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Administration without Sovereignty

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I. COUNTERFACTUAL SOCIAL FACTS

Legal statements involve sociological commitments. This may not be true of all cases. It is obvious, nonetheless, that a summons to appear in court, for example, presupposes the existence of addressees who are capable of understanding what they have been ordered to do and also interested, potentially, in avoiding sanctions. The social universe conjured up in a summons is not the world in which power is diffused in networks or where the rationality of different social systems is bound to remain incommensurable. The world taken for granted by legal statements exhibits the ontological features of what is called, heedlessly perhaps, 'ordinary life'. It is a world mostly inhabited by individual human beings. The communication in the relation between the legislature and the legislated is not shrouded in mystery. The subjects are capable of understanding their obligations. Conversely, those wielding the powers conferred by the legal system are capable of controlling the behaviour of norm addressees by threatening them with sanctions. Therefore, legal enactments appear to be self-referentially concerned with the stipulation of being adhered to. It is as though they reflected the belief that if it were not for law society would fall apart—a belief imparted with the notorious truism *ubi societas, ibi ius*.

The sociological presuppositions of law may strike one as either terribly naïve or distressingly prosaic. It is almost preposterous to assume that the addressees actually do understand the law; and, of course, it is more than trite to remind everyone of the inescapability of enforcement. But both presuppositions merely reveal law's *very own* sociology of law. Distressingly enough, this sociology rests on a perplexing composite of idealisation and insight. The law needs to be clear. On a factual level, this sounds ludicrous. But dropping the expectation altogether would be cynical, for otherwise expecting compliance would be nothing short of preposterous. From

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the perspective of the legal system it needs to be believed that the law is, despite its complexity, clear enough to quell doubts regarding the reasonableness of compliance. What there is becomes systematically assimilated to what there ought to be. In other words, the law idealises the social context of its operation and thereby invites misreading reality as a manifestation of the ideal.

However, law's sociology also works the other way around. Reality becomes a by-product of idealisation. The law signals that if it were not for its existence the social world would collapse.[1] When state authority disappears so-called failed states sink into chaos. No law, no order. It has to be that way, for this conforms to what we have come normatively to expect. It is a self-fulfilling prophecy. Hobbes's political philosophy provides us with a most instructive example of how idealisations influence the real. Hobbes believes us to make a cognitive assumption for a normative reason. That is, in order to be good curators of our own self-interest we had better believe others to pursue their own self-interest aggressively, at any rate, when push comes to shove. On a cognitive plane, it may not be the case that people pursue their self-interest, for it may often be profoundly unclear what this really means. Nonetheless, our own interest in survival counsels in favour of acting on the basis of a stereotype that involves the idealisation that people do in fact pursue their self-interest. To act on the irrefutable presumption that people pursue their self-interest presupposes that they are capable of doing so. Hence everyone pursues what he believes to be in his self-interest because of the belief that everyone else is doing so. Ought implies can. It has this power over us even when it is profoundly unclear if what you ought to do is also what you can do. The result is, again, the idealisation of social facts. Social facts are cast in the light of idealisations.

Hence, the context against which we render something intelligible *as* valid law is laden with idealisations. The law comes surrounded with a normative aura. The addressees understand the law (*yeah!*). They are self-interested and self-directing (*applause*).[2] None of these idealisations can be legislated or brought about legally. They are, logically, *prior to law*. They involve idealisations of our selves and of our mutual engagements. Their presence should not come as a surprise. Modern law is addressed to us as specimens of one and the same type of moral agent. This is a counterfactual presupposition. But it is not *merely* counterfactual. Everyone had better be capable of manifesting in some manner the universal conception of agency in practical life.

These idealisations are, of course, not innocent. The presupposition underlying private law according to which adult contracting parties are equally capable of procuring their own interests can be sustained only so long as a situation is not marked by serious inequalities of power and wealth. There is a degree, however, to which idealisations may legitimately conceal, for they may actually help to neutralise differences that ought not to matter from a legal point of view. Nevertheless, idealisations may

[1] This is, in a sense, equivalent to what Hart thought to be the minimal content of natural law (H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 189–95).

[2] They are what Pierre Schlag would describe as 'legal subjects' (P. Schlag, 'The Problem of the Subject' (1991) 69 *Texas Law Review* 1627–743).

also reach a point at which their use appears to distort social realities. This is the case, as is well known, wherever agreements are deemed to be invalid owing to unequal bargaining power.

Legal statements are sociological. They are sociological in the sense that they take for granted the existence of conditions that are normatively presupposed by the law in order to render its own existence feasible and, not least, legitimate. For the purpose of the exposition that follows I would like to refer to these presuppositions as *counterfactual social facts*.[3] They are manifest in facts such as the intelligibility of authoritative enactments, the capability of agents to engage in planning their conduct and to adjust their plans in accordance with changing circumstances, the rough predictability of the operation of courts, the responsiveness of the system of government, and the democratic input into the political process. These are social facts that the legal system takes for granted in order to conceive of itself as reasonably fair and acceptable.

The few examples have also shown, however, that *systematically* the law has to be inclined either to assimilate the ideal to reality or to construe reality as the expression of an ideal. Owing to the presence of counterfactual social facts, therefore, the law has a built-in tendency towards ideological self-obfuscation.

II. COMPETING DESCRIPTIONS

Dieter Grimm's unwavering scepticism with regard to the premature celebrations of constitutionalism beyond the nation state[4] expresses precisely a concern about the obstructive influence of counterfactual social facts.[5] The promise that resides in the inherited concept of the constitution becomes drained of its normative force, where major elements of the original context of constitutional law, such as consolidated state authority, can no longer be taken for granted. What cannot be sustained in a transnational context, in particular, is the concept of the constitution as a comprehensive regulation of state power that facilitates collective self-determination. Using the attribute 'constitutional' in order to describe fragmentary transnational processes is likely to create serious distortions.

[3] I cannot, for the purpose of the discussion that follows elaborate in which respect my view of counterfactual social facts is both similar to and dissimilar from Lon Fuller's take on what constitutes the internal morality of law. There is a similarity for it highlights the fact that certain idealisations are part of the practice of law; the approach is fundamentally different, nonetheless, for it abstains from consolidating a number of idealisations into a 'procedural' version of natural law. Rather, the presence of counterfactual social facts is itself taken to be a social fact about raising and defending legal claims. See, by contrast, L. L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, rev edn, 1964), 91–106.

[4] For one example among many others (with references to other examples), see A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 579–610.

[5] See D. Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447–63.

However, constitutionalism is not the only theoretical vocabulary that has been used in order to account for transnational structures. Indeed, over the last few years, the number of contenders has grown considerably. Above all, 'governance', in particular 'governance without government' and talk of new 'sites' of authority haven taken centre stage.[6] Sociological approaches that highlight the systemic effects underlying the behaviour of international actors, such as constructivism[7] and systems theory, compete for shedding light on a situation for which the long-serving counterfactual social facts, such as 'states' and the 'national interest' no longer appear to be of any avail. Whereas the social ontology of 'realistic' approaches to international affairs appears to enjoy considerable support by American legal scholars,[8] a highly tentative and fluid discourse on soft-law, 'hybridity', and governance has come around in Europe.[9]

What the use of these various vocabularies indicates is keen awareness that the inherited categories of public international law are no longer capable of capturing a new reality. In fact, owing to the idealising moment inherent in tacit references to counterfactual social facts the traditional legal sociology of international law tends to ascribe to state governments more power then they actually possess.[10]

None of these contending vocabularies, however, has as of yet attained the stature of a *lingua franca*. Yet, the attempt to account for global structures of governing in terms of 'global administrative law' is nonetheless remarkable.[11] It stands out, for it is based on the realisation that most of the more recent developments in transnational law have indeed enhanced its administrative dimension.[12] What is to be observed today, from the preparation of side agreements to the GATT all the way down to the regulation of foodstuffs in the European Union (EU), is an increase of transnational

[6] See, most prominently, J. N. Rosenau, *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (Cambridge: Cambridge University Press, 1997). 'Governance', generally, refers to processes of regulating and ordering issues of the public interest.

[7] See D. Bederman, 'Constructivism, Positivism, and Empiricism in International Law' (2001) 89 *Georgetown Law Journal* 469–97, at 477; P. A. Karber, ' "Constructivism" as a Method of International Law' (2000) 94 *Proceedings of the American Society of International Law* 189–92; J. Brunée and S. J. Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 *Columbia Journal of Transnational Law* 19–73.

[8] J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005).

[9] See G. de Burca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

[10] This observation has been made, very aptly, by A.-M. Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2003).

[11] For a manifesto, see B. Kingsbury, N. Krisch, and R. B. Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15–61.

[12] See J. H. H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 *Heidelberg Journal of International Law* (*ZaöRV*) 547–62.

regulatory cooperation and of joint efforts at implementation. The new world of international law is the world of loosely coupled but often highly interactive and effective national and international bureaucracies.

III. A REMARKABLE PARADIGM SHIFT

It should not go unnoticed that as the project unfolds the concept of administrative law is given a more American twist.[13] The focus lies, hence, not so much on individual administrative acts[14] but on the establishment of new regulatory authority.[15] The rights dimension hence receives less attention than the governance dimension, for the guarantees of transparency and participation are the regulators' modality of respecting the interests of stakeholders and affected groups.[16] Nevertheless, a whole range of phenomena enters the purview of global administrative law, ranging from administration by formal organisations, such as the World Health Organization, over collective action by more or less formalised transnational networks of national regulatory officials all the way down to private institutions with regulatory functions, such as the International Organization for Standardization.[17]

Intriguingly, the range of phenomena studied reveals a departure from a basic analogy. In the exemplary case, a legislature delegates regulatory authority to an agency, which, after giving notice, scheduling hearings, and providing reasons, adopts an implementing regulation. By analogy, in the paradigmatic international context a treaty typically takes the place of legislation and a general act adopted by an international organisation the place of the regulation. Hence, acts by the United Nations Security Council, which have increasingly come to exhibit a general nature,[18] would derive their authority from the delegation effected by all acceding signatory states of the UN Charter. If I understand the project correctly, it is the very point of global administrative law to emphasise that what used to be the paradigmatic make-up of the modern 'regulatory state' is merely a limiting case of how the administrative process becomes re-enacted on a global scale. Remarkably enough, the paradigm shift amounts to precisely this 'decentring' of the image of delegation

[13] For similar observations, see C. Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 *European Journal of International Law* 187–214, at 209.

[14] This is not always the case: the declaration of refugee status by the UNHCR is an individual administrative act.

[15] See Kingsbury et al, above n 11, at 16.

[16] On the pedigree of 'governance' from the pluralistic transformation of American administrative law into an instrument of participation and agreed upon rule making, see the highly perceptive comments by M. Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 369–77, at 376.

[17] See Kingsbury et al, above n 11, at 20–3.

[18] See J. E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 *American Journal of International Law* 873–88.

of authority to rule-making and rule-applying bodies. Not only can regulation on the basis of delegation no longer be considered the paradigmatic core of administrative law, no other relation can claim to have taken its place. Individual acts by the Security Council are just as paradigmatic an instance of global administrative law as standard setting by the Codex Alimentarius Commission.

On a descriptive level, hence, global administrative law sweeps so broadly that one is inclined to take it to be a *re-description* of modern international law.[19] It actually provides a picture of the international law under the dominating influence of administrative rationality. The absence of a paradigm reveals the 'rhizomatic' quality of this situation.[20] There is neither system nor centre, merely family resemblances among different processes.

Against this background, it is all the more surprising that the normative thrust of global administrative law is relatively straightforward. Indeed, the purveyors of the idea are confident that from the mush of the decentred paradigm will emerge 'the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, by providing effective review of the rules and decisions they make'.[21]

Global administrative law links the description of variegated phenomena with the pursuit of a limited normative agenda, which is committed to core principles of the rule of law and values associated with 'good governance'.[22] Hence, global administrative law has set for itself quite pragmatic objectives, which are, incidentally, far more modest than the claims made by those advancing in one way or another the cause of constitutionalisation.[23]

The only problem that is posed by this project is whether or not even in this case the use of *legal* vocabulary involves a mismatch in the relation between counterfactual social facts and the conditions under which operates what is supposed to be law.

[19] See N. Krisch and B. Kingsburg, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1–13.

[20] © Deleuze and Guattari (see G. Deleuze and F. Guattari, *A Thousand Plateaus*, trans B. Massumi (London: Continuum, 2004)).

[21] Kingsbury et al, above n 11, at 17. See also ibid at 28.

[22] For apt remarks as regards this more limited agenda, see S. Marks, 'Naming Global Administrative Law' (2005) 37 *International Law and Politics* 995–1001. Harlow, above n 13, at 198–203, goes to great pains to distinguish rule of law principles, such as legality and limited powers, from good governance values, such as transparency and participation. She sees the latter originating from World Bank and International Monetary Fund policies and denies them the stature of genuine administrative law principles. I can imagine that American scholars would have a different take on this.

[23] For self-conscious modesty, see N. Krisch, 'Postnational Constitutionalism?' (manuscript, 2008).

In other words, the project may, in spite of its forward-looking orientation, give rise to idealisations whose use is likely to be unwarranted in the face of existing realities.

IV. GLOBALISATION'S *GUTE POLIZEY*

Lest I be misunderstood, I add that the problem is not whether administrative processes are by their very nature not susceptible to legal control. The rise of administrative law in the context of nineteenth-century European monarchies serves as a reminder that the task is not too arduous to be achieved. The question is whether in certain instances a *description* of social processes in traditional legal terms may not render them obscure owing to the law's intrinsic tendency to idealise the context of its operation. This danger is all the more virulent in settings that are marked by the prevalence of administrative rationality. In other words, when speaking of law we ought to take heed of the mutations that legal relationships undergo when they become absorbed by processes of administration.

Since its inception, administrative *action* has been teleological in its orientation and both comprehensive and particularising with regard to its scope.[24] Administrative rationality is *comprehensive*, for with the rise of the modern state administrative processes are self-reflexively concerned with strengthening the vitality and enhancing the presence of the state. The expenditure of energy in discrete processes of administration is therefore ultimately fine-tuned and calibrated in light of these final objectives. Every act of administration is always part of a larger ambition. At the same time, administrative rationality is also *particularising*. Foucault may well have been right in assuming that, from earlier Christian doctrines of good governing, it inherits an individualising 'pastoral' orientation.[25] The administrators are expected to manage the lives of citizens and to see to the flourishing of the population.[26] Whatever seems to be conducive to the life of the population or, as one would have put it in the nineteenth century, the nation or, nowadays, the health and safety of the global consumer, is in and of itself within the purview of the administration.[27]

It is in this connection that, owing to the subject at hand, the professed concern with the vitality of social life confers comprehensive competence.[28] Maybe one does not go wrong in assuming, again with an eye to Foucault, that administrative

[24] The following remarks are taking their cue from, without thereby slavishly following, M. Foucault, '"Omnes et Singulatim": Toward a Critique of Political Reason', in *Power*, ed J. D. Faubion, trans R. Hurley (New York: New Press, 1994), 298–325.

[25] See ibid at 309.

[26] See ibid at 323.

[27] On the early cosmopolitan connotation of *Polizey*, which suggests administrative action that is geared toward creating polite citizenry that is conversant in wordly affairs, see H. Maier, *Die ältere deutsche Staats- und Verwaltungslehre (Polizeiwissenschaft): Ein Beitrag zur Geschichte der politischen Wissenschaft in Deutschland* (Neuwied: Hermann Luchterhand Verlag, 1966), 128–9.

[28] For the Christian origin of the idea of the sanctity of life (*pace* Agamben), see H. Arendt, *The Human Condition* (Chicago, Ill.: Chicago University Press, 1957), 313–14.

rationality is 'bio-political' in its orientation, for it is concerned with the preservation, the moral quality, the conveniences, and the pleasures of life.[29] Any particular measures that are taken by the administration nonetheless serve the comprehensive ultimate objective of reinforcing state power. Administrative rationality is a means 'to develop those elements constitutive of individuals' lives in such a way that their development also fosters the strength of the state'.[30]

The calibration of action with regard to attaining both the comprehensive and the particularising objectives would be severely hampered if it had to play by pre-established rules of law. The management of life-enhancing processes—be it the provision of wholesome food, the stipulation of sanitary public baths, or the correction of damaging customs, such as smoking, drinking, gluttony, or unprotected sex—needs to be, thus understood, indeed an activity that defies the discipline of law.[31] In other words, the administrators need to be in a position to adjust the investment of resources from one situation to the next in accordance with felt necessities at the time of action. No general rule can determine in advance the type of response that would be adequate to a particular situation. In fact, from within the perspective of managing the life of the population (or global prosperity) rules can merely establish some provisional standard. Denying existing rules their authority does in no manner undermine the rationality of administration; it does not, at any rate so long as the activity remains geared to both the comprehensive and the particularising objectives.[32]

What is more, it is not by accident that administration—the *gute Polizey*—is associated with sovereign power in the sense of a power that is essentially *legibus solutus*. In the administrative context this power works, though, not through the spectacular demonstrations of *omnipotentia terranea*, which puts itself on display in gruesome public executions, but through the omnipresence of measures of correction, learning, nurturing, fostering, facilitating, promoting, educating, training, optimisation, and advice. The macro- and micro-management of life can best flourish when it enjoys the backing of sovereign power. Under this condition, it is not hampered by jurisdictional constraints or held back by the demand to respect a rule or a right. The coupling with sovereignty explains why administrative power is so menacing. Administrations regulate, to be sure. But they resort to regulation only as an expedient in order to get things done. Even deregulation is a method of administrative goal attainment.[33] When there is promise that things might get

[29] See Foucault, above n 24, at 321. See also M. Foucault, *Society Must Be Defended: Lectures at the Collège de France 1975–1976*, trans D. Macey (New York: Picador 2003), 243.

[30] Foucault, above n 24, at 322 (a view that Foucault attributes to Justi).

[31] See Harlow, above n 13, at 191.

[32] See M. Oakeshott, *On Human Conduct* (Oxford: Oxford University Press, 1975), 116–17, who may in turn have drawn on Fuller's account of the contrast between adjudication and managing. See Fuller, above n 3, at 207–8; L. L. Fuller, *The Principles of Social Order*, ed K. Winston (Durham, NC: Duke University Press, 1981), 195.

[33] For an overview, see C. Crouch, *Post-Democracy* (London: Polity Press, 2004).

done more effectively through direct action, administrative rationality is the first to override its own pre-established constraint.

The eudemonism of life-enhancing administrative action encounters different conditions in the age of globalisation. This change does not affect its comprehensive and particularising momentum: what has altered is the entity whose life is the object of comprehensive concern. No longer does the state occupy this position, but rather, in Marxian parlance, the life process of society,[34] which has come to adopt as its final cause the want-generation and want-satisfaction of the global consumer. What one encounters in this context is administrative rationality that has been stripped of its backing by sovereignty. It therefore needs to negotiate and calibrate its relative authority in each case with an eye to the overall stabilisation of global economic processes. Such deferential fine-tuning with regard to other agents wielding administrative authority would not be necessary, constitutional constraints aside, under territorial rule. Territoriality is the consequence of the absence of substantive jurisdictional limitations. Occupying supreme authority over a territory is what distinguishes sovereignty from the functionally differentiated claims to supremacy that purportedly inhere in self-contained regimes.[35] The WTO may well have built into its operation the claim to have the final say over how to resolve 'trade and …' questions, but it would have to expect resistance if it decided to ride roughshod over the findings of a human rights regime. It is the mark of sovereign power that it does not have to accommodate other powers. Sovereign power is capable of overcoming obstacles wherever they might arise, lest it is not what it purports to be.

I do not claim that my brief characterisation of administrative rationality is either original or complete.[36] I merely point out that where administrative rationality dominates it appears doubtful whether belief can be sustained in the presence of the law's counterfactual social facts. I would like to argue, instead, that the new situation for which there exists already a fair number of competing descriptors is best understood—in particular, from a historical point of view—when conceived of as *administration without sovereignty*. Neither talk about 'law beyond state', to which global administrative law in any case formulates a contribution,[37] nor some lofty-softy 'constitutionalism' is adequate to capture the essence of transnational governance processes. They are not, for they miss the most important point, that is, the demise of the traditional legal relationship.

[34] For an apt observation, see Arendt, above n 28, at 255.

[35] See A. Fischer-Lescano and G. Teubner, 'Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999–1046.

[36] For a similar description, see M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), 17–18.

[37] See S. Cassese, 'Administrative Law without the State? The Challenge of Global Regulation' (2005) 37 *New York University Journal of International Law and Politics* 663–94, at 673: 'The centrality of the state to the notion of public powers has become an optical illusion.'

V. THE LEGAL RELATIONSHIP

It is only with reluctance that I take up a topic that smacks of a stale debate. But it is unavoidable to come close to addressing the concept of law, even though this is precisely what I would still like to avoid.[38] I express uneasiness about having to do so for the simple reason that the topic has suffered enormous intellectual setbacks in recent debates over legal positivism. One debate is (still) concerned with examples of 'wicked law' whose encounter supposedly renders untenable the distinction between law as it is and law as it ought to be.[39] The other debate, if the existing scholarship even amounts to one, affects the purportedly conventional nature of standards used to identify valid law. The first debate is useless because it does not address the underlying problem of political resistance. The second debate is wrongheaded because it overlooks that, even though there are undeniably conventions for raising and contesting legal claims, these claims do not merely self-referentially point to conventions.[40] This is also the case for the concept of law. We refer to some matters as law conventionally while what we thereby intend aspires to more than mere conformity with more or less settled practice. Even if we may find, in some cases, an appeal to conventions sufficient, we do not rest content on conventional grounds.

The concept of law presupposes the concept of legality. From Enlightenment legal philosophy we inherited an understanding of legality according to which the relationship between the commander and an addressee is legal if the latter is not required to share the point of view of the former.[41] The addressee is free to obey with complete indifference towards the lawgiver's plans and objectives.[42] That the relationship between lawgivers and addressees and, indeed, any person entering into a legal relationship with another is characterised by legality is part of the law's counterfactual social facts. Legal subjects are expected to have such a detached attitude. A legal relationship presupposes the mutual ascription of counterfactual social facts with regard to how control is exercised by someone over another and what it takes to

[38] Scholars of global administrative law usually also avoid addressing this question, for this would get in the way of promoting the pragmatic objectives of increasing transparency, accountability, and possibly also democracy. For this observation, see D. Dyzenhaus, 'Accountability and the Concept of (Global) Administrative Law' <http://iilj.org/courses/documents/Dyzenhaus.TheConceptofGlobalAdministrativeLawFinal.pdf>. I would like to thank Nico Krisch for drawing my attention to this paper.

[39] For the latest outgrowth of this debate, see R. Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trans B. Litschweski Paulson and S. Paulson (Oxford: Oxford University Press, 2002).

[40] For a forceful critique, see R. Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), 140–86.

[41] Enlightenment legal philosophy was concerned with freedom from interference by others: see, eg J. G. Fichte, *Grundlage des Naturrechts nach Prinzipien der Wissenschaftslehre*, ed M. Zahn (Hamburg: Meiner, 1979), 118–19.

[42] See Fuller, above n 3, at 209.

be controlled by someone else. The use of coercion as a means of last resort signifies the existence of such a mutually detached, 'external' relationship.[43]

Traditional international law involves a legal relationship. The norm giver and the norm addressee are not, owing to their relationship, members of a common project or joint enterprise.[44] They may remain foreign to one another in the sense that the addressee is always free to point to limits of obligation without having to explain why what he has or has not done does not amount to disloyal, inconsiderate, or unproductive behaviour. The relationship is *external*, for it merely requires conduct to be norm oriented. Governing by law is not directed at some goal of optimisation, nor does it involve a learning process. It is about laying down, and doing, what is right and avoiding what is wrong. It is a separate matter whether determining what is right or wrong involves a reference to rules or a classification of the weight of different arguments,[45] but there would be no legal relationship if without further qualification all kinds of arguments were admitted to some process of optimisation.

Owing to its external character, the legal relationship, traditionally understood,[46] is also marked by *distance*. One party does not assist, counsel, train, support, or educate the other party into what it takes to secure compliance. Unless parties have decided to establish a common administration, working towards the retraining or transformation of partners would transcend a legal relationship. But even when parties agree to endure counselling or training, the terms of the agreement define the limit from which the distance can be perceived that governs the relation between partners. What matters, in the final event, is that the addressees undertake to engage in conduct that they have agreed to, or were ordered to, espouse. In other words, the addressee, even though liable to comply with a rule, neither becomes the rule giver's servant nor, worse still, his or her slave.[47]

The legal relationship, even when it creates a position of subordination does not give rise to comprehensive or unconditional subjection. This is the case because any power that is given to anyone is limited. The defenders of republican liberty—the liberty Skinner refers to as liberty before liberalism—understood perfectly well that domination can only be avoided when the jurisdiction of the superordinate power is limited.[48] The legal relationship cannot tolerate sovereignty. It involves

[43] See Immanuel Kant, *Metaphysik der Sitten, Werke in zwölf Bänden*, ed W. Weischedel (Frankfurt am Main: Suhrkamp Verlag, 1969), viii. 338–9.

[44] Evidently, this is a point I borrow from Oakeshott, above n 32, 128.

[45] The latter was integral to Dworkin's original project: see his *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 2nd edn, 1978).

[46] I add this historical marker, for I would like to leave open the question whether legality cannot be seen in a process of historical transformation. But see A. Somek, 'Legalität heute: Variationen über ein Thema von Max Weber' (2008) 47 *Der Staat* 428–65.

[47] On the following, see Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).

[48] See also R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 159.

jurisdictional limits. This is not to say that the absence of sovereignty in and of itself corroborates the presence of a legal relationship. On the contrary, the void becomes all too easily filled with administration without sovereignty.

The significance of such jurisdictional limits can be seen by spinning even further the analogy between compliance with legal norms, on the one hand, and the execution of tasks, on the other. Since the addressee is not subjugated to the unconditional command of the lawgiver he or she remains in a position similar to that of a craftsperson or a contractor. They determine themselves how they go about fulfilling their promises and doing their work. They are not under permanent guidance or direction. The analogy appears to be particularly apt for the classical international legal relationship where the labour of compliance is entirely left to the obligated subject. In the case of non-self-executing treaties the obligated states are free to adopt the norms that accommodate their international obligation to their internal situation. But even being commanded to do something—Austin style—is different from suffering the type of subordination that is characteristic of service or apprenticeship (apprenticeship, in fact, describes accurately the situation of those who are being assisted into being capable of compliance).

Conceiving the negative of a legal relationship in terms of servitude and apprenticeship captures merely a segment. The non-legal relationship is not necessarily hierarchical. Tongue in cheek, I add that it may well be heterarchical. Teams of technicians committed to their expertise can become slaves of their ambition, in particular, when they mutually push their standards to new heights. More generally, competitive situations create subordination not merely under the shifting predilections of consumers but also to the conditions of actions that are the contingent result of uncoordinated efforts. It would be worth exploring in what respect market situations create domination that is the opposite of legality; it is, however, beyond the purview of this chapter.

Bluntly speaking, the legal relationship is a negation of administrative rationality, and administrative law the resulting unstable synthesis. Legalisation introduces a break into the overall teleological compass of administrative action and creates obstacles for particularistic interference. The synthesis is unstable, for administrative rationality is always inclined to make legal form subservient to its own ends. The legal constraints on administrative action can either consist of norms that it needs to comply with—these norms may be as nebulous as the notorious reason-giving requirements—or of the obligation to secure the consent or to avoid the veto of others. I concede that this is, if anything, an almost obscenely trivial characterisation of what may strike one as 'legal' about administrative law;[49] nevertheless, simply because of its very meagreness it is all the more apt for presenting the contrast that I would like to defend.

[49] I should like to emphasise that the tendency prevalent among students of the common law to see the rule of law triumph as soon as there is judicial review of administrative action (and the ensuing judicial elaboration of standards) strikes me also as not particularly ingenious. See Harlow, above n 13, at 191–2. Similarly, Dyzenhaus, above n 38, at 28, appears to be convinced that, indeed, a legal relationship obtains so long as the decision-making body offers a 'reasoned opinion' for its decisions. This must strike one as clearly insufficient, for any legal decision needs to explain the weight of reasons with an eye to the existence

VI. THE GLOBAL ADMINISTRATIVE RELATIONSHIP: INTERNSHIP TO PARTNERSHIP

Why the world envisaged by global administrative law does not involve a legal relationship in the sense reconstructed above becomes clear, remarkably enough, already in the opening pages of Slaughter's *The New World Order*.[50] Even though the author presents in this work her own account of what transnational governing processes are all about, she describes quite perceptively what the various relationships between and among the actors engaged in administrative networks involve.

First, the influence exercised in those networks is based on the imparting and sharing of information. This means, by contrast to the legal relation, that norm-oriented behaviour is not part of the picture.[51] Rather, the point appears to be that the participants in networks are expected to rise from their present level of knowledge and skills to the next. Broadly understood, this involves some process of teaching, learning, and growth. What really matters are processes and not acts. As has been observed by Shapiro this means that 'dialogue itself evolved into governance'.[52]

Second, the basic image of the relationship is not that of distanced agreement and compliance but one of either unidirectional or multidirectional 'capacity-building'. Of course, building the capacity to comply is a better means of securing compliance than trust in the fidelity of the partner or the effectiveness of sanctions.

Third, it is understood, mutually and generally, that all action taken within networks contributes to a process of problem solving. This explains why an ostensible oxymoron such as 'regulation by information'[53] can pass muster. It explains also why the usual ersatz material for norms, such as 'best practice', 'benchmarking', or mutual learning and adjustment, have become the sweethearts of the advocates of transnational governing. Where 'problem solving' serves as the preferred descriptor of an activity, ideological conflict does not enter the picture. Problem solving is the antithesis of political struggle. It is the activity in which those engage who already share a certain view of the world and share a mutual understanding of the values that they adhere to.

Multi-level regulatory problem solving, such as the determination of permissible food ingredients, has as one of its points of reference WTO side agreements and the default standards set by the Codex Alimentarius Commission. But the WTO dispute

of a legal relationship (hence, for example, by drawing a line between principle and policy arguments).

[50] See A.-M. Slaughter, *The New World Order* (Princeton, NJ: Princeton University Press, 2004), at 4.

[51] It has been pointed out by Luhmann already that with the rise of world society cognitive expectations will play a more important role than the normative expectations characteristic of law (see N. Luhmann, 'Die Weltgesellschaft', in his *Soziologische Aufklärung: Aufsätze zur Theorie der Gesellschaft* (Opladen: Westdeutscher Verlag, 2nd edn, 1975), ii. 51–71, at 55).

[52] Shapiro, above n 16, at 372.

[53] Slaughter, above n 50, at 24.

settlement process is merely one of the relevant locales. National and regional institutions are also involved. In the context of such multi-level systems, decisions are increasingly understood to be provisional formulations of standpoints in a context where convergence is the hoped-for result. The counterfactual social facts characteristic of the legal system cannot be taken for granted here. The substantive standards applied suffer from a high degree of de-formalisation, which has been rightly decried by Koskenniemi.[54] One finds neither prescriptions nor proscriptions, merely certain factors that pull in different directions but nonetheless need to be taken into account for decision making in individual cases. There is no relation of indifference. It is understood that regulators positioned at different levels, such as the WTO and the EU, are part of a common enterprise and may well entertain different ideas for what it may take to arrive at the best result. Decisions in individual cases are treated as though they were contributions to an ongoing learning process which is to result in the final catholic consensus that Peirce believed to be the epiphany of truth.[55] The normative is no longer normative. It is transformed into something cognitive.

The emerging view of the social universe perceives the life process to depend on the capacity on the part of various actors to participate in problem-solving processes, which in turn involve expertise and widespread communication. It is a world of partnerships and apprenticeships. In fact, it is the world that one first personally encounters in 'internships'. It is also a world that requires a high degree of mutual accommodation and comity among units operating in different jurisdictional spheres. The mutual accommodation among cooperating units is concomitant with the lack of sovereignty. From it emerges the most remarkable feature of the modern governing relationships, namely that they are ultimately grounded in reflexive administrative processes. These processes take place in a setting that is marked by the absence of sovereignty,[56] which is manifested in two indeterminacies: the indeterminacy of jurisdiction, on the one hand, and the indeterminacy of sources on the other. Both give rise to a remarkable development. A style of reasoning that has its roots in the common law tradition comes to play havoc with reason and to enchant members of the discipline. Regardless of whether one considers the legality thereby abandoned or transformed, it is clear that the counterfactual social facts underpinning a traditional legal relationship can no longer be sustained.

[54] See M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1–30.

[55] See C. S. Peirce, 'Some Consequences of Four Incapacities', in *The Essential Peirce*, ed N. Houser and C. Kloesel (Bloomington: Indiana University Press, 1992), i. 28–55, at 54.

[56] The absence of traditional legality's counterfactual social facts—such as norm-oriented behaviour, a mutually detached relationship, or respect for jurisdictional limits—is *indirectly* confirmed by this absence of sovereignty. I do not want to claim that the existence of a legal relationship presupposes the existence of sovereign power; what I would like to suggest, however, is that it is easier to establish legal relationships within a homogeneous sphere of power.

VII. INDETERMINATE JURISDICTION

Global administrative law conceives of global problem solving as taking place in a pluralist universe where institutions located at different levels contend to resolve certain issues. The relevant institutions, such as a WTO dispute settlement panel or the United Nations Security Council, can be tied to constituencies whom they arguably represent or are, at any rate, answerable to.[57] According to Krisch's intriguing reconstruction, no potential constituency is disqualified from deciding on certain issues.[58] The national constituency lends a voice to the concerns of local communities. The international constituency represents the interests of states across borders. The cosmopolitan constituency, finally, stands for the perspective of 'a truly global public'.[59] But no constituency is qualified to exercise exclusive jurisdiction.[60] The national is not, for it is not sufficiently capable of taking into account the effect that its acts have on its neighbours. The international constituency suffers from a severe democratic legitimacy deficit, and the cosmopolitan is not associated with any community at all. A consociational solution does not seem to be of any avail either, for it would allow for too much veto power to obstruct the process.[61] The solution that Krisch recommends would apparently embrace concurrent jurisdiction without pre-emption. Decisions should be taken anywhere; however, any other constituency would retain a right to contestation before the decision-making institution or anywhere else:

> The resulting picture of global governance would then be one of a constant potential for mutual challenge: of decisions with limited authority that may be contested through diverse channels until some (perhaps provisional) closure might be achieved.[62]

This is a world that does not recognise the final legal word.[63] Krisch perceives correctly that the absence of a final legal solution is likely to have a moderating effect in a situation where all representatives of constituencies believe the long-term benefits of cooperation to exceed the short-term gains of ostensible defection. Sweet harmony of agreement is likely to pervade a world of 'smooth cooperation,

[57] Global administrative law is basically understood to address accountability problems. See Krisch and Kingsbury, above n 19, at 1, 4.

[58] On the following, see N. Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247–78, at 253–5.

[59] See ibid at 255.

[60] See ibid at 269–70.

[61] See ibid at 264–6.

[62] Ibid at 266–7.

[63] In a similar vein, see G. Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses', in R. Rawlings (ed), *Law, Society, and Economy* (Oxford: Oxford University Press, 1997), 150–76.

compromise and mutual accommodation'.[64] But this is only a positive way of saying that what is to be encountered here is the pragmatic logic of administrative problem solving and not reasons that invoke a legal constraint. Instead of being put to work on substantive issues, administrative rationality is applied to dealing with the presence of others. The mutual influencing of different jurisdictions, the fluid and provisional pragmatic approximation,[65] and the mindful processing of disagreement are nothing short of *administrative rationality in action*.

The reason why the outcome of such processes of mutual self-observation is not a product of legality can be seen all the more clearly by examining the attempt that has been made to present such processes of mutual accommodation, adaptation, learning, and creative problem solving as emerging from the 'auto-constitutionalisation' of regimes. In the course of their highly original analysis of the fragmented nature of the world's legal system, Fischer-Lescano and Teubner see processes of autonomous societal constitutionalisation at work whenever and wherever reflexive processes of various social spheres become combined ('coupled') with reflexive processes of the legal system. The idea is intriguing. According to social systems theory, reflexive processes occur in social systems whenever the system's internal logic and operation becomes applied to itself.[66] This is the case, for example, when the scientific system, which is the wellspring of theories about the world, begins to develop theories about theories. The legal system switches into a reflexive mode when secondary rules come to address the creation and application of primary rules of obligation. Hence, science would avail itself of a constitution if theories about theories—ie philosophy of science—were to inform the adoption of legal standards for the admission of standards of truth. Arguably, science already *has* a constitution, thus understood, but it is an entirely negative constitution, for it prohibits the adoption of such secondary rules out of concern for the freedom to conduct research. Alternatively, the market economy can be said to apply its most elementary principle, the principle of allocative efficiency, to itself when it identifies failures in the actual operation of the market to attain efficient results. When this reflexive process is combined with secondary rules for the intervention into the economy, competition law ostensibly comes to play the role of the 'constitution of the economy'. The self-reflection of politics, that is, the application of partisan struggle to partisan struggle, becomes constitutionalised when it is used to define the rules of the political game. The procedural core of the constitution, and only the procedural core, is the political constitution of society. Higher law may be ubiquitous, but only to a limited extent does it affect the constitution of politics.

Even though such a use of the concept of the constitution may strike one as fundamentally at odds with Grimm's historical sensibilities,[67] it has certain purchase,

[64] Krisch, above n 58, at 267.

[65] See ibid at 263.

[66] See N. Luhmann, 'Reflexive Mechanismen', in *Soziologische Aufklärung* (Opladen: Westdeutscher Verlag, 4th edn, 1974), i. 92–112.

[67] See above n 5.

nonetheless, for it invites re-conceiving of all legal systems—domestic as well as transnational—in terms of patchworks of overlapping and potentially colliding constitutions of social sectors. However, in the cases that are of interest here, and these are the cases affecting global administrative law, these purportedly 'auto-constitutionalised' regimes experience the necessity 'to take into account', 'to learn from', and 'to defer by default' how their respective peer regimes have dealt with certain issues. The pragmatic ingenuity that comes into play in such processes confirms that *no* secondary rules are being followed. It is the administrative process with its dual orientation towards the whole and towards the particular that accounts for the decision making. Primary rules, that is, are not brought to life, put to work, and eliminated on the basis of secondary rule of procedure, but rather on the basis of intuitively arrived at provisional adjustments.

VIII. THE EXALTATION OF THE COMMON LAW

I would like to anticipate, at this point, two potential objections. According to the first objection, I am guilty of bringing to bear on the subject matter a narrowly formalistic and positivistic concept of the legal relationship, which has long turned out to be indefensible even for legal systems of a municipal kind. By contrast, it is not at all implausible to assume that background moral and political principles, rather than neatly stated secondary rules, inform all legal problem solving.[68] Denying such principles a legal status is tantamount to committing a classical fallacy of legal positivism.

The second objection has it that even if the pedigree of processes of mutual adjustment might be in doubt, there would be no point in denying the product the quality of law.

I would reply to the first objection in two related ways. First, I readily concede that the concept of legality is not immune to historical transformation. I believe, indeed, that the legal relationship has been amended not only by the 'super-legal' dimension hinted at by the objection, but has also been tentatively transformed into a more experimental and provisional relation of mutual engagement.[69] It should not escape our attention, however, that in this latter and more 'creative' format, the legal relation becomes easily prey to administrative rationality.[70] The application of norms and coordination of conduct pursuant to norms is then rendered indistinguishable from management and flexible adjustment.[71] Secondly, how co-optation works can

[68] This objection would have its backing in Dworkin's keen analysis of legal reasoning (see Dworkin, above n 45).

[69] See W. H. Simon, 'Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes', in G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford: Hart, 2006), 37–64.

[70] See Somek, above n 46.

[71] It remains to be explored in the future whether this development needs to be viewed as a process that is as irreversible as was the 'emancipation of dissonance' in music.

be seen from a different angle. It is a truism that every act of law application also contains a law-creating element. A preferred strategy for explaining how it is that the creative element becomes part of application is pointing to the power of the law-applying official to do so. Accordingly, valid law is created on the basis of power-conferring norms. But this is not the only possible account of how a synthesis of existing law and some creative element is brought about in the adoption of legal acts. It can be argued that the synthesis in the relation of application and its creative element is made possible by 'good arguments', 'sound judgment', the (right) 'moral attitude', or convincing reasons. However, good arguments, sound judgment, and convincing reasons are person-relative entities. Someone needs to have the power to declare that he or she has been persuaded by them. Otherwise one would not arrive at law, but merely at some intermediate result of a discussion. Legal systems presuppose the systematic mediation of norms by other norms. The work cannot be done by moral intuition. If the work is done by moral intuition one does not get a full-fledged legal system, but some extension of community morality into the realm of the justification of coercion. What is called 'common law' may well have to be described in such terms. In any event, if the adoption of legal acts is not mediated by legally circumscribed powers but by considerations of administrative expediency then legality is turned into an appendix of the latter.

This is of relevance to the second objection. It is not possible to create law from a system of argumentation. One can make statements, arrive at conjectures and provisional outlooks, and arrange for some *modus vivendi*. This, in fact, appears to be the state that the international system has come to embrace.[72] But it is not unimportant to note that the rampant intuitionism gives rise to an exalted version of the common law, which is, strangely enough, celebrated under different headings, such as 'international constitutional law' or 'networks' of adjudicative expertise. An exalted common law has lost its moorings in positive law. In fact, it is common law in the state of its own negation, that is, in a state *before* the rule of *stare decisis* has made it into what was to become of it.[73] There are no limits to authority. Legal materials from various jurisdictions provide occasion for wide-ranging reflections from case to case. Nothing is fixed, everything is in flux. Common law in such an exalted state does not offer any resistance to administrative rationality. Therefore, it is particularly vulnerable to co-optation.

I conclude that the supposed management of 'regime collisions' or the jurisdictional open-endedness of global administrative law cannot reflect guidance by secondary rules. They are plainly and simply second-order administrative processes. This diagnosis is reconfirmed by looking at what these processes deem relevant to their success: concern for the stability of the overall project on the one hand (and therefore, 'default reference' to related regimes) and particularisation on the other. Particularisation, above all, underlies the praise of fluidity and experimentation that Krisch has for the global administrative process. As long as settlements are

[72] It is all the more remarkable that this is then called 'constitutionalisation'.

[73] The idea that the beginning of something presupposes its negation is a common theme of Jewish and German Romantic mysticism.

of no general relevance and do not establish a precedent, they do not prejudice a continuing process of mutual accommodation.

IX. INDETERMINATE SOURCES

The exalted state in which common law is thrown back onto its origin is a manifestation of the absence of sovereignty. The latter is an ultimate power-conferring norm that permits allocation of jurisdiction. A sovereign is one who decides over the limits of his or her own jurisdiction and, hence, indirectly the jurisdiction of others. When sovereignty disappears, all that one is left with is unauthorised administrative action. There are no jurisdictional bounds.

But the absence of sovereignty is also reflected in the manner in which proponents of global administrative law conceive of sources of law.[74] At the outset it is claimed that customary law, treaties, and general principles of law are to be considered sources of global administrative law. The proponents of this claim need to concede, however, that 'it is unlikely that these sources are sufficient to account for the origins and authority of the normative practice already existing in the field'. They would have us look, rather, at spontaneous law-making practices and express confidence that the norms governing global administrative practice might emerge from a *ius gentium*, that is, basically, the understandings of those who are familiar with basic administrative law principles from their home jurisdiction. Remarkably, the authors have no qualms about their submission that it is practice that ought to matter, whereas, at the same time, they confirm that 'uncertainty remains about the basis for determining such norms and their legal status'.[75] They candidly admit that disagreement about the sources is part of the law-making process:

> Moreover, under a *ius gentium* approach, disagreement is inevitable about whose practices to count and whose not to count for the emergence of a rule, and as to how much consistent practice might be necessary to generate a strong pull for cohesion.[76]

The authors express confidence that future research might be able to do the work. There is little reason to be confident, however, for the study of the emergence of customary international law has shown that the emergence of custom itself is a matter of conflicting principles.[77] Customary law is, if anything, a deficient form of law from a formal point of view. This deficiency, however, benefits those claiming to be masters of the artificial reason of the law.[78]

[74] See Kingsbury et al, above n 11, at 29.

[75] Ibid at 30.

[76] Ibid at 31.

[77] See M. Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

[78] See Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed J. Cropsey (Chicago, Ill.: University of Chicago Press, 1971).

X. CONCLUSION

There was a time when even the most steadfast defenders of the international legal system readily conceded that this system was still in a primitive state and actually aspired to see it transformed before it was to form the basis of a world order that rests on principles of legality.[79] The situation has changed. Since nobody appears to believe any longer in a change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities. If the world cannot be changed you imagine it changed and pretend the work of your imagination to amount to the real.[80] It should not surprise us that this is happening in a cultural context where confidence boosting or communication strategies are believed to be key to altering one's life.

Re-descriptions often involve the use of idealisations. This is, in and of itself, not problematic, for idealisations are part of how the law itself perceives social realities in its own context of operation. Idealisations turn out to be problematic, however, when they purport to see a legal relationship where in fact such a relation is absent. The law's most elementary idealisation does not apply then.

The most ludicrous form of re-description is the application of constitutional vocabulary to international law. In this chapter, I have not addressed this phenomenon at all. Owing to its lower degree of exuberance, global administrative law promises to offer a more plausible account of existing international processes. I have tried to explain why the idealisations of global administrative law might actually distort our perception of administrative realities.

Beyond critically examining the claims of global administrative law, the analysis yields an important result. If it is true that domestic political and legal processes are increasingly under the substantive influence of global coordination processes then it seems that ultimately second-order administrative processes are increasingly taking the place of norms. Hence, it would not amount to a valid defence of the purported legality of global administrative 'law' if one were to say that formality and flexibility affect merely the relations among administrators in the multi-level system, whereas for private persons compliance with international standards is mediated through national administrative law. If it is true, as claimed by proponents of global administrative law, that the latter is increasingly under the sway of the former then informality also seeps into national systems. Moreover, with an exalted common law providing the overall 'legal' background mentality, the disintegration of legality transcends the boundaries of the administrative branch, narrowly understood, and spills over into the judiciary. Administrative processes seep into legal processes, altering their shape from the inside.

[79] See H. Kelsen, *Peace through Law* (Chapel Hill: University of North Carolina Press, 1944).

[80] Did I say Judith Butler? On the ideological distortion of public international law by its proponents, see S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford: Oxford University Press, 1999).

If this, in turn, is true, what we encounter, then, is a far cry from the demise of the state under conditions of globalisation. On the contrary, it is the eventual triumph of the state over law. What we perceive, however, is the face of the state that is often ignored, for it is not as spectacular as sovereignty. It is the state, understood as the agency busying itself with governing, that is, the state qua administration. The state, thus understood, is not identical with law, for it does not partake of the law's normativity.

Finally, the triumph of run-of-the-mill governing also marks ascendancy of the state over politics. The de-politicised state introduces the omnipresence of administrative problem solving. I conclude, that instead of ushering in law beyond the state, globalisation may well reinstitute the lawless state. Who would have expected that?