCR recognizes a refugee status it produces direct effect to an individual out of the traditional IL

[116] Benedict Kingsbury and Nico Krisch. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law (EJIL). Vol. 17. No. 1. 2006. p. 3.

legal equation. Networks of financial State officials set standards for banking practices that are, in sequence, taken to domestic level for implementation and enforcement. In some instances, the State is the one regulated, such as the case of the International Labour Organization (ILO), whose Conventions are then enforced domestically by Member Countries, under ILO's supervision. The case presented by ILO is even more complex, since its representation has a tripartite nature, encompassing not only the State, but workers' and employers' representatives as well.

The aforementioned descriptions of different actors and relationships all cast a shadow over the applicability of a traditional interpretation of International Law. A convoluted description of legal relationships isn't enough to merit, by itself, the project of GAL, or to justify the explanation of the existence of a global administrative space. What gives that claim purchase is not the denial of the international and domestic spheres, or even the recognition of the (still) important role played by the states, but the recognition that lines between those arenas and actors are blurred, and that present norms are unsuitable to accompany these regulatory activities in an oversight effort. As Kingsbury, Krisch and Stewart advise:

> In our view, international lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts. National administrative lawyers can no longer insist that adequate accountability for global regulatory governance can always be achieved through the application of domestic administrative law requirements to domestic regulatory decisions. We argue that current circumstances call for recognition of a global administrative space, distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each[117].

[117] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 26.

It is paramount to face the challenge posed to traditional International Law by those five types of regulative bodies described above, and fashion legal solutions that, whilst steaming from the widely accepted theory of IL, manage to find new avenues to work solutions for those challenges.

> In practice, the increasing exercise of public power in these structures has given rise to serious concerns about legitimacy and accountability, prompting patterns of responses to those concerns in many areas of global governance. Accountability problems are addressed through greater transparency, through notice-and-comment procedures in rule-making, and through new avenues of judicial and administrative review, in a vast array of disparate areas (…)[118].

Let us proceed with a closer examination of how exactly GAL works, allowing us to see a broader picture and imagine which contributions the present research can provide.

This emergent Global Administrative Law

Given the international complexity presented by interactions at this global administrative space, a simple question is what GAL would have to offer in riposte. Amidst this confluence of actors and regulatory bodies entwined in domestic and international relations, a clear goal would be an increased focus on accountability and transparency, which are, according to conventional theory, subject to domestic instruments of all participant States. Fast-paced development of international affairs, however, with ever-growing complexities, requires better mechanisms and strategies.

> Under the classical distinction between the domestic and the international realms, international norms were agreed upon on the international level, but the state remained free to adopt them or not, as their obligatory character and effect depended on domestic ratification and implementation. Because of this freedom, domestic

[118] Benedict Kingsbury and Nico Krisch. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law (EJIL). Vol. 17. No. 1. 2006. p. 1

> accountability mechanisms were thought to be (reasonably) effective: parliamentary process and administrative procedures could have a meaningful impact. The more the domestic and international processes are interwoven, however, the more this freedom breaks down, and with it the effectiveness of classical accountability mechanisms[119].

These mechanisms of administrative action should function under requirements of domestic administrative law with similar provisions, geared to a more democratic maintenance of those legal regimes. But what constitutes this Administrative Law, even on the domestic level? According to Dyzenhaus, there are three segments that compound the definition of Administrative Law[120]. There is the "law that constitutes the authority of administrative bodies" and defines their functions and scope. This would be the "constitutive administrative law". There is also the law that is a product of regular action of these constituted bodies, under the guise of their accredited authority - they may have a quasi-legislative nature, establishing parameters and developing policies. That would be the "substantive administrative law". Finally, there is the law that defines processes through which the administrative bodies behave, and that would be the "procedural administrative law". As Dyzenhaus proposes:

> In the late twentieth century, scholars of administrative law confronted again a perennial problem of administrative law that arises because of the unavoidable fact that much of the substantive law made by administrative agencies is made on the basis of constitutive statutes which more or less hand the task to the agencies of developing their own legal regimes, and which moreover do so in ways that seem not obviously amenable to judicial review.[121].

These three dimensions have room in GAL. In the same way as the State is observed and scrutinized in all domestic actions, all other public-affecting activities – even those performed abroad and under the guise of international relations – should be similarly held

[119] Benedict Kingsbury and Nico Krisch. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law (EJIL). Vol. 17. No. 1. 2006. p. 3-4.
[120] David Dyzenhaus. Accountability and the Concept of (Global) Administrative Law. IILJ Working Paper 2008/7 (Global Administrative Law Series). 2008. pp. 4-5.
[121] Idem. p. 5.

under supervision, at the broadest sense. We once again return to Kingsbury, Krisch and Stewart, and their proposal:

> In our approach, global administrative law effectively covers all the rules and procedures that help ensure the accountability of global administration, and it focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decision making, and on mechanisms of review[122].

The idea is to set aside the substantive roles performed by those five types of bodies presented, focusing on their procedures and administrative content and identifying existing principles, mechanisms of review, transparency, participation, reasoned decision making and assurance of legality – all values protected by administrative law[123].

One fundamental question is that of sources – what would the sources for GAL be? Kingsbury, Krisch and Stewart posit the emerging field as situated somewhere between the classical sources of IL – treaties, customs, general principles – and a revived version of jus gentium, widening the scope of international subjects to encompass those described above. At the same time, pressures to accommodate domestic law (especially constitutional constraints) should be taken into consideration[124].

Where should these mechanisms envisaged by GAL be developed? The first candidate would be domestic institutions as checks on Global Administration. This is the case of domestic judicial review of International Organizations. Courts have usually been called to jurisdiction on alleged violations of individual rights by these international organizations, markedly on private issues. Further domestic bodies could play other roles of providing more accountability to international activities as well, especially by allowing a greater degree of

[122] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 28.
[123] Idem. p. 29. Dyzenhaus presents a different opinion on this, underscoring the necessity of tackling this issue taking in accordance not only the procedural dimension of administrative action. It is impossible, states Dyzenhaus, "to have rule by law without the rule of law". See David Dyzenhaus. Accountability and the Concept of (Global) Administrative Law. IILJ Working Paper 2008/7 (Global Administrative Law Series). 2008. p. 7.
[124] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 29-31.

participation. Another avenue could be making institutional adjustments to international organizations in lieu of improving participation and accountability.

One example of such a mechanism was the establishment of a procedure for listing and de-listing of individuals targeted by UN sanctions.

> (I)ndividuals in Europe have brought actions in domestic courts challenging E.U. regulations implementing U.N. Security Council sanctions. In one of these cases, three Swedish citizens of Somali descent argued to the European Court of First Instance (CFI) that they had been targeted by the Council mistakenly and without due process, and that the implementing E.U. regulations were accordingly unlawful. The CFI rejected their application for provisional relief on narrow grounds, but reserved judgment on the merits. Soon thereafter, the Security Council's sanctions committee decided to strike two of the claimants from the list and to establish a general procedure, in which individuals can, through a national government, present a demand to be delisted and their reasons for it.[125]

It is a clear-cut administrative procedure, albeit limited, in an international forum that still uses provisional rules of procedure. And it stems from domestic court reviews of the implementation of listing decisions, given the challenge over procedural rights by targeted individuals[126]. Another possibility could be the development of mechanisms in distributed administration bodies aimed at protecting the interests of stakeholders outside the national competence of domestic regulators, keeping those concerns in line with broader economic interests[127]. Kingsbury, Krisch and Stewart bring to memory an example from WTO Law:

> The WTO Appellate Body's first ruling in the Shrimp/Turtle case was a striking effort to promote forum state protection of the interests of affected foreign states. The Appellate Body ruled that in order for process-based import restrictions to be sustainable under the GATT Article XX exceptions, a state must show that the

[125] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 32.
[126] Idem. p. 34.
[127] Idem. p. 36.

> countries and foreign producers affected were provided with some form of due process. Thus, international norms required domestic administrative procedure to refocus its pursuit of accountability in order to help ensure that domestic regulators take into account the relevant external constituencies[128].

Another remarkable example of this kind of action are the Bretton Woods institutions – policies in organizations such as the World Bank mutate from examples and recommendations of good practices to basic standards, conditioning policies of domestic administration[129].

Finally, beyond those institutional mechanisms already mentioned, GAL possesses some basic legal tenets, constraints of procedural and substantive nature, that guide this administrative action. While recognizing that those principles are still emerging from practice and theory, Kingsbury, Krisch and Stewart advance some proposed core values for GAL: a) procedural participation and transparency; b) reasoned decisions; c) review; d) substantive standards; e) exceptions: immunities; and f) exceptions: special regimes. All those principles are traditional elements from administrative law that could somehow be seized for international use.

The practice of fostering procedural participation and transparency (a) has been a growing tendency in International Law. It stems from the demand of the affected voices to be heard before an action is taken and is in accordance with domestic administrative practice. This has led to opportunities of participation in proceedings not only for those directly involved, but also for representatives of other economic and social interests that might find themselves affected. Furthermore, organizations have been developing transparency practices, such as the right of access to information and the guarantee of decisional transparency, paramount to any kind of right of review[130].

The presentation of grounds for decisions (b) is also an important feature in GAL, at the same time as it is instrumental for review (c). The exposition of reasonings for administrative actions is essential to guarantee predictability and grant stability to the institutions. The right

[128] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 36.
[129] Idem. p. 37.
[130] Idem. p. 38.

to have a case reviewed, which is also present in International Law, is of likewise importance, albeit in a more restricted scope than the whole domestic sphere – usually constrained to staff employment issues[131].

> How far a right of review is accepted in different governance areas and with what limitations, and what institutional mechanisms it encompasses in such areas, are all unresolved questions. Despite strong calls for effective review mechanisms in several important areas, these have not been instituted. For example, the Security Council has failed to establish an independent body to scrutinize its sanctions decisions. Similarly, the UNHCR has so far accepted only internal mechanisms of supervision. Even in the transitional administration of territories such as Bosnia, Kosovo, or East Timor, international organizations have not been willing to accept a right of individuals to obtain review of intergovernmental agency actions before courts or by other independent bodies with greater powers than ombudspersons[132].

Several substantive standards (d) have also been observed in international administrative practices. Criteria such as Proportionality, Means-End Rationality, Avoidance of Unnecessary Restrictive Means, and Legitimate Expectations are all commonplace in domestic administrative law and have grown in importance globally, although still far from being a mainstay. An exception is represented by the Proportionality principle, a major factor for ECHR jurisprudence, given WTO's perennial demand for least-restrictive trade measures[133].

Present practice also provides examples of exceptions from domestic rules, for the sake of immunity (e) and application of special regimes (f). In both cases, interests elsewhere are taken into consideration allowing the enforcement of contracts and the application of special administrative oversight regimes. Regarding immunity, ECHR has signaled that the exercise of international immunity may be examined under Proportionality lenses, dispelling the

[131] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 40.
[132] Ibidem.
[133] Ibidem.

notion of immunity as an absolute right and putting it instead in perspective with human rights requirements[134]. On the other hand, just as at the domestic level, some institutions – for security or other higher national interest reasons – are subject to a different regime of administrative oversight, but subject to one nonetheless. International bodies such as the Security Council have been developing mechanisms to cope with public demands for more accountability, although in a more permissive and opaque way[135].

Challenges to traditional International Law

The practices identified by GAL show an interesting divergence from traditional International Law, mainly because they showcase several interactions established and guided by sources other than Law which are carried out by several actors other than the State – that would usually be seen as the administrative figure *par excellence*. Scholarship has been developed in the past two decades to explore some of its consequences. Kingsbury and Krisch single out some of the main areas where GAL indicates new developments for International Law theory: (a) the distinction between domestic and international law, (b) the legitimacy basis of international law, (c) the sovereign equality of states, and (d) the doctrine of sources[136].

Firstly, the domestic/international dichotomy may have been blurred (a), as regulators seek international fora to globally converge on domestic policies that will set standards with profound impact on individuals and private entities, without any kind of legislative action. This sort of dynamic interferes with the traditional interpretation that used to see every State as a legal universe closed unto itself, that would be represented internationally to other States, which would in turn also constitute legal universes closed in their own right and according to their own institutional blueprint. At this point, consent to these globally agreed regulations is left completely out of the equation. This presents a challenge to the legitimacy of International Law (b). Moreover, development of the normative power of these informal

[134] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. 41.
[135] Idem. p. 42.
[136] Benedict Kingsbury and Nico Krisch. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law (EJIL). Vol. 17. No. 1. 2006. p. 10-12.

structures also has the power to erode the sovereign equality of States (c) by reducing safeguards of representation that those countries enjoy in more conventional settings.

> In traditional international law-making through treaties and custom, sovereign equality reconciles a formal equality of status with the ubiquity of power disparities. When global institutions exercise far-reaching regulatory functions, however, this reconciliation becomes precarious; the more powerful actors are reflected in formal as well as informal institutional rules[137].

Furthermore, the activities identified under the GAL umbrella may represent a new influx of diverse kinds of normative content that invite a debate regarding the present applicability of the doctrine of Sources (d). As previously described, several of these activities emanate from public-private or totally private settings, with standards or principles being enunciated by national administrations, private enterprises or judicial bodies, avoiding legislative processes altogether in the shaping of the Law. When contrasted to this phenomenon, Article 38 of the ICJ Statute seem inadequate. Where would these instances all fit under the traditional scheme? Does depriving them of obligations of a legal quality reduce their cogency? These are questions open for further exploration. There is still, however, an element of GAL to be further analyzed in the scope of this research: could this administrative field be repurposed for the sake of promoting Democracy?

Democracy as an administrative goal

The simple contemplation of normative power in the back channels recognized by GAL studies has invited, since the beginning of the enterprise, questions regarding to how that normative power would relate to values such as Democracy. Kingsbury, Krisch and Stewart, on the inaugural article of the field, comment that one of the main challenges of this function would be the lack of accepted standards of democracy to use as a foundation for a global administration, which would then bear a very complicated responsibility:

[137] Benedict Kingsbury and Nico Krisch. Introduction: Global Governance and Global Administrative Law in the International Legal Order. European Journal of International Law (EJIL). Vol. 17. No. 1. 2006. p. 11.

> Thus, a global administrative law would have to be built on very different grounds: it would either have to democratize international law-making so that ensuring the legality of administrative action would promote democratic accountability; or it would have to construct administrative procedures that can shoulder the democratic burden alone[138].

At that point (2005) the authors suggested a more cautious approach, to "bracket questions of democracy (while nurturing democratic attributes and tendencies where viable), and to focus on attaining more limited but nonetheless important objectives.[139]", leaving it to further development, after some development on the field. More recently (2015), Kingsbury returned to the subject, this time working in tandem with Donaldson and Vallejo, in a study where they reaffirmed the importance of GAL project in its dualistic nature of both a descriptive dimension of the real-world phenomenon and an intellectual framing, in a normative mission to theorize better institutions.

> The increasing demands for transparency, participation of affected groups, reason-giving, and rights of recourse or review, all have direct bearing on the inputs to and the processes of power. In that respect such demands may be protective of rights, whether of states, individuals or collective entities. They may also help produce better outputs, by correcting errors and increasing fidelity to the intended purposes for which norm-setting or decision-making power was allocated[140].

Such demand did not dismiss the criticism to the dangers of the pursuit of a pure proceduralism, analyzing only the bureaucratic aspects of those institutions without orientation towards values of justice and democracy. That failure to provide axiological safeguards constitutes, in fact, a *carte blanche* for those with power to act freely. Some higher end must, then, be kept in sight.

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[138] Benedict Kingsbury, Nico Krisch and Richard B. Stewart. The Emergence of Global Administrative Law. IILJ Working Paper 2004/1 (Global Administrative Law Series). 2005. p. 49.
[139] Idem. p. 50-51
[140] Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo. Global Administrative Law and Deliberative Democracy. In: A. Orford & F. Hoffmann (org.) Oxford Handbook of International Legal Theory. Oxford University Press, 2016. p. 5.

> The identification of GAL as lying in the procedural qualities of existing institutions, and the consequent focus on purely procedural aspects of administration rather than higher order questions of which institution deals with which problems, may work to legitimate a highly uneven institutional apparatus skewed to the interests of the most powerful[141].

So how can we infuse this administrative apparatus with democratic content? According to Kingsbury, Donald and Vallejo, a pathway could be found in a process akin to what happened at the national level: democracy has greatly evolved by virtue of "the consolidation of the administrative state, the entrenchment of judicial review, and the proliferation of non-electoral modes of oversight and participation" [142]. These are all activities that have some sort of equivalent at the international arena and could be performed with granular quality, bypassing altogether the necessity of a grand scheme of democratic governance and favoring the prevalence of democratic practices instead.

> Arguments for global democratic institutions, indeed for top-down global democracy in any form, are met with staunch normative and positive-political skepticism. We contend that, in promoting the bottom-up scrutiny of very specific institutional exercises of power and related issues of institutional design, GAL opens space for investigation of whether bottom-up pathways and minor pro-democratic quotidian inflections in such institutions might hold greater promise[143].

One of the founding ideas of democracy is self-government, which cannot be possibly dissociated from citizenship. No society can be understood as democratic if it forbids – or demotes – the participatory act of the individual that enables a better society by engaging in the political realm and thus sharing its burden of responsibility for its guidance. At the same time, citizens are also empowered to pursue their best interests in tandem with the interests of society.

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[141] Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo. Global Administrative Law and Deliberative Democracy. In: A. Orford & F. Hoffmann (org.) Oxford Handbook of International Legal Theory. Oxford University Press, 2016. p. 5.
[142] Idem. p. 6.
[143] Ibidem.

This represents a challenge by itself at national level, and an even more gargantuan task in a system of global governance focused on monolithic States, impervious to individual action. In no area does this distance get more salient than in the administrative regimes, which must somehow be tamed to guarantee that regulations tend to the needs of the distinct actors with varied relevance that set the international agenda. For this reason, it may represent an important area for the nurturing of a deliberative kind of democracy, and GAL may present several opportunities for that. The way forward, however, would benefit further specification, elucidating how exactly these structures could be improved. We side with Kingsbury, Donaldson and Vallejo in their focus on the development of conditions for public reason as paramount for deliberative democracy to strive:

> Deliberative theories of democracy generally regard open and inclusive deliberation as intrinsically enhancing the democratic legitimacy of governing decisions by ensuring procedural conditions that are supposed to make those judgments somehow those of the collective concerned. These theories typically recommend or require deliberation, participation, and publication. Deliberation is understood with varying degrees of stringency, but requires some form of discourse, rather than merely episodic voting or bargaining, in at least certain stages of the process of reaching decisions about norms. Participation in this deliberation is required under conditions of equality. Publication involves some orientation to 'public' reason, most minimally, the publication of reasons put forward by participants, but sometimes also encompassing substantive characteristics ranging from a loose commitment on the part of participants to reason from a notional general interest, rather than self-interest, to some stricter criterion for the arguments which may be put forward[144].

Dyzenhaus emphasizes the role of accountability on GAL discourse, stressing that more than a generic concept, it is important to direct accountability to produce the correct results. He

[144] Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo. Global Administrative Law and Deliberative Democracy. In: A. Orford & F. Hoffmann (org.) Oxford Handbook of International Legal Theory. Oxford University Press, 2016. p. 8

starts by recalling Grant and Keohane's models of accountability, that propose two different versions of political legitimacy[145]. The first would be the "participation model", in which "performance of power wielders is evaluated by those who are affected by their actions". The other would be the "delegation model", in which "performance is evaluated by those entrusting … [power wielders] with powers' and the power wielders are viewed as 'authorities with discretion'". While both models would exist in liberal democracies, Grant and Keohane posit that the international arena is better understood under the delegation model, since there is no clear global population to directly provide account to, rendering the analogy useless. They cite as an example the discussion of who gets to influence OPEC's decisions by participating in its deliberations, whether it should be only States or other similar actors, or if the corresponding group simply includes everyone that buys gasoline.

> In order for a global public to function politically, there would need to be some political structure that would help to define who was entitled to participate, and on what issues. In addition, many more people would have to identify transnationally and be willing to participate as members of a global public. The number of participants would have to be sufficiently large and representative, and the means of participating sufficiently open, that the views of the active public could be seen as reflective of the opinions of people in the world as a whole to a significant extent. Whether such conditions could ever be met or whether the problems of scale render global democracy impossible or even undesirable will continue to be highly contested questions. What we can say with confidence is that, today, while there are fragmentary global publics, a genuine global public comparable to publics in well-established democracies does not exist.[146].

What Grant and Keohane seem to believe is that since there is no delimited global population for institutions to account to, the only way they could provide acts of accountability would be through strategies of representation, which in turn could be validated through national democracies. That logic seems reasonable but skewed towards

[145] Ruth W. Grant and Robert Keohane. Accountability and Abuses of Power in World Politics. In: American Political Science Review. Vol. 99. No. 1. 2005. p. 30
[146] Idem. p. 34.

voting as the way of affirming political validation, in a very restricted scope of legitimacy. Although institutions participate of societies – even domestic ones – where legitimation isn't exercised through vote, that doesn't mean they are not subject to standards of accountability. Such interpretation would exclude many administrative bodies and the bulk of the Judiciary branch in most of the states. There are several other methods of democratic oversight outside of voting procedures.

> Largely missing though from their account is the idea of legitimacy. It is not that the word is missing, only that on their analysis legitimacy seems to be merely a synonym for the accountability achieved through the political mechanisms of democracy. Since there is no global demos, the point of their analysis is to identify functional equivalents to democratic mechanisms. Hence, law's legitimacy is equated with the accountability brought about for the most part by the delegation model, where, recall, 'performance is evaluated by those entrusting … [power wielders] with powers' and the power wielders are viewed as 'authorities with discretion'[147].

Furthermore, international organizations, like other administrative bodies, perform important roles of justification. According to Grant and Keohane, such justification is due to those who represent the demos at national level, who in turn must present justification to those who are represented. This function is unnecessarily curtailed by the delegation model, given that presenting justification broadly, even without a delimited demos, would not hinder domestic activity in any way. In fact, one could argue that by employing strategies to provide accountability in general they might make incentives and examples available to national democracies as well. In this vein, Dyzenhaus contends that there is a nominal problem with the concept of Accountability as widely understood.

We must now submit this requirement to closer inspection, canvassing what would be a public reason milieu conducive to fostering a deliberative democracy. In order to fully grasp the ways that GAL could contribute in this endeavor, we will entertain, in the next chapter, a discussion regarding public reason and its relevance in a democratic society. For that purpose, we will glide over the main elements of such a society, focusing on its more

[147] David Dyzenhaus. Accountability and the Concept of (Global) Administrative Law. IILJ Working Paper 2008/7 (Global Administrative Law Series). 2008. p. 9

important component, the citizen. How can an active role of citizenship contribute to a better society, in domestic and international settings? The backdrop for that discussion will be the political philosophy of John Rawls, who provided a meaningful account of how institutions should be chiseled in order to provide stability and fairness. Furthermore, it will be shown that one of the elements to be enhanced is the notion of citizenship itself, emboldened by a strong idea of public reason, able to foster a well-ordered society.

> In conditions of intensifying globalization and dispersed political authority, deliberative democracy offers one point of departure, a sort of beacon, casting light on what is important, and consequently also on where the dangers for the good governance enterprise in this post-national context lie. Conceived as a regulative ideal, deliberative democracy arguably still provides one meaningful way in which we can make transnational forms of political order at least intelligible from a democratic cosmology, providing an attractive path for their understanding, assessment and critique, focused not only on procedural or institutional aspects of governance but also the ethos that should be animating them[148].

In the following chapter, we shall provide an account claiming that the increase on the participation in the process of elaboration of the Law, either at drafting or interpretation, is not only possible but desirable, aiming at the establishment of a more stable international society. In fact, we'll draw from traditional contractarian literature in support of the claim that an active citizenship is not a given, but a product of inclusive institutions. Adequate institutions are pivotal in developing a virtuous cycle of citizens that protect a society that protects citizens.

[148] Benedict Kingsbury, Megan Donaldson and Rodrigo Vallejo. Global Administrative Law and Deliberative Democracy. In: A. Orford & F. Hoffmann (org.) Oxford Handbook of International Legal Theory. Oxford University Press, 2016. p. 13

4. PUBLIC REASON AND TRANSFORMATIVE LIBERALISM

Introduction

One frequently overlooked feature of Rawlsian theory is that it is designed ground-up upon the premise of the incompleteness of human experience. Given the fact that people are essentially diverse, carrying within themselves a plethora of different aspirations and concerns, societies should not contest that tendency, but more like the opposite, embrace it and thrive upon its complexity, building layers of superimposed relations over a societal structure of common values that can be acceptable to all. The basis of this ideal society rests on the legal tradition of the Social Contract theory, which established that an agreement must be reached on basic features of common life. Everything else must remain open for construction of possibilities. As Button remarks:

> For how are promises even possible for beings who are always in a process of becoming who they are? How can a once pledged word, like a constitution signed by an earlier generation, continue to possess living meaning in the present, and endure as a legitimate organizing structure for the future? Under what conditions are promises normatively binding, and under what conditions, and for what purposes, may these willful constraints legitimately be broken? Perhaps more important, is it possible for compacts and promises to serve as "islands of predictability" for human life without becoming petrified barriers to individual and collective development?[149]

As previously stated, this research was based on the ideas proposed by the American scholar John Bordley Rawls, more especially in his theory of Justice as Fairness (JF), as presented on the homonymous book[150], a late entry to his scholarship. This work would serve as a restatement, revising his ideas as laid down on A Theory of Justice (TJ)[151], enlarged on

[149] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 4.
[150] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001.
[151] John Rawls. A Theory of Justice. Revised edition. Harvard Press, 2000.

the Political Liberalism (PL)[152], interwoven with several other articles, book chapters and lectures developed throughout his long and fruitful career, amassing a consistent theoretical and philosophical system. Justice as Fairness also included a section on a Rawlsian proposal of international law entitled Law of Peoples (LP), which later received a separate treatment[153]. Writing the restatement of his thesis, Rawls' objectives were twofold: revision and cohesion[154]. It is important to mention that Rawls closely knits his concepts in a succession of subordinate ideas that co-relate with each other and must be comprehended in its systematic nature, from the role of political science to the effective design of a just society of free and equal citizens. Throughout this chapter we'll present some of the main elements of his theory, in order have a better grasp of the requirements of a just and stable society. As Rousseau has famously:

> I want to inquire whether there can be a legitimate and reliable rule of administration in the civil order, taking men as they are and law as they can be. I shall try always to reconcile in this research what right permits with what interest prescribes, so that justice and utility are not at variance.[155].

After canvassing the basics of Rawlsian theory, we'll proceed to deeper analyze the ideas of Public Reason and Public Justification. While doing so, we'll investigate the notion of citizenship, with duties and benefits connected. Building from that, an argument will be put forward on the necessity of observing citizens not only as creators of democratic societies, but also products thereof. Starting from traditional background from contractualist theory, the concept of Transformative Liberalism will be affirmed, hopefully setting the context for the next, and final, chapter. In order to tackle disparities and injustices it is paramount to empower those more able to influence power in a democratic society, citizens. All parts of society – including institutions and legal regimes – shape citizens, and should heed that as a responsibility.

> In claiming that contract makes citizens I mean to stress the idea that the central modern problem of political justification – how to justify

[152] John Rawls. Political Liberalism. Columbia Press, 2005.
[153] John Rawls. The Law of peoples – with "The idea of public reason revisited". Cambridge: Harvard, 2002.
[154] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. xv.
[155] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. BI. p. 46.

> political order and coercive laws to persons conceived as free and equal citizens – entails and calls upon a range of transformative ethical-cultural practices in order to cultivate and solidify the qualities of self and citizenship required by the ideal of a political society rooted in a social compact, mutual covenant, or reasonable agreement. Compacting, covenanting, and promising presuppose a certain kind of ethical subject (at least in potential), that is, a subject of veracity, fidelity, and foresight. The social compact and the institutional and cultural forms invoked by it must sponsor and cultivate the very beings who have "authored" or "consented" to the *pactio inter cives*[156].

Unboxing Justice as Fairness

To begin discussing his theory, it's relevant to follow Rawls' advice, since he stated that "(t)he most fundamental idea in this conception of justice is the idea of **society as a fair system of social cooperation over time from one generation to the next**[157]" (emphasis added). This notion of a fair system of cooperation is worked out in conjunction with two other ideas that will be presented in a moment: "citizens as free and equal persons", and a "well-ordered society". These are ideas Rawls considered intuitive, present on political tradition from democratic societies – at least in liberal democracies.

A system of social cooperation

This society is seen by its components as mutable, free from shackles of religious or aristocratic conventions, but product of political agreement. Citizens of this society reject the possibility of any political group demanding the extinction of any other group or class, or the rights of their members[158].

[156] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 7-8.
[157] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 5.
[158] Ibidem.

This idea of social cooperation is grounded on three elements[159]: i) recognition and acceptance of public rules; ii) reciprocity; and iii) rational advantage.

The first component – or feature – is the recognition and acceptance of public rules[160]. According to Rawls, there's a significant difference between a simple coordinated activity and social cooperation. For instance, one action performed under authoritarian command wouldn't fit the category, inasmuch as they involve the expression of the will of a few (if not one, as in the example). Reciprocity is the second element[161]. Essential to the core idea of cooperation is that it must entail fair terms of agreement, accepted in mutual exchange of demands. These fair terms guarantee, according to Rawls, a degree of mutuality that will influence the so-called "strains of commitment", i.e. "(…) strains that arise in such a society between its requirements of justice and citizens' legitimate interests its just institutions allow[162]". Such reciprocity does not imply automatic gains for all. Some citizens, when subject to institutions designed under Rawlsian principles of justice in a well-ordered society might find themselves relatively worse, included in a distributive scheme proposed exactly to improve the lives of those worse off. Hence a conflict is set between the individual expectations of each citizen – that aims to perform actions maximizing his or her personal gain – and the social requisites of cooperation necessary to a well-ordered society. This tension is important for the evaluation of the stability of any given political system. Lastly, the final element on the establishment of social cooperation is the idea of rational advantage: all those involved in the cooperation do so according to their individual judgement and liberty, through fair rules they know and abide to, and set objectives according to their own conceptions, following the ideas they believe will lead to better results[163].

In conclusion: a group of subjects that intentionally agree with a publicly expressed set of rules are, according to Rawls, entwined in a well-ordered society, and thus likely to keep their commitments, being reasonable to honor their agreements henceforth.

Therefore, the role of the principles of justice would be to specify the terms of social cooperation by setting a few basic parameters: i) The definition of basic rights and duties for

[159] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 6.
[160] Ibidem.
[161] Ibidem.
[162] John Rawls. The Law of peoples – with "The idea of public reason revisited". Cambridge: Harvard, 2002. p. 17.
[163] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 6.

the members of cooperation; ii) The division of benefits in social cooperation; and iii) The division of the burdens necessary to maintain such cooperation scheme[164]. They establish what one can do, who gets to lose and who gets to win at a cooperative arrangement. According to Rawls, they serve as guidelines for the society, and represent a universe of possibilities and doubts that must be addressed by political philosophy. The main question they try to answer – and at the same time to justify it politically – is this[165]:

> What is the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens regarded as free and equal and as both reasonable and rational and (...) as normal and fully cooperating members of society over a complete life, from one generation to the next?

Rawls intends to answer that question delineating basic features of a viable social arrangement. As previously stated, "citizens as free and equal persons", and a "well-ordered society" are concepts worked in conjunction with the idea of a fair system of social cooperation. We'll first explore the latter, then direct our attention to the former.

A Well-Ordered Society

A well-ordered society, in Rawlsian terms, implies[166]: i) a society in which all accept the public conception of justice (a sole public order in power); ii) a basic structure that is in accordance to that conception of justice (an effective order), and, following this second characteristic – and also the first, in a lesser degree - a third, which states that iii) citizens have a working notion of justice that allows them to understand and to apply principles of justice they largely respect. As long as an effective structure is set in place according to a conception of justice commonly adhered to, in a scheme of cooperation collectively understood by its citizens, we'll have a well-ordered society. This abstract model serves as a reference point against which political arrangements can be compared. Given its procedural nature, many different systems can fit the description of a well-ordered society, inasmuch as they have minimal commonly shared values and preserve the equality and liberty of their citizens.

[164] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 7.
[165] Idem. p. 7-8.
[166] Idem. p. 9.

On the other hand, Rawls himself concedes that the hypothesis of a homogeneous society, in which a public conception of justice is truly universal, is utopian at best. However, even though the acceptance of total axiological uniformity – what Rawls would call a comprehensive doctrine[167] – may be unfeasible, it is possible to agree on the fundamentals of an idea of public justice. This would concern the basic elements of the institutions and the system which would in turn allow the debate about the other values. This is the core idea of the Political Liberalism. There lies the belief that this structural minimum is enough, so far as such public sphere of discussion is maintained. What would this minimum consist of?

> (…)the basic structure of society is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time.[168]

The set of rules that structures social life is the basic structure. From the economic models – free-market capitalism to State monopoly – to the forms of employment and property ownership, even the separation of powers, all these are elements of such institutional framework[169]. The correctness of the basic structure guarantees what Rawls calls "background justice", a fair deal of opportunities. Such set of institutions is pivotal, encompassing all human existence in society, shaping its liberties, rights and duties, and even the definition of equality. Being the *locus* of most of the questions of justice, this is an element of fundamental importance, possibly settling the future for all members of the society. But who are these citizens?

Up to this point several elements of Ralwsian theory have been described as connected to the idea of free and equal persons, as sort of an ideal condition of the denizen of the *polis*. Justice as Fairness defines that citizens are fully capable of social interaction throughout their whole lives and can do so in virtue of their "moral powers"[170]. These are: i) capacity to have their own sense of justice, not limited to understanding and following, but which includes acting from (and not only according to) principles of justice; ii) capacity to

[167] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 9.
[168] Idem. p. 10.
[169] Idem. p. 10. Item 4.1., to be precise.
[170] Idem. pp. 18-19.

have their own conception of the good, which allows a hierarchy of values, as well as a conception of the value of life and of what makes it worthwhile.

If we affirm that humankind is imbued with an innate sense of justice that empowers it to define behavior patterns adequate to a gregarious life, and that it is endowed with the capacity to rank values, we can therefore rationally establish that people are capable of prescribing socially convenient actions guided by their values and accepting responsibility for them. By affirming this level of autonomy of the human being, Rawls defines what a "moral personality" would be, i.e., the quality that bestows upon someone the status of a "moral person"[171]. However, it's important to remember that this is not a comprehensive moral doctrine. We must recall that the focus here is on political philosophy, and Rawls' main concern the public sphere. The Rawlsian conception of person is "meant as both normative and political, not metaphysical or psychological."[172]. It's a theory circumscribed to the limited scope of the fundamentals of the society.

> In what sense are citizens regarded as equal persons? Let's say they are regarded as equal in that they are all regarded as having to the essential minimum degree the moral powers necessary to engage in social cooperation over a complete life and to take part in society as equal citizens. Having these powers to this degree we take as the basis of equality among citizens as persons: that is, since we view society as a fair system of cooperation, the basis of equality is having to the requisite minimum degree the moral and other capacities that enable us to take part fully in the cooperative life of the society[173].

The Rawlsian citizen must, therefore, be capable of applying both of his "moral powers"[174] in the same way as his peers, so that they remain leveled. When one conception of values has a disproportionate impact on the collective formation of public value, we then face a situation of unbalance. This underscores the parallel between the formation of political and moral principles, and the establishment of public collective action and occasional subsidiary groups and other social arrangements such as associations or communities. These private groups hold shared values that guide their actions. Developing the structure of a

[171] John Rawls. Political Liberalism. Columbia Press, 2005. §§ 3-4.
[172] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 19.
[173] Idem. p. 20.
[174] See also on page 71

democratic society, however, dismisses those values unconnected to the shared public conception of justice. As Rawls recalls:

> The citizens of a well-ordered society affirm the constitution and its political values are realized in their institutions, and they share the end of giving one another justice, as society's arrangements require.[175]

The only indispensable value of societal life, the one that must be shared by every citizen, is the importance of life in society, and the adequate way of enjoying and respecting it. Everything else stems from pluralism, that infuses lives with other complementary values. Identifying the difference between the private and the public arena is important, since they establish different criteria of equality. While the private order can prescribe differentiation among its members, or between its members and the participants of other orders, the public order is bound to consider every participant as an equal.

> It is a serious error not to distinguish between the idea of a democratic political society and the idea of community. Of course, a democratic society is hospitable to many communities within it, and indeed tries to be a social world within which diversity can flourish in amity and concord; but it is not itself a community, nor can it be in view of the fact of reasonable pluralism. For that would require the oppressive use of government power which is incompatible with basic democratic liberties. From the start, then, we view a democratic society as a political society that excludes a confessional or an aristocratic state, not to mention a caste, slave or racist one. This exclusion is a consequence of taking the moral powers as the basis of political equality.[176]

A perfect communion with homogeneous values would be, according to Rawls, impossible to achieve, given the necessary pluralism that exudes from a free society. Maintaining a relative equilibrium in the salience of values requires a democratic society to protect minorities from annulment by majorities. In a democratic regime the individual voices can't simply be added in an arithmetic operation leading to the supremacy of the most

[175] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 20.
[176] Idem. p. 21.

numerous citizens sharing those values. In fact, it must be comprised of concentric circles of individual values that are circumscribed altogether in a public sphere of justice. These values, publicly affirmed values of justice, are the common ground where all other values stand.

Citizens as free and equal

What, then, define citizens as free and equal? According to John Rawls, the quality of freedom is tied to one's capacity to create the self, and thus be able to change; to make use of his or her moral powers in order to fashion a public conception of justice[177]. There is however an important difference between one's public and private identity. To the Justice as Fairness theory there must be a public notion of identity which encompasses the public values of justice and remains unmoved notwithstanding the change of private values that person may pursue[178]. Those are the two connections – political and non political – that shape the moral identity and the *modus vivendi* of each person. That's the perspective in which the person sees him or herself as an active being that performs actions aspiring specific objectives. Without either of those identifications, Rawls argues, the person would feel lost[179]. It's not only natural but actually expected that throughout life people mutate and develop their private convictions, in virtue of education, experience or persuasion. But this change, abrupt as it may be, should not lead to alteration of our public identity. As Rawls puts it:

> On the road to Damascus Saul of Tarsus becomes Paul the Apostle. Yet such a conversion implies no change in our public or legal identity, nor in our personal identity as this concept is understood by some writers in the philosophy of mind. And, in a well-ordered society supported by an overlapping consensus, citizens' (more general) political values and commitments, as part of their noninstitutional, or moral, identity are roughly the same[180].

These two existential domains must function in parallel, in such a way that even if one radically changes all life values and notions of what is just and unjust, right or wrong, one will still be recognized publicly as a citizen – since such qualification is indifferent to

[177] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 21.
[178] Idem. p. 22.
[179] Ibidem.
[180] Idem. pp. 22-23.

anyone's private values. To believe otherwise would entail that the recognition of citizenship and legal rights is somehow related to adherence to specific convictions, while the only conviction that can be expected from a citizen is respect for publicly agreed obligations – under a Constitution or a legal system with likewise function. A citizen will still be entitled to citizenship and all associated rights even if there is a breach of those obligations.

Another aspect which requires attention on the issue of freedom of citizens according to Justice as Fairness refers to the image each citizen has of themselves as self-authenticating sources of valid claims[181]. That means that every member of the society sees him or herself as capable of proposing a conception of public justice, with the ability to evaluate institutions and public values. Furthermore, Rawls contends that it is desirable for a constitutional democracy that each and every citizen be able to formulate principles of justice based solely on their capacity as citizens, without any additional qualification. Conversely, to consider that someone would need any special quality in order to be eligible to formulate propositions would imply a narrow discursive space, far from an egalitarian perspective of civil participation.

One example of this impossibility of participation is represented by the condition of slavery. Rawls argues that the victims of slavery, while being factually human, wouldn't be regarded as persons, and would therefore be regarded as "socially dead":

> To take an extreme case, slaves are human beings who are not counted as sources of claims, not even claims based on social duties or obligations, for slaves are not counted as capable of having duties or obligations. Laws that prohibit the abuse and maltreatment of slaves are not founded on claims made by slaves in their own behalf, but on claims originating either from slaveholders of from the general interests of society (which do not include the interests of slaves). Slaves are, so to speak, socially dead: they are not recognized as persons at all[182].

Precisely because of the possibility of this status – someone that is a person without rights – slavery is incompatible with Justice as Fairness. From the point that persons can be dislodged of their human quality and reified, denying them their "moral powers", different

[181] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 23.
[182] Idem. pp. 23-24.

levels of personhood are set. There can be no hypothesis of exclusion of participants from the democratic existence. On the contrary, the construction of a political consensus, or the Overlapping Consensus[183], is held precisely by the inclusion of diverging arguments that share the same baseline respect for basic principles of justice. The exclusion of any specific conception in compliance with those principles of justice would imply an imposition of an individuality over another. Both individualities reaffirm themselves as participants in the social life on equal footing, in the condition called citizenship:

> Since ancient Greece, both in philosophy and in law, the concept of the person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties. In specifying the central organizing idea of society as a fair system of cooperation, we use the companion idea of free and equal persons as those who can play the role of fully cooperating members. As suits a political conception of justice that views society as a fair system of cooperation, a citizen is someone who can be a free and equal participant over a complete life.[184]

Personhood is, therefore, affirmed in political action, not a biological given. The concept of person to Rawls entails the qualification of the political agent, a person in order with the public sphere of action. Once again, it is important to stress that this is not a metaphysical or psychological consideration, but a recognition limited to political science.

Public Reason and Public Justification

The Rawlsian concept of Public Justification is logically connected with the ideas of Reflexive Equilibrium[185] and Overlapping Consensus[186].

As previously explained within the discussion on the concept of a Well Ordered Society[187], the fundamental aspect of life in a democratic society is not a perfect unison

[183] This concept will be further explained on page 83
[184] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 24.
[185] See also on page 79
[186] See also on page 83
[187] See also on page 70

among the comprehensive conceptions of life, as a perfect community, but instead a simpler agreement on the principles of justice. What would then this ideal conception of justice be? In order to grasp these values, we need public justification, a tool to gather information in a pluralist society teeming with diverging opinions[188].

There are three defining features for this public conception of justice. Firstly, it is a narrow concept. Rawls contends that while this might be understood as a moral concept, it should be restricted to the Basic Structure of the society, without any sort of transposition to other areas of life. By restricting its functionality, it gets easier to keep the integrity of the concept, protecting it from having to deal with a wide range of conditions. The second element is that acceptance of this public conception does not mean acceptance of any given set of values other than the agreement to a political conception that allows a *modus vivendi*. Hence, the adherence to these base values does not represent capitulation to any specific conception of life. In fact, citizens merely agree to disagree on the specifics, only converging on the most basic and essential elements of life in society. Finally, this conception of justice is elaborated in such way that it borrows features from the democratic culture of the society. It draws content from regular political discourse and must bear connection to public discourse, in order for it to be understandable[189].

> An essential feature of a well-ordered society is that its public conception of political justice establishes a shared basis for citizens to justify to one another their political judgments: each cooperates, politically and socially, with the rest on terms all can endorse as just. This is the meaning of public justification.[190]

Public justification, therefore, is applied as a tool to assist public debate and to foster argumentation in general. In order to achieve that, a commonly shared set of information must be established, defining facts that will then be ideally employed on activities of persuasion. Without this shared set of knowledge, the participants of public debate will remain arguing about separate issues, in a cacophony without constructive consequence.

[188] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 26.
[189] Idem. pp. 26-27.
[190] Idem. p. 27.

Rawls declares that the Justice as Fairness approach can only work in the presence of such discursive space[191], where the grounds of argumentation can be understood by others than those who support claims, especially by those who oppose it[192]. One way of achieving this is to restrict the scope of the theory to the constitutional essentials. The principles that shape institutional structures, the political checks and balances, as the recognition of individual rights and freedoms, are all matters of great relevance and urgency, strongly benefiting from this core set of public justification.

By allowing discussion of essential questions and securing common grounds for the participants of political interchange, Public Justification encourages, at the same time, respect and otherness. If a person, an autonomous being capable of making use of his or her moral powers in order to establish their own values, succeeds in recognizing the same qualities and the same power in others, the idea of equality is then satisfied[193]. Therefore, Justice as Fairness aims to set course in search of these common grounds of discourse, navigating among different comprehensive political visions and focused on a discursive minimum. If it is impossible to reach total agreements, how is it possible to coexist in society? Through the recourse to partial agreements, mostly on basic features of society, on publicly recognized conditions[194].

Starting from the idea that all citizens are endowed with the moral power of capacity to reason and to draft their particular conception of justice, we can reach the conclusion that these capacities evolve through time, nurtured through education and maturity, until there is public recognition of our capacity to function in society. Our opinions are a product of our judgement, which confers value to the facts of life and draws judgments from them. The divergence of values and judgements between two different persons is natural. A complete unity of value is unexpected even in the dominion of the self, since people themselves change, as their reasoning sometimes evolve through life.

Rawls contends that the greater part of our most serious conflicts is drawn from this domain of individual judgement. Some defend the complete consistence of values throughout life, something the American philosopher would consider a dogmatic behavior. The challenge is to achieve a higher integrity of political thought, on the private or public

[191] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. pp. 27-28.
[192] John Rawls. A Theory of Justice. Revised edition. Harvard Press, 2000. §87. p. 508.
[193] See more on Reflexive Equilibrium, on page 85.
[194] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 28-29.

spheres, threading away from dogmatism. In search of a path of disentanglement from these conflicting conceptions, Rawls exhorts that:

> Justice as fairness regards all our judgments, whatever their level of generality – whether a particular judgment or a high-level general conviction – as capable of having for us, as reasonable and rational, a certain intrinsic reasonableness. Yet since we are of divided mind and our judgments conflict with those of other people, some of these judgments must eventually be revised, suspended or withdrawn, if the practical aim of reaching reasonable agreement on matters of political justice is to be achieved.[195]

Reflexive equilibrium

At this point, it is possible to achieve two levels of what Rawls calls reflective equilibrium. Whenever a person manages to harmonize his or her different spheres of public and private beliefs in a unified and comprehensive scheme, that person achieves what Rawls defines as a narrow reflexive equilibrium. However, when someone not only manages to develop that unified comprehensive belief but is also able to confront it – not necessarily to adhere or diverge – with outer conceptions of justice, they achieve a more complex, wider reflexive equilibrium[196]. This is a wider approach inasmuch as it encompasses a higher number of competing claims and still manages to articulate some level of comprehension. Rawls establishes this to underscore the citizen role of public justification in political life. In the pursuit of a society with free and equal members, this might be a valid foundation for the establishment of a fruitful political dialogue. Our shared principle is, as previously stated, the commitment to a political sphere in conditions that are adequate to all, or, in a world of scarce resources, at least cause the least possible harm to those most in need.

As previously mentioned, a democratic pluralist society with total political agreement is unfeasible, and to a point, an oxymoron. Pluralistic democracies not only offer room for divergence but are also sustained and enriched by their dialectical capacity to build upon diverging political conceptions. To Rawls, the impossibility of a comprehensive

[195] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 30.
[196] Ibidem.

political conception is an implicit fact of a reasonable pluralist society[197]. How to proceed, then, to equate diverging values in a democratic society?

Overlapping consensus

Rawls proposes the adoption of the idea of an overlapping consensus. Even though each and every private conception of values contains its inherent and morally-defining choices, they must share a public and political conception, which in turn gives support to a public conception throughout generations. That's precisely the aim of the establishment of the Overlapping Consensus: the possibility of a social culture capable of enduring time[198]. Like a Venn diagram, a plethora of private conceptions of justice can be conjoined by a minimum public agreement, strong enough to support change as society evolves.

Reasonable pluralism is an essential element of a democratic society. The diversity of religious beliefs, opinions, moral and philosophical convictions cannot be considered a matter of occasion, but an inherent feature of life in society. In a free society, with fair institutions, this unevenness of opinion will naturally prevail. This raises a strong argument regarding the artificiality of thought uniformity, made possible only under oppressive governments and totalitarian regimes, which drastically hamper choice. Citizens will necessarily hold diverging and conflicting opinions regarding the facts and elements of life. The role of the State is to establish normative conditions where this coexistence may take place, under that which Rawls defines as a reasonable pluralism[199].

A logical consequence is that the content of the social contract that grounds cooperation in society must be deemed acceptable for a number of diverging particular doctrines. Despite the existence of such plurality of interests and beliefs under a reasonable pluralism, the core rules that sustain the whole system should not be incompatible with those interests. The fragmented interests of the diverging particular doctrines are united under a shared conception of justice restricted to the public sphere, to the political action. As Rawls declares, justice as fairness is a political, not metaphysical conception of justice[200]. The establishment of those core rules is nevertheless the root that allows the growth of particular doctrines on the private sphere. Nevertheless, it is important to mention that Rawls doesn't

[197] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 32.
[198] See Samuel Freeman. Rawls. Routledge, 2007. p. 366.
[199] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 34.
[200] See John Rawls. Justice as Fairness – Political, not Metaphysical. Collected Papers. Harvard University Press, 1999. p. 388-414.

affirm public values are superior to those metaphysical or apolitical values, but that they are elements of a different order. To define political values as absolute would entail judgements of higher order, beyond the limits of the political[201].

Rawlsian theory doesn't set out to analyze the clash of conflicting theories and propositions and find therein room for convergence amidst divergence. Conversely, Rawls intends to propose a system that enables its citizens to enjoy a long and prosper life under a democratic regime, while developing the natural vocation for plurality and divergence – under a reasonable ethos. Circumscribed by political institutions, this agreement of social cooperation would entail an egalitarian system with aspirations of permanence, mitigating inequalities and fostering stability across generations.

Reaching for stability

A fundamental element of Rawlsian theory is the analysis of the stability of its own structure. If his theory fails to achieve a status of sustainability and is incapable of establishing a just society, it will be regarded as a frivolous effort, a lackluster academic adventure. If justice can't resist everyday challenges, being cast aside at the first occasion, it will be a matter of flimsy foundations. In Rawls' view, order is more than anything a conviction: a political agreement of cooperation must be respected and duly kept, despite contingencies, as a product of a rational and reasonable conception.

We'll thus explore how Justice as Fairness proposes to tackle these critical moments. Recall that Justice as Fairness does not represents a moral philosophy in a wide scope, being restricted to a narrow application: the domain of the political. Moreover, it pertains to an even more limited scope, the configuration of the political and its institutions, optimized in such a way as to guarantee not only the greatest liberty for the citizens, but also a just society that fosters social cooperation, therefore protecting interests of those in worse conditions.

The political values – cornerstone of Justice as Fairness – arise from the specificities of the political domain. Rawls focuses on two of those features[202]. The first characteristic of the political is that it encompasses the whole extension of one life, given that we are inserted

[201] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 37.
[202] Idem. p. 182.

in society from the moment we are born to the moment we die, in a forced relationship. It is not a voluntary association. Although it may entail a host of granular associations, they are all situated under the umbrella of a community of mankind to which we are related from our birth. The second characteristic is that the political power is imbued in the coercive structure of the State. In democratic States, however, this power is considered to be sourced on the power of the people, as a common collective of free and equal citizens. This power from the people is thus enforced upon the persons. That activity may certainly be questioned in its legitimacy[203]. Rawls contends that:

> Political liberalism holds, then, that there is a distinctive domain of the political identified by these features (among others) to which certain values, specified in an appropriate way, characteristically apply. So understood, the political is distinct from the associational, say, which is voluntary in ways that the political is not; it is also distinct from the familial and the personal, which are affectional, again in ways the political is not (The associational, the familial, and the personal are simply three examples of the nonpolitical; there are others).[204]

The existence of this political dimension does not entail the disqualification of other classes of values. The values that animate women and men to associate towards the most diverse ends are relevant and hold important space in human life, but that space cannot be muddled with the political domain, at least not as a category. Naturally, the political draws from these values – which are essential to life – but sits aside. The crux of the issue of stability in Justice as Fairness arises from the fact that it is imperative that, in a democratic regime, the institutional arrangement can be progressively supported by members of the society. Bearing in mind the dialectical processes effected through the Overlapping Consensus, something must prevail, something that can serve as a basis for adherence of the citizens, and without which the maintenance of a constitutional regime would be severely endangered[205].

> Thus as a form of political liberalism, Justice as Fairness holds that, with regard to the constitutional essentials and questions of basic

[203] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 182.
[204] Ibidem.
[205] Idem. p. 183.

> justice, and given the existence of a reasonably well ordered constitutional regime, the family of basic values expressed by its principles and ideals have sufficient weight to override all other values that may normally come into conflict with them. It also holds, again with respect to constitutional essentials, that so far as possible, questions about those essentials are best settled by appeal to those political values alone. It is on those questions that agreement among those who affirm opposing comprehensive doctrines is most urgent.[206]

Constitutional principles are, therefore, the touchstone of democratic political debate, where the disparate comprehensive conceptions of the world should converge.

It is important to recall that the dimension of the political – which is rooted in those constitutional principles – must strive for the development of a public order capable of sustaining itself from one generation to the next. Following this logic, Rawls contends that the political conception must be feasible, practical, and must "fall under the art of the possible"[207]. A moral conception, situated outside the domain of the political, can indulge broad condemnations of iniquity and futility of the world. A political conception, in turn, must be stable from one generation to the next, and also, to the limit of its capacity, fair[208].

Framing stability in a political conception can be achievable, according to Rawls, in two ways. The first would be to simply assume that an unstable political proposal should be discarded upon the recognition of its unworkability. That would lead to a passive stance of alternating political regimes and ideas, without due observance of their merits and complications. The second would stem from certain psychological traits believed to be inherent to human beings: if one grows in an environment of institutions that are just, he or she will not only accept this system, but also defend it. In time, citizens develop a sort of loyalty to institutions.

> Put another way: citizens' sense of justice, given their character and interests as formed by living under a just basic structure, is strong

[206] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 183.
[207] Idem. p. 185.
[208] Ibidem.

> enough to resist the normal tendencies to injustice. Citizens act willingly to give one another justice over time. Stability is secured by sufficient motivation of the appropriate kind acquired under just institutions[209].

The question of stability is not, for Justice as Fairness, merely a matter of obedience, that would render allegiance to a normative body from the application of sanctions. Furthermore: given the liberal affiliation of the theory, the real objective of Justice as Fairness is to foster the rational conviction that such political conception is the most reasonable, being based on reason and the moral powers present on every and each citizen. By virtue of this endeavor, the result is an adhesion that merits more than simple acquiescence, amounting to a reflected disposition[210].

Every citizen has, therefore, two different perspectives: the political conception and the comprehensive conception. A society can be deemed fair and well-ordered when the society – despite each citizen's comprehensive conceptions – it supports a political conception and rejects comprehensive conceptions that aim to hamper the political conception of justice. It is left for each citizen to define exactly how the moral political and non-political values can be harmonized, the focus being that the latter doesn't undermine the former, and that the comprehensive conceptions are kept from eroding the basic foundations of liberty and equality inscribed in the constitutional democratic pact[211]. Those political foundations, though restricted in their nature, can be easily accepted by the varied comprehensive conceptions. This is therefore the most reasonable way to deal with the inescapable pluralism which is peculiar to the human being developed in full potential.

> The discovery of a new social possibility: the possibility of a reasonably harmonious and stable pluralist and democratic society, may follow from this success of liberal institutions. Before the successful practice of toleration in societies with liberal institutions there was no way of knowing of that possibility. It may seem more natural to believe, as centuries-long acceptance of intolerance appeared to confirm, that social unity and concord require agreement on a general and comprehensive religious, philosophical, or moral

[209] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p. 185.
[210] Idem. p. 186.
[211] Idem. p. 187.

> doctrine. Intolerance was seen as a condition of social order and stability. The weakening of that belief helps to clear the way for free institutions[212]

Such description is bound to conflict with the perspectives presented in the first chapter of this research, where democracy seems to be navigating rocky straits of uncertainty and tensions of legitimacy. The second chapter also deepens that sense of insecurity, delving into inadequacies of traditional international legal theory, that are further explored in the following third chapter, as the establishment of a global administrative regime raises several causes for concern, and maybe some opportunities. Another interesting avenue of work is that which proposes examination of the public reason theory under a new light, which may provide insights and opportunities that merit closer attention.

The ideas of public reason and public justification are certainly interconnected, albeit in varied scope. While public reason speaks of the content infused in arguments put forward by citizens in their political activity, public justification addresses the need for such communicative acts. They might be relevant to affirm values, in cases in which persuasion is necessary. Another important instance is the attribution of meaning by joint explanation of what terms mean to those involved. One other possibility is the exercise of the duty of civility wherein citizens explain the justness of their actions and at the same time reinforce the importance of the common agreement upon which society rests. All those practices are common in democratic experience, and all have a role to play in further improving the search for a stronger society.

> The idea of public reason, operating in various ways throughout the social contract tradition, is both a crucial expression of a modern (increasingly liberal) transformative ethos and an effort (albeit an uneven one) to confront internal dilemmas posed by the recognition that the contract makes citizens[213].

On the next section we will entertain the argument raised by Mark Button that one of the most traditional normative accounts of societal life, the social contract tradition, raises the possibility that citizenship may have a more important role than is generally understood,

[212] John Rawls. Justice as Fairness: a restatement. Harvard University Press, 2001. p, 197.
[213] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 14.

not only as drafters of the social contract at a certain point, but as persons that experience and are influenced by it throughout time. Moreover, the Contract, once settled, also helps to shape the contracting parties, fostering the citizens' capacities in many ways. In sum, the hypothesis is that the stability of any given society is related to the way it empowers its citizens. If there is truth in such assertion, many avenues of research are opened, all exploring the question of how institutions can be improved in order to furnish citizens with better information and capabilities, aiming at a better society overall.

Historical explorations: the background on how contract makes citizens

Society requires agreement, the same way any group demands guidelines of coexistence. From accidental encounters to lifelong companionship, all human relationships are in some way sided with express or unspoken rules. Legal tradition has dealt with the subject extensively.

Hugo Grotius himself, internationalist emeritus, declared:

> Again, since the fulfilling of Covenants belongs to the Law of Nature (for it was necessary there should be some Means of obliging Men among themselves, and we cannot conceive any other more comfortable to Nature) from this very Foundation Civil Laws were derived[214].

From the moment a societal compact was deemed necessary, discussions regarding its contents and limitations followed, detailing – in a varied depth among proponents of the social contract – what would be necessary in order to maintain peace, or to foster riches and progress. While some argued about limits to be set upon the States, or protections to be granted to subjects, one element worth mentioning, apropos of this research, is the way citizens perform actions to uphold the social contract, and, going further, what dispositions and virtues are conducive to a good society. At this point we'll benefit from Mark Button's research on the history of the Social Contract theory to explore some of the groundwork set by Thomas Hobbes, John Locke and Jean-Jacques Rousseau, to then return to John Rawls

[214] Hugo Grotius. The Rights of War and Peace. Liberty Fund, 2005. p. 93. Preliminary Discourse. §XVI.

and try to sketch a tentative answer for the following question, here enunciated by Button, but already undertaken by many:

> How can liberal societies acknowledge this moral and ethical dependence on the character and dispositions of its citizens and leaders and seek to fulfill this need in meaningful ways, while honoring commitments to individual liberty, self-direction, freedom of association, and moral pluralism?[215]

The focus of this section is an exploration of the characteristics of the citizen, laid here in conjunction with – and as a background to – the ideas of John Rawls, in order to enable us to envisage some different kind of civic participation in tune with the future and its incoming challenges. We begin from the thought that societies can be better and that improving the way citizens participate may be a helpful method to achieve that. Democracy is anchored on the idea that people are sovereign to decide, and we look forward to better understanding the importance of public reason in democratic conduct.

Button emphasizes the connection between the ideas of public reason and social contract, recalling the modern focus on consent.

> The idea of a social contract is itself a mechanism of public justification, a normative model by which to imagine the principles (or the procedures) that could govern otherwise free and equal individuals. Closely related to this, the contemporary focus on public reason – of having and providing reasons for the direction and use of political power that all can reasonably accept – is likewise ushered into modernity with the moral centrality given to the idea of consent, buttressed by the commitment to the natural freedom and equality of persons in the contract tradition.[216]

From the perception that the idea of social contract encompasses far more than the elaboration of the contract, ranging to its indefinite destiny, we shall proceed to the maintenance and further improvement of those contracts, leading to the consolidation of a

[215] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 15-16
[216] Idem. p. 21.

transformative ethos of liberalism. Button defines that as "a shared commitment to the formation of civic character and the cultivation of forms of political self-understanding and ethical sensibility upon which a liberal political order depends"[217]. This entails two ideas. First, that the way someone enters the social contract doesn't define who or what they will become and how they will relate to the terms of such contract. Second, that this interplay of transformative action happens not by force of government or political institutions, but as a product of a mix of institutions, culture and identity[218].

Hobbes – concerns of the minds of men

Discord and conflict is a staple of Thomas Hobbes (1588-1679) scholarship, and his idea that men survived in a State of Nature until pacification by virtue of the social contract is well established not only in philosophical literature, but also in common knowledge. Less explored it how Hobbes views indicate a sort of Public Reason.

We must recall that, according to Hobbes, reason commands a man to self-preservation inasmuch as he is "forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved"[219]. That is the first law of Nature. In search of that protection, he seeks communal shelter, relinquishing part of his freedom in the process, for "as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war"[220]. Only the social compact can take the individual out of the state of continuous war represented by the state of nature. This happens in virtue of a "mutual transferring of right", i.e. a contract.

[217] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 5-6.
[218] Idem. p. 6.
[219] Thomas Hobbes. Leviathan. McMaster University, 1999. 1.XIV. p. 80. In full: "A law of nature, lex naturalis, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved."
[220] Idem. p. 80-81. In full: "From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law: that a man be willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men as he would allow other men against himself. For as long as every man holdeth this right, of doing anything he liketh; so long are all men in the condition of war. But if other men will not lay down their right, as well as he, then there is no reason for anyone to divest himself of his: for that were to expose himself to prey, which no man is bound to, rather than to dispose himself to peace."

Back to the issue of public reason, while in the state of nature every person is fully entitled to the whole range of liberty and is also entirely free to elaborate and to act on their conceptions of the right. On the pacified environment of the contract, there must be a way to settle down those divergences.

> In the state of nature, where every man is his own judge, and differeth from other concerning the names and appellations of things, and from those differences arise quarrels, and breach of peace; it was necessary there should be a common measure of all things that might fall in controversy; as for example: of what is to be called right, what good, what virtue, what much, what little, what *meum* and *tuum*, what a pound, what a quart, etc. For in these things private judgement may differ, and beget controversy[221].

Hobbes contends that the solution is that of a public arbiter, responsible for converting private judgement into a public one, effective on the polity. This contraposition of private and public reasons is an important one. It is the first precedent of the duality of public-private lives, giving precedence to the former over the latter, since "if every man were allowed the liberty of following his conscience, in such differences of consciences, they would not live together in peace an hour"[222], all but completely defeating the purpose of the social contract. But that doesn't settle what is to be made of those private reasonings that will be subject to public examination under jurisdiction.

In *Leviathan*, Hobbes lectures on the causes that may weaken the Commonwealth, i.e., the society, or take it to dissolution[223], comparing the threats of a society to the maladies of the body. The diseases are aplenty, most of them related to erroneous judgements of individuals that opt to favor their private reasoning, while "law is the public conscience by which he hath already undertaken to be guided"[224]. In fact, Hobbes warned against the perils of "perverse doctrines", a precaution essential to the "conservation of inward peace".

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[221] Thomas Hobbes. The Elements of Law Natural and Politic. Cambridge University Press University, 1928. 2.29.8. p. 106.
[222] Idem. 2.24.2. p. 77-78.
[223] Thomas Hobbes. Leviathan. McMaster University, 1999. 2. XXIX. p. 197.
[224] Idem. p. 198. In full: "Another doctrine repugnant to civil society is that whatsoever a man does against his conscience is sin; and it dependeth on the presumption of making himself judge of good and evil. For a man's conscience and his judgement is the same thing; and as the judgement, so also the conscience may be erroneous. Therefore, though he that is subject to no civil law sinneth in all he does against his conscience, because he has

> It is therefore the duty of those who have the chief Authority; to root those out of the mindes of men, not by commanding, but by teaching; not by the terrour of penalties, but by the perspicuity of reasons; the Lawes whereby this evill may be withstood are not to be made against the Persons erring, but against the Errours themselves[225].

In similar tone, he advised that Universities held an important role as "fountains of civil and moral doctrine" whereas knowledge would be shared, both formally and informally ("both from pulpit and in their conversation") with great benefit to society, leading to a more peaceful – and probably more stable life.

> And by that means the most men, knowing their duties, will be the less subject to serve the ambition of a few discontented persons in their purposes against the state, and be the less grieved with the contributions necessary for their peace and defence; and the governors themselves have the less cause to maintain at the common charge any greater army than is necessary to make good the public liberty against the invasions and encroachments of foreign enemies.[226]

Citizens, therefore, not only can be swayed with great profit to the Commonwealth, but such change of mind and action is led by education and persuasion. While traditionally seen as a theorist of the Sovereign power, to which citizens entrust their freedom upon entrance in the social contract, Hobbes acknowledges that tending to the reason of members of society is a duty of the (chief) Authority, and necessary for the survival of the body politic[227]. This effort isn't natural or passive, just as the social contract is a directed and

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no other rule to follow but his own reason, yet it is not so with him that lives in a Commonwealth, because the law is the public conscience by which he hath already undertaken to be guided."

[225] Thomas Hobbes. De Cive - the english verson. Clarendon Press, 1987. PII.XII.IX. pp. 160-161.

[226] Thomas Hobbes. Leviathan. McMaster University, 1999. XLVII. A Review, and Conclusion. p. 445.

[227] Interestingly enough, Hobbes stresses the importance of the reasoned adherence instead of submission, while differentiating action from the will to do so, what he calls "endeavour". In Thomas Hobbes. De Cive - the english verson. Clarendon Press, 1987. PI.III.XXX. p. 74: "It's evident by what hath hitherto been said, how easily the Lawes of Nature are to be observ'd, because they require the endeavour onely, (but that must be true and constant), which who so shall performe, we may rightly call him JUST". Similarly, in Thomas Hobbes. Leviathan. McMaster University, 1999. XV. p. 97: "The same laws, because they oblige only to a desire and endeavour, mean an unfeigned and constant endeavour, are easy to be observed. For in that they require nothing but endeavour, he that endeavoureth their performance fulfilleth them; and he that fulfilleth the law is just."

active desire. In fact, nurturing the virtues of citizenship is an essential part of the social contract itself. As Mark Button recalls:

> When we pay attention to the moral-educational writings of contract theorists it becomes increasingly clear that one of the most important and "hazardous" steps in the course of their accounts is not from a state of nature to civil society, but rather the passage from youth to adulthood and citizenship. Indeed, the moral and civic transformations that are thought to transpire by virtue of the simple passage from a state of nature to a political state are belied by the attention they give to the cultivation of morals and manners. What the Greek called *paideia*, the moderns call good breeding. In many respects, however, the object of social contract theorists is the same: the formation of those citizens their theories of political order require but who are neither found in nature nor accrue through the accidents of history[228].

Locke – mining for a heart of gold

John Locke (1632-1704) is widely famous for his Empiricism, conferring great importance to experience as the provider of all information in life, taking us from a *tabula rasa* state to a fully functional life. He also had lasting contributions to political theory, including on the topics of public reason and the roles of citizens under the social contract. In fact, we'll propose that his account of public reason implies a transformative ethos that fosters the development of citizen attentiveness and nurtures respect for consent.

According to Locke, Politics are twofold, focusing either on the inauguration of societies, delineating their powers – and limits therein – or on government and on how to manage the polity. We'll proceed to investigate the contours of public discourse and how citizenship is performed in Lockean terms. It is important to state upfront that, for Locke, it is not up to governments to instill virtue through legislation.

[228] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 75-76.

> Yet give me leave to say, however strange it may seem, that the lawmaker hath nothing to do with moral virtues and vices, nor ought to enjoin the duties of the second table any otherwise than barely as they are subservient to the good and preservation of mankind under government[229].

This falls in line with Locke's steadfast separation between the law of men and the law of God, and his peculiar take on promises and obligations. The self has limited sovereignty over several areas of life, given all his promises and civil agreements are only valid on the occasion they reflect higher values of Natural Law. It is such recognition that provides their cogence, determining that promises ought to be kept.

> It is not to be expected that a man would abide by a compact because he has promised it, when better terms are offered elsewhere, unless the obligation to keep promises was derived from nature, and not from human will[230].

From these superior values in the law of Nature it rests upon men to fill the blanks with civil and private law, leaving up to the contract whatever has not been previously defined by God. Consent, therefore, is a manifest adherence to what reason perceives as fair, suitable to higher values of Nature. Obligations arise not from consent, but from God's will, given that those other engagements that diverge from Natural Law are simply not to be followed.

> It is a serious theoretical confusion to claim, from a Lockean perspective, that individual agents "make" promises, insofar as a promise is the undertaking of an obligation. Human beings surely enunciate them, ad participate in their verbal articulation, but we do not create or have any power over the obligations that they establish. Rather, promise and compacts in a very real sense make citizens, not the other way around. In promising, we enact or situate ourselves

[229] John Locke. Essay on Toleration. In: Political Essays. Cambridge University Press, 2002. p. 144.
[230] John Locke. Essays on the Law of Nature I. In: Political Essays. Cambridge University Press, 2002. pp. 87-88

> within an obligatory stream of actions that is no longer within our power to control, stop, revoke or annul[231].

Reason, to Locke, does not have the power to legislate, or to create law. Its role is not one, of invention, but of discernment of those truths unseen. It "does not lay a foundation, although again and again it raises a most majestic building and lifts the summits of knowledge right into the sky"[232]. This leads to two consequences, according to Button. The first is that the domain of the political is not entirely artificial, since it must, in some level, bear resemblance to the designs of Nature. The second is that part of the world is beyond our powers, and we are, therefore, limited in our sovereignty.

> For, in the first place, since God is supreme over everything and has such authority and power over us as we cannot exercise over ourselves, and since we owe our body, soul and life - whatever we are, whatever we have, and even whatever we can be - to him and to him alone, it is proper that we should live according to the precept of his will[233].

In sum, although we might find a source of obligations in compacts and in mutual consent, its real ground rests on God's will, and on the Law of Nature. Without submission to God – such as in the case of atheists – obligations, even though sourced in acts of express will, are groundless, and cannot be trusted, for such person wouldn't have to keep their promises. For all others, God-fearing citizens, obligations are an extension of His will. Natural Law, therefore, exists as yardstick and as a moral compass, intelligible by reason and required from all. As any tool, it can be wielded haphazardly, or honed to perfection. Locke contends that there is a pull towards the latter. As Button explains:

> Not only do our peculiar faculties have moral content, like the fingerprint of God on his workmanship, we are under an additional and more extensive obligation to understand and perfect these faculties as far as possible for limited, shortsighted creatures[234].

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[231] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 113-14.
[232] John Locke. Essays on the Law of Nature II. In: Political Essays. Cambridge University Press, 2002. p. 90.
[233] John Locke. Essays on the Law of Nature VI. In: Political Essays. Cambridge University Press, 2002. p. 119.
[234] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 141.

Hence, human beings have a duty to improve their reasoning in order to better grasp God's will. For this he or she shall look nowhere else than inwards, by virtue of the faculties they are born with. Locke draws an analogy characterizing this effort as similar to that of a miner who searches for gold deep inside the Earth. With effort and resilience, one can reach the treasure of knowledge of the laws of Nature[235]. As Button puts it, "Men will obtain God's truths and laws in accordance with and insofar as each person employs those critical, discerning, reasoning faculties that God has given them for this very purpose[236]". This determines the process of harmonizing the private and civil obligations with Natural Law as a product of reasoning.

In this examination, men consider their voluntary actions under three standards, which Locke calls "moral relations": natural law, civil law, and law of opinion and fashion, every single one assessing a different aspect of life.

> The divine law judges whether human actions are sins or duties, the civil law determines whether our actions are criminal or innocent, and the laws of opinion attribute virtue or vice to our deeds. What is crucial about these distinctions is that while Locke views the divine (or natural) law as the only true guide for moral rectitude, and although the civil law has all the powers of the commonwealth behind it, the real, effective force guiding men's everyday judgements and actions is the rule of fashion or custom. It is not sin or crime that men fear most but disrepute, shame, and public censure.[237]

Those standards, which are different domains of life, possess different values to Locke, from the grandeur of natural law to the pettiness of laws of opinion and fashion, but he himself contends that that is not the common understanding on the issue. Societies are generally guided by fashion and opinion, and the elements of virtue and vice change between communities, but they're somehow ultimately guided by God's will, that guarantees that everywhere men will show obedience to the obligations of law – derived, as previously exposed, from natural law. In virtue of this, ethics represents to Locke a twofold enterprise:

[235] John Locke. Essays on the Law of Nature I. In: Political Essays. Cambridge University Press, 2002. p. 81.
[236] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 144.
[237] Idem. p. 146-147.

first, the rules that men follow, many times unconsciously derived from Providence, and which represent an overlap of moral standards across different times and societies responsible for its stability. Secondly, ethics also represent the search for the right reasons to act. Not a shadow of the morality of natural law, but the reasons provided by God's will itself[238]. The practicality of Locke thought resides on that fact that while convinced that there is a higher truth accessible to all by virtue of reason, people are notwithstanding moved by laws of fashion and opinion, much more tempestuous, in need of an adequate nudge that would guide them to more elevated truths. Thus, he proclaims that "he therefore that would govern the world well, had need consider rather what fashions he makes, than what laws, and to bring anything into use he need only give it reputation.[239]"

Since government is responsible for upholding norms that aim to preserve society, the Lockean citizen might as well do his or her part to make sure that such government is keeping the path of rectitude. The citizen must be able to trust that this job is performed *in bona fide*, meriting assent. Locke declares that "in the whole conduct of the understanding, there is nothing of more moment than to know when, and where, and how far give assent, and possibly there is nothing harder[240]". From the requirement of assent arises the need for better citizens, willing to endeavor effort and study to grasp a better understanding of Natural Law. This, however, is no easy feat. As Button recalls:

> Yet the majority of men instead follow the pull of present passions, immediate interests, and, most powerfully, public opinion and what they have been accustomed to believe since time out of mind. The individual so understood is not a self-conscious, autonomous being of reason guided by the light of self-interest alone – the caricature of modern liberalism. Rather, a host of nonvolitional, non-rational factors influence the scale of values by which everything else in an individual's life is measured[241].

[238] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 149.
[239] John Locke. Reputation. In: Political Essays. Cambridge University Press, 2002. p. 272
[240] John Locke. The Conduct of the Understanding. Paternoster Row, 1801. §33. p. 107.
[241] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 152-153.

It does seem unreasonable to expect from the average man the acumen of Wittgenstein or the inquiring mind of Socrates. Either people are ill-informed, as "fashion and the common opinion having settled wrong notions, and education and custom ill habits, the just values of things are misplaced, and the palates of men corrupted[242]", or, as described by Mark Button in a way much familiar to present life, "are so caught up in the day-to-day pressures of life and work that they lack the time and leisure to make proper inquiries into their principles of belief[243]".

Locke singles out several other challenges to public reason. The reluctance before diversity of opinion ("since we cannot reasonably expect that any one should readily and obsequiously quit his own opinion, and embrace ours"[244]) and ingrained ideas ("beyond all possibility of being pulled out again"[245]), barriers both individual and cultural, abound, since "men will disbelieve their own eyes, renounce the evidence of their senses, and give their own experience the lie, rather than admit of anything disagreeing with [their] sacred tenets"[246]. Locke complains that "we take our principles at haphazard upon trust, and without ever having examined them, and then believe a whole system, upon a presumption that they are true and solid; and what is all this but childish, shameful, senseless credulity?[247]"

> Lockean politics faces a problem precisely because it situates the legitimate transfer of authoritative decision making and political power in the trust of people. Locke is concerned with sustaining social and political stability, but at the same time, he recognizes that cultural and political objects of trust have a tendency to become the engines of their own reification. What individuals choose or assent to, often in haste and without undertaking a fair and just examination, has a tendency to stick to them[248].

Hence, the challenge is set. The perils of stubbornness, credulity, misinformation and zealotry are all predatory not only for the reason of the individual, but also for the body

[242] John Locke. An Essay Concerning Human Understanding. Penguin Classics, 1998. BII.XXI.71. p. 357.
[243] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 153.
[244] John Locke. An Essay Concerning Human Understanding. Penguin Classics, 1998. BIV.XVI.4. p. 892
[245] Idem. BIV.XX.9. p. 967.
[246] Idem. BIV.XX.10. p. 968.
[247] John Locke. The Conduct of the Understanding. Paternoster Row, 1801. §12. p. 48.
[248] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 161.

politic to which that subject provides legitimacy through assent. The answer to those difficulties, and to the overall task of entering and participating in social compact, rests on an education of habits, those capable of fostering virtue.

> For Locke, habits, custom, and opinion are necessary features of political society, just as human passions constitute a necessary feature of the individual life. With respect to the passions, the question is not one of "having or not having appetites, but [whether we have] the power to govern or to deny ourselves in them". Likewise, his more extensive reply to the conditions of habits and custom is not an inquiry into how these extrarational features might be extirpated from the calculus of social and political order but, more pragmatically, how these necessary characteristics of political society might be given a different structure and a different purpose. Habits are conditioning factors in the moral life of individuals that seem to preexist and await the self, but they are also flexible and adaptable sources for the self, if "managed" properly[249].

Lockean contribution to the conundrum, therefore, is centered not on the affirmation that moral theories are ideal for the citizen, but on the resort to an education based on building the practices of citizenship. Tension, however, arises from the fact that an education grounded on development of custom is, by default, set on the path and not on the goal, much akin to the irreflective tending of tradition. How can an education in search of a critical ethos be furthered by the development of behaviors projected to be absorbed into the mental processes?

> Perhaps the real paradox with which Locke leaves us is how, or whether, an education in habits and custom, governed by the mechanisms of praise and shame, will produce citizens capable of critical self-examination, public reasoning, and the proper governance of assent and public reason. Locke has a vision of the kind of populace he thinks is necessary to sustain the right kind of

[249] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 164.

> relations between men, between man and God, and between governors and governed[250].

Rousseau – Ulysses in chains

Jean-Jacques Rosseau (1712-1778) draws from both the voluntarist and liberal traditions (which both Hobbes and Locke represented, respectively) to write his own account of how life in society should be organized. We'll proceed to recount some of his contributions to the ideas of public reason and citizenship on contractarian tradition. Rosseau represents a formidable contribution to the idea of Transformative Liberalism inasmuch as he championed sovereignty of the people in such a high regard as to jeopardize the capacity to hold commitments in time. If the power of the people is limitless, it knows no boundaries of assumed obligations.

Rousseau believed that the people's capacity of reason was trusted to guide and control government. That didn't mean, however, that he reckoned a society composed of philosophers, conceding that in contentious discussions, passion would trample reason on public judgement. The answer to this is the establishment of a system aimed both at providing extensive room for public reasoning while, at the same time, providing for the stability of the society. He does so by drafting a "unique theory of constitutional order that integrates the idea of public reasoning as a reiterative practice of collective self-reflexivity with a cultural-civic concern for the preconditions of stability[251]".

His theory departs form the proposition that political sovereignty is intrinsically connected to the body politic, to the members of the society under contract. This relationship is so deep and radical that he goes as far as to say that "there is not, nor can there be, any kind of fundamental law that is obligatory for the body of the people, not even the social contract[252]". Akin to the famous koan that states that no God can create a rock so big he can't

[250] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 167.
[251] Idem. p. 175.
[252] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. BI.VII. p. 54.

raise, no sovereign polity can, according to Rosseau, bind itself beyond its own powers, paradoxically rending itself powerless.

> The Hobbesian citizen is a subject, loyal and properly quiescent except where basic self-preservation is at stake. The Lockean citizen is also a subject, but one who may need to exert his ultimately "supream power", along with his fellows, under appropriately dire circumstances – specifically, when the government or legislative power has already been "forfeited" or dissolved. In contrast, the Rosseauian citizen is always simultaneously subject and sovereign. In this sense the self is always double: a subject with duties and bound to the laws, and a citizen with rights who is the author of the laws. It is precisely this internal dualism that makes a social contract possible for Rousseau, and the social contract – the political relation itself – is responsible for this doubling of the self[253].

Citizens live a double life of subjects and sovereigns, and these roles run in parallel, given that one cannot exhaust the other or be subsumed to it. Subjects are all equal cogs in the intricate machinery of the polity, indistinguishable from it in such level that Rosseau argues that no harm against them can take place, for the sovereign wouldn't harm itself. Conversely, the opposite is not guaranteed. The adherence of the subject is not so obvious, since "each individual, as a man, may have a particular will contrary or dissimilar to the general will which he has as a citizen. His particular interest may speak to him quite differently from the common interest[254]".

> The act of making the social contract generates a promise of fidelity on the part of individuals (and the private, subjective side within each individual) that no subject can have complete confidence in either meaning or knowing fully what it does or will entail, or whether he shall be able to continue to abide by and keep such promise in the future. The social contract, in other words, engages

[253] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 176-177

[254] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. BI.VII. p.55.

> individuals in the promise to become what they are not either by nature or by history: citizens of an always specific and limited polity[255].

Therefore, the social contract isn't fulfilled at foundation, but merely initiated, heading towards the future in a sequence of agreements and exchanges of trust among the participants of the compact. This is a development that is nurtured throughout time and entails a specific responsibility of maintaining trust by dispensing wisdom in choosing meaningful commitments. As Rousseau exemplifies in Émile, in a situation where the protagonist is warned about the dangers of unreasoned adherence to obligations:

> Young man, you make difficult commitments lightly. You would have to know what they mean in order to have the right to undertake them. You do not know the fury with which the senses, by the lure of pleasure, drag young men like you into the abyss of the vices. I know that you do not have an abject soul. You will never break faith, but how often you will repent having given it… Just as Ulysses, moved by the Sirens' song and seduced by the lure of the pleasures, cried to his crew to unchain him, so you will want to break the bonds which hinder you[256].

That's a striking metaphor that exemplifies the tensions between the desires of the private and of the public, and how the general will binds while unbound. From the capacity to articulate this kind of disposition to self-containment while in subordination to the body politic, it seems a complicated deal. As previously described about Hobbes and Locke, the hardest piece of this jigsaw game is that of the citizens, which seem unable – or at least resistant – to fit. In Rosseau's description, the double life of subject and sovereign underscores the tension.

To complicate things even further, men are creatures led not by reason, but by passion. Like other thinkers, Rousseau understands that while reason might be a strong foundation, the conflictive nature of passion might take the individual – and the societies – either way. It is an obstacle for any account of a stable order. Any attempt to mitigate that

[255] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 179.
[256] Jean-Jacques Rousseau. Emile - or On Education. Basic Books, 1977. p. 326.

influence through acts of preparation – exercises on foresight – might, however, incur in other risks. Opting to limit the scope of action, for fear of the difficulties that may arise from the turbulence of passion, also shapes the possibility of a future that does not exist, and to which one may never take part.

> Just as foresight is needed for politics, and in particular for acts of political founding, promising raises the problem of forming and sustaining meaningful commitments in the political lives of citizens. This problem sets the stage for a crisis of meaning insofar as he expressions and ties to the past slide into cultural petrification, routinization, and political or legal despotism. So, while foresight is a necessary virtue during moments of political founding, it can easily overstep the bounds that make a shared civic life meaningful as it attempts to orchestrate that future in full, perhaps with the hope of evading politics altogether.[257]

Rosseau advocates, therefore, politics of impermanence, where not only the future is improbable, but the past is irresponsible. The self would be the same person as a physical body, however "it would be foolhardy to affirm that one will want tomorrow what one wants today[258]". An apparent translation to the society as a group would entail that "it is contrary to the nature of the body politic for the sovereign to impose on itself a law it cannot break"[259]. It seems confusing and plainly unworkable. Nothing is ever set in stone, as you can never enter the same political river twice. It is hard to envisage how could a society function devoid of commitments.

Rosseau answer to this challenge invites us to look a bit closer to what any commitment entails: an act of will, an act of promise and, underlying those, the opportunity of change. As the philosopher puts it, "(o)ne can obligate oneself to do, but not to will; and there is a great difference between executing what one has promised, because one has promised it, and continuing to will it, even when one has not previously promised to do so". While we cannot be sure that we will remain the same, our obligations exist, so we must

[257] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 184.
[258] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. pp. 167-168
[259] Idem. p. 164

choose very carefully to which shackles we submit our future self. This, in turn, has a different meaning to the body politic, since:

> today's laws should not be an act of yesterday's general will, but of today's, and we have engaged ourselves to do not what everyone has willed, but what everyone now wills, on the understanding that the sovereign, whose resolutions as sovereign concern only itself, is always free to change them[260].

Will is therefore in constant need of revision and renewal, and it does so by virtue of institutional possibilities, in which the society listens to the desires of its own will and finds out what it wants now. It is only by this public activity of reasoning and expression of the will that the social contract can be maintained.

> In large measure Rosseau encourages these channels of democratic accountability to prevent the usurpations of government – something that he thinks is as inevitable as the death of every living thing. Yet, so long as these institutions and this spirit of revisability persist, the proper relationship between sovereign authority, public reason and government will be sustained. As Rousseau makes clear (inverting Hobbes and radicalizing Locke), a magistrate's "own reason should be suspect to him, and he should follow no other rule than the public reason, which is the law[261]".[262]

Society must keep close watch on the present, lest it be drawn to a state of indifference from citizens, leaving to magistrates the power to freely shape the contents of law and obligations to their heart's content. What Rosseau means, therefore, urging for institutional review, is not that every action must be at all times undone in a state of constant instability bordering nothingness, but that societies should be allowed to protect their interests to make sure the sovereignty they embody reflects themselves. Otherwise, they would not belong, and this is how political bodies die – out of starvation. Making sure institutions remain true to the sovereign is, therefore, an investment in its permanence. The

[260] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. pp. 173-174
[261] Idem. 211.
[262] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 189.

way to achieve such continuous assent and investment is that of public reason and public action, both of which are embodied in (but not limited to) law and institutions.

> It is to law alone that men owe justice and freedom. It is this healthy instrument of the will of all that reestablishes, as a right, the natural equality among men. It is this celestial voice that tells each citizens the precepts of public reason, and teaches him to act according to the maxims of his own judgement and not to be in contradiction with himself[263].

While there might be a tendency to interpret Rousseau as a defender of the undoing, we could switch the idea on its head and argue that what he defended was in fact all that was not undone, and thus confirmed and maintained by the will of the sovereign, even when it could have been undone. Laws grow on relevance and respect when they have been supported for long periods of time. It changes the shape of a legal culture based on the legitimacy infused at the moment of creation to other of constant affirmation of such legitimacy.

Unsurprisingly, with great powers comes great responsibility. The possibility of an effective political action by the citizenry, which could cause instability and chaos, calls for prudence and caution. That should not, according to Rousseau, lead us to discredit the power and importance of individual participation upholding the sovereignty.

> (The) crucial claim here is that for Rousseau this necessary "circumspection" is a "maxim of politics and not a rule of right." Citizens cannot be prohibited from such fundamental reconsiderations just because there is a chance that the use of such powers may end up badly. Rousseau agrees with other modern contract theorists that governments are not instituted by or through contracts but rather through an act of law (public reason) undertaken by sovereign authority, that is, by the body of citizens. As he claims throughout The Social Contract, "a people is always the master to change laws". This principle applies even to the best laws of a

[263]Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. p. 214.

> regime: "for if it wishes to do itself harm, who has the right to prevent it from doing so?[264]"[265].

It is this interplay between making choices (even bad ones) and being held responsible for them that provides the opportunity to learn and to improve the autonomy and the capacity of citizens. In fact, Rousseau affirms that "political rule, without reference to the reiterated practices that makes power personally salient, is bound to inure citizens to passivity and ultimately delegitimize governmental authority[266]". While the idea of shielding institutions and laws from political participation might be a reasonable way to tackle the threat of populism, authoritarianism, or even despotism, it comes with a cost in political autonomy that, taken to an uncertain point, might sever the ties that give that political relationship a status of representation, mutating it to something else.

So how does Rousseau account for the keeping of commitments, if not from the foreclosure of options that would endanger the livelihood of the compact? Under the perception that society is not limited to the domain of laws, but spread over a sociocultural context manifest in many ways, including morals and habits, many of those conservative and adverse to change. These elements compose a web of factors that have a greater influence over people than the advocacy for higher values.

> Men are not ultimately governed or changed by laws but by other human beings acting within a specific set of cultural standards and norms. If the most powerful force in the life of individuals is not government or laws, and thus not even their own self-willed laws, but rather *moeurs* and public opinion, then we need to try and understand how these forces relate to Rosseau's political theory and to his version of social compact[267].

Rosseau seems steadfast in his appraisal: "the greatest wellspring of public authority lies in the hearts of citizens, and that for the maintenance of the government, nothing can

[264] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. p. 76.
[265] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 190-191.
[266] Idem. p. 191.
[267] Idem. p. 197.

replace good mores"[268]. Customs and public opinion are the main drivers of society, as is *amour popre*, a sense of precedence that one has about his or her relative success in comparison to others.

While Locke prioritizes the development of an informed and rational citizen, capable of making sense and judging society critically, prone to converge to Natural Law, Rousseau differs substantially in his approach. He is ready to give more leverage to customs, exactly because they represent the bedrock of recalcitrance and stability.

> Of course, he stresses time and again that the governing passion ought to be love of country. The standards according to which a people's judgements are made and the common objects of their steem should be directed at public goods and civic services. This is in contrast to the feverish pursuit of commercial or luxury goods, which will prove both hard for a regime to sustain over the long haul and which does little, on its own, to produce citizens. Underlying this moral critique is a more extensive understanding of the mutually constitutive traffic that goes on between the individual – and the individual's sense of self – and the cultural and social institutions (both formal and informal) that surround, support, shape, constrain, debase, frustrate, and ennoble the individual[269].

Rousseau recognizes that laws have a minor part to play in the enterprise of swaying opinions. In fact, he argues that "if you want the laws to be obeyed, make them beloved, so that for men to do what they should, they only think they ought to do it[270]". Citizenship is essential to the maintenance of society, and it is clear, to Rosseau, that it needs tending and incentive as well. For him, it means giving people objects of desire and reverence, the laws and institutions amongst them, but not all. We should hence reflect on ways we could impart meaning and substance to live people, teeming with pettiness and banality. From there, higher.

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[268] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. p. 217.
[269] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 199.
[270] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. p. 217.

> Someone may tell me that anyone who has men to govern should not seek, outside of their nature, a perfection of which they are not capable, that he should not want to destroy their passions, and that the execution of such project would not be any more desirable than it is possible. I will agree the more strongly with all this because a man who had no passions would certainly be a very bad citizen. But it must also be agreed that although men cannot be taught to love nothing, it is not impossible to teach them to love one thing rather than another, and what is truly beautiful rather than what is deformed[271].

Past and future of transformative liberalism

We started this chapter by canvassing some of the fundamentals of the Rawlsian thought, from the basics of the Justice as Fairness theory to concerns about public reason and the challenge to achieve stability not as a *modus vivendi*, but as workable compromise among citizens. We have then skimmed over some of the main features of the contractarian thought, as developed by Thomas Hobbes, John Locke and Jean-Jacques Rosseau. Throughout that section we tried to demonstrate that the stability of the social contract was a concern from the start, and the role of its members has been under constant examination, always motivated by the desire to achieve a better society through stimuli proposed to improve legitimacy and stability. We have followed from Mark Button's research, where he proposes that "contract makes citizens, never the other way around" to emphasize how the way the social contract is drafted – as the obligations and expectations it entails – is instrumental to shape the role of citizenship and of citizens, that are in turn pivotal for the uphold and good functioning of this same compact. These scholars provided us with interesting insights.

> To claim that contract makes citizens is to emphasize the central point that a concern for political justification – symbolized and addressed by the idea of a mutual compact, promise, or agreement –

[271] Jean-Jacques Rousseau. On the Social Contract – with Geneva Manuscript and Political Economy. St. Martin's Press, 1977. p. 222.

> sponsors a range of ethical-civic transformative practices in order to make good on the idea of political society as grounded in a mutual promise and, most important, to sustain such an understanding of self and society over time[272].

We must, then, begin the trip out of the wilderness and back to the praxis of International Law, and question where such connection of stability to political justification and civic participation could lead us, possibly in different institutions, aspiring a safer and fairer world. That will be the subject of the next and final chapter.

[272] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p. 207.

5. INTERNATIONAL COURTS AS CITIZENSHIP BUILDERS

Introduction

When we set out at the start of this research various political facts seemed to almost overwhelmingly arise from several aspects of global governance (and international life), leading to a sense of perplexity, almost as if International Law represented a dam, shielding us from authoritarian dangers (amidst other perils enshrined on UN Charter preamble as a testament of the nightmares of our times). Nowadays this dam appears to be in a bad shape, with infiltrations proliferating, putting into question the reliability of whole sections of its structure. Will it break? Will it prevail? Prof. Jutta Brunnée delivered a keynote at the 112th Annual Meeting (2018) of the American Society of International Law (ASIL), where she provided a rough description of the prevailing concern, adding her take on the issue:

> Interactional law[273] is surprisingly resilient and many actors can defend and strengthen it. But when norms come to be widely challenged and when they are no longer effectively defended, they will change, or decay. The same is true for the principles and understandings that underpin international law itself. I want to suggest that the former type of change is inherent, even necessary, in law. The stability and resilience of a legal system depend on its capacity to change, even if that change is often incremental and existing rules may prove hard to displace.
>
> We may not always like the changes that are brought about, or we may even be concerned about new rules and norms that are being promoted. But, to date, we have also known that we can rely on the constraints inherent in legality and legal interaction to resist certain types of changes – much as Harold Koh outlined in his remarks.

[273] Prof. Brunnée defines interactional law in the same speech as: "(…) in order for an international legal order to exist, it must provide universally, or perhaps somewhat less ambitiously put, generally applicable principles of conduct and interaction. These principles include those that define what counts as 'law' in the first place, and that enable as well as discipline argumentation and justification that is 'legal' in nature. Elsewhere, in my work with Stephen Toope, I have elaborated on what I consider to be the distinctive – and constitutive – traits of law and legal interaction. We have come to think of international law as 'interactional law.'".

> Professor Koh seemed fundamentally optimistic about the power of what he calls "transnational legal process." Yet, he too acknowledged that we may be at a cross-roads, witnessing "a deeply consequential struggle between competing visions of world order."
>
> I agree. What worries me is that we are witnessing not merely fights around particular rules and institutions, but sustained challenges to the very underpinnings of international law. That is not entirely unprecedented (…), but it is something that has been a rarity in modern history.[274]

We began by exemplifying this uncanny situation in the extremely fast pace that the Trump administration redirected – and even reversed – matters of International Law in the beginning of his presidency, in a conflation of policy changes that led – and is still leading – to rearrangements of power equilibria abroad, players and Asia and Europe have sought new roles. The same can be said of Latin America, where some of the measures entertained up North seem that could be replicated, given the election in Brazil of a president on steadfast support of this arising "Trump Doctrine", even before formally taking office. Not only the speed was remarkable, but also the direction of changes. Described as an anti-globalist backlash, many of the measures seems to be a call to arms against the same globalization that strongly benefitted western liberal countries such as United States or even United Kingdom – that found its own crisis of consciousness at Brexit, in an arguably even more tormenting process. Events like those suggested that there were more at play than the drafting of "bad deals" by diplomats in foreign palaces.

One way of trying to understand the situation – that which was ultimately chosen as a research avenue in this dissertation – was of understanding the interplays of legitimacy in present-day International Law, or how its presence (or absence) could influence the upholding of the Law. Under liberal democratic societies, legitimacy is understood as to be transferred from citizens to those entrusted to perform international acts, but the question was (and certainly still is) how this movement happens. The main hypothesis is that obstructions on this flux led to a diminishing legitimacy of global governance, in such way

[274] Jutta Brunnée. Challenging International Law: What's New? – Keynote Speech. In AMERICAN SOCIETY OF INTERNATIONAL LAW. Proceedings of the 112th Annual Meeting. 2018. The full speech can be found at: http://opiniojuris.org/2018/11/13/challenging-international-law-whats-new/

that the citizen can barely recognize the outcomes of international agreements as a relevant product, leaving what was unwittingly done as easily undone[275].

On the first part of research the work was divided in a twofold examination on the capacity of defining obligations, under two different approximations. The first part explored the question of how the content of obligations is defined[276], the second canvassed fora where international governance acts on such obligations[277]. Both parts aim to present a more nuanced view of International Law, especially a more porous and less monolithic perception, attuned to the present role performed by States – still central, but complemented by several other actors and structures that influence the transnational legal processes in a myriad of ways and capacities. The sheer variety of acts and impacts described give purchase to the idea that the traditional account of legitimacy – as a simple and relatively straightforward sequence where legitimacy is bestowed from voters to mandate-keepers – incapable to encompass the complexities of the modern, integrated, globalized life. With several political and legal phenomena being conducted without democratic oversight, the conclusion of public mistrust or ignorance seems even understandable, if not justifiable.

The latter part starts from that sense of overload of international legal activity that it not adequately conveyed to public discourse. It presents the works of several political theorists that elaborated on the issue of public reason, on why it exists, and under which purpose. While presenting texts from fundamental authors from the contractarian tradition (Hobbes[278], Locke[279] and Rousseau[280]) it proposes that such concern for legitimacy on public affairs is far from new, and also that there is room to argue that throughout the development of Social Contract theory there was always some concern over the role of the citizen, and how fundamental it was to create a stable society. From this standpoint we delve into one relatively recent contribution on this field, the Justice as Fairness theory of John Rawls, wherein such concerns are recognized in their importance.

As previously affirmed by the other authors, the way institutions are designed deeply affect not only their directly predicted outcomes, but also their relationship to citizenship. In

[275] See on page 16.
[276] See on page 21.
[277] See on page 50.
[278] See on page 94.
[279] See on page 98
[280] See on page 105.

that sense we follow from Mark Button's insight that "contract makes citizens, never the other way around[281]". Therefore, Rawlsian focus on public reason, vis-à-vis the fostering of values in citizenry that are conducive to the empowerment of a society resilience by imagining ways in which the Basic Structure could be adapted in order to create better citizens – which, in turn, herald a fairer and more stable society.

Rawlsian theory seems to provide room for an extension of this idea – which Mark Button denominates Transformative Liberalism[282]. If we understand that such tending of citizens is important for the maintenance of a stable society, and the sustenance of singular institution themselves, we might propose that international organizations have not only an interest, but a duty to foster public debate and improve on the capacities of citizens to evaluate and contribute to its work. Under this interpretation of International Law, international organs possess a double life, one as legal actors that create and uphold obligations, other as explainers and informers of such obligations, helping to shape cultures. We contend that both lives are equally important. The main thrust of this argument is that any democratic society that relies on transient legitimacy is at risk of sudden (and violent) upheaval of political conditions. The antidote of those uncertainties is indicated not to be magical nor definitive, but the long and slow cultivation of international institutions by shaping it's conduct under the premise that without inclusiveness it will probably fail on the long run.

This is not to say that advances have not been made on the issue of legitimacy and overall transparency, but the focus here is that those aren't features to be understood as mere facilitators of performance, or promoters of efficiency on the performing of its core functions, but as one of the main functions of these organizations by its own merits, inasmuch creating bodies of law can only guarantee a level of compliance as there is a legal and societal culture prepared to uphold that law, to participate in the interplay of meaning and thus to demand the equilibrium of the application of the law.

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[281] Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. p.7.

[282] It is important to stress that Button's analysis has a different focus than this research, and his proposed solution, to exercise what he refers to "Democratic Humility", is not the goal recommended here. He defines it as "a cultivated sensitivity toward the limitations, incompleteness, and contingency of both one's personal moral powers and commitments and the particular forms, laws, and institutions that structure one's political and social life with others". Further information about that concept, its sources and applications, can be found at: Mark E. Button. Contract, Culture, and Citizenship – Transformative Liberalism from Hobbes to Rawls. Pennsylvania State University Press, 2008. pp. 229-236.

As the conclusion of this research, we will suggest one exemplary application of this proposal, analyzing democratic opportunities to be pursued by international courts, and how structural adjustments could amount to potential gains in transparency and legitimacy. This is far from an easy task. As Bogdandy and Venzke said:

> The international debate is more or less at the same stage at which European integration found itself at the end of the 1980s. There is a growing realization that for international institutions the democratic question is becoming urgent, but there is great uncertainty about what persuasive answers might look like[283].

Furthermore, we'll indicate other areas of future research that, to our understanding, could be investigated under the same premises: that a theory of International Law in line with Liberal Democracy principles must put public interest up front and center, renouncing any aristocratic veneer, and that it should do so by inviting participation, contribution, and more importantly, oversight. This aims to the advancement not only of the international institutions, but domestic democracy itself.

Questions of design: focusing on international courts

Throughout the vast literature of International Organizations, it is widely accepted that they are a product of an expression of will, in lieu of an accidental action. While some of their defining features – or even entire organizations themselves – might have haphazard origins, they come to fruition as a deliberate act of one or several States. They are carefully planned in a constitutive document scrutinized by diplomats and international lawyers, in order to guarantee that they will be able to perform their intended roles. The foremost characteristic of these subjects of International Law, created by international treaties out of thin air, is that they have a function. They are anything but random. As Barbara Koremenos, Charles Lipson, and Duncan Snidal defined, International Organizations are "explicit

[283] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. p. 136.

arrangements, negotiated among international actors, that prescribe, proscribe, and/or authorize behavior[284]"

> Explicit arrangements are public, at least among the parties themselves. According to our definition, they are also the fruits of agreement. We exclude tacit bargains and implicit guidelines, however important they are as general forms of cooperation. Institutions may require or prohibit certain behavior or simply permit it. The arrangements themselves may be entirely new, or they may build on less formal arrangements that have evolved over time and are then codified and changed by negotiation[285].

Starting from the fact that every organization has a *raison d'être*, we can start to evaluate what are the objectives of those institutions, in order to investigate their role – if there is any – in fostering legitimacy, authority, and therefore, stability. If they are a product of choice, it matters what is being chosen and why.

Restricting our analysis to judicial bodies, we could follow from Leslie Johns' research, that listed six different ways that an international court can help its proponents, mostly helping them to improve collaboration[286]. First, they can "create expectations about appropriate behavior[287]", signaling what is the right thing to do in a specific situation, fostering a sense of security on application of Law. Second, they can "provide information about the prior actions of state[288]", informing third parties about the behavior of involved States and facilitating acts of reciprocity. Johns compares the benefits with the situation of medieval traders, whereas the lack of a central authority forced the development of a quasi-official network of professional honor.

> When a merchant violated a contract, his victim reported the violation to an individual known as the law merchant who kept a public record of all violations. Each merchant could then go to the

[284] Barbara Koremenos, Charles Lipson, and Duncan Snidal. The Rational Design of International Institutions. International Organization. Vol. 55. Issue 4. 2001.
[285] Idem. p. 762.
[286] Leslie Johns. Rational Institutions and International Law. In: Strengthening International Courts – The Hidden Costs of Legalization. University of Michigan Press, 2015.
[287] Idem. p. 15.
[288] Ibidem.

> law merchant prior to making a trade to see if his potential partner was a violator. If merchants refused to trade with violators, then merchants had no incentive to cheat. A system based on reciprocity can therefore reduce the temptation to violate because violators are excluded from future cooperation[289].

The third and fourth contributions of international courts addressed by Johns are remedies to commitment problems. In a stricter sense of commitment, Johns contends that courts are helpful in constraining political leaders by reducing their leeway. Courts protecting foreign investment are a good example of this dynamic:

> If I am the leader of a developing country, then I benefit if a foreign investor decides to build a shoe factory in my country. The factory will increase employment, generate tax revenue, and develop infrastructure. Before the investment is made, it is optimal for me to woo the foreign investor by promising to respect his property rights. However, after the factory is built, I have less incentive to abide by my prior promise. I may want to seize his factory and make it a government-run enterprise. Or I may wish to increase taxes or regulation to secure a larger share of the factory's profits. The foreign investor should be able to anticipate these temptations and he will not build the factory if he believes that my promise will be broken. So I can only lure in foreign investment if I can find a way to make my promise credible. I must find a way to "tie my hands" so that the investor knows I can't later grab his property.[290]

On a broader sense of commitment, States signalize a long-term disposition towards certain issues and positions by virtue of association to international organizations and systems of governance. This way, it ensures that the possibility of departure of these values – sometimes pursued in times of blue skies – is not taken light under dire straits. Therefore, by association to, for example, an Human Rights monitoring regime, a State can make it

[289] Leslie Johns. Rational Institutions and International Law. In: Strengthening International Courts – The Hidden Costs of Legalization. University of Michigan Press, 2015.pp. 15-16.
[290] Idem. pp. 16-17.

harder for future administrations to violate dispositions of values under that generic umbrella. That is the fourth way indicated by Johns[291].

The fifth way international courts are helpful is by adjudicating on legal gaps[292]. The contracting parties deliberately draft a treaty that will need further complement via interpretation. Thus, an impasse can be postponed, and a compromise – although a, admittedly precarious one – can be reached. Finally, the sixth way courts are used by States is that of playing the role of a stage for power politics[293]. In several different ways, an international court can provide a civilized veneer for the usual arm-twisting displays of International affairs. As Johns exemplifies (references omitted):

> A powerful state may pressure a weaker state to sign a trade agreement, even if the agreement harms the weaker state. Similarly, some scholars believe that the International Criminal Court was created, at least in part, so that middle powers, like France and Germany, could limit the actions of more powerful states, like the United States. Interest groups can also use international law and courts to entrench their preferred domestic policies. For example, Moravcsik argues that after World War II, new democracies supported the European Convention on Human Rights because they wanted to prevent fascism and communism by constraining future politicians. Legalization can also promote the growth of interest groups that support compliance.[294]

All of those six objectives seem practical and realistic, as drivers of State interests to further their particular claims at any given time. Alas, they are not rooted on a democratic imperative of maintaining stability and are not designed to build adherence and legitimacy. How, if even possible, could an international court be designed in order to be democratic?

[291] Leslie Johns. Rational Institutions and International Law. In: Strengthening International Courts – The Hidden Costs of Legalization. University of Michigan Press, 2015. p. 17.
[292] Ibidem.
[293] Idem. p. 18.
[294] Ibidem.

Armin von Bogdandy and Ingo Venzke sketched a possible answer inspired by the Treaty of the European Union[295]. That treaty contains four articles under the heading of "Provisions on Democratic Principles" that represent an outcome of democratic politics aimed at improving democracy at international level. Such articles shouldn't be taken as an (another) European model to be copied, but only "clues that reveal which aspects should be paid attention to in developing the democratic principle in the international realm"[296]. Those dispositives represent, for Bogdandy and Venzke, four different areas of crucial importance[297]: citizenship (Article 9); representation (Article 10); transparency, deliberation, participation (Article 11); and reorientation of domestic parliamentarism (Article 12). We'll proceed to assess how those areas could function in a more democratic court.

The first element is citizenship, or who are the subjects of this polity. Article 9 defines who should be considered as a target of European democratic concerns[298]. It doesn't refer to any "people", positioning all European citizens as equals (and thus entitled to "receive equal attention from [European] institutions, bodies, offices and agencies"), under the support of both citizenships of Member States and European Union. That means that individuals that are part of a domestic scheme of political representation, therefore regarded as citizens of those countries that chose to become Member States of the European Union, receive a status of a quasi-cosmopolitan affiliation, that stems not from the formation of a single identifiable People, but from the connection to this international political group[299]. Consequently, the international organization must take heed not only of the subjects of the States, but of individuals from those States as well. This could influence significantly the judicial activity, broadening the scope of what usually perceived as the common functions of international courts.

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[295] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. p. 135.
[296] Idem. p. 136.
[297] Ibidem.
[298] The text of the Article 9 reads as follows: In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship
[299] This seems to be an approach opposite to what proposed by John Rawls in his theoretical proposal for International Law, the "Law of Peoples", where the main building piece of international relations are peoples. See John Rawls. The Law of peoples – with "The idea of public reason revisited". Harvard University Press, 2002.

> On the whole, then, it seems possible and worthwhile to follow the approach underlying Article 9 of the TEU and to address the decision-making power of international courts from the citizenship perspective. It can inspire processes of judicial interpretation and law-making as well as doctrinal reconstruction. When it comes to justifying international judicial decisions, that should take place not only—and perhaps not even primarily—with a view to the states, but with a view toward the individuals who are, in the final analysis, affected by them—individuals who are not merely holders of defensive positions, but also political subjects, citizens[300].

At this point Bogdandy and Venzke contend that the resulting situation is of a fundamentally different kind of democracy. The dual nature of the polities puts in direct comparison agreements that are fundamentally different. While domestic policy might have a majoritarian overtone, international politics under organizations such European Union is necessarily marked by diversity, creating a tapestry of different cultures and subjects that cannot be simply reduced to a "normal" majority. The great challenge is how to level such different societies, while themselves might be already discrepant. In this sense, Bogdandy and Venzke defend that the domestic legitimation of international acts will remain important. That legitimacy should be sought after under doctrines such as "margin of appreciation" or "subsidiarity"[301], by preparing the domestic to deal with the diversity of the international, providing it with guidance and support.

Another aspect relevant is that of one of the main concerns for international democracy: political inclusion. This inclusion should go farther than theories of self-determination, requiring something else than traditional views of individual or collective self-determination. Bogdandy and Venzke contend that[302]

> Such inclusion can take place in two ways: via mechanisms that incorporate the citizens collectively— this is the established path that builds on elections —and via mechanisms that provide for the inclusion of individual citizens and groups in specific decision-

[300] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. pp. 144-145.
[301] Idem. p. 146.
[302] Idem. p. 148.

> making procedures. Courts can be built into this kind of understanding of democracy much more constructively than into models committed to the idea of political self-determination.

The second element proposed by Bogdandy and Venzke is that of representation, enshrined on Article 10, that defines representative democracy as a cornerstone of European Union[303]. Courts, however, are far from the projected *locus* for democratic representation – role more usually taken by the Legislative or Executive branch, or by organs that exercise similar functions. However, the existence of democratic parliamentary bodies, able to give room to the dual legitimacy scheme, and to a plethora of diverse participants, may in turn concede to international courts its legitimacy, in processes such as the election/appointment of judges, and the drafting of norms that will in time be interpreted as soft law by those magistrates[304].

The third element, the public involvement present via transparence, deliberation and participation is present in Article 11 as an imperative of public authority[305]. The dialogue envisaged at item 11.2 could be fostered in courts, which not only settle disputes between litigants, but also proclaim an understanding of the meaning and importance of the Law. There is a role to be explored for courts as spaces for development of citizens' political

[303] The text of the Article 10 reads as follows:
1. The functioning of the Union shall be founded on representative democracy.
2. Citizens are directly represented at Union level in the European Parliament.
Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.
3. Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.
4. Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union.

[304] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. p. 151.

[305] The text reads as follows: Article 11
1. The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.
2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.
3. The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.
4. Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.
The procedures and conditions required for such a citizens' initiative shall be determined in accordance with the first paragraph of Article 24 of the Treaty on the Functioning of the European Union.

conceptions, being exposed to a proceed designed exactly to contrapose better argument from litigant parties.

> This renders it advisable to conduct judicial procedures, for example, transparently—and this not just for the parties, but also for the wider public that might be affected. But a transparent reasoning, too, offers a strategy through which a court can contribute to its own democratic legitimation. Such a justification allows the scholarly and general public to engage much better with a judicial decision[306].

By rejecting distance and opacity in search of proximity and transparence, these institutions can gather support for their decisions, and muster both legitimacy and authority[307]. One might argue that there looms the danger of politicization of the courts, that could abandon their duty to interpret the Law changing into a different kind of institution, one that considers itself the interpreter of popular will. Bogdandy and Venzke defend that not only there are benefits in this kind of engagement with public discourse, but this might be a sine qua non condition for the maintenance of international judicial bodies.

> It is one of our core insights that the success of many international courts leads to the need for an accompanying international politicization. If international courts succeed in promoting this kind of politicization, they can support their own democratic legitimation. To be sure, not every form of politicization holds democratic potential. A legally and institutionally unrestrained struggle for power has no such quality. But if the pursuit of interests takes place within legally hedged pathways, which are responsive to democratic requirements, then this holds promise[308].

We shall now turn for some examples of active international courts on how they have been trying, with varied degrees of success, to better engage in outreach activities. Nicole de

[306] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. p. 152

[307] A very promising avenue of research regarding how transparency and participation improve democracy is present in: Theresa Squatrito. The Democritizing Effects of Transnational Actors'Access to International Courts. In: Global Governance, 2017.

[308] Armin von Bogdandy and Ingo Venzke. In Whose Name? A public law theory of international adjudication. Oxford University Press, 2014. p. 154

Silva has conducted a very thorough research of 23 operational courts, summarizing some of the main strategies of those institutions, based on their activity reports[309]. Surprisingly, eight of those 23 courts did not provide formal reports[310]. De Silva analyzed which of those courts have developed some sort of strategy of socialization, meaning "the process through principles ideas become norms in the sense of collective understanding of appropriate conduct, which lead to change in identities, interests, and behavior"[311]. In other words, how many of them actually sought to improve courts' performance disseminating its values inwards (by improving it's functioning) or outwards (via education and sensibilization). Most of the international courts employ some sort of socialization strategy. Only two of those fifteen courts that have reports available fail to mention any action in this direction[312].

Almost all of the thirteen courts conduct activities aimed at the external public[313]. Some of them act in both internal and external strategies[314]. Only one judicial body is solely focused on internal strategies[315].

> The general assumption behind the policies and practices was that actors lacked understanding of (international courts') norms, rules, and procedures, and different forms of communication and interaction could address this deficit.[316]

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[309] Nicole de Silva. International Courts' Socialization Strategies for Actual and Perceived Performance. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). The Performance of International Courts and Tribunals. Cambridge University Press, 2018.

[310] Those courts are: 1) Benelux Court of Justice, 2) Central America Court of Justice, 3) Court of Justice of the Central Africa Economic & Monetary Community, 4) European Nuclear Energy Tribunal, 5) Judicial Tribunal of the Organization of Arab Petroleum Exporting Countries, 6) Mercosur Permanent Review Court, 7) Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, 8) Court of Justice of the West African Economic Monetary Union.

[311] Idem. pp. 289-290.

[312] Those would be the International Court of Justice (ICJ) and the Court of the European Union (CJEU). See Nicole de Silva, p. 312.

[313] Those would be: Andean Community Tribunal of Justice (ATJ); European Court of Human Rights (ECtHR); Economic Court of the Commonwealth of Independent States (ECCIS); European Free Trade Association Court (EFTAC); Interamerican Court of Human Rights (IACtHR); International Criminal Court (ICC); International Tribunal for the Law of the Sea (ITLOS); African Court on Human and Peoples' Rights (AFCHPR); Caribbean Court of Justice (CCJ); Common Market for Eastern and Southern Africa Court of Justice (COMESACJ); East African Court of Justice (EACJ); and ECOWAS Community Court of Justice (ECCJ). See Nicole de Silva, p. 313.

[314] Those would be: African Court on Human and Peoples' Rights (AFCHPR); Caribbean Court of Justice (CCJ); Common Market for Eastern and Southern Africa Court of Justice (COMESACJ); East African Court of Justice (EACJ); and ECOWAS Community Court of Justice (ECCJ). See Nicole de Silva, p. 313.

[315] That would be the World Trade Organization's Appelate Body (WTO-AB). See Nicole de Silva, p. 313.

[316] Nicole de Silva. International Courts' Socialization Strategies for Actual and Perceived Performance. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). The Performance of International Courts and Tribunals. Cambridge University Press, 2018. p. 313.

Of the six Courts that described internal socialization strategies, most of them developed some sort of new guidelines, codes of conduct or strategic plans aiming at improvement of performance. All of them, however, included in their strategies some kind of training for judicial and/or administrative officers[317].

Regarding external strategies, twelve of those courts described practices of training and dissemination in order to further their legal regimes. Many of them aimed at promotion of dialogue with society at large, using multimedia content or social networks. They also promoted open sessions, local sessions, and even "judicial dialogues".

> Through these interactions, (international courts) envisioned that (their) officials) would improve relevant actor' understanding and appreciation of their mandates and associated norms, rules, and procedures. Given the open-ended nature of these dialogues between IC officials and actors in their legal regimes, these interactions could have involved both persuasion and social influence and been oriented towards influencing IC's actual and perceived performance[318].

Another interesting issue is that several of those institutions devised training programs tailored to persuade legal professionals regarding their norms and customs, not only providing useful information to active judges and lawyers, but inspiring young professionals to share those values, professionally or not.

Further avenues of research

If the claim that contracts make citizens have purchase, it follows that institutions must be reevaluated in order to assess their impact on democracy: if there is any, or even if any could be. International courts' influence is varied, as the scholarship occupied in their examination. All of them could be studied in their socialization strategies, not only in search

[317] Nicole de Silva. International Courts' Socialization Strategies for Actual and Perceived Performance. In: SQUATRITO, Theresa; YOUNG, Oran; ULFSTEIN, Geir; and FOLLESDAL, Andreas (Eds.). The Performance of International Courts and Tribunals. Cambridge University Press, 2018. p. 314.
[318] Idem. p. 316.

of an optimal performance, but in order to fulfill a role of democratic support, allowing participation, fostering transparency and improving public reason.

The same can be said to other types of international organizations without a clear judicial mandate. In this sense, the United Nations Security Council represents que quintessential example of what is an international organization designed for secrecy and avoidance of public scrutiny, standing as a memento of an anachronistic United Nations that seems unable to reform itself, or to find its place in a world very different from that in which it was created. Moreover, several other quasi-administrative bodies have grown in importance, while remaining out of spotlights, and, especially, avoiding accountability.

If we happen to believe that developing better citizens may represent an opportunity of fashioning new tools for democracy, better equipping it to understand itself in 21st century, there are several avenues of exploration, many of which this research only suggested. The possibilities and challenges abound, as democracy remains an open-ended story, an ideal worthy of pursuit. It is my hope that this research, with all of its shortcomings, can contribute to such virtuous aspiration.

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