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**The quest for equilibrium: Democracy, International Law, and Metamoderism**

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# The quest for equilibrium: Democracy, International Law, and Metamodernism

Gianluigi Palombella\*

## 1. Introduction

In perusing the issue of democracy *vis à vis* international law as well as in the extra-State space, I would keep on the forefront the question regarding the role that law can play in a complex and transformative setting where a large number of political and normative authorities intersect by crosscutting territorial borders: whether ‘democracy’ matters in inter- and supranational intercourses, or conversely how international law defends domestic democracy (and human rights), are questions resting on the implicit presupposition that some legal frame is given, or should structure or ‘regulate the world’. Therefore, it is not just a political question but also a matter of the rule of law, in one of its many understandings. The issue of democracy’s relation to the ‘external’ world, is itself framed through law, and it is reflected as a controversy about the interpretation of the rule of law and the legal paradigms. The following pages are not directly devoted to ‘democracy’ as such, but to the understanding of the novel contexts in which its relevance is intertwined with legal issues concerning the respect for the rule of law or the relations between the State and international law.

Although this subject matter looks rather usual in legal scholarship, and although its evolutions have often been under observation, its understanding and analysis are framed by and all in all presuppose theoretical underpinnings belonging to legal positivism or post-positivism, and alternatively to the tussle between natural law (often under the clothes of *jus gentium*, human rights etc.) and modernist faiths in the will of the People, and so forth. In some way, one could raise the question whether we still can use those pillaring conceptions as fully up-to-date and capable of reflecting the present state of the art.

In the last years a word has started appearing in some quarters where lawyers attempt to understand legal transformation and define their own discontent: *Metamodernity*. In the pages below I will uphold the suggestion of *metamodernism* and try to understand what could be its added value. In particular, I will discuss the use of the word as it recently appeared in the

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legal realm, and thereafter revise at least two main cases in point, that is, the concept of the rule of law and the concept of inter-legality, whose features and heuristic strength I believe are relevant here. They are evidence of our *metamodern* times and simultaneously expose the categorical context in which should be located our question concerning democracy, international law and the prospect of their relation, that is, the form of their undecided equilibrium.

The following section will recognize the fact that the President of the Russian Constitutional Court has attempted to catch the word *metamodernism* in order to shape its function in the Russian legal and political context, especially with reference to the tussle between Russian ‘democracy’ and international laws and tribunals. That was a very first resort and reference to metamodernism ever in the *legal* theoretical debate, by the highest Judge of a country where such relation between democracy and international law is an issue. Thereafter I will analyse metamodernism briefly noting how that discussion can be a fruitful and telling ‘assist’ for our wider and possibly countervailing consideration. In the fourth and the third sections I will respectively turn to depicting the rule of law and thereafter inter-legality as metamodernist and equilibrium-seeking representations (and conceptualisations) best fitting the legal features of contemporary years. The concluding remarks will consider once more the democratic problem in the wider relation between domestic community and extra- State legal context. Needless to say, the contribution of metamodernism to better reflect the complexity of opposite normativities and values should not be discarded.

## 2. The allure of metamodernism

The word was upheld in a presentation delivered by Valery Zorkin, President of the Russian Constitutional court, in 2019.<sup>1</sup> The presentation deals with the relations between Russian legal order, the international legal order, and international and supranational Courts.

Before that time, the Russian Court’s intercourses with the ECtHR had been

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<sup>1</sup> VD Zorkin, ‘Pravo metamoderna: postanovka problemy’ (Metamodern law: Statement of a problem, *in Russian*) (2019) 4 Zhurnal Konstitutsionnogo pravosudiya (Journal of Constitutional Justice, in Russian) 1-9. It is available at <<https://rg.ru/2019/05/16/zorkin-priverzhennost-vernoj-filosofii-prava-pozvoliaet-tvorit-dobro.html>>. One commentator swiftly stressed that Zorkin had finally been able to officially get rid of the RoL also endorsing a dogmatic conception of the truth as a State defined content. Available at <<https://ridl.io/valery-zorkin-s-rejection-of-the-rule-of-law/>>. Although Zorkin’s speech might well be interpreted that way, I will take up some parts of his analysis that are moving from the uneasiness of present times with both positivism and post-positivism.

controversial. In a 2017 essay, the Russian constitutional judge Nikolai Bondar,<sup>2</sup> reconsidered the relations of his Court to ‘other jurisdictional bodies’ also in the supranational context.<sup>3</sup> The problem raised regarded the *unity of value foundation* of the national legal order *vis-à-vis* the ‘polyphony’ of the Conventional legal order. For the Russian Judge, unfortunately the ECtHR does not fully recognize the pluralism of values and ‘unambiguously demonstrate(s) double standards and a lack of polyphony of European constitutionalism’.<sup>4</sup> For Bondar there is no hierarchy between the Conventional and national constitutional values but ‘first of all, coordinating relations’. Problems arise where a balance is due ‘between the European consensus and the national constitutional identity’ since the ‘European consensus is used to the detriment of constitutional pluralism’.<sup>5</sup>

In his 2019 speech,<sup>6</sup> Valery Zorkin addresses the problem offering a wider, historical and theoretical perspective. Critical transformations affecting ecology, finance, geopolitics require a different approach to the understanding of law, some loosening of received dogmas, and a revision of legal paradigms, *beyond modernity and post-modernity*. In Zorkin’s view, the positivisation of universalized (natural) human rights, on the one hand, has provided the missed moral criterion to legal positivism, on the other it has made for a deracinated morality, detached from the contexts of beliefs and socio-cultural values, and what is more, imbued with Eurocentric interpretations. That creates a tension with national law, the identity of a country (‘national’ identity): such ‘theoretical one-dimensional’ approach has marginalized countries with a historical, non-western legacy and destiny. Such a rigid, Eurocentric and modernist

<sup>2</sup> N Bondar, ‘The Constitutional Court of the Russian Federation in the National and Supranational Systems of Jurisdictional Bodies. Cooperation and Competition’ (2017) 4 Kutafin U L Rev 2 ff.

<sup>3</sup> The first part of Bondar’s intervention relates to the 2014 reforms of the Russian system that allow the CC to be the new Supreme Court ‘as a uniform and sole highest judicial body’ (ibid 4). The responsibility for uniformity does not concern only domestic rules but also the relation to international courts. Notably, Bondar stresses the difference between European setting and supranational universalization. The European legal setting is considered as a regional promise to create some constitutional integration which does not amount to ‘supranational legal universalization’ but protects members’ legal systems, preserves their legal sovereignty and favors their mutual enrichment (ibid 21).

<sup>4</sup> ibid 24.

<sup>5</sup> ibid 25. The example of same-sex marriages is recalled proving the distance of the two Courts (decision of 23 September 2014 n 24-P of the Russian Constitutional Court, where the Court detaches from the European standards of the ECtHR, assuming that in a specific culture, the fight against discrimination and inequality should not be ‘substituted by the demand for exclusive rights for sexual minorities’ at 26), while on other hand a successful example of mutual coordination and flexibility is given, by recalling the prisoners’ right to vote case (see The ECtHR decision in *Anchugov and Gladkov v the Russian Federation*, Apps 11157/04 and 15162/05 (ECtHR, 4 July 2013) in sharp contrast against the Constitution of the Russian Federation (Part 3 art 32)) and the RF CC Ruling dated April 19, 2016 No. 12-P when ‘the Court, dealing with the question concerning the possibility of execution of the ECHR decision, evinced a flexible, constructive approach indicating existing options for implementation of the act of the jurisdiction under the European Convention that are consistent with the Constitution of the RF’ (Bondar (n 2) 26). In the 2016 ruling, the CC opened to less automatic restrictions to voting rights. A subsequent legislation in 2017 by introducing alternative sanctions, like community work, opened the door to voting, thereby cancelling the previous blanket ban.

<sup>6</sup> Zorkin (n 1) 1-9.

paradigm has generated an opposite practice developing the ‘cynical’ double standard of the *postmodernist* paradigm. Double standards – *vis-à-vis* different cultures – are hidden under doctrines such as the responsibility to protect, humanitarian interventions, and the like. Their interpretation has the features of postmodern relativization of values and brings about the fading of modernity ideals like objectivity, justice, right. Arbitrariness and injustice originate also from international law. Despite the clearest rules enshrined in the United Nations Charter, empowering the Security Council for international security, the ‘applied doctrine’ of humanitarian intervention has taken a radically different road since the 1999 Federal Republic of Yugoslavia bombing, and the NATO allies have arbitrarily decided which principles of international law have to get priority. Relativism in the application of principles is the mark of postmodernism in action. The same inexplicable contradiction is recalled when the humanitarian doctrine remains silent for the historical genocide of Ruanda (1994), or the Rohingya refugees problem (Myanmar, 2016-17).<sup>7</sup>

Postmodernist obsolescence of truth and justice is seen as a (rebound) consequence of modernist disrespect for differences and identities: he thinks of constitutional identities and the social structure of non-European post-socialist countries, where the experiment of the transplant of (western) legal institutions in the ‘90s was felt largely dysfunctional. In the series of consequences, Zorkin registers a crisis of ‘legal democracy’, democracy based on the legal state, citing the diverse populist ‘rebellions’ including as well the Brexit choice. Problems affect Russia as well. Equality, political competition, the democratic premises of a legal state are still in progress. The end of the Soviets system has thrown Russia into a postmodernist arena, of which it has still to find its way out.

Now, the theoretical suggestion that Zorkin advances concerns the overcoming of modernism and postmodernism, meaning in the legal theoretical realm, legal positivism and post-positivism. His lecture is the first important reference to metamodernism by authoritative legal interpreters, and such interpretation appropriates the concept in a shape that articulates the main concerns and interests of a country whose ‘democracy’ is fighting the western use of international law. Although it is not yet a theory, or a paradigm, Metamodernism is a heuristic

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<sup>7</sup> Zorkin recalls as well the case *Drėlingas v Lithuania*, App no 28859/16 (ECtHR, 12 March 2019), where the Fourth Section of the Court challenged the view on the definition of genocide previously endorsed by the Grand Chamber in *Vasiliauskas v Lithuania*, App no 35343/05 (ECtHR, 20 October 2015).

and potentially fruitful concept, in his view. It is for him an existential matter.<sup>8</sup> If law is a cultural phenomenon, then Metamodernism is an appeal to overcome one-sidedness and upgrade legal understanding through a new philosophical view, one that hints at a more comprehensive insight in human and legal values, and can be able to reconsider the centrality of the individual not as a single and abstract, deracinated figure, but as a concrete ‘person’ living within the history of a society linked to its territorial bonds. Metamodernism suggests therefore a renovated synthesis of different legal paradigms, different juridical understandings.

I am not going to accept the interpretation of Metamodernism as a final answer to western human rights and international law, *id est* as an argument justifying the disregard for civil and political rights in some countries, or as a plea for a Russian revenge over the fundamental obligations enshrined in general international law. But, of itself, the intuition touches upon a raw nerve in our legal self-understanding, and invites to see what in fact Metamodernism can contribute to it.

Zorkin seems to propose that a metamodern view could aim at a reconciliation, getting rid of deracinated rationality (of law), and unilateral Eurocentrism, by hinting at comprehensiveness, inclusiveness, and the end of unilateral approaches to legal matters. In my view, it is perhaps more likely that the metamodern feeling perceives instead the indefinite and recursive, back and forth fatigue between irreconcilability and an aspirational horizon of reconciliation.

### **3. What can metamodernity tell?**

There are some versions of metamodernism, born in art and literature, that actually present the reconciliation perspective: Alexandra Dumitrescu writes that through art and literature surfaces ‘a dramatic paradigm shift that surpasses the modern exclusive reliance on reason. This new paradigm is apt to be called *metamodern*. The metamodern self undergoes alchemical-like transformations, and eventually integrates various faculties, among which reason, imagination, and emotions. It is a self which escapes the logic of the grid, bridges dichotomies, and values interconnections, the feminine, and innocence’. So the idea evokes

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<sup>8</sup> Modernism and the Enlightenment, Zorkin reminds us, were for a while opposed in Germany as to the legal reforms by the Historical School of Law: among its claims, the importance of conceiving the law a manifestation of the People as fundamental as language.

some integration of opposites.<sup>9</sup>

In principle, the feeling of reconciliation, at first sight, animates, for example, the ECtHR seeking consensus, and the adoption of the Protocol to the European Convention which institutionalizes the principle of subsidiarity and the doctrine of the margin of appreciation.<sup>10</sup> Is that the import of a metamodernist attitude? These provisions of course are a mitigation of the original deontology of abstract rights' protection in the text of the European Convention. Paradoxically, but with some reason, the attitude to reconciliation is considered by many ending up into *relativist* understanding of conventional rights, paving the way to an oscillating interpretation of the law: up to the point that the practice of the doctrine reaches to a kind of post-positivist openness (not a metamodern attitude, then), felt by many as a problem. That is, the possibility of one, one hundred and more<sup>11</sup> 'margins of appreciation'.

Although many 'democracies' as Parties to the Convention feel somehow to share a basic, common legal understanding,<sup>12</sup> one should not forget that different is the case with the non-Eurocentric worldviews. For the Russian scholars the postmodern openness in the ECtHR equates a double standard, disregarding the democratic feeling of different countries. If the promoters of universalized liberal democracy do appeal to the primacy of justice as an international measure, others appeal to the primacy of democracy. The Russian case is a special case, but the criticism of the very deep sense of international law, as is well known, was raised by the Third World international law scholars in the last decades, mainly showing how IL 'formally universalizable doctrines are the product of European imperialism (eg, the desire of cultural expansion through the cost and oppression to other peoples)'.<sup>13</sup>

The appeal to a metamodernist feeling, loaded with the purpose of a new balance overcoming unilateral application/interpretation of law, is perhaps an overstatement. Timotheus Vermeulen and Robin van den Akker, who wrote the *ouverture* essay on metamodernism (to which Valery Zorkin makes reference), also wrote thereafter some more *Notes* on

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<sup>9</sup> A Dumitrescu, '**Romantic and Metamodern Glimpses at Self-transformation**' (2010) *Inter-textes. A Journal of Culture and Comparative Literature* 227-239 at 227.

<sup>10</sup> Protocol No 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013, entered into force 1 August 2021) art 1.

<sup>11</sup> G Itzcovich, 'One, None and One Hundred Thousand Margins of Appreciation: The *Lautsi* Case' (2013) 13 *Human Rights L Rev* 287-308.

<sup>12</sup> This I believe is the trend drawn by D Lustig, JHH Weiler, 'Judicial Review in the Contemporary World—Retrospective and Prospective: A Rejoinder' (2019) 17 *Intl J Constitutional L* 40.

<sup>13</sup> JD Haskell, 'TRAIL-ing TWAIL: Arguments and Blind Spots in Third World Approaches to International Law' 27 (2014) *Canadian J L & Jurisprudence* 383, at 391.

Metamodernism entitled ‘Misunderstanding and Clarifications’ (June 3, 2015). Their answers seem to dismiss some romanticized and harmonized worldviews.<sup>14</sup> Truly, as Tawfiq Yousef writes ‘Metamodernism does not mean a complete break with the traditional notions of modernism and postmodernism. Rather, it draws upon both schools to spell out its own notions and concepts’.<sup>15</sup> And ‘[i]nstead of postmodern irony, pastiche, deconstruction, skepticism and rejection of grand narratives, we see sincerity, authenticity, hope, universal truths, oscillation and openness of metamodernism coming to shape the contemporary cultural mode(...). Metamodernism synthesises the best qualities of modernism and postmodernism’.<sup>16</sup> If something seems to prevail however in the many versions of metamodernism it seems to be oscillation, and *metaxy*, explained in terms of ‘in-between-ness’,<sup>17</sup> as a field of contact between different dimensions and forces. Moreover, the qualifying point of such in-between feeling, is its ‘tentativeness’, its ever tentative relation to the final achievement of harmony and reconciliation: such an achievement is however ungranted and possibly unreal, although it does not disappear in our horizon. The aspiration to re-compose a kind of ‘totality’ beyond fragmentation (the latter being a mark of postmodernism), the idea of hierarchy after the spreading of heterarchy and networking, the de-fragmentation process even in social and legal sciences do simply coexist with their opposites, in a horizon of incomplete tendering. I find for example this feeling of still *hinting at*, as surfacing since the start in Neil Walker’s book, *Intimations of Global Law*.<sup>18</sup> The way the book is conceived and construed can be taken, in my opinion, as an example of a metamodern sensitivity. Walker elaborates precisely on what he defines as the ‘intimated’ quality of the global order; that is, something clearly emerging but unfulfilled, and yet ‘inéxorable’. The perception that such a completion is inescapable is quite right. Its unfinished state, however, proves to be not just ‘contingent’ and transient.

The same holds for the repeatedly evoked waning of the State: the transformation is never complete and the ‘plurality’ of legality layers does not reach the point where the State evaporates; on the contrary its persistence and its fundamental roles *vis-à-vis* their citizens are

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<sup>14</sup> In their notes, they stress that ‘New generations of artists increasingly abandon the aesthetic precepts of deconstruction, parataxis, and pastiche in favor of aesthetical notions of reconstruction, myth, and metaxis [in-betweenness]. These trends and tendencies can no longer be explained in terms of the postmodern. They express an (often guarded) hopefulness and (at times feigned) sincerity that hint at another structure of feeling, intimating another discourse’ (T Vermeulen, R van den Akker available at <https://www.metamodernism.com/2015/06/03/misunderstandings-and-clarifications/>)

<sup>15</sup> T Yousef, ‘Modernism, Postmodernism, and Metamodernism: A Critique’ (2017) 5 Intl J of Language and Literature 19.

<sup>16</sup> *ibid* 41.

<sup>17</sup> J Duraj, *The Role of Metaxy in the Political Philosophy of Eric Voegelin* (English edn, Peter Lang 2021).

<sup>18</sup> N Walker, *Intimations of Global Law* (CUP 2014).



recurrently reaffirmed.<sup>19</sup> In a sense the same holds when one thinks of the notion of States' *jurisdiction*. The peroration of the value of jurisdiction and jurisdictional concepts – not as just a leftover of an obsolescent past – speaks of the relevance of the States in IL: according to Samantha Besson, it saves authority as a relation between the State and the people, it allows for resistance to external arbitrary intruders. But it cannot oppose international law as such, because it is a legal construct of *both international and domestic* law: therefore, it cannot live without any of them. In Besson's narrative mutual constitutive links make for a unity of international law and national law. All this detracts from jurisdiction as a source of dis-integration of the image of international order as a whole. In Besson's view, the problem of the 'plurality' is not something affecting IL, as various entities and IOs are to be considered still under the ultimate control of States. Thus, the very question of fragmentation should be somehow dismissed.<sup>20</sup> Yet, we perfectly know that regional and global governance realities thrive precisely on separations, specialization, heterarchy, plurality, fragmentation.

On the other hand, among the indicia of the *Zeitgeist* are the returning up-and-downs of the global constitutionalist hopes. While the universalized ingredients of a constitutional culture are seen as already belonging to the common heritage and traditions of many legal orders, and while constitutionalisation of international laws, principles, rights seems at hand, its presumption of universality, gained at the price of its lack of determination, is strongly rebutted and contested, since the general commitments that it invokes are doomed to evaporate *vis-à-vis* national identity 'constitutionalism', cultural, social, geopolitical allegiances and idiosyncratic characters. To many, a universalized constitution appears to be an oxymoron in itself, and it is necessarily misleading. However, the development of a common language of rights, liberty, rule of law, democracy seems undeletable in the common conscience and enshrined in all the universalized treaties and international commitments. It looks too hard to attempt any legal discourse by opposing and explicitly denying those fundamental principles.

As a kind of *Zeitgeist*, metamodern feeling is epistemologically akin to the Kantian regulative idea, not so much to the Hegelian philosophy of history reaching to the absolute

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<sup>19</sup> I have addressed the global arena as a kind of 'Penelope's public' ever *in-between* the accomplished frame of institutionalized public law and its de-structuration in G Palombella, 'The (Re-) Constitution of the Public in a Global Arena' in C MacAmlaigh, C Michelon, N Walker (eds), *After Public Law* (OUP 2013).

<sup>20</sup> Be that as it may, still one can recognize that unity is more like a theory or a paradigm, more a formalist dogma than a lively practice. The same author reflects, at some point, that unity is devoid of effective hierarchy. Some ordering between IL and national law mainly derives from the *material weight* given to some norms or principles, and to the appearance of fundamental obligations of states now mainly belonging to general international law. (see S Besson, 'Whose Constitution(s)? International Law, Constitutionalism, and Democracy' in JL Dunoff, JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (CUP 2009) 381-407 at 390-1.)

Spirit and the end of history. On the contrary, in the Kantian regulative idea,<sup>21</sup> we think *as if* the unity of views, the world as a totality, the overcoming of partiality, the construction of the whole were abstractly thinkable. But such grand design evokes the height of metaphysics, it alludes to the ‘thing in itself’ as a ‘noumenal’ object, something that cannot be attained, is beyond our capacity and to which, nonetheless, we aspire. This unsatisfied tension, living *between* enthusiasm and illusion, is the fuel of a valuable existence: it finds its place in the *axiological* plane, it is supported by the *ethical* attitude. The integration of opposites and differences that Dumitrescu<sup>22</sup> connects to *metamodernism*, might well resurface, but it can do so at the ethical level, not the epistemic one.

All in all, what the evocation of *metamodernism* brings with itself is more *metaxis*, oscillation, and ‘in-between-ness’ than a final harmonization into some conclusive whole. In factual reality the push to harmonization is a never-ending effort more than an achievement.<sup>23</sup>

#### 4. The disharmony of the Rule of Law

There are cases in point that can better be understood through the lens of a metamodern feeling when at stake are conceptions of the rule of law and democracy, especially in the international arena. Domestic democracy may well be raised as a political shield against the *rules of international law*, that is, those resolutions, judicial decisions, or interpretations of international norms that should otherwise be respected and implemented by States. That can well be done precisely by appealing to the RoL. The main path through which democracy might oppose the *international rule of law* leads to breaking the unity of the RoL concept into pieces, that is, by assuming that the RoL is different, depending on whether it refers to domestic or to international law. It is the flagship of democracy that has often drawn the cleavage between the

<sup>21</sup> D Emmet, ‘Regulative Ideals: Kant’ in D Emmet (ed), *The Role of the Unrealizable: A Study in Regulative Ideals* (Palgrave Macmillan 1994).

<sup>22</sup> Metamodernism for Alexandra Dumitrescu is a paradigm for ‘revisiting traditions and establishing an ongoing dialogue with previous paradigms of thought – as opposed to the modernist rejection of traditions and the postmodernist ironic detachment from previous texts. Metamodernist works and practices seek to reinstate people’s concerns for the ethical, as opposed to the dominance of the epistemological in the wake of the Enlightenment, and of the ontological in the postmodern era. Metamodernism is a paradigm in which connection with fellow humans, and indeed with all sentient being and with nature, is valued – in contrast with an emphasis on individualism and isolated experience ...’ (‘What is Metamodernism and Why Bother? Meditations on Metamodernism as a Period Term and as a Mode’ Electronic Book Rev (4 December 2016) available at <<https://electronicbookreview.com/essay/what-is-metamodernism-and-why-bother-meditations-on-metamodernism-as-a-period-term-and-as-a-mode/>> at 8 – page numbers are only in the manuscript posted in Academia.edu).

<sup>23</sup> Despite adopting subsidiarity and margin of appreciation as an adjudicative doctrine and a norm (Protocol 15 to the European Convention (n 10) above), the ECtHR is not always praised for reaching effective balance or compensation, and harmonization is often deemed insufficient or ineffective (even more so as from the view-angle of Zorkin himself).

RoL in the domestic sphere and the international rule of law. Think of the famous US Supreme Court's 2006 *Hamdan v Rumsfeld* decision declaring unconstitutional the military commissions ordered by the U.S. President to try detainees in Guantanamo Bay. The President infringed the American common law of war and, among the rest, 'the "rules and precepts of the law of nations"... including, *inter alia*, the four Geneva Conventions signed in 1949 ...'.<sup>24</sup> Moreover, by creating such military commissions, the U.S. President had used a power that is not his own, is not 'implied' in times of war, and has not been conferred upon him but must be deliberated and delegated by the Congress. In its conclusive statement the Court remarked 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'.<sup>25</sup> Violation of human rights and humanitarian law is one side of the coin, the other is domestic democracy and the separation of powers, the RoL in 'this' jurisdiction. Appropriate was to define the *Hamdan* case decision as 'democracy forcing'.<sup>26</sup> And as Justice Breyer remarked, deference to the Congress, requested by the Court, means 'faith in ... democratic means'.<sup>27</sup>

Now, the majoritarian decision of the Congress, here referred to as the exercise of democracy, per se, is not a guarantee either for rights or for the rule of law. Indeed, the Congress a few months later upheld and confirmed the Military Commissions (with the Military Commission Act) which were clearly incompatible with IL obligations and the Common Article 3 of the Geneva Conventions. Nonetheless, that was (held to be) by the Court, the RoL in 'this jurisdiction'.

The single example of Hamdam story shows democracy overtaking International Law, emphasizes the Rule of law as system-relative notion (the RoL 'in this jurisdiction'), and divides the RoL in two pieces, that can easily contradict each other. At the same time, in common perception is the need for a shared ideal of the RoL, capable of overcoming the (post-modern) use of it as a malleable and multi-faceted tool, good to any different objectives: that is a sign of postmodern relativization, the instrumentalization and abuse, something that, once

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<sup>24</sup> *Hamdan v Rumsfeld*, 548 U.S. 557, 613 (2006). According to the Court, the Geneva conventions – and the requirements of Common art 3 – are 'judicially enforceable' because they are part of the law of war (art 21 of UMCJ). I have already mentioned this case in my previous writings, see especially G Palombella, 'The Rule of Law at Home and Abroad', (2016) 8 Hague J Rule of L 1-23.

<sup>25</sup> *Hamdan v Rumsfeld*, 548 U.S. 635.

<sup>26</sup> As Jack Balkin writes: 'What the Court has done is not so much counter-majoritarian 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'. J Balkin, 'Hamdan as a Democracy-Forcing Decision (29 June 2006) available at <<http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html>>.

<sup>27</sup> *Hamdan v Rumsfeld*, 548 U.S. at 636 (Breyer J concurring).

more, the recent tussle between Hungary or Poland and the EU demonstrates.<sup>28</sup>

The premise to all that is the fact that the ‘rule of law’ *in this jurisdiction* mainly downgrades the RoL to the rules and standards positivised in a legal system. The RoL so defined can have itself democratic legitimation, or at least lives on the assumption that the RoL reflects and respects the will of the People. In the European continental tradition this includes the understanding of the judiciary as subject to the ‘law’. This view has brought also the idea that delivering justice belongs to the judiciary *insofar as it* complies with the source of law, which rests in the parliamentary deliberation, or, ideally in the people itself.<sup>29</sup> A legal system expresses the unity of culture and belief of a people on a territory, in a Montesquieuvian sense. In this conception the rule of law equates mostly with the European idea of the *principle of legality*. The chain of virtues of such a RoL includes the faith in a certainty of law that is mainly insured by sticking to the Scalia’s RoL as a ‘law of rules’.<sup>30</sup> Democracy well fits into this frame, one that looks coherent and values self-determination, and on the legal side, predictability and therefore non arbitrariness. Legal positivist tradition has come to reflect and protect such an understanding of the RoL.

The point is that each legal order has to be respected, which turns out to be a dead end path for the RoL as a normative ideal.

Although scholars have listed the necessary requirements for a society to be guided by law, and for insuring the sheer ‘existence’ of a legal order (think of the eight requirements prescribed by Lon Fuller<sup>31</sup> or the improved list by Joseph Raz<sup>32</sup>), and although the legal-formal rationality of law, described by Max Weber, can still be a source of legitimacy of State’s authority,<sup>33</sup> nonetheless, beyond the functionality and existence of law as such, the ideal of the RoL meant an objective of liberty in its ‘original’ venue, even beyond the need that fullerian conditions are satisfied. A further condition, depending on its normative end, embedded in its more ancient rationale, is due to a kind of equilibrium between justice and sovereignty. The law plays (or should play according to the RoL normative ideal), beyond its instrumental value, a

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<sup>28</sup> A Sajo, *Ruling by Cheating* (CUP 2021). See also G Palombella, ‘The Abuse of the Rule of Law’ (2020) 12 Hague J Rule of L 387–397.

<sup>29</sup> Notably, that is among the fundamentals of the ‘Stato di diritto’, the legal State, although it is further revised with the consolidation of a constitutional State.

<sup>30</sup> A Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 U Chicago L Rev 1175-1188.

<sup>31</sup> L Fuller *The Morality of Law* (Yale U Press 1969).

<sup>32</sup> J Raz, ‘The Rule of Law and Its Virtues’ in J Raz (ed), *The Authority of Law* (Clarendon 1979) 267 et seq.

<sup>33</sup> M Weber, *Economy and Society* vol I (U California Press 1978).

justice protective function, preserving conditions of (co)existence of individuals and groups while at the same time enabling collective (sovereign) decision making to develop within their frame. The normative quality, since its medieval appearance in the English landscape, is aiming at the defence of liberty by limiting the juris-generative power of the Sovereign, the monopoly of law-making.<sup>34</sup> This entailed that the legal order reaches to the ideal of the RoL when it is organized so as to enshrine and protect, besides the legislated law produced by the Sovereign, also a law that is not under his purview and that he cannot legally overwrite. If that was a feature since ancient times in England (with its plurality of concurring sources, among common law, the judiciary, and the Parliament),<sup>35</sup> it is approximated by the Constitutional State, where the protection of the principle of democracy and of sovereign legislation gets a counterpoise in the constitutional enshrining of further principles, defending rights and the common weal, that are not at the disposal of ordinary democratic means. The tension between these two poles, in the rationale of the RoL (where another law cannot be deleted by the law of the sovereign), the duality in the organization of law, its liberty oriented constitution, are, as I have extensively surmised in some of my previous works, the incarnation of the medieval *jurisdictio-gubernaculum* pair.<sup>36</sup> When the equilibrium between the two falls down, when *either* terms fade into obsolescence, despite the ‘existence’ of a ‘functioning’ legal order, the RoL ideal is quickly disappearing.

This conception of the RoL, which keeps the normative meaning that can be rescued in the historical roots and development of this ideal, cannot (consistently) be reduced to a system-dependent notion, since it does not end at the borders of a State, and in principle it cannot be broken by a cleavage between International Law and domestic law. Again, it is *not* a notion that owes its meaning to the development of democracy, it develops regardless of the nature of political power, it applies to whichever sovereign, of which it also provides reassurance of the right of governing. Needless to say, democracy is itself a power whose law-making has to be met with some appropriate counterpoise. And in fact, if we return to the Hamdan story, mentioned above, the RoL ‘in this jurisdiction’ has a clear unilateral

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<sup>34</sup> At more length on this in G Palombella, ‘The Rule of Law and Its Core’ in G Palombella, N Walker (eds), *Relocating the Rule of Law* (Hart Publishers 2009).

<sup>35</sup> Famously, AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 121 and *passim*.

<sup>36</sup> The prescriptive sense of the RoL ideal indicates that the law has to live up to the role of justice-keeping as well as to that of structuring and empowering the sovereign right to legislate. The ‘*jurisdictio*’ related legality has to coexist with the one legitimately stemming from the sovereign authority, that is, the necessary ‘instrumental’ side of legality. As to the pair *jurisdictio-gubernaculum* see among others, CH McIlwain, *Constitutionalism: Ancient and Modern* (Cornell UP 1940).

insufficiency, it is incomplete and wanting: while democracy takes the entire scene, justice, or the *jurisdictio* side is doomed to be forgotten.

Therefore, if we read the question of democracy through the RoL lenses, and given the unity and continuity of the ideal of the RoL, with no cleavage between International and Domestic Law, we learn that just as within the State democracy cannot be ultimate, any monopoly of law-making should face a counterweight also beyond the State.

Such a continuity is seen in the development of Internationalism in the last 70 years that has enriched International law with a counterweight to the Masters of Treaties: that is, to the States monopolizing at will the international law-making. That is due not just to the peremptory force of *jus cogens* norms (still vaguely identified), but to diverse provisions or interpretive achievements including the definition of obligations *erga omnes* (either ‘parties’ or all states, when such obligations become general and universalized), the thick fabric of norms generally protecting human rights, the huge progress of normative commitments concerning common concerns, global public goods, and involving the interest of the international community as a whole: all of them bearing a rationale unsuited to remain under the sheer will and the self-interest of the State, and capable of weakening the paradigm of States’ consent as the pivotal pillar of the international order. The appearance of this ‘another law’, flanking the intergovernmental *gubernaculum*, a ‘law’ that sovereigns cannot override, in principle, manifests the increasing duality in the structural features of international law, that fairly approximate the ideal of the RoL.

International law, by interfering with the internal autonomy of States, has contributed to the further development of the RoL also *within* the State, enhanced the domestic protection of human rights but also propounded the spreading of domestic democracy as an international legal principle (democracy within the States).<sup>37</sup> As evidence of the continuity between the two realms of law, democracy and human rights have also been reasons for a recoil, justifying resistance against international rules, resolutions or obligations deemed to be inconsistent with those reasons.<sup>38</sup>

This duality in the law’s organization does not indicate either what norms justice should include or what sovereign ‘democracy’ policies should be, but its rationale has helped

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<sup>37</sup> The international norm which is milestone of the commitment to democratic governance is art 25 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>38</sup> An overview is in Lustig, Weiler, ‘Judicial Review in the Contemporary World’ (n 12) 40.

the modern positivist notion of law to evolve towards a legal horizon where the fulcrum ceased to be hierarchy of rules, system-closure, and the main paraphernalia of self-confident XIX and XX century legal positivism. As a matter of fact, the key-vault seems the pursuit of some equilibrium, also at the cost of winding and recurrent oscillation, where different fundamental principles, democracy included, and the increasing fundamental rights and international common goods, are recognized as needing protection and equal concern.

If we turn to the understanding voiced by President Zorkin (that the new times bear a metamodern sensitivity), we should agree upon such a recurrent ‘metaxis’, between positivist dogmatic truths and post-positivist relativization. The debate over the significance and meaning of the RoL, including its impinging upon democracy, is affected by a number of opposites, that are not reconciled. While on one side we acknowledge the European and liberty-oriented roots of the RoL, on the other we witness different conceptions and uses as well as different arrangements for democratic purposes. Being an ‘illiberal’ democracy, for example, entails in current practice a rejection of the RoL original normative ideal, which was synthesized above. Positivist views of the RoL as a sheer Rule *by* law might easily focus just on certainty stability and efficiency. Some other unilateral interpretations only ‘understand the rule of law as a social facilitator capable of establishing the formal and impersonal guidelines that allow the spontaneous order of the market to advance without impediment. Under this regime, all else is derivative. From a constitutional standpoint, however, those values are far from being the only or even the most important ones’.<sup>39</sup>

Metamodernism is not a way out, but the feeling that something is to be taken from both sides of a moon landscape. And unsurprisingly such ‘feeling’ is cognate to a deeper understanding of the RoL potential.

## 5. Interlegality

Beyond the rule of law, one telling narrative of the present times well explains and can be explained by metamodernism. It is what I called the interweaving of different ‘formats’ of law.

First, there is an echo of the positivist and post positivist tussle in the very same structuration of the law. While it fits the positivist system related idea of ‘objective’ law on one

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<sup>39</sup> G de Burca, O Gerstenberg, *The Denationalisation of Constitutional Law* (2006) 47 Harvard Intl L J 243, 253.

side, the legal scenario is thriving on a variety of legal formats, whose multiplication, diversity and overlapping looks specially vivid today. I wrote about the diversity of formats<sup>40</sup> referring to the simultaneous surfacing of diverse structures, patterns, or ‘formats’ of legality whose birth is originally placed in different historical times. Think of the medieval legality that we rightly thought had been superseded and displaced by a State-based law paradigm. One of its features materializes before us, due to the disorder of multiple orders, the confusion of normativities, capable of challenging the ever ‘closed’ jurisdiction of the State. And despite medieval law being a false friend to the present, however it seems to re-propose its schemes (or lack of them), on one side despite the existence of the State, and on the other, despite the absence of that unifying transcendent faith in the idea of God, that marked its capacity to survive for a millennium or so.

The layer of law as *Jus Gentium* is a further exemplary icon of law through centuries: its appeal refers today to the existence of common problems that can require common answers. The universality of law is one of the early generating humus of inter-nations legality and is felt as competing against the structures of law as a situated, territorial production, as well against varied regimes and orders (in the medieval sense). Despite holding to the idiosyncratic character of legality, we assume that there are common principles, common language through which law can be communicated through and by all peoples (beyond being the law that treats the relations among peoples and among States). And in some voices it brings about the allusion to a cosmopolitan legal order.<sup>41</sup>

However, even in the transformation of international law, one realizes the development of a global normative fabric sourced by a variety of non- state entities and producing non-treaty based law, that is a further protagonist, one unknown in previous historical times: it has been some years ago described and qualified as exceeding international law and creating a cross cutting regulatory layer of administrative content, thereby called Global Administrative Law.<sup>42</sup> It is conceived as a flat layer of horizontal law crossing frontiers and organizing specialized fields of human action on a supranational scale. A vertical order among regimes and legal systems, a regulated interaction among such formats of law are difficult to achieve: yet, the State systems of law, and their idiosyncratic and self-reliant exclusivity (that I have called ‘Law as Esprit’) have to coexist with the

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<sup>40</sup> I draw here on – and expose in a concise resume – G Palombella, ‘Formats of Law and their Intertwining’, in J Klabbers, G Palombella, *The Challenge of Interlegality* (CUP 2019) 23-41. I refer the reader to the further full bibliography there included.

<sup>41</sup> Among many, A Stone Sweet, ‘A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe’ (2012) 1 *Global Constitutionalism* 53, 54–55.

<sup>42</sup> S Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 *New York U J Intl L and Politics* 663, B Kingsbury, ‘The Concept of «Law» in Global Administrative Law’ (2009) 20 *European J Intl L* 23.



imbrication of legalities, reluctant to hierarchy, with the horizontal dissemination of juris-generative authorities exceeding and piercing the States, as well as with the awareness of some common or sharable principled law reproducing the recursive features of the ancient *jus gentium*. As I wrote, it is now that we have to cope with the simultaneous recirculation of formats of law that bear different ideal-type logics and nature, and resurface to contaminate each other, regardless of their date of origin, at a time when it is vain to try and impose one single paradigm.<sup>43</sup> By realizing that such ‘formats’ that is, *Law as Esprit, Jus Gentium, Medieval law, and Global Administrative Law* (but that does not need to be an ‘exhaustive’ list) help us to understand the present scenario, we come closer to see the law as the outcome of their combined effectiveness. Such complexity of ‘legal formats’, their contemporaneity, prevents us from holding to, say, a monist internationalist paradigm or a State self-referential perspective, or from accepting the all-powerful global regulatory law as the ultimate determinant of the legal world. In truth, we do have to take into account *all* of them, at the same time. The key-vault is not any of them singularly; it is our attempt to grasp how they do coalesce.

The difficulty we experience to make of all different variables a coherent basis for the ascertainment of ‘what is the law’ might generate recoils into exclusive State positivism or on the contrary a deconstructive, realist, legal relativism. It might generate some dogmatist escape into naturalist faiths, or the assumption of the death of law in the name of regulatory technocracy.<sup>44</sup> Yet, despite feeling in an undecided state we institutionally pursue the *legal* discourse, the claim of legal authority to legitimately guide human behavior, and all in all the inherent orientation to justice, that law ‘should’ bring about. If something can represent the appearance and role of *metaxis* and *metamodernism* in law, that is a sound path to its understanding.

A second consequence that, in my view, looks as a mark of a metamodern attitude, is in any of its respects, inter-legality. Given fragmentation and lack of any common gravity center, yet, what spurs the aspiration to consider law as a comprehensive frame, is the fact that under the functional divides, interconnections flourish: interconnections are the underlying state of affairs, while single legal regimes are the artificial construct aimed at better mastering fields under legal ‘separations’ and different rationales.

As a consequence, in the lack of a global constitutional and hierarchical legal order, nonetheless connections and conflicts require to be managed. Such situation I have called

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<sup>43</sup> See above (n 42).

<sup>44</sup> W Lucy, ‘The Death of Law: Another Obituary’ (2022) 81 Cambridge LJ 81, 109-138. R Brownsword, *Law, Technology and Society* (Routledge 2019) and R Brownsword, *Law 3.0. Rules, Regulations and Technology* (Routledge 2021).

interlegality.<sup>45</sup> Inter-legality is not the post-modern reality of fragmentation of the legal discourse, the relativization of sovereign States authority, the multiplication of conflicting juris-generative entities. On the contrary, it hints at the underlying reality of the material interconnections beneath the artificial functional fields' division that characterizes global governance and the ways the world is 'ruled'.

With material *interweaving* I refer to the entanglement of different fields of action governed by different authorities in the global space: environment and economy, human rights and trade are not dwelling in separate realms, although we see them as different systems of action. We are unable to separate in practice security and rights. We understand environment as a social, not just 'natural' object: large-scale climate change disruptions produce inequality, migration, hunger, and dissolve the fabric of settled societies. Although many issues are fictitiously taken as an insulated matter, under the control of a special sector's regulation, their competing rationales most often intersect and inter-legality is the recognition of legal sources in concurring or conflicting directions controlling the same objects or the same field. The inter-legality approach can be, then, considered as a method for understanding law amidst a situation in which the law in one single jurisdiction would not fully embrace the extent of the issue at stake.<sup>46</sup>

To such an inter-legal context the conception of law as system-based is unprepared.<sup>47</sup> In such circumstances, multiple intersections should generate a suitable revision of our understanding of law as a closed system of norms, whose authority (and jurisdiction) was stably meant as exclusive. Therefore, the point of an inter-legal understanding is the recognition that the law of a case at stake is composite, and made of the concurrence of legal sources, be they at the sub-national, national, regional, inter-national, supranational/global level.

The methodological justice-related premise of inter-legality amounts to avoiding one-sided decision making, to accounting for the full range of legal claims raised, and to abiding by a culture of justification, all things considered, through the focus of the given context. As a prescriptive method, it assumes that the plurality of legalities disciplining the case must be taken

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<sup>45</sup> G Palombella, 'Theory, Realities and Promises of Inter-legality' in J Klabbbers, G Palombella (eds), *The Challenge of Inter-legality* (CUP 2019) 363.

<sup>46</sup> Y Shany, 'International Courts as Inter-Legality Hubs' in J Klabbbers, G Palombella (eds), *The Challenge of Interlegality* (CUP 2019) 319.

<sup>47</sup> Its categories are shaped in order to face intra-systemic issues: it starts from the current notion of the validity of norms, to be 'recognised' through the fundamental norm – or the rule of recognition – of the legal order, which is thereby a bordered and exclusive device, unable to account for the concurrent entanglement of 'external' legalities (unless they are somehow incorporated or otherwise assimilated to the system).

into account, as a whole.

Now, the aspiration to account for the comprehensive state of things does not imply a grand vision of the global common good, but a more modest attempt at deepening the concrete enmeshing of legal claims and factual circumstances, one case at a time. From that point of view, ‘holism’ is only contextual, it is contingent upon the legal arrangements (as the positive law) relevant in context.<sup>48</sup>

This is even more necessary when rights are at stake: it should be noted that human rights, as part of international law commitments, appear to be exposed to a double-level understanding, in between a thin or universalizable overlapping consensus among the international community and a thick and ‘situated’ determination in national contexts. The very fact that rights are not referred to States as such, but to ‘individuals’ living in separate communities, generates the need for such a second-level comprehension, which also depends on the normative bases in each polities’ legal system. Accordingly, in the sphere of, say, the Interamerican or the European Convention on Human Rights, whichever doctrine of a margin of appreciation to be left to States, cannot be one of primacy between two legal orders.<sup>49</sup> The task of a Court, like the ECtHR is to countervail the majoritarian disregard of rights: therefore, neither jurisdiction’s exclusivity nor democracy should be invoked here.

In principle, looking at the law of the case simply means to accept that multiple (and even uncoordinated) sources fall into the same place, making for a composite interweaving of norms as a *third ground* irreducible to any of its contributing, and separate, legalities. It does not ask nor answer the question as to which legal system, or legal regime, must prevail, but

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<sup>48</sup> An analysis of judicial cases (from the Kadi case at the CJEU, to the Al-Dulimi at the ECtHR, to the Taricco case again before the CJEU, or the Italian Constitutional Court decision on civil compensation and rights of access to justice in the Germany v Italy case decided by the ICJ, and others) exemplifies the way through which adjudication does or might take in its legal reasoning an inter-legal path: I have done so in various works, such as G Palombella, ‘Theory, reality and promises of Interlegality’ (n 47) as well as in others that I must refer to here, eg ‘Exploring the Rationale of Inter-legality’ (2022) 11 *Rivista di filosofia del diritto* 9; ‘Interlegality: On Interconnections and External Sources’ (2021) 7 *Italian L J* 943; or G Palombella, E Scoditti, ‘L’interlegalità e la ragion giuridica del diritto contemporaneo’, in E Chiti, A di Martino, G Palombella (eds), *L’era dell’interlegalità* (Il Mulino 2021) .

<sup>49</sup> The structural deference to the will – the democratic will – in a member state should not detract from the assessment of a right violation. Behind this problem there are diverse theories and approaches. For example, one author calls for anti-foundationalist protection of Human rights, see B Tripkovic ‘A New Philosophy for the Margin of Appreciation and European Consensus’ (2022) 42 *Oxford J of L Studies* 207–234. See also A Zysset, ‘Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of “Democratic Society”’ (2016) 5 *Global Constitutionalism* 16, 22 and 44-5. On a different, more ‘deontological’ side, G Letsas, ‘The ECHR as a Living Instrument: Its Meaning and Legitimacy’ in A Føllesdal, B Peters, G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 125.

which normative claim, on the ground, can be provided with a better in-context justification of a legal character.

## 6. Some conclusive remarks

From this point of view, democracy does not count per se. In a supranational setting, one cannot simply assume that democracy has an ultimate value. It should be added that even as to the legitimacy of the international authorities, a realist view on the actual state of affairs would deny that democracy has a specific role. Referring to that issue Wojciech Sadurski has written that that would be

‘a non-starter, due to the apparent weakness of democracy at a supra- national level. Rather, we should follow a different strategy, and uncouple legitimacy and democracy (at least, of an electoral or participatory kind). We should further hypothesize that the legitimacy of supranational authorities is often grounded on the *type of arguments* provided by supranational entities, and in particular, their appeal to public reason – a legitimacy-conferring device well-suited to supranational authorities. And particularly good instances of such ‘supranational public reason’ (to be distinguished from Rawls’s ‘public reason of the Society of Peoples’) are provided by adjudicatory or quasi-adjudicatory supranational bodies, such as the two regional human rights courts and the WTO dispute settlement...’<sup>50</sup>

The potential of public reason for grounding supranational authorities’ legitimacy, however, is itself depending, as we discussed in the above sections, on how ‘pluralist’ such reason appears to be. It is therefore a double track: overcoming the close self-referentiality of internal democracy on the one hand, and on the other attempting to construct a credible setting for a public reason that should however be including real differences, cultural perspectives and situated world views.

Although this is not the place for a more extensive analysis of interlegality as a legal paradigm and as a method of adjudication, it helps in defining the *in-between-ness* that marks

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<sup>50</sup> W Sadurski, *Constitutional Public Reason* (OUP 2023) 320.

the legal world in the metamodern overcoming of positivist certainties and postmodern anxieties. We feel some nostalgia for positivist certainty while claiming some realist recognition of the ‘polyphony’ of world views.

After the post-modern trends lamented by the Russian Justice, the meta-modernist rise is however not the expected solution, that he seemed to announce, but simply the new *Zeitgeist*. As we are used to admit, some universality of a legal language has to coexist with vernacular law and particularity: the required equilibrium is not fixed in advance, and it is to be recurrently reshaped. Such a situation frames the sense and the prospect of democracy and the role of the ‘will of the People’ in a complex context of external interrelations.

Tellingly, in speaking of what makes for a *constitutional community*, in a domestic, bounded polity, Michel Rosenfeld insisted on his view of a ‘comprehensive pluralism’, according to which ‘justice as a good must rely to the greatest extent possible on *accommodation* of competing conceptions of the good – including competing conceptions of distributive justice – even if the latter are *inconsistent* with pluralism so long as they do not prove downright *incompatible* with it’.<sup>51</sup> Democracy has to include diversity, up to some point. Therefore identities as well as different conceptions of the good must be recognized and represented unless they would impair a minimum level of material justice in the community.<sup>52</sup> And since assessments are always contextual, inclusion and exclusion are a dynamic evolution not a fixed abstract arrangement.<sup>53</sup> As one can see, this reflective context-sensitive understanding of the legal and political complexities in a constitutional order is itself open-ended, but it should rest on sharing some ‘justice essentials’<sup>54</sup> that would border and frame the accommodation of the plurality of claims. The theory here shows the problematic scope of democracy, which has to revise and overcome any pretense of monolithic and closed self-understanding.

Now, if we turn from domestic to the inter-and supra-national setting, as we have seen, the latter is not the external ‘environment’, outside of domestic democracy but looks the true

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<sup>51</sup> M Rosenfeld, *A Pluralist Theory of Constitutional Justice* (OUP 2022) 27.

<sup>52</sup> *ibid* 249 ff (eg Amish anti-technology education is permissible unless their community becomes too large thereby impairing the progress of the entire society; The objection to military service can be allowed easily if it does not impair national security).

<sup>53</sup> The logics is always the necessary interplay between a fixed-core minimum and contextual variables in order to maximize the plurality.

<sup>54</sup> Rosenfeld proposes to preserve some essential conditions of justice – substantive, not procedural- regarding economic redistribution, recognition of individuals or groups (identity and dignity) and fairness in representation of individuals and groups in democratic participation, see Rosenfeld (n 56) 227-287.

context where any contemporary democracy is located and features as ‘participant’. And as such, it contributes the inter-legal arrangements that characterize the wider legal realm, where it is hard both to find a hierarchy of sources and to isolate one of them in a self-sufficient, stand-alone mode. The kind of non-foundationalist, but open-ended recipe, suggested above, might be suited, since plurality and context dependent assessments are inescapable. At the same time, it falls in a metamodern incompleteness: what makes it all so evidently expressing a metamodern scene (in the *as if* mode) is that *beyond the domestic borders* we strive to support such understanding of pluralism and justice, despite that – in this widest realm – we cannot really count upon a shared, universally settled, common constitutional frame.