SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER 1/2014

Gianluigi Palombella

The Law's Two Sides and Their Benefits: Domestic to International Context (and from Hamdan to Al Jedda)

Sant'Anna School of Advanced Studies
Department of Law

http://stals.sssup.it

ISSN: 1974-5656

The Law's Two Sides and Their Benefits: Domestic to International Context (and from Hamdan to Al Jedda)

Gianluigi Palombella

Abstract

This chapter maintains that when the law lives up to the ideal of the rule of law, it is organized so to display two internal sides, that are in a mutual tension and concurring with different contents in the legal order as a whole. Thus, as history and comparative institutional analysis show, there is a part of the law that is not under the jurisgenerative power of the sovereign. This feature of law as duality (in the same sense as the medieval jurisdictio and gubernaculum couple) represents a scheme that prevents domination from being perpetrated through the monopoly of law. Such an essential aspect of law -- if it has been realized in the concrete reality of a legal order -- has a normative import that can be measured also beyond the State. It means that sheer exercise of democratic sovereignty is not a sufficient reason for justifying infringement of international law. But in as much as the rule of law is not reducible to compliance to whatever rules, it means as well that the sovereign exercise of rule-making power by the UN Security Council cannot per sé unconditionally oblige State legal orders to infringing, say, fundamental rights.

Even in the beyond-the-State setting, a recurrent struggle between the supremacy of sources and the substance of legal contents -- available in the relevant system of norms -- takes place. Different patterns have been under scrutiny: from Hamdan case at the US Supreme Court to Al Jedda at the European Court of Human Rights. And only the latter seems to suggest a new way of reasoning, one that reinstates the Rule of law as a notion actually controlling a reflexive and balanced legal answer, beyond the imperative of compliance with the will of the most powerful source of law. Finally, being a notion different from sheer respect for human rights or democracy, and one that deals with a peculiar configuration of law, it would be even too narrow the assumption that the rule of law simply boils down to benefit individuals (against States that should not "be entitled" to its "benefits").

Key-words

Rule of law, Al Jedda, Hamdan, US Supreme Court, European Court of Human Rights

The Law's Two Sides and Their Benefits: Domestic to International Context (and from Hamdan to Al Jedda)

Gianluigi Palombella[**]

1. Preamble. A genuine Rule of law question.- 2. The Rule of Law as legality principle?.- 3. Normative/institutional history.- 4. On the Rule of law as an extra-state question, and its 'benefits.-5. The dynamics of Rule of law and the lesson from Al Jedda (ECtHR).

Il n'y a point de plus cruelle tyrannie que celle que l'on exerce à l'ombre des lois et avec les couleurs de la justice

Montesquieu

1. Preamble. A genuine Rule of law question

In the famous case before the US Supreme Court (2006 Hamdan v. Rumsfeld) the Military Commissions ordered by the US President in Guantanamo Bay were declared unconstitutional, because sentences and executions were carried out "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples' " [1]. Moreover, by creating such military commissions, the US President had used a power which is not "implied" in times of war, and should have been conferred upon him by the Congress. This is why the Court affirmed, with confident solemnity, that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction"[2].

I often cite this case because, although the two steps are connected, the decision of the Court is recognising *on one side* that the judicial rights of Mr Hamdan and IL obligations must be respected (fundamental principles of law recognised by civilised nations) and *on the other* that the separation of powers has been infringed. However, the relevance of rights and international norms

[**] University of Parma - Faculty of Law; Scuola Superiore Sant'Anna, Pisa. Robert Schuman Center, European University Institute.

[1] According to the Supreme Court, the Uniform Code of Military Justice "conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations' (…) including, *inter alia*, the four Geneva Conventions signed in 1949. (…). The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws" (Hamdan v. Rumsfeld, 548 U.S. (2006), *Opinion of the Court*, at 49). According to the Court, the Geneva Conventions – and the requirements of Common art. 3- are "judicially enforceable" *because* are part of the law of war (art. 21 of UMCJ). Reference is to *The Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949, art. 3 § 1(d).

[2] 548 U. S. _(2006), *Opinion of the Court*, at 72.

is here granted by their inclusion within the laws of the land. Democracy and the separation of powers (the "structural" aspect) are at the heart of the justificatory arguments, denying Presidential power a blank check, thereby making the Hamdan case decision (as it is known), as "democracy forcing."[3]. This is confirmed through the concurring opinion of Justice Breyer.[4]

Given the mixed rationale of the Supreme Court decision, the Congress was asked to legislate on the matter. The result was the legalisation of the Military Commissions (MC Act) in October 2006. Many MCA provisions "are incompatible with the international obligations of the United States under human rights law and humanitarian law." The MCA contradicts "the universal and fundamental principles of fair trial standards and due process enshrined in Common Article 3 of the Geneva Conventions."[5].

This being however a consequence of the "Rule of law in this jurisdiction", the question arises whether a matter like basic rights and the Rule of International Law can be reserved to *democracy* as such. Of course the latter is just one among the ideals that western constitutional polities cherish. Should the legal duty to provide individuals with the minimum guarantees universally recognized by the most fundamental rules of international law, be wiped away by a majority vote of the United States Congress?

As I did elsewhere, I would call this a genuine Rule of law question. The reason for the emergence of the Rule of law as a principle and an ideal in our legal civilization has to do with the service of legality, its autonomy, its non instrumental function, and its conceptual separability *vis à vis* the albeit legitimate exercise of sovereign normative power: regardless of whether its holder can show democratic credentials or otherwise.

In the following pages, I shall resume the features of the principle of legality, the Rule by law, and the Rule of law, extending their rationale beyond the State, and in the last section I shall conclude with a short analysis of the ECHR decision in *Al Jedda*, as an instance of the practicability and normative import of the notion of Rule of law (RoL) that I shall propose and defend in this chapter.

---

[3] Jack Balkin wrote: "What the Court has done is not so much countermajoritarian as *democracy forcing*. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has, and if Congress gives it to him, then the Court will not stand in his way."((*Hamdan as a Democracy-Forcing Decision*, June 29, 2006 at http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html last visit 2013, June)

[4] "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger" by trusting constitutional "faith" in "democratic means" (548 U. S. _(2006), Breyer J., concurring, at 1).

[5] Cf. list of violations in *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin: United Nations Press Release, October 27, 2006. at http://www.unog.ch/unog/website/news_media.nsf .

2. The Rule of Law as legality principle?

2.1. At one level of meaning the RoL may be intended to protect the linkage between constituencies and the law, ethos and a legal order. The RoL is here a jurisdiction related notion. Its descriptor has famous templates, for example Montesquieu, "L'esprit des lois": starting from a huge amount of data and experience among diverse peoples, Montesquieu came to an intuition: laws are "relations" that result from the combination of social, cultural, geographical factors, commerce, economy, manners and costumes, as much as from the sound (or unsound) role played by political rule. Not a naturalist, Montesquieu explains in this sense law, as a situated notion, under general rationales: not simply its ultimate belonging in nature or will. And in turn even polities live up to the "principles" that "set [them] in motion", and make their structure to "act". Public passions towards common "institutions" are a functional, objective element of the complex system[6]. One can take this pattern to fairly reflect some part of our received ideas on law, made of the "relations" connecting diverse contextual vectors, a fabric embedded in the "nature of things"[7]; and the general "esprit des lois" takes shape as such a "whole" re-composing.[8] Accordingly, laws are hardly detachable from what they are supposed to regulate[9]. One can say that a version of that conception can conservatively recall the "Burkean" mode, within which the Courts are to reflect the "whole experience of a nation".[10]

This conception sometimes - unfortunately and somewhat misleadingly - becomes a reinforcement of a rigid, will based, self referential notion of law. It works externally as well, through deciding, by coherent interfacial constitutional rules, the general attitude toward-- and the legal force and status that domestic law can assign to-- conventional or customary international law, Treaties and general principles. It is, in brief, the "(Rule of) law in this jurisdiction".

A second fashion of the latter can be less ethically or socially embedded, but still of much weight, in current theories. It dictates again a jurisdiction-relative conception, but builds upon the importance of abiding by the law, and sticking to its alleged determinacy, by making law count through interpretive restraint, through exegetical attitudes, less inclined to replace meaning with teleology or similar evolutionary openness. That is in the words of his famous champion, Justice of the US

---

[6] Ch. L. de Secondat, Baron de Montesquieu, *The Spirit of Laws* (Thomas Nugent, Cincinnati, R. Clarke & Co., 1873) vol. I, 22 ff

[7] Montesquieu, *The Spirit of Laws*, supra note 6, *Pref.*, at XXXII

[8] This is suggested by E. Ehrlich, "Montesquieu and Sociological Jurisprudence" (1916) 26 *Harvard Law Review*, 582, at 589

[9] Accordingly, "something is right not just because it is a law; but it must be a law because it is right" (Montesquieu, *Cahiers*, Paris, Grasset, 1951, p. 135.). One should note how even in this perspective the law is not a matter of mere 'will'.

[10] Oliver Wendell Holmes, in *Missouri v. Holland*, 252 U.S. 416, 433 (1920) and see R. Post, "The Challenge of Globalization to American Public Law Scholarship", in *Theoretical Inquiries in Law*, (2001), 2:323, at 326 ff.

Supreme Court, Antonin Scalia: the rule of law as a law of rules[11].

There are a host of expected consequences of making law count, in this very sense: serving certainty and submitting public powers to the pre-established rules, is a necessary premise of a liberal state, of the separation of powers, and it seems to grant the *legality principle*: that is, the very idea that the exercise of power is depending on laws' conferral, and submitted to limiting rules. The legality principle is tantamount to reminding *non-arbitrariness*. Here is the core of its virtue. From this point of view it is sometimes legitimated because allegedly convening the ethos of a nation, and fidelity to its law[12]; *non-arbitrariness* can be defended as coherence of rules' fabric, either as expression of a State constitution, of its life world, or formally, given the above recalled service that formality or textuality provide.

In the European doctrines, the service of legality was precisely intended through the idea of a 'legislative State': whose nature, according to the German sociologist, Max Weber[13], was granting predictability of public powers' action, providing each citizen with legal certainty under the formal rationality of a rule-based method of social control (instead of any other methods, arbitrary, casual, violence based, etc.).

Yet, the RoL can be misled if reduced to a kind of legality principle and ultimately, it could not explain the difference, if any, between the rule of law *sans phrase* and the rule of law as a jurisdiction dependent notion.

2.2. If we want to overcome this perspective, we might look first at the telling semantics of the Rule *of* law, one to be clearly differentiated from a rule *by l*aw, which is often still used, unconvincingly, as equivalent.

A mainstream conviction is endorsed by Tamanaha:" "The rule of law, at its core, requires that government officials and citizens be bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied"[14].

Now, as I submit, such a definition is not the 'core' of the rule *of* law, but the core of the rule *by* law. One must take the mentioned requisites as necessary for the *law to exist*, as it is aptly showed in

[11] Antonin Scalia, "The Rule of Law as a Law of Rules", 56 U. C HI . L. R EV . 1175 (1989).

[12] One can cite the famous dictum adopted from Roman civilization, in the European continental State in XIX and XX centuries: *dura lex sed lex*.

[13] Max Weber, *Economy and Society*, vol 2, edited by G. Roth and C. Wittich, Berkeley, CA: University of California Press, 1978, p. 82.

[14] Brian Z. Tamanaha, "A Concise Guide to the Rule of Law", in G. Palombella / N. Walker, *Relocating the Rule of Law,* Hart, Oxford 2009, p. 3.

Lon Fuller[15] famous list of the eight features that law requires in order to be law. Of course, the evidence is that such a legality of itself makes obviously a huge difference *vis à vis* arbitrariness and crude violence, as Max Weber himself taught. Not by chance, given the constraining logics of legality, and in order to get rid of its albeit procedural limitations, the German Nazi legal order was *de facto* suspended every time that made easier to effectively achieve the regime's objectives[16].

But still the rule *by* law is hardly our normative ideal (the one that the Rule *of* law can be referred to). It conforms instead with what Thomas Hobbes described as the means of social ordering by the sovereign, the Leviathan, that does rule *by t*he law: it sets up rules, public competences, and organized procedures in stable and prospective ways[17]. The requirements for the law to exist do not automatically mean that the RoL is actually realized; its rationale needs that those requisites be effective, and nonetheless *per se* insufficient for the RoL to be properly achieved (as I shall explain in a while).

A further argument, referring to the relation between law and the political process, can reinforce this tenet. A widespread perspective, like the one endorsed by Stephen Holmes[18], looks at the RoL from the view that law is, after all, (just) an instrument: it all depends on how power is socially distributed whether the law will result as just or unjust, serving liberty or oppression. Accordingly, as the argument goes, only a democratic polyarchy can make the difference. Now, there is hardly a way, within such a perspective, to draw a line between *rule of law* and *rule by law*.

On the contrary, in the views that I maintain, should we achieve the first and get beyond the second, law would emerge with some functional autonomy *vis à vis politics*, and shall cease to simply reflect its decisional arm. The question about the RoL is not tantamount to asking about the organization of governmental power, and cannot coincide with the structure/ quality of the Sovereign. Distinctively, it is the question about the organization and role *of law* itself, in its *additional* value. A quality turn makes the law not *only* an instrument of social groups, but in some part *also* an authority irreducible to sheer manageability at their own whim.

3. Normative/institutional history

[15] Martin Krygier has graphically called similar notions "anatomic", in his "The Rule of Law: Legality, Teleology, Sociology" in *Relocating the Rule of Law*, edited by Gianluigi Palombella and Neil Walker, Oxford, Hart, .2009, 47 ff. Law must be general, public, non retroactive, non-contradictory, comprehensible, possible to perform, relatively stable, and consistently followed by officials and administrators (L. Fuller, *The Morality of Law*, II ed. New Haven, Yale University Press. 1969, ch. 2).

[16] Ernst Fraenkel described this as the Nazi "Doppelstaat": *The Dual State. A Contribution to the Theory of Dictatorship* [1941], transl. E. A. Shils, New York, Octagon Press, 1969, 56 ff.).

[17] Th. Hobbes, [1651]. *Leviathan*, edited by M. Oakeshott. Oxford: Blackwell, 1946, chaps. 26–28).

[18] Stephen Holmes, "Lineages of the Rule of Law." Pp. 19–61, in *Democracy and the Rule of Law*, edited by J. Maravall and A. Przeworski. Cambridge: Cambridge University Press., at pp. 49–51.

Accordingly, behind the *by/of* alternative there is some *institutional* difference, that can be understood if we analyze the institutional embeddedness of the RoL, specifically: In what follows, I shall turn to the original sense of the RoL and its normative meaning (as such ever lasting). But *before* that, I shall explain in the same methodological attitude, what the sense of legality in continental Europe was taken to imply. This is a significant test.

3.1. Before the totalitarian decades, the legal state (*Etat de Droit, Stato di diritto, Rechtsstaat*) and the so called 'thin' conception of the alleged RoL took the central place in Continental Europe. First, despite being the current translation for the English "rule of law", the European expressions are not 'equivalent', not least because they do not refer to the law but to the State, that is, a determinate institutional system, a configuration of power, in a certain range of times. Contrariwise, the RoL spans diverse historical settings, and should not be frozen necessarily in any contingent State configuration. Second, I focus now upon the European State *before* its *constitutional* transformations in the aftermath of the II World War. Despite its non-arbitrariness, some of its features are compatible with those recently resumed under the oxymoron "the authoritarian rule of law", labeling the Singapore regimes[19].

More in detail, as F. J. Stahl[20] and the German public law doctrine worked out the concept of *Rechtsstaat*, the State was to act under precise and fixed mechanisms, and pre-defined rules, thereby self-limiting its own power through the law. Beyond

enlightened paternalism, it appeared to move from the law of power to the power of law. The *Rechtsstaat* means that law is the structure of the State, but not a limitation to it. Liberty is a consequence not truly a premise of the law. In its overall European meaning it included both the separation of powers and the mentioned principle of legality, which requires that no authority can exist that is not created and conferred by legislation The priority of legislation can both formally grant individual rights and subordinate them. The independent role of the judiciary was trusted rigidly to respect the legislative will. Legislation turns out to be the authentic voice of the State, expressing its will: it is not the constraint but rather the "form" of the State's will[21].

Both "La loi" in France and *die Herrschaft des Gesetzes* in Germany are the ultimate source of the law. This "legislative state" is generated by the hierarchical supremacy of legislation, lacking

[19] Jothie Rajah, *The Authoritarian Rule of Law. Legislation, Discourse and Legitimacy in Singapore*, Cambridge, CUP, 2012.

[20] Friedrich J. Stahl, *Philosophie des Rechts,* vol. II, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung*. Heidelberg: Mohr. 1870, 137 ff. See the term from Ludwig v. Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates,* I-III, Tuebingen, Mohr, 1832.

[21] The importance and dominance of legislation was also a product of the process of codification of law which took place in continental Europe from the seventeenth through twentieth centuries.

equally relevant sources, protagonists and actors on the (institutional) scene. This impinges upon the relationship with rights. According to Georg Jellinek[22], citizens hold "public subjective rights" on the ground that the latter result from a self-obligation of the State. There is almost nothing real, including rights, unless it is contained in legislation. The tension between individuals and public power could only be "decided" by legislated law. Despite (or because of) being a sound incarnation of the Rule *by* law, such a law-based state was based neither on "Rule of law" nor on the practice of modern constitutionalism (cf. 1787 American Constitution).

As I show in the following section, the fact that some rights might even be actually protected by the law is not the litmus test in the RoL discourse. The point relates instead with independent legal sources. The declaration of independence of rights (and individuals' prerogatives) from State legislation was written only with contemporary Constitutions, that is during the twentieth century: the constitution – not legislation – created that 'independence', long awaited on the continent. Constitutional rules and principles granted fundamental rights and other countervailing principles as high a rank as the democratic principle, preventing the exercise of the second from being endowed with the legal power to discretionally decide the fate of the first. Prior to this, the logic of the RoL could not be developed.

3.2. Contrary to a *Rechtsstaat* (or a *Stato di diritto*), understood as a peculiar form of the *State*, the RoL as an ideal presupposed that, in part, positive law be beyond the disposal or "will" of the King, or the sovereign power. Its ideal can be shown as one based upon a relationship between two essential western law domains developed within the medieval tradition and evoked through the couple *jurisdictio* – *gubernaculum*: justice and sovereignty. "For in *jurisdictio,* as contrasted with *gubernaculum*, there are bounds to the King's discretion established by a law that is positive and coercive, and a royal act beyond these bounds is ultra vires. It is in j*urisdictio*, therefore, and not in 'government' that we find the most striking proof that in medieval England the Roman maxim of absolutism was never in force theoretically or actually."[23]

In the line which unites Henry de Bracton (cf. the pair *gubernaculum/jurisdictio*) with Edward Coke (cf. Bonham's case), the U.S. Federalist Papers and ultimately U.S. judicial review, we find — despite their differences – evidence of a general unitary logic.

There is a plurality of sources going together to make up the intrinsic diversity of the law of the land. It allows for rights to be retained and emerge with an autonomous aspect.

[22] Georg Jellinek, [1892]. *System der subjektiven öffentlichen Rechts*, Tübingen, Mohr, 1919[2]

[23] Charles McIlwain, *Constitutionalism: Ancient and Modern,* Ithaca, Cornell University Press, 1940, at 85 and *passim* (elaborating on the pairing of jurisdictio and gubernaculum).

For sure, the law also reflects Parliamentary sovereignty, however, sovereignty is complex, shared between Crown, Lords and Commons, and the law has a wider purpose. As a matter of fact, law includes a main second pillar, the common law and the Courts, the ultimate interpreters of the legal system as a whole.

The complexity of legal achievements in the diverse denominations of common law, precedents, customary law, conventions and rights, is entirely relevant to the "rule of law." The latter is a "founding" element of itself, to the extent that Dicey recognized certain English features: no man can be punished for what is not forbidden by law; legal rights are determined by the ordinary courts; and "each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded"[24].

But this endows the constitution and the RoL with the historical content of liberties, which is part of positive law, not abstract claims from natural law (or, say, organic)

doctrines. This feature stands at odds with the self-reference of the formalist idea of legality, the final turn of the *Rechtsstaat*.

As Giovanni Sartori noted, "the Rule of Law does not postulate the State, but an autonomous law, external to the State: the common law, the case law, in sum the judge made and jurists' law. Therefore, there is a 'rule of law' without the State; and more exactly it does not require the State to monopolize the production of law."[25] However, while the reality of a Stato di diritto is the self-subordination of the State by its own law, in the case of the "rule of law" the State is subordinated to a law which is not its own[26]. Again, the roots of these differences are in medieval times, as MacIllwain, Haskins[27] and others have showed.

In conclusion, the meaning of the RoL is better understood through its enduring continuity with its own past: the concurrency of sources of law is requisite to creating a virtuous "tension" within the justice-government coupling. Beyond the legitimate expression of sovereign will there is a part of the law belonging in the land, protecting its positive idea of justice and giving liberties their due: it is the part formed through

judicial decisions, the common law and conventions. On the other hand, there is the gubernaculum,

[24] Albert V. Dicey, *Introduction to the Study of the Law of the Constitution*, edited by E. C. S. Wade, VIII ed. London, Macmillan, 1915. Repr. 1982. Indianapolis, Liberty Classics. *Introduction*, p. LV). As Dicey wrote (Ibidem, p. 21): "[W]ith us . . . the rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts."

[25] Giovanni Sartori, "Nota sul rapporto tra Stato di diritto e Stato di giustizia" in *Rivista internazionale di filosofia del diritto*, 1964, at 310.

[26] Ibidem, 311.

[27] Cf. McIlwain, supra note 24, at p. 90. And see George Haskins, "Executive Justice and the Rule of Law: Some Reflections on Thirteenth-Century England.", in *Speculum* 30, 1955, 536: the medieval "rights and remedies of the common law came to be identified with the rule of law itself."

which embraces instrumental aims and government policies. The ultimate power of a polity could avail itself of the law only in part: that which is under its sovereign prerogative. If there must be law which remains at the disposal of the sovereign, another side of law is not, and the sovereign is thus bound to be deferential.

In principle, then, despite legality being effective under the purview of the Sovereign's idea of the common good, it is implied that where the RoL is absent, justice, or the "right," has no shield. It becomes mere 'morality' and fades outside the positive order, altering the balance between *gubernaculum* and j*urisdictio*, and undermining a reliable premise for the RoL.
Eventually, in *moral* terms, the institutional shift from rule *by* law to the Rule *of* law has a possible representation, in terms of consequences. Being the moral import of the RoL generally designated through the idea of liberty, here the point is not the sheer *fact* that the law by the sovereign does not in fact interfere arbitrarily on individuals' and minorities' spheres. On the contrary, at issue is that such an interference has to be considered illegal due to a law that the Sovereign cannot legally overwrite. Those spheres are placed outside of the ultimate (legal) control of the Sovereign, however gracious he might happen to be. The borders of the Englishman home are legally safe, and not contingently so, from arbitrary interference, accordingly, due to the existence of "another" law. In the logic of the RoL (its scheme) such a 'duality' of law has a decisive role, and affects its general form, one that can encompass a wider spectrum of political regimes, regardless of centuries. When this situation applies, it is not improper to describe the ideal of the RoL as a specific asset of liberty, that is under a *non-domination*[28] principle, since liberty itself is not made to depend from contingent law of the prince, but on a law beyond its disposal.

4. On the Rule of law as an extra-state question, and its 'benefits'.

4.1. As from the foregoing, such a normative meaning exceeds the mere fact of complying with the rules that apply in one jurisdiction or the other. It is rather the opposite: it is the law "in this jurisdiction" that should be 'measured' against the parameter of the RoL, one that interrogates the very configuration of legality, and its legal 'non domination', liberty serving, structural scheme. To this regard it works a measuring function as much as other normative ideals, democracy and human

[28] Not being under someone else's control: I borrow the meaning suggested, in a rather different (not referred to law) context, by Phillip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford, Oxford University Press, 1997.

rights, do in our present legal civilization.

When freed from a single jurisdiction-dependent notion, the RoL displays its projection onto a supra-state setting, in so far as we choose to adopt its consequences in managing the tensions among different legal orders.

Let us take first into account how the above mentioned scheme or rationale of the RoL can be referred to the international law; thereafter I shall call into the scene a case that can be made in point (*sec. 5*), with regard to the relations *among legal orders*, and their arbitration on a RoL measure.

Once we recognise that constitutional States can realise a balanced duality of legal 'sides', and good enough to fulfil in their domestic order, the RoL, that means for instance that an unlimited exercise of "democratic" power is prevented, and even the Sovereign lacks (unless the present system is cancelled) a legal monopoly. Such a duality should emerge in the international legal order as well. Beyond unrestrained States' power to negotiate as to their own interests, in the traditional view of International Legal Order as 'conventional', an "other international law" has developed to include human rights law out of the 1948 *Universal Declaration of Human Rights*; or, among many others, the *International Covenant on Civil and Political Rights* (1966), or *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984). And not least, environmental law, or humanitarian law, in times of war, through the *Hague Convention* (1899 and 1907), and *Geneva* (1949, and 1977 Protocols) and the exemplary Article 3 of the Geneva Conventions (mentioned in the case at the start of this chapter), that was defined in 1986 *Nicaragua* judgment by the International Court of Justice (ICJ) as one incorporating "elementary considerations of humanity."[29] Albeit slowly, a corpus of general norms of IL is increasingly thought of to become *jus cogens* [30]. Thus a "community" law has enriched the contents of IL, a "super partes law", and the principle that there are rules, beyond the conventional consent. All those create an "other side" of international law, that clearly prefigures a "non instrumental" aspect- and area- of legality. Founded on this "duality," even the International Legal Order has developed an embryonic rule-of-law like structure, one that can aspire to be a *measure* of civilisation *vis à vis* States' behaviour and the diverse entities and regimes of supranational nature as well.

One can assume that in the relations between domestic and international orders the ultimate nature of mutual obligations rests on the substantive *acquis* of contents that they share. Beyond the *pacta sunt servanda* meta-rule, which boils down to respecting consented rules, whatever, the

[29] *Nicaragua v. United States of America, Merits*, Judgment of 27 June 1986, ICJ Reports 1986, par. 218. The Court recalled its first use of the expression in the *Corfu Channel Case* (*United Kingdom v. Albania*, 9 April 1949).
[30] See A. Cassese, *International Law*, 2nd ed., Oxford, Oxford University Press, 2005, at 294, and 310.

positive allegiance to an international order is, in the more recent transformations, better seen as framed by converging normative commitments, like those just recalled, which contribute the generation of RoL itself. The idea that domestic democracy is not the final judge of whichever question internally, goes hand in hand with the assumption that mutatis mutandis, powerful States, even in international intercourses, cannot take their whim as the ultimate (external) legislator: the recognition of the RoL principle, that they proclaim internally, is unsuited to a double standard, and hard to dismiss (consistently) when participating in a common wider order whose RoL features are enshrined and entrenched in the same sense.

Confrontations among diverse legalities stably happen between States in the international order, between international organisations and global 'regimes' on one side and national law and Courts on the other, and so on. Accordingly, we can conceive of the RoL as a frame where to locate mutual intercourses and confrontations, a parameter that displays as well an *interfacial* function, in so far as those very relationships are thought of as bearing a legal nature. If there is a "legality" holding in the *intercourses* among orders of different nature and levels, even in those relations the duality and the non domination principle (in the legal sense of the notion) as described in the foregoing have a potential to develop.

Different constitutional arrangements in diverse States however (whether making IL general principles of higher constitutional rank or affording Treaties with legislative, supra-legislative strength, etc) do not change the point that interconnections between matters of external *independence* (concerning the external action of States) and internal sovereignty (concerning their action within their own internal sphere)- let's think of environment, human rights especially, or commitments in international trade to abstain from protectionist provisions- have made it rather contradictory to maintain that the "Rule of law" can stand alone, "in this jurisdiction". Less than ever there is a watertight separation among RoL in each different orders, unless it is used as a shield, a self referential normative closure, thus with a meaning that narrows to the parochial one, generally objected against in the first sections of this chapter.

4.2. For intuitive reasons, the very fact that the ideal of the RoL has started to concretise through the duality enshrined even in the International Legal Order, ends up *benefiting all the actors or subjects,* that would otherwise fare worse without. In so far as individuals are considered and protected through IL provisions (but they can also be targeted by supranational authorities) or weaker States are allowed to countervailing legal claims against power, the desirability of the RoL connects to the functioning of an objective state of affairs, to legal institutions' design as a whole, more than only to the protection of individual justice, or to a 'benefit' exclusively reserved to

individuals. This descends from the systematic nature of RoL one that concerns as well fairness and avoidance of specific domination through law in the relations among legalities of different nature, reach, power, and social embeddedness (think for instance of global regimes like UNCLOS, WTO, ISO, ICANN, *vis à vis* regional orders, the EU, national States, IL Order *stricto sensu*)[31]. Some confrontational legality path, when the players appeal to legal clothes, exists that does not reduce law to the purview of the most powerful among the interlocutors, while, and this now goes without saying, the Rule of law is all but identifiable with some unilateral formalism of textual rules compliance, or similar parochial, one sided use of legality.

Eventually, the RoL in other words is not to be seen in a straightforward identity with, say, human rights, precisely inasmuch as it cannot be equated either with the single value of the pursuit of democracy. The latter are, not by chance, listed separately, with an autonomous strength and bearing a separate rationale *vis à vis* the RoL itself. Although, the RoL, a democratic society and respect for human rights are in consequential terms, to be seen as mutually reinforcing, each being a strong bedrock for the increasing establishment of the others, the RoL focuses upon the quality/configuration of legality, providing the scheme of law's duality. There is in a sense a *systematic* character of the configuration of the legal universe that separates the point of the Rol from the important question of one and each individual's justice case, and matters in a *specific* modality through the ideal of the RoL. This is why I find true only in part that States should not be "entitled to the benefits of the rule of law"[32] while individuals are. Although truly nothing can be justified, in its ultimate *raison d'etre*, unless for the sake of human beings, nonetheless in a legal universe even the claims from distinct legal orders (IL, or domestic law, etc.) can have an inherent value *vis à vis* each other: inherent value that does not necessarily preclude their being also serving further values, or even more fundamental ones (justice to individuals, for ex.). A inherent value, if any, deserves to be considered as such: the existence of something else that one can regard as even more 'fundamental' does not detract from it, nor contradicts that it itself be worth of protection, benefits and respect. The benefits from the RoL in a sense, need to be multifaceted.

5. The dynamics of Rule of law and the lesson from *Al Jedda* (ECtHR)

The RoL can be construed in confrontational steps among legal orders, but it cannot avoid the question of consistency between principles embraced externally and those enshrined internally.

[31] On these issues, at length in my "*The Rule of Law in Global Governance. Its construction, function and import*, The Straus Institute for the Advanced Study of Law and Justice, New York University, New York 2010.
[32] With regard to Jeremy Waldron, "Are Sovereigns entitled to the benefits of the Rule of Law?" in *European Journal of International Law*, (2011), Vol. 22 No. 2, 315–343.

Some of those principles, either construed by the epistemic community of national, supranational Courts, or shared through domestic constitutions, international charters and conventions, are actually practiced as bridges among different confronting orders, between global regimes, the WTO and the WHO, the SC and ECHR, and so forth[33]. Although an analysis of that progress exceeds the scope of this chapter, in order to close the circle opened in my Preamble, I shall recall the *Al Jedda* case at the ECtHR: as I think, that decision does not embrace simply an adversarial, self-referential point of view, that is, the single European Convention's regime for the individual, human rights' protection. Its argumentation, although without mentioning it, interprets the Rol and its implications as a general and shared principle within the common supranational legal setting (in which the Security Council is included).

The Grand Chamber of the ECtHR found in *Al-Jedda v United Kingdom*[34], that indefinite detention without charge of Al Jedda (dual citizen British/Iraqui) by the UK in a Basra facility controlled by British forces was unlawful and infringed his rights to liberty under art. 5 of the ECHR. The significance of the argumentative strategy adopted by the Grand Chamber marks an innovative step. The ECtHR rejected the opinion upheld by the House of Lords in the proceedings that had decided Al Jedda in UK (before he applied to the ECtHR): a universally reputed champion of the Rule of Law, Lord Bingham' (House of Lords) had asserted that the treatment reserved to Al Jedda derives from the unavoidable compliance with the UNSC resolution (n.1546), requested under art. 103 of the UN Charter[35]. This is the argument of conformity to the rule of international law, centered upon *respect for the RoL* as a matter of hierarchy of rules in the international order[36], one that cannot be objected against even if implying human rights infringements.

The ECtHR neither took such a path, nor did resort to another and famous reasoning adopted in the *Kadi* (2) case by the European Court of Justice. In its decision, the ECJ found that fundamental rights of Kadi had been actually infringed by a EU regulation in order to implement a Security Council resolution against him. According to the ECJ, however, those rights are not simply part of a

[33] It is here developing an intensive amount of work taking account of the elaboration by Courts and scholarship, see Ch. Brown, *A Common Law of International Adjudication*, Oxford, Oxford University Press, 2007; S. Cassese, *I Tribunali di Babele*, Roma, Donzelli, 2009.

[34] European Court of Human Rights, *Case of Al-Jedda v. The United Kingdom*, Application no. 27021/08, 7 July 2011 (*Al Jedda*).

[35] See the para 35 (Lord Bingham) of the House of Lords decision, as pasted in the ECtHR, *Al Jedda,* at 11 : "Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 [UN] to 'any other international agreement' leaves no room for any excepted category, and such appears to be the consensus of learned opinion". The same author, Tom Bingham, though, has written the important book, *The Rule of Law*, London, Penguin, 2011.

[36] That kind of appeal to the RoL in the international legal order, resonates in the 2005 decision of the European Court of First Instance in the case *Kadi* (1) (21 September 2005, Case T-315/01 *Kadi v Council and Commission*).

well founded individual claim, they are pillars of the European primary law[37]: RoL in the European order requires that internal regulations are unlawful, regardless of a Security Council mandate, when they violate the fundamental norms of Community law.

Now, as one can see, what the RoL is deemed to command in one path (House of Lords, Al Jedda) is contrary to what Rol commands in the other (the ECJ in Kadi 2). There was a third alternative available, though: in a less strict interpretation, the Kadi 2 decision can be intended as an appeal to the Security Council, aiming to grant compliance in the future if it can guarantee some equivalent protection of human rights of the targeted individuals. Seen in these latter terms, it represents more than a vindication of the "Rol in this EU jurisdiction", namely a pattern of RoL beyond the State, with promising potential in the relationship among legalities (the UNSC and the EU) [38].

By walking a peculiar path, different from those just mentioned, *Al Jedda* (2011) can now be understood as further contributing the theoretical profile of the RoL. In proclaiming the unlawfulness under the ECHR, art 5 (1), of indefinite detention without charge, the ECtHR reasons by taking on its shoulder a more comprehensive interpretive pattern (which overcomes as well the Kadi 2 decision even understood in its better light).

The Court refers to the RoL as a principle whose consistency is not a matter for each separate regime/order of law to internally (self) assess; the judges reason around it as an issue and a model ultimately controlling the interactions among the respective orders. They do not put to the forefront the issue of the supremacy through art 103 of the UN Charter. The ECtHR refuses to agree that the unlawful indefinite detention *was commanded or authorized* by the SC resolution. On the contrary, it finds that under the relevant resolution, the security task assigned to the UK could not be considered an authorization (and less than ever an obligation) to preemptively and indefinitely detain Al Jedda, without judicial review, and lacking necessity.

Accordingly, it does not ask the question about which is the most powerful law in international *hierarchy.* Despite this (not asking/not answering) is believed a kind of prudential withdrawal from the core issue of the 'last word' & ultimate authority in IL, therein lies its strength, and its deep value. The Court raises an argument not of 'sources' but of *integrity and meaning of the RoL,* in the wider and plural, supranational order. The issue is no longer which is the higher to rule, whether the UNSC or the European Convention, in 'pyramidal' terms, but which meaning can be ascribed to the whole system of relevant law, included that from the SC. Such a meaning should be made to cohere

[37] ECJ, Joined Cases C-402/05 P, Yassin Abdullah Kadì and Al Barakaat International Foundation v. Council & Commission, 2005 E.C.R. II-3649, Judgment of 3 September 2008.

[38] I took this line in my "The Rule of Law beyond the State: Failures, Promises, and Theory", in *International Journal of Constitutional Law*, Volume 7, Number 3, 442 – 467. In that article I started my analysis on one of the issues in the present chapter.

with the normative context where it is placed. As the Courts states, art 1 of the UN Charter "provides that the United Nations was established to 'achieve international cooperation in … promoting and encouraging respect for human rights and fundamental freedoms'. Article 24(2) of the Charter requires the Security Council, in discharging its duties with respect to its primary responsibility for the maintenance of international peace and security, to 'act in accordance with the Purposes and Principles of the United Nations' "[39].

It cannot be really *presumed* that Security Council imperatives are to be conceived either in isolation or as unconditional, regardless of any *other law.* In fact, for the Court, "in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights"[40]. Human rights seem to escape a sheer source-hierarchy, bearing a countervailing, autonomous strength, in the interpretive scope, even *vis à vis* the ultimate security authority. Accordingly, "the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations"[41].

Now, human rights law becomes a meaningful check on the Security Council. Eventually, in a last statement, the Court, as I see its reasoning, raises the point that the law of human rights enjoys an *equally* concurring weight: therefore, should the Security Council want to impose a rupture in the fabric of UN law, this could result only from "clear and explicit language" (§ 102) against international human rights law. As I submit, this last point raises, ultimately, an argument *per absurdum*, in so far as there can hardly be integrity of the system, and convincing interpretation, that would beyond dispute allow for that. Here lies the challenge, one that leads to the denial that a *legitimate* IL norm can be conceived that shall undermine the basis of *duality* of the RoL.

Naturally, one can recall the principle of legal civilisation that an extensive, beyond the text, interpretation (of the resolution, in our case) can be used only in favour of the less powerful or the accused person. But more importantly, how can the 'sovereign' authority of the Security Council *explicitly phrase* an order of direct negation of fundamental basic human rights (that is, outside state of necessity)? and how could it be defended as unconditionally legitimate, that is, holding- in the UN system- an unassailable seal of legality? While the ECtHR commits itself to comply with any SC resolution, it requires, against human rights, only explicit terms: but those very terms could hardly be worded, without making the resolution apparently unlawful, that is, equally

[39] ECtHR, *Al Jedda*, para 102 (and the premised para 44).
[40] Ibidem.
[41] Ibidem.

explicitly, illegitimate in the integrity frame that the Court itself has aptly drawn.

Or this- should one wish to disagree on my view of *Al Jedda*- would be the sense of a reasoning intended to live up to the ideal of the RoL that I have maintained in this chapter.