Essays

On Fundamental Rights and Common Goals: At Home and Abroad

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Abstract

The article addresses the understanding of 'fundamental' rights and their relations to public goals. Do fundamental rights need to stand in stark contrast against the public goals normativized within a legal order? The question is relevant in different ways in the State and in the inter- and supra- national setting. By referring to a notion of 'fundamental' rights, the first part deals with the institutional (dis-) embeddedness of rights in the domestic legal orders, an issue which features in winding interpretive paths *vis à vis* public goals. A second part asks how the relation between rights and goods can fare beyond the State domain, taking into account the main legal transformations of the international contemporary legal fabric and some of its 'community'- related commitments.

I. Introduction

In times of human rights talk, a further candidate worthy of legal protection has rapidly taken the scene, that is, global public goods. For many aspects, environmental concerns are well witnessing the relentless emergence of the notion of the 'good' which spans interests and values deemed common to all peoples.

It is useful to reconsider how our more familiar and domestic view of the relation between fundamental rights and common goals has been intended in the evolving institutional narrative of our legal orders. The pre-understanding of their opposition or disconnection is mainstream in the Western constitutional history, starting at least from the thrust of the American Constitution and *mutatis mutandis* up to the present time neo-liberal view of rights.

Although common goods, public goods, global concerns are notions with distinct meanings and scope, they all seem to require a further assessment of such 'received' lines of thought. There is much to be clarified concerning the relations between human or fundamental rights and the legal understanding of some global good(s). First, it is crucial to see what it really means to assume that a right is fundamental in a legal order, and whether or not that connects to the very idea of pursuing common goals. Second, how the answer to the latter question works beyond the familiar domain of domestic orders, in the wider extra-states arena? Not least, for instance, is the question whether the present

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need to oppose and reduce climate change, to preserve or enhance environmental integrity, to respect future generations and prevent disastrous consequence, would best be served by resorting to rights or to the idea of the global public goods as efficient legal notions. Indeed, one intuition would find it obvious that the environment is a common good of some kind as well as a right (we (should) hold a right to a healthy environment), either at home or abroad.

However, in some sense, the two things should be seen as pointing to different conceptual domains. Of course, the narratives and the grounds are different:[1] one thing is to protect a good on the ground that it enjoys a collective priority, a different thing is to protect it on the ground that someone, or many, have a right to it.

For example, to future generations, the preservation of the environment looks a matter of justice, implied by the very rights of future generations, including what we owe to their survival regardless of whichever notion of the common good we think to presently choose. Needless to say, it would be difficult to convey a common good universalized conception, say, univocally shared between the Global North and South. That notwithstanding, on the global side, beyond human rights claiming, there are global public goods, known as non rival and not excludable, that we are to protect, due to some grounding assumptions, be they the ethics of the universal humanity needs, or the ethics of responsibility towards poorer peoples, or even more basically, the mutual interests that all happen to share, for example *vis à vis* some factual threats to human life, such as climate change, or pandemic and disease, the two most recently acknowledged ones. Therefore, working conceptions fit to states' driven scenario are to confront different hurdles onto the global dimension.

I will first deal with a general question concerning legal rights in the State traditional dimension. Do fundamental rights stand in stark contrast against the goals normativized within a legal order? What happens if we ask the same question in the legal international dimension? Global public ends surface as much as human rights as covered by legal instruments. In the state setting, that is, within the domestic domain, rights and public goals have been often put in a conflictual relation, while in truth they might be conceived of in a converging path. The way toward the latter can be made to rest upon an institutional idea of rights, and in particular of those rights that are, as a matter of fact, deemed to be 'fundamental' in a legal order. I will follow the winding road of institutional (dis-) embeddedness of rights. In a further section I will take into consideration whether global public goods and rights beyond the State can benefit from such recognition.

[1] Cf S. Cogolati, 'Human Rights or Global Public Goods: Which Lens for Development Cooperation' (13) *Manchester Journal of International Economic Law*, 334-356 (2016).

II. Rights And Public Goods' Understanding

Spanning older and new emerging rights, the tussle between public interest and individual liberal and neo-liberal advocates, often forgets some conceptional drifts that have been and still are at stake, beneath the assessment that interpretive accounts within a legal order provide. I will trace and recall some pivotal questions referring to the returning opposition between common goals and individual liberties and safeguards, questions that rest on a divide of which constitutional reasoning should better be fully aware.

At the level which corresponds to primary public goals, as I submit, the relevant rights are 'fundamental' rights. As I will surmise, for a right to be fundamental in a legal system it has to play a special role as a validating criterion, working as a rule of recognition for the legality and constitutionality of any positive norms. At the same time, this quality and status of 'being fundamental' in a legal order would imply a full-fledged institutional account of rights, one that is often at odds with some liberal understanding of them as somehow unfettered by the sovereign jurisgenerative power, and indeed just curbing and limiting its exercise. The concept of fundamental rights requires of us to come to terms with such views and to restate the understanding of their reconciliation.

The legal systems can protect rights and even qualify rights as 'fundamental' by providing for their guarantees, and by allowing some of them to have a special place or define their functional role in the institutional organization of law.[2] This was not fully true in the legal logics of the pre-constitutional European State, also called the 'legal State' of the time (*Estado de derecho*, *Rechtsstaat*, *Etat de droit*): the legal system, historically, was institutionally organized in ways that were not focused upon awarding rights a true recognition as bearing 'intrinsic value' worth of legal protection *per se*.[3]

Even from a legal point of view, having a value of one's own means primarily not being derived from other values; receiving consideration not just as the tool of an ulterior, pre-eminent objective, but through being vested with

[2] See this conception of fundamental rights in G. Palombella, 'Arguments in Favour of a Functional Theory of Fundamental Rights' 3(14) *International Journal for the Semiotics of Law*, 299-326 (2001), also confronting (and diverging from) different theories like that of G. Peces Barba (*Curso de Derechos Fondamentales. Teoria general* (Madrid: Ediciones de la Universidad Complutense, 1991) and the ('extensional' or universality dependent) notion of 'fundamental' originally exposed by L. Ferrajoli ('Diritti fondamentali' *Teoria politica*, 1998/2, engl. transl., 'Fundamental Rights' 1(14) *International Journal for the Semiotics of Law*, 1-33).

[3] On the definitional features of the Rule of law as distinct and different from the European continental conception of the *Stato di diritto*, *Estado de Derecho*, etc, cf G. Palombella, 'The Rule of law as an institutional ideal' 1(9), available at https://tinyurl.com/bdh6kf54, 4–39 (2010). For an 'application' of the rule of law conception see G. Palombella, 'Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis' 1(10) *Hague Journal on the Rule of Law*, 5–19 (2017). And also G. Palombella, 'Two Threats to the Rule of Law: Legal and Epistemic (Between Technocracy and Populism)' 11(2-3) *Hague Journal on the Rule of Law*, 383-388 (2019).

'weight' and 'merit' of its own. If the intrinsic value of rights indicates on the axiological plane that they cannot just depend on the importance of something else, then on the institutional plane it should have implied at least that they should exist legally in some standing that would shield them *vis à vis* the contingent whim and purview of a legislative *fiat*: that is, the everchanging, discretionary will of the majoritarian legislator (the sovereign). Yet, such institutional protection coupled with no dependency upon the legislative will was not the case in continental Europe (in the 'legal State' of continental Europe major countries before the II WW). As long as the very 'recognition' of rights depended on legislation, as a matter of fact, the legal existence of rights remained strictly decided by the will of the sovereign, so that individual rights were lacking an independent, self-standing normative source and scope.

The relative independence of rights *vis à vis* legislation is instead a concept that can certainly be traced back, at least in principle, to the Anglo-Saxon tradition: despite the supremacy of Parliament as the ultimate normative source, a competition flourished among the established power, the Courts, the common law, since the medieval England to the modern history of the Bill of Rights, and on a line bringing us to the ideas of public law propounded by the A.V. Dicey: A consistent legal representation of the intrinsic value of (some) rights was achieved due to the assumption of rights' 'independence', ascribing to them a *raison d'être* external to the state and certainly autonomous, of the deliberations of the Parliaments (and today, of the people, or democratic 'majorities'). What A.V. Dicey wrote of the rule of law in the English setting aptly phrases the state of the art:

> '[W]ith us...the rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts.'[4]

Although that should be taken as a necessary premise for an independent (of the sovereign will) recognition of rights, however, a further question arises. Such form of recognition has fostered an anti-institutional conception. Paradoxically, that paves the way to disentangling individual rights from political institutions, leading to the dichotomy, often stressed in the last decades by liberal authors (as we will see later, like Ronald Dworkin), between individual rights as a matter of individual justice on one side and on the other the jurisgenerative sources in the domain of political majorities pursuing collective goals and the common weal.

Legislative institutions bear the task of deciding collective ends, and in short, the pivotal policy orientation of the legal order, thereby defining what is deemed normatively worthwhile in their jurisdiction. Whereas the issue of what possesses an ultimate value for a determined legal system, ie proves legally

[4] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan and Indianapolis: Liberty Classics, 8th ed, 1915, Reprinted 1982), 21.

'fundamental' for it, depends on the choices actually made by institutional actors (in turn depending on their ethical and political convictions), the separation between the goals of a polity and the right of the individuals puts rights defense purposively outside the political realm. In the basic background of the American Constitution, checks and balances are to constrain the public powers. A paradoxical anti-institutional nature of rights is not out of sight, if for example we think of rights just as separate and independent limits to the normative exercise of sovereign authority.

Such a dichotomy can be explained. In general, having an intrinsic value for fundamental rights has been intended to mean that such rights should be placed outside the purview of the sovereign. Hopefully, they cannot be overridden by the State and its public institutions. The ultimate property of rights of this kind is seen to oppose the expansive force of public decision making: such a property is mainly due to the fact that they are somehow pre-positive and pre-political, or in a second version, they should not be simply depending on ordinary legislation. Of course, and especially in that second version, the assumption may certainly be accepted – and put in practice – in constitutional systems. However, the question arises whether fundamental rights are necessarily incompatible with the goals of public institutions.

Contrasting institutions vs rights, entails a 'defensive' view of rights, treating them as clearly distinct, following Carl Schmitt, from 'legal goods' (and goals).[5] As it seems, this correspondence between rights that have intrinsic value and the 'defence' of individuals against power, dominates the evolution of the conceptions of rights, as coined in a sustained strand of the western legal and political theory.

Public goods, with Carl Schmitt, are a more 'earthy' category to which allegedly fundamental rights cannot immediately belong. One can define such a situation as the institutional dis-embedded-ness of fundamental rights. This became, ironically, their safe harbor.

As it is known, Ronald Dworkin interpreted such circumstances as the basis for the priority of rights. Rights are seen as the task of the judiciary, while public goals belong to politics and legislation. Therefore, the distinction strictly matches the separation of powers. The goals, the purposes relative to the 'common weal' are the competence of the political process (of policies), which should have no bearing on rights to be adjudicated by the judiciary. Arguments of principle sustain rights while they exclude the application of arguments that

[5] In his *Verfassungslehre*, even Carl Schmitt wrote that the 'scientific utility' of a concept such as that of fundamental rights holds, in a bourgeois state governed by the rule of law, if it is established that 'fundamental rights are only those rights that may apply as pre- and supra-state rights and that the state does not concede by virtue of its laws, but recognizes and protects as pre-existing [...] [I]n their substance, therefore, they are not legal goods, but spheres of freedom, whence rights and precisely rights of defense derive' (C. Schmitt, *Verfassungslehre*, Sechste, unveränderte auflage, Berlin: Duncker & Humblot, 1983, 163).

establish a collective goal.[6] One collective purpose encourages 'trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole';[7] while on the other hand 'It follows from the definition of a right that it cannot be outweighed by all social goals'.[8] After all, as United States constitutionalism includes a Bill of Rights, it 'is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest'.[9] The fact that rights must be guaranteed even *vis à vis* the democratic process is taken for granted, because 'decisions about rights against the majority are not issues that in fairness ought to be left to the majority'.[10]

Although the safeguard of rights' intrinsic value is necessarily starting from their normative independence from the whim of the political majority and given for granted that the judiciary is actually a countervailing power capable of protecting rights against the assaults from the legislator, nevertheless rights are still legal norms, and their protection belongs to the responsibility of the judiciary as well as of the legislator. The protection of rights is not so much a responsibility of the judges but seems to depend on the development of a functioning polity and is in any case woven intimately into the same fabric.

If rights must have an intrinsic value, also institutionally, they must be conceived for what they are, as part of a 'positive' project for affirming goods (pertaining to individuals or groups) and the values they include. This conclusion appears to be the most suitable for applying tools dealing with the more complex contemporary situation. For in the contemporary framework civil and liberty rights and political rights are flanked firmly not only by social rights, but also by rights of the fourth and fifth generation, which include peace, solidarity, safeguarding the ecosystem, the rights of the planet's future inhabitants, the rights arising in relation to the use of biotechnologies and so forth; but this is not all, for even the 'oldest' civil and political rights are now acquiring quite unprecedented (and anything but negative) profiles, by virtue of the changing circumstances in which they attain to a new meaning and in which they have to be guaranteed. This has consequence also on the 'external' legal relations. In many inter-orders confrontations, a vision of human rights propounded through internationalist ideals in defense of peace since 1948, is seen to be balanced and re-interpreted in the light of domestic and 'national' elaboration in their own terms of rights as the outcome of a cultural or 'constitutional' prerogative. Recent events can be read in the same line: for example, the famous and recurrent statements of the German Constitutional Court *vis à vis* the European Union,

[6] R. Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth & Co Ltd., 1978), 90.
[7] ibid 91
[8] ibid 92
[9] ibid 133
[10] ibid 142

from the Maastricht to the Lisbon Treaty, to the criticism against the European Central Bank and the European Court of Justice (the PPSP judgement)[11] are part of the trajectory. The same, *mutatis mutandis*, holds with the European Convention of Human Rights, that has finally resolved to make the doctrines of the Member States' margin of appreciation and that of subsidiarity a legally binding method of assessing the Convention's rights.[12] New dimensions of legal arguments develop generating a dialogue if not a contestation to be arbitrated between abstract or pre-political rights and fundamental rights as rooted in one's system fabric. The same issue of rights' defense might emerge from one legal order vs another eg, in the even wider arena of the United Nation security system.[13]

What we have here is a qualitative leap: a necessary emancipation from that slightly deforming and outdated perspective which holds that rights on the one hand and on the other the common weal belong to different vessels, each of whose levels can only rise if that in the other falls: in other words, it is not a game between contradictory opponents, each of whose sole purpose is to deny the other.

III. More On Being 'Fundamental'

If the foregoing stands as a reminder of the necessity for rights to be embedded in the institutional goals of a polity, the reverse holds true as well: It has actually been observed that the importance of certain 'collective goods' can also be protected from a liberal perspective, that is, one concerned mainly with the individual freedoms and welfare:

> 'Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value'.[14]

The questions of the priority of Right (meant as fairness and non-interference *vis à vis* individuals' sphere) over the Good (meant as the ideas of well-being that can be collectively supported) as well as that of individual rights over collective goals tend to resemble each other. In the evolution of liberal

[11] BverfG, 2 BvR 859/15, 05 May 2020 (PSPP), BverfG Cases 2 BvR 2134/92, BverfG 2 BvR 2159/92 (Maastricht), 2 BvE 2/08 (Lissabon).

[12] See the Protocol 15 of the European Convention on Human Rights.

[13] One good example, among many though, is the appeal to constitutional rights with which the Italian Constitutional Court (2014) dismissed a decision of the International Court of Justice (*Germany* v *Italy*, 2012). Cf. G. Palombella, 'German war crimes and the rule of international law' 3(14) *Journal of International Criminal Justice*, 607–613 (2016). And a similar discussion in G. Palombella, 'Senza identità: Dal diritto internazionale alla corte costituzionale tra consuetudine, *jus cogens* e principi supremi' *Quaderni Costituzionali*, 815-830 (2015).

[14] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989), 165.

rights, their normative status thought of as eluding any political substance, is possibly more legendary than real.

Admittedly, different traditions have shown variable paths. As an example from early 20th century American constitutional doctrine, rights proved to be successfully defined by the courts regardless of the ethical and political goals advanced by legislation: think of how the doctrine had a clear and famous test with the *US Supreme Court Lochner* v *New York* case in 1905, when the fundamental right of contractual freedom was held to prevail over a statute limiting the number of weekly working hours. The constitutional rights held in the Lochner era were contractual freedom and property. It was an idiosyncratic way to assert the priority of the Right over the Good, in the sense that 'certain individual rights prevailed against legislative policies enacted in the name of the public good'.[15]

In the subsequent decades, the question of the priority of Right over the Good took alternate interpretations, or at least the Constitution was not compelled to stand only as the bulwark of a conception based on the free-market rights and the absolute priority of property.

The element that determined the contrast between liberals and communitarians, famously started in the 1980s-1990s of last century, resided in the fact that for one group it is individuals and the rights of freedom that have ultimate value, while for the other it is the community, its conceptions of goodness and its collective goals. When constitutional seasons, after the II WW, spread throughout continental Europe, the features of such constitutionalism were tailored on a different standpoint compared to that of, say, the liberal American constitutionalism. The point of limiting power was of course central, but in a different setting. Much of the continental Europe's constitutional ideologies were built upon the primacy of the 'common weal', along with a connected effect of re-balancing individual rights *vis à vis* the public interest. The recurrent wordings of rights' protection are flanked by an anti-individualistic tone, one that includes associative and solidarity obligations for the pivotal sacred right to property, and that promotes an idea of democracy through social rights and substantive equality. More recently, the European access to the problematique of rights vs public goals is partly reflected in the work of Robert Alexy, insofar as his *Theory of Constitutional Rights*, meant as 'optimization principles', refers to their construction within the German Constitution: the very possibility of 'balancing' in the pool of rights and goals, depends on their principle-structure, which prevents them from being viewed as belonging to radically separate and self-contained realms.[16]

[15] M. Sandel, *Democracy's Discontent. America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1998), 42.

[16] Cf R. Alexy, *A Theory of Constitutional Rights*, tr. J. Rivers (Oxford: Oxford University Press, 2002); Id, 'On Balancing and Subsumption. A Structural Comparison' 4(16) *Ratio Juris*, 433-449 (2003).

However, whatever is left of the tussle between public goals and individual rights should be downplayed- since it bears minor relevance when in question are those rights that are considered to be fundamental from the positive side of a legal system. Their being fundamental for the law is, in fact, due to their functional role in the validity judgements of a legal system: they work as criteria of recognition of other norms (as consistently capable of belonging) in a system where those fundamental rights' choices have been elected as ultimate parameters.

From that point of view, then, should a legal system adopt some rights as fundamental, and thus, as pivotal for assessing the validity, legality and legitimacy of other norms (legislation included) it is indeed their categorization as 'fundamental' that places them among the priorities and goals embedded in the legal system. Accordingly, rights deemed to be legally fundamental are necessarily part of the ethical-political choices of that polity inasmuch it is ordered through law. In such a conjunction, even those rights become part of the ideas of the Good, as it features through a legal order.

Of course, all that should not conceal the further question concerning what substance we attribute to them, which rights- (for example, in an individualistic and neo-liberal culture) and which balance *vis à vis* other legal principles defending wider collective interests. Moreover, it is a matter of fact whether primary goals are established pursuing, say, a market driven idea of individual autonomy or otherwise.

Our concern here is only to combine the idea that some rights constitute values in themselves (ie not merely instrumental to purposes of the common weal) with the possibility to bind them as public ends, not necessarily depriving them of their well-deserved deontological *status*.[17]

Of course, this task transcends the very concept of fundamental rights as a sheer guarantee of individuals against public laws and policies.

Ironically, and due to its previous history and culture, continental Europe, as hinted above, seems to be traditionally better disposed towards perceiving the status of rights as norms and their institutional, collective significance. In the rationale of the post II World War constitutionalism, as mentioned above, public values and the public weal, as well as correlative obligations of rights-holders, seem to be the original epistemic standpoint also for the assessment and somehow socially harmonized protection of individual rights.

It is perfectly possible, of course, that some downsides would be noted: overcoming rights as mere freedoms, conceiving them as *objektive Grundsatznormen*, forces fundamental rights to be measured, if not defined, on the basis of the political and social variables that prevail from time to time; and it is also possible that rights will have to pay for

[17] For the defense of the deontological status of rights contrary to the balancing exercise elaborated by Alexy, J. Habermas, *Between Facts and Norms, Contributions to a Discourse Theory of Law and Democracy*, tr. William Rehg (Cambridge, Ma: MIT Press, 1996), 256-259.

> 'their claim to extend further than the liberal tradition with an unquestionable loss of weight and of normative force; in a word, they would try to normativize the political dimension and are remorselessly relativized by it'.[18]

Another risk, often voiced in long standing debates, concerns the assimilation of rights to public utility, or better their surrender to utilitarianism. On this one can recall the thoughts of Amartya Sen. He argues that goal-based theories (enhancing the point of the common weal) are not necessarily opposed to those that attribute priority to rights, but are in contrast only to utilitarian theories. One can think to reconcile the priority of rights and theories of collective goals, for example, of the (public) goal of equality: for Amartya Sen it coincides with the moral idea that the underprivileged have *rights* to a better treatment.[19]

And other hypotheses of re-conciliation might be invoked, although on radically different basis.[20]

If some rights are to be vested with ultimate intrinsic value (and these are the candidates to feature as fundamental rights in a legal system) their *raison d'être* cannot thus be reduced only to creating a free zone that the majoritarian ethics cannot override. The common weal partakes in explaining the significance attributed to fundamental rights. Thus the idea that rights are an individual question that keeps public matters out 'is based on a profound misunderstanding of the nature of rights generally and of civil and political rights in particular'.[21] Considering rights as goals, then, opposes the false assumption that rights are simple limits to public decision making and social action. They must be conceived as social objectives deserving of maximum attention.[22] Rights can be placed at the foundation of a system only if they can be selected to number among the objectives of public policies and the goals of normative production. In turn, should exist no rights (norms protecting rights) to which the legal order attributes the role of 'criteria of recognition', there would be no fundamental rights: and none would feature among that social and political system's collective goals. Sen expresses a concept that is relevant when he writes that

> 'if rights are fundamental, then they are also valuable, and if they are valuable intrinsically and not just instrumentally, then they should figure

[18] M. Fioravanti, 'Quale futuro per la "costituzione" ' *Quaderni Fiorentini*, 632 (1992).

[19] A. Sen, 'Rights as Goals' (Austin Lecture), in S. Guest and A. Milne eds, *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: F. Steiner Verlag, 1985) ARSP, Beiheft 21, 12.

[20] John Finnis, for example, made the question of (natural) rights to converge into an objective order of goods (through a neo-aristotelian and neo-tomist philosophy), and the common weal: J. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980).

[21] A. Sen, n 19 above, 56

[22] ibid 15

among the goals'.[23]

In a liberal democratic culture, where sovereignty is vested in the people, if rights are legally enshrined, they are a good that affects the way of being of the public power itself.

In a further sense, it is possible to recount the same problem by considering that when we admit of fundamental rights as institutionally belonging to the criteria of recognition and conceived as goods for individuals and groups that are worth protecting according to the ultimate choices within a legal order, we also hint at some objectivity in law's institutes that refers to their being legal norms. Therefore, we are at least sympathetic with the idea that places rights somewhere in the very fabric of objective law. In a recent talk, as well as in a previous chapter, the French scholar Kervégan,[24] challenging the 'conservative' risk of that position, attempts a reconstruction of institutionalist view of law, ranging from Hegel to Savigny and Hauriou, in order to escape the deadlock between natural law and positive law theories: in his view, and to some extent as in the view of Neil MacCormick,[25] for rights to be guaranteed *vis à vis* sovereign whim (that is, the positivist fiat) we do not need a faith in natural law, but the strength of a networked normative order within which particular rights are placed. Rights are part of a formalized set of legal institutions. And institutions are not immune from reforms, revolutions, changes, but at the same time they have some resisting capacity, or objective normativity encompassing rights as part of a context, one that resembles for him the foundational theory of Hegel's 'objective spirit'. In a sense, one can accept, through such a reconstruction, that fundamental rights do not come from heaven, but at the same time: while they can legally matter only if they reach to their objective status (and function, as in the previous sections), they vehicle our ethical, moral and political expectations to law.

IV. Human Rights and Global Public Goods

1.

Human rights as a legal construct have a 'concrete' existence in legal norms, and as far as they hold through the last seventy years or so, from the founding document, the Charter of the United Nations (1945) and the Universal Declaration adopted by the General Assembly in 1948, followed by The International Covenants (on Civil and Political Rights and on Economic Social and Cultural Rights) as well as several multilateral human rights treaties and Covenants in

[23] A. Sen, n 19 above, 15.

[24] J.F. Kervégan, 'Towards an Institutional Theory of Rights', in I. Testa and L. Ruggiu eds, *'I that is We, We that is I.' Perspectives on Contemporary Hegel* (Leiden: Brill, 2016), 68–85. The talk was online at Oxford Jurisprudence Group 2022.

[25] N. MacCormick, *Institutions of Law* (Oxford: Oxford University Press, 2007), 163.

the International Community, up to Regional Conventions (European, American and African) and so forth, that constitute a body of law endowed with normative force, albeit at different levels of juridical scope.

In the state domain, I meant that rights, if they are fundamental, they should be part of the goals, in so far as they have to work as criteria of recognition of the validity of norms in a legal order. I also submitted that this view of rights, as fundamental, has an explanation based on the function of recognition/validation it plays.

One can think that the same would apply in the extra state domain with regard to rights that are capable of calling upon States' responsibility for their violations, although not all infringements are violating fundamental rights. The point then is to be made in factual sense, inasmuch as some rights at least are fundamental for the international community and in the international order, if they work as rules of recognition discriminating which norms or decisions are validly admissible in it. As Hart reminds us, all that is not just written down in some legal text but can only be known looking at those norms that are practiced as recognition rules by officials.[26] Admittedly, applying to rights the case for Hartian rules of recognition, and to assess what rights are 'fundamental' in this very sense within (the) extra-state order(s) remains still uncertain or debatable.

Aspirational thoughts would put some kind of human rights- certainly not all of those which feature in the human rights' mentioned body of law- at least at the forefront as fundaments of validity of norms in an international legal order. But much and main attention has been devoted to a very different issue, that is, which rights are actually human rights, among those enshrined in international legal instruments[27] or what criteria should better count for 'deciding' that a right is a human right or not. However, one can agree that a supporting moral value is to be conceived at the basis of Human Rights Legally enshrined, since they 'also serve urgent-universal-concern-meriting moral rights'.[28]

The question of the role played by a right as fundamental in a legal order is possibly analyzed through empirical ascertainment, but is far from being easily solvable. One could wish that some human rights become criteria for the

[26] Hart confirms that this 'rule of recognition', unlike other rules and norms (which are 'valid' from the moment they are enacted and even 'before any occasion for their practice has arisen'), is a 'form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts'. (H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2nd ed, 1997), 256.

[27] The main theses are divided into two sides, the moral (orthodox) and the political view (here John Rawls and Joseph Raz are placed at the center). See the chapters in A. Etinson ed, *Human Rights: Moral or Political?* (Oxford: Oxford University Press, 2018).

[28] A. Sangiovanni, 'Are moral rights necessary for the justification of international legal human rights' 4(30) *Ethics and International Affairs*, 471-481 (2016). See also for the debate between moral and political conceptions of human rights, Id, 'Beyond the Political-Orthodox Divide: The Broad View', in A. Etinson ed, *Human Rights: Moral or Political?* (Oxford: Oxford University Press), 174-198.

recognition of the validity of other norms.[29]

On the other hand, the standard narrative of IL based on bilateralism is slowly declining, since IL needs to provide a credible foundation for the emergence of its 'community' layer, human rights protection against states, environmental and biodiversity duties, jus cogens norms,[30] as well as obligations *erga omnes*.[31] All these transforming notions are to be taken seriously. Indeed, they make it possible, among other things, to pave the way through which the connections between fundamental rights and community goals develop. Still, it cannot be denied that for some structural features the extra state realm would work differently.

As in the foregoing section, in the state domain if a right protects a good, an interest of the individuals, that good or interest is given a validity-recognition function and accordingly it is considered fundamental in the political choices of a legal order. As we know, there is poor sense here to distinguish between negative and positive rights: policies and expenditures include negative or positive rights, liberty, property as much as freedom of speech, education, health, housing and so forth.

Although (and admittedly) doubts and principles' conflicts and disagreements are common even in the domestic arena, the international setting is hardly clear as to its disparate goals, and which goals are primary is itself uncertain. We have difficult time in coming to clarify which rights are fundamental because the legal order works in fragmented and let's say less-than-constitutional ways. We cannot speak of rights that are beyond the purview of a legislator because a legislator proper is said to be absent; conversely, we cannot either assume that there is a pre-eminent sovereign to which the political choices concerning the common goods are assigned. Even making a right the goal of a set of international norms and actions is only possible within the remit of the cluster of human rights regimes, but hardly outside them. It is well known and also exemplary how the World Bank interpretation, which sets the scope of its Environmental and Social Framework (2016), includes no human rights obligations and in general the question of human rights is not a condition for the WB aid, since rights are meant as importing a political question which is beyond its powers,[32] that are 'limited' within the objective of poverty reduction

[29] Otherwise, International law possesses such criteria of recognition, of course: cf. S. Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas eds, *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 163-185.

[30] Peremptory norms such as *jus cogens* are those that, according to Vienna Conventions on the Law of Treaties, May 23, 1969, art 53, render void a treaty conflicting with them. According to Antonio Cassese (*International Law*, 2nd ed, Oxford: Oxford University Press, 2005), 217, rules banning slavery, genocide, and racial discrimination and the rule banning torture have become customary.

[31] On obligations due to the international community as a whole, see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press, 2010).

[32] See G. Palombella, 'On the potential and limits of global justice through law' *Rivista di*

through investment programs. On the other hand, thinking in terms of providing global public goods, endowed with a transboundary scope, rests on the common interest of all states and peoples, since climate change or the fight against COVID pandemic are intrinsically belonging to the self interest of all.

Therefore, the question remains whether it is possible to see human rights as public goals or identify a connecting logic between human rights and public goods in international setting. According to Neil Walker each will sound as one hand clapping.[33] He examines whether Human Rights can supply 'in the register of global political morality' a complementary support to the pursuit of the 'good' and the need to sustain it with political authority.[34] The discourse of Global Public Goods 'presupposes rather than provides grounds for the relevant 'public' and so suffers from a general deficit of political authority'; the same deficit holds for Human Rights which lose their authoritative roots when projected beyond their state-centered sources, in the global setting.[35] The nature of Global public goods speaks to a problem of collective action which is furthermore loaded with controversial issues regarding their scope, contents, distributive balances, and so forth. While those are possibly solved in State institutions there is no equivalent to the latter at the supra-states level, and that undermines even their political morality background.[36] The urgent need and the apparent evidence of providing/ protecting global public goods (again, think of the pandemic disease, or climate change), which amounts to a strong support from the side of political morality (basing on concurrent interest of actors in the global arena), is not itself able to substitute for the lack of political authority. For Walker

> 'the two hand need to meet. If they do not do so on account of a deficit of political authority, the claims of substance at the level of political morality may either over-reach and fail to be implemented, or be prey to unilateral implementation by a non-globally representative yet hegemonic political power; or, as is more likely for most global public goods, it may under-reach in compensation for a lack of political authority'.[37]

Now, Human Rights do not afford the missing authority supplier, because

filosofia del diritto, 15-16 (2017).

[33] N. Walker, 'Human Rights and Global Public Goods: The Sound of One Hand Clapping?' 1(23) *Indiana Journal of Global Legal Studies*, 249-265 (2016).

[34] ibid 263.

[35] ibid 251.

[36] The reference here is to 'instrumental goods': contrasting and mitigating climate change or controlling disease spreading. Admittedly, and despite a range of possible controversial choices, an 'enlightened self-interest' can become credible ground of common commitment. I skip here the further and for Walker even more serious difficulty concerning the need of a global public community with reference to those goods, like a tolerant society or a society treasuring cultural heritages (that is, communal goods) which presuppose a much stronger societal and communitarian sharing at the global level. See N. Walker, n 33 above, 252 ff.

[37] ibid 258.

they do not really rest on a background political community, and they do not signal the emergence of a global political community, which remains limited in the borders of the State. That amounts to a 'structural bias' also due to the concurrent doctrines of sovereign autonomy. Walker's observations are well based on a widespread common sense. However, they might end up foreclosing the projection of the concept of fundamental rights, that I described in the first part above, onto the global arena. Notably the 'structural bias' of rights themselves resurfaces as highly relevant here, because it hints at the dependence of rights upon the construction of public power (that rights are intended to limit), not vice-versa. It seems to imply too much, though. Neither global public goods nor rights in the global arena would have a positive normative strength, since positive commitments could only be based on a universalized political authority capable of exposing prescriptive tenor and teleological significance.

I will return on this last point in my conclusive remarks, since different conclusions would depend on recasting the problem in terms of legal justice and legal institutions. But some considerations as to how human rights contribute to common goals and vice-versa in the legal setting, are in order.

2.

The thrust of the relation between fundamental rights and common goals (interest-concern)[38] as I depicted it in the 'domestic' side, should not be excluded a priori in the global arena, since, as a matter of fact, legal norms are available that explicitly raise some rights themselves to fundamental goals, to be pursued as common goods by the international community. One can recall for example that the protection of the community interest to peace and security was interpreted by the Security Council in order to protect fundamental rights against the action of their own government, in case concerning Lybia: to protect civilians means at the same time avoiding a menace against world peace and security (UNSC February 2011, resolutions 1970 and 1973).

The connection between some rights and the communitarian interest is recurrent: the ICJ famously noted in its Advisory Opinion on Reservations to the Convention on Prevention and Punishment of the Crime of Genocide (ICJ Reports 1951, 15) that the *raison d'être* of the Convention is not the pursuit of states' interests, since States 'merely have, one and all, a common interest, namely the accomplishment of those high purposes' of the Convention, which in turn are to protect huma rights of individuals and groups. As in other cases of States' obligations to protect human rights-some still Treaty based, some other become customary law- the 'common interest implies that the obligations in questions are owed by any state party to all the other states', they are obligations

[38] Among several portraits of common interest and common concerns, cf. S. Thin, 'In search of Community. Towards a definition of common interest', in G. Zyberi ed, *Protecting Community Interests Through International Law* (Cambridge: Intersentia, 2021), 11-30.

'erga omnes' (parties or tout court), toward the international community as a whole. That is precisely reinforced by the Study Group of the International Law Commission on Fragmentation of International Law:

> 'If a State is responsible for torturing its own citizens, no single State suffers a direct harm [...] such action violates values or interests of all [...] the international community as a whole' (para 393).

Recently, ICJ case law[39] confirms for example that

> '[T]he common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*'.

In principle, then, the fact that some rights are taken in such highest consideration through institutional means, supported by legal norms and jurisprudential interpretation and implementation, shows how IL itself is not simply sticking to the logic of protecting rights *vis à vis* states' power, the negative part of the issue, but is meant to positive duties, and states are entrusted to cooperate collectively in order to protect promote and realize rights that need the commitment of all toward an established interest shared by the sovereigns themselves. In other words, the *mediation* of a common interest or better of the common concern includes some rights, making them a goal in the 'communitarian' side of international law. Again, one can discuss that international law does not have any community or polity of which one can identify the proper goals: but as things stand that is clearly counterfactual, from a legal point of view. And even more so, when some rights and obligations belong in jus cogens,[40] peremptory norms: that which endows those norms with hierarchical superiority as well.[41] Of course, such examples are still evoking

[39] 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (*Gambia* v *Myanmar*), judgment on jurisdiction, 22 July 2022, esp paras 107-108.

[40] M. Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' 6 *Nordic Journal of International Law*, 211-239 (1997).

[41] See recently the Draft Conclusions *on Jus Cogens* adopted in 2022 by the UN International Law Commission (UN Doc A/77/10), Conclusion 2 holding that 'Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are universally applicable and are hierarchically superior to other rules of international law'. Another pillar is in the pronouncement of the ICTY, in *Prosecutor* v *Furundzjia*, case no IT 95-7/1, Trial Chamber II, at 260, para 153 (10 december 1998). On whether one can understand jus cogens as the appearance of a common good, cf M. Retter, '*Jus Cogens*: Towards an International Common Good?' 2(4) *Transnational Legal Theory*, 537–571 (2011). J. Vidmar correctly adds that, however, the hierarchical superiority is debated, as in some cases the dependence on the will of States resurfaces, insofar as the legal system might not provide for remedies in case of breach of jus cogens norms (here the reference is made to the ICJ, 2012 case, *Germany* v *Italy*). See the chapter: 'Protecting

the common interest by way of limitation of States' abuse. It is not irrelevant, then, that a more, say, positive or goal-based significance emerges in areas where the issues are radically connected to a structural question of cooperation, as with regard to environmental concerns and their relation to rights: based on the United Nations Framework Convention on Climate Change (1992) defined as a 'common concern of humankind'. Here it is a global public good based at least on *interdependence* to spur a chain of legal acts and obligations which are meant toward a shared objective.

The protection of human rights infringed by the consequences of climate change is a core issue. It has been noted as well that the very idea of the common concern of humankind 'provides a point of departure for the development of the extraterritorial dimension of human rights obligations in relation to climate change'.[42]

All in all, the idea propounded by authoritative scholars like Cancado Trindade, or Theodor Meron, and Antonio Cassese about the progress toward 'humanization' of international law has put human rights not just as a common interest of States but of the international community beyond States themselves.

Perhaps the most comprehensive case in point is found in the principles of sustainable development: In the understanding of sustainable development on a global scale, approaches based on human rights and those based on Global Public Goods are said to mutually compensate each other. Development policies and programs include protection of human rights while the Global Public goods approach values, for example, at the same time prevention or mitigation of climate change, protection of biodiversity, fight against pandemic disease, and so forth.[43] The strength of a human rights-based approach to development lies in its relying on legal obligations, fixed by supranational and treaty international law, obligations that have an objective normative basis. Global public goods, which are to be traced back to an economic or utilitarian basis, enjoy legal positivization but leave open further questions of production, distribution and choice. The theoretical approach does not take into account preferences, individuals, minorities, and does not of itself empower people to demand something as a matter of 'justice' that is, as a 'right'[44] and in the aggregate pursuit of global goods there is a systemic objective which might well be not mindful of equitable distribution issues.[45] One can recall that often the appeal

Community Interests in a State centric Legal System: The UN Charter and Certain Norms of 'Special Standing' ', in W. Benedek et al eds, *The Common Interest in International Law* (Cambridge: Intersentia, 2014), 109-125.

[42] W. Scholtz, 'Human Rights and Climate Change', in W. Benedek et al eds, *The Common Interest in International Law* (Cambridge: Intersentia, 2014), 134 ff.

[43] See S. Cogolati, n 1 above.

[44] S. Cogolati, n 1 above, 350.

[45] D. Augustein, 'To whom it may concern: International human rights law and global public goods', WZB Discussion Paper, No SP IV 2015-809, Wissenschaftszentrum Berlin für Sozialforschung (WZB), 5 ff.

to issues of common interest remains too vague: the reference to interests that are 'common' bears indeterminacy which 'does not allow for distinguishing oppressive interests from those of the oppressed'.[46]

However, the logic of rights could well work as remedying the blind spot of a global public goods approach, providing for and legitimating the access to the production of a global public good insofar as it can be claimed as a right of individuals or groups. On the other hand, it is equally true that human rights are loaded with the constraints of western, liberal, individualistic, universalistic and state-oriented bias. Therefore,

> 'human rights law in its current iteration fails to adequately contest and remedy elements of social, global and environmental justice, business responsibility for human rights, and the effects of neoliberalism'.[47]

Global public goods, in turn, suffer the unresolved state of affairs, in the extra-state sphere, where it is possible to consider each subfield of law as a common interest of some collective value, that is, human rights, environment, trade, natural resources protection, cultural heritage, security, peace and so forth, leaving their relations and the priorities, as much as the interpretation of their sting, open and negotiable.

These circumstances do complicate the picture, but they ultimately do not detract from the point that making some rights *fundamental*, as I submitted, would mean to make them a goal of common concern, or should allow for interpreting them in conjunction with an idea of a common objective, even beyond the individualistic bias that might have been marked the lamented 'liberal' and western coin. Corina Heri maintains, for example in the case of the movement vindicating peasants rights, that rights can be freed from the neoliberal box. The peasants movement, related to the United Nations Declaration for the Rights of Peasants and other People working in Rural Areas (2019), focusing on rights to land, water, seeds, the environment, is said to bear a 'subversive' potential. In this vein, it

> 'seems to be going beyond simply protecting [that] environment for the benefit of human individuals, and may be seen as advocating for a closer connection between humans and the natural world, and even a protection of nature in its own right. This indicates a possible transcendence of definitionally anthropocentric human rights'.[48]

[46] C. Heri, 'Pushing the boundaries of human rights discourse: Peasants rights and Peasants interests', in G. Zyberi ed, *Protecting Community Interests Through International Law* (Cambridge: Intersentia, 2021), 304.

[47] ibid 286. Should be added here: S. Moyn, *Not Enough: Human Rights In An Unequal World* (Cambridge, Massachusetts: Belknap Press of Harvard University, 2019).

[48] Ibid 295

In other words, the connection between common interest and human rights is to be understood as relatively open as regards the direction it takes, and the ethical and political choices underneath are decisive and determinative, while the mutual reference between rights and the goals pursued proves however mutually reinforcing and demonstrates some implication of consistency and coherence.

A different question instead concerns whether the inter and extra state setting host some understandable and credible one single global common good. Of course, the idea of IL's humanization hints at shared basic considerations of commonweal. But the understanding of such grand objective is substantially contestable and is resolved into the protection of single common goods. The rather metaphysic idea of the general good for the peoples on the globe might have resurfaced in the context of very fundamental threats for the survival of humanity on earth, first of all, nuclear war or the irreversible degradation of the environment and natural resources. But even here, the urgency is *morally* prevailing over the disposition to share an ethical convergence toward a full-fledged idea of the further good for humanity as a whole. Loaded with choices of huge complexity the global good remains somehow unreachable and perhaps even undesirable, if one wishes to preserve pluralism and contestability, at least. What remains is more a matter of *goods* and *discrete* goals. And here, the fundamental quality of choices concerning which common interests and which rights is not decided in a pre-fixed hierarchy nor in a unitary and once for all manner.

In a fragmented universe of specialized international regimes, global goods are coming up in varied guises.[49] Those regimes are fixing statutory goals, principled basis for pursuing norms, policies and regulations. Among them hierarchy is hard to define, if any. Legally speaking the convergence among the fundamental, undeletable legal strength of such regimes, and the individual/ collective rights and those single common goods proves a substantial vantage point. And as hinted above, cooperation is becoming a chance not to be neglected.[50] The appearance of sustainable Development Goals is even considered as the common interest in international law[51], and therefore it looks as a kind of coordinative imperative:

[49] Cf 'Global Public Goods amidst a Plurality of Legal Orders: A Symposium' 3(23) *The European Journal of International Law*, 643-791 (2012). See also J. Verschuuren, 'The Role of sustainable Development and the Associated Principles of Environmental Law and Governance in the Anthropocene', in L. Kotzé ed, *Environmental Law and Governance for the Anthropocene* (Oxford: Hart Publishing, 2019), 3-30.

[50] P.T. Stoll, 'A 'New' Law of Cooperation: Collective Action across Regimes for the Promotion of Public Goods and Values versus Fragmentation', in M. Iovane et al eds, *The Protection of General Interests in Contemporary International Law* (Oxford: Oxford University Press, 2021), 321-343.

[51] Ch. Voigt, 'Delineating the Common Interest in International Law', in W. Benedek et al eds, *The Common Interest in International Law* (Cambridge: Intersentia, 2014), 9-28.

> 'This principle is incorporated in various agreements in environmental and economic fields and in agreements related to certain commons. The adoption of the 2014 Sustainable Development Goals (SDGs) has cemented the relationship of sustainable development to human rights. With the adoption of the SDGs in 2015 the relationship of sustainable development to human rights has been firmly established. The principle of sustainable development most importantly contains three elements: environmental protection and economic as well as social development, and therefore encompasses various aspects related to public goods, commons, and fundamental values. It can substantially inform the proper implementation of agreements'.[52]

In truth, climate litigation[53] has been exemplary to this regard[54]. Despite many and persisting (procedural and substantive) limitations and complexities,[55] the recognition of the standing before a judge in order to vindicate a country's inertia in putting in place sufficient environmental measures for preventing further global warming or for mitigating the present consequences of climate change, contributes to the preservation of a discrete global public good. In a sense the dynamic is two-way: viewing the healthy and safe environment as a right[56] activates the legal protection and asks for States' duties to be respected. At the same time, the general recognition of the urgency of the climate change problem has elicited a revision of more traditional obstacles concerning the standing before a court,[57] that is, the enhancement of access to justice, if not also the progress beyond affirming wider or novel rights matching goods that bear as well a collective and in principle recognizable common value.

Arguing in terms of legal rights often ends up bypassing underlying indeterminacy in the scope or content of a common good, bearing a determinative strength in concrete circumstances; at the same time, it depends on the assumption, found in multilateral legal instruments, that, say, climate change represents a primary goal for the international community. On the other hand, nothing detracting from the above, a caveat is due: climate litigation based on

[52] P.T. Stoll, n 50 above, 331.

[53] There is a flourishing literature on the increasing amount of climate litigation in several continents, cf A. Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages', in S. Duyck et al eds, *Routledge Handbook of Human Rights and Climate Governance* (London: Routledge, 2018), 31-43.

[54] For the hugely expanding number of climate cases see the databases at Sabin Center of LSE.

[55] D. Shelton, 'Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role', in J. Knox and R. Pejan eds, *The Human Right to a Healthy Environment* (Cambridge: Cambridge University Press, 2018), 97-121.

[56] S. Varvastian, 'The Human Right to a Clean and Healthy Environment in Climate Change Litigation', MPIL Research Paper Series no 09, 1-14 (2019).

[57] Cf G. Palombella, 'Access to justice: dynamic, foundational and generative' 2(34) *Ratio Juris*, 121-138 (2021).

rights alone[58] might not necessarily prove to be always the only path to contrast climate change. On the contrary, procedural and substantive aspects of relying on individual or collective rights bring about a narrowing of the perspective, thereof preventing it from evolving toward disentangling the idea of environmental integrity from the angle and the vantage point of Anthropo(cene-)centric rights.

V. Questions And Remarks

In the global arena, the connection between rights and goals is said to lack the political authority that it enjoys in the domestic setting. Indeed, when some rights are fundamental in a legal system, they are pivotal in the validity recognition practice of officials, judges, legislators and public administrators. Such a core function belongs to the structure of a legal order. However, making sense of it implies the recognition that all this involves the commitments that a legal order intends to respect, that is, the goals that are taken as of primary importance, or ultimate, within the same order.

I have submitted that also the international legal order, as its normative fabric shows, weaves common goals and human rights, accordingly, transcending the opposition-divide along the lines of a contrast between individual rights and common interests. Such a mutual reinforcement compensates for the one-sided understanding of the nature of rights and common goals respectively.

In truth, both the question of rights and that of global public goods come to be framed by legal means through a chain of choices, and out of ethical political selective process that involves States, peoples, private actors, NGOs, as well as corporations and in the supranational sphere an array of players active in the global governance scenario.

As a matter of fact, the normative strength of legal international commitments and rules might avail of varied or disputable legitimation sources, something recurrently debated, and relatively far from the consolidated *acquis* of the kind that, for instance, domestic systems possess, and Juergen Habermas described as embedding the *co-originality* between sovereignty and the system of rights in constitutional democracies. In the foregoing sections I have not dealt with problems of legitimacy, but I focused on the dynamic interplay between rights and public goals, in the domestic and international arenas as a matter of the functioning and institutional organization of a legal system.

Focusing on legality and the normative strength of positive law has its own theoretical premises, though, that deserve of some further explanation. Justice is often seen as depending upon the birth of some coercive power: this thesis,

[58] Interesting account of the recent use of tort law procedures and their limitations, D. Bertram, 'Environmental Justice 'Light'? Transnational Tort Litigation in the Corporate Anthropocene' 5(22) *German Law Journal*, 738-755 (2022).

famously well represented by Thomas Nagel,[59] is only in part acceptable, and even as regards the extra-state sphere epistemically insufficient. It entails that the lack of coercive political authority would make laws of international and global justice untenable.

In such a view, the possibility of some conditions of justice would end up being erroneously made to depend *directly* on *power*. This narrative can be contrasted with the modern legal narrative that from Kant or Bentham explains how those conditions – for developing the *possibility* of justice – are due to the birth of *law*, instead:[60] Kantian view of law[61] sees it as a generator of publicness in which the creation of legal parameters puts the basis for conceiving the problem of justice. In Kant's reasoning, law is resorted to conceptually in order to avoid the (state of nature) condition in which the abuse of personal liberty encounters no objection and no contrary reason. Even if the state of nature need not be unjust, it is devoid of justice, so that men 'do one another no wrong when they feud among themselves'.[62] For Bentham, it is again the law to provide for generally accessible criteria of behavior, it aims at ensuring social coordination and fairness precisely because it makes possible the solution of the tussle between collective goals and individuals' interests as well as among different conceptions of the common well-being.[63]

In other words, the epistemic premise of (the possibility of) justice, is law, not power. The question of coercive background power can point to a different problem, one that is potentially affecting or undermining *not justice*, but the *actual existence and effectiveness of a legal order*. That holds true as well for the international legal order of which legal scholars have for long time doubted the nature and quality of a juridical system, and for several reasons.[64] But as a matter of fact that must not be an issue, here, unless one would revoke again,

[59] Th. Nagel, 'The Problem of Global Justice' 3(33) *Philosophy & Global Affairs*, 113-147 (2005).

[60] I draw, to this regard, on a more extensive treatment of the matter in G. Palombella, 'On the potential and limits of global justice through law' *Rivista di filosofia del diritto*, 11-26 (2017).

[61] In Kant's view unless man '[W]ants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law' (I. Kant, 'Metaphysical First Principles of the Doctrine of Right', in *The Metaphysics of Morals* [1797] (Cambridge: Cambridge University Press, 1996, repr 2003), §§ 33, 44, 90.

[62] I. Kant, n 61 above, §§ 42, 86.

[63] J. Bentham, 'Of Laws in General', in J.H. Burns and H.L.A. Hart eds, *The Collected Works of Jeremy Bentham* (London: The Athlone Press, 1970), 192. As Bentham argued, a civil society public sphere would be impossible to imagine outside the service afforded by law.

[64] Famously, the reasons provided by Herbert Hart (n 26 above) for international law being just a set of rules (not a mature legal order) are given in his chapter X. For criticisms establishing the contrary for example Besson (supra at note 29) and J. Waldron, 'International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?' *New York University Public Law and Legal Theory Working Papers*, 2013.

after some centuries of controversies, the nature of international law as an 'existing' legal order.[65] Here the problem concerning how the foundational pillars of international law are capable of standing, even in the absence of a global sovereign and of a global 'polity' cannot be taken into further account. Suffice to say, that legality beyond the state is a notion of clear and dense reality, of which international law is the oldest appearance. On this premise, the idea of justice that the legality- beyond- the- State actually conveys (whichever it contingently is) shall bear the same level of bindingness, validity and effectiveness as that which such a legal order in fact demonstrates. Given this premise, this article has just focused on how in the logic of legal ordering, rights and goals are interwoven in a joint enterprise. The collective nature of law as public,[66] in truth, should mitigate the ambiguity and relativize the dogmas according to which human rights are not a matter of common weal, are opposed to it, and fare on a self-standing path unrelated to the fundamental goals.

[65] In a huge literature, I would suggest a 'classic' work gathering the array of questions & answers about authority and international legality: N.G. Onuf, 'International Legal Order as an Idea' 2(73) *The American Journal of International Law*, 244-266 (1979).

[66] More on this in G. Palombella, 'The (Re) Constitution of the Public in a Global Arena', in C. Mac Amhlaigh et al eds, *After Public Law?* (Oxford: Oxford University Press, 2013), 286-309.