

# LOST IN TRANSITION?

## Domestic Courts, International Law and Rule of Law *'À la Carte'*

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### 1. INTRODUCTION

For some time now, we have been told that the rule of law is high on the international agenda for several reasons: it brings political stability and prompts economic growth, and it is also central to sustainable development and contributes to international peace and security.<sup>1</sup> Working around the hypothesis of an international version of the concept, I suggested that 'the "rule of law" is undoubtedly one of the most powerful expressions in the modern world. In a sense, it has become an activity in itself, a mental-social phenomenon which exists within human consciousness and acts independently within physical social realities, like a pat on the back or a slap in the face.'<sup>2</sup> Indeed, it can be argued that the rule of law has become a 'buzzword' ('buzzphrase') in legal theory and political studies.<sup>3</sup> To borrow from Ogden and Richard's philosophy

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<sup>1</sup> In particular, see the work by the World Bank, starting with D. Kaufmann, A. Kraay and P. Zoido-Lobaton, *Governance Matters*, in: World Bank Policy Research Working Papers, no. 2196 (1999), and the more recent updated studies on the subject, available at [www.worldbank.org/research](http://www.worldbank.org/research).

<sup>2</sup> S. Beaulac, *The Rule of Law in International Law Today*, in: G. Palombella and N. Walker (eds), *Relocating the Rule of Law* 197 (Oxford: Hart Publishing, 2009) (footnotes omitted).

<sup>3</sup> For a point of comparison, where the linguistic sign 'sovereignty' was scrutinized in this fashion, see S. Beaulac, *The Power of Language in the Making of International Law – The*

of language, the rule of law is a formulation of 'hurrah!' words; that is to say, words that provoke a good feeling in those who voice or hear them.<sup>4</sup>

On the more cynical side, Carothers observed: '[o]ne cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles.'<sup>5</sup> The United Nations has fuelled such criticism in recent years, including in the context of post-conflict states and other situations of transition. Witness, inter alia, the 2004 UN Secretary-General's report on the rule of law and transitional justice,<sup>6</sup> the outcome document of the 2005 UN World Summit,<sup>7</sup> with a full section on the rule of law,<sup>8</sup> and the uninterrupted string of resolutions by the UN General Assembly, from 2006 to 2010, all entitled 'The Rule of Law at the National and International Levels',<sup>9</sup> as well as the creation of a rule of law unit in the Executive Office of the UN Secretary-General<sup>10</sup> and the many reports by UN officials on the rule of law since 2006.<sup>11</sup> In short, perhaps the rule of law has been a victim of its own success because, as we all know, too much of a good thing can be harmful.

In the context of transition, as in other areas of application of the rule of law, general acceptance does not mean that we know precisely what we are talking about. On the point, Krygier wrote that 'we can more easily state the values it serves, and recognize violations of it, than can specify the particular institutions and practices that will promote it.'<sup>12</sup> Similarly, Peerenboom opined: 'Foreign actors and experts are better at the creation of norms and generating a menu of

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Word Sovereignty in Bodin and Vattel and the Myth of Westphalia (Leiden & Boston: Martinus Nijhoff, 2004).

<sup>4</sup> C.K. Ogden and I.A. Richards, *The Meaning of Meaning*, 149–150 (London: Kegan Paul, 1927, 2<sup>nd</sup> ed.), suggest dividing up the functions language can fulfil into two categories: symbolic and emotive. In the latter role, language is used to express or excite feelings or attitudes; language thus used can be referred to as 'hurrah!' words and 'boo!' words, because of the feelings, good or bad, that it generates.

<sup>5</sup> T. Carothers, *The Rule of Law Revival* 77 *Foreign Affairs* 95 (1998).

<sup>6</sup> UNSC, Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (S/2004/616) (23 August 2004).

<sup>7</sup> Endorsed by UN General Assembly Resolution 60/1, 2005 World Summit Outcome (A/RES/60/1) (24 October 2005).

<sup>8</sup> *Supra* note 7, section 134.

<sup>9</sup> UNGA, *The Rule of Law at the National and International Levels* (A/RES/61/39) (18 December 2006); (A/RES/62/70) (8 January 2008); (A/RES/63/128) (15 January 2009); (A/RES/64/116) (15 January 2010).

<sup>10</sup> Which was recommended as per section 134(e) of the 2005 World Summit Outcome, *supra* note 7, and was established pursuant to Resolution 61/39, *supra* note 9.

<sup>11</sup> See, for instance, the Secretary-General's Report, *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law* (A/61/636-S/2006/980) (2006) and Corr.1.

<sup>12</sup> M. Krygier, *Rethinking the Rule of Law after Communism*, in: A. Czarnota, M. Krygier and W. Sadurski (eds), *Rethinking the Rule of Law after Communism* 273 (Budapest and New York: Central European University Press, 2005). See also M. Krygier, *Transitional Questions About the Rule of Law: Why, What and How?*, 28 *East Central Europe / L'Europe du centre-est* 12 (2001).

substantive legal rules than figuring out how they will be implemented.<sup>13</sup> This being so, one thing is certain though, especially in transition societies: both institutions *and* good practices must be part and parcel of rule of law reforms.<sup>14</sup>

This book is concerned with the possible role of one such institution, namely the national judiciary, in promoting the rule of law domestically through the use of international normativity, particularly in jurisdictions that have gone through violent conflicts or that have moved out of authoritarian regimes. With a view to giving a bit of perspective to the case studies and other discussions in this book, the present chapter dwells upon the heuristic models for the rule of law in relation to the problematics of international law in domestic courts. Avoiding the *lieux communs* of these issues, the goal is to set the tone and help navigate the sometimes obscure waters of these diverse situations of transition toward a structured social organisation based on a new or true stable constitutional arrangement. Before discussing rule of law heuristic models, groundwork questions need to be briefly addressed: what does the UN mean by the ‘international rule of law’ (section 2), and what do recent debates on interlegality<sup>15</sup> teach us in terms of the rule of law (section 3)? Next, the crux of the paper (section 4), where various formulations of the rule of law are examined, from thin to thick understandings, highlights the difficulties with a spectrum-type of reasoning. The conclusion is that an ‘à la carte’ heuristic model is most appropriate for rationalising the rule of law and interlegality.

## 2. THE UNITED NATIONS AND THE RULE OF LAW

Leaving aside for a moment the actual content of this essentially contested concept<sup>16</sup> – which is analysed in detail later – let us first focus on what the United Nations intends to achieve through the ‘international rule of law’,<sup>17</sup> pursuant to its proclaimed mission to promote ‘The Rule of Law at the National and International Levels’.<sup>18</sup> This is most relevant because, needless to say, the UN is a

<sup>13</sup> R. Peerenboom, *The Future of Rule of Law: Challenges and Prospects for the Field*, 1 *Hague Journal on the Rule of Law* 9 (2009).

<sup>14</sup> See R. Kleinfeld, *Competing Definitions of the Rule of Law*, in: T. Carothers (ed.), *Promoting the Rule of Law: In Search of Knowledge* 31 (Washington: Carnegie Endowment, 2006). Concentrating on structure and institutions, however, have proven insufficient; see J. Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, 18 *Minnesota Journal of International Law* 418 (2009), who speaks of (and deplores) the ‘if we build it, they will come’ attitude.

<sup>15</sup> I use the term *interlegality* to refer to the phenomenon of normative migration among legal orders, in particular the national application of international law by domestic courts.

<sup>16</sup> Borrowing from G.A. Gallie, *Essentially Contested Concepts*, 56 *Proceedings of the Aristotelian Society* 167 (1955–1956), Jeremy Waldron has suggested that the rule of law is an essentially contested concept; see J. Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *Law and Philosophy* 137 (2002).

<sup>17</sup> On the international version of the rule of law, generally, see also J. Crawford, *International Law and the Rule of Law*, 24 *Adelaide Law Review* 3 (2004).

<sup>18</sup> *Supra* note 9.

prominent actor in rule of law promotion around the world, including in transition societies, of course.

Based on the narrative of the UN, I want to underline that referring to the rule of law at the international level can be linked to two different, albeit closely related phenomena.<sup>19</sup> First is what I refer to as the rule of law *internationalized*: that is to say, how rule of law values can be externalized onto and applied within the international legal order. In that regard, one would look at international adjudicative bodies, like the International Court of Justice (ICJ) for instance, in order to assess the extent to which rule of law values are present, be it in terms of legality, equal application of the law, judicial review, etc.<sup>20</sup> The twin phenomenon, or second occurrence, can be called the *internationalization* of the rule of law: that is to say, how the international plane may be used to export the rule of law from domestic spheres and promote its values within other domestic jurisdictions. It acknowledges the fact that the rule of law in domestic law has become an international relations issue and that international normativity and institutions can act as a transit point, in a sense, for rule of law values.<sup>21</sup>

One can observe manifestations of this dual conception of the rule of law from UN policy statements and General Assembly resolutions.<sup>22</sup> One good illustration is the UN Secretary-General 2006 report, 'Uniting our Strengths: Enhancing United Nations Support for the Rule of Law',<sup>23</sup> especially the last part of the document dealing with the future: that is, how to strengthen the UN capacities, coherence, and coordination in regard to the rule of law. The activities under UN auspices pertaining to the rule of law were put into three 'baskets'. The first one is actually labelled the 'rule of law at the international level' and deals with issues linked to the UN Charter, multilateral treaties, international dispute resolution mechanisms, the International Criminal Court (ICC), as well as training and education regarding international law. It is clear that these actions correspond, as per the classification suggested above, to the rule of law internationalized, given that the UN activities pursue rule of law values on the international plane. In other words, these elements are interested in how rule of law values – linked to institutions, normativity, adjudication, human rights – are to be present and embraced within the international legal order.

<sup>19</sup> This dichotomy was inspired, somewhat, by S. Chesterman, *An International Rule of Law?*, 56 *American Journal of Comparative Law* 331 (2008).

<sup>20</sup> See S. Beaulac, *An Inquiry into the International Rule of Law*, European University Institute Working Papers, MWP 2007/14 (2007).

<sup>21</sup> These ideas were first articulated at a seminar in January 2008, organized by the Amsterdam Center for International Law and the Leuven Center for Global Governance Studies, where I presented a paper on the recent debates at the United Nations on the meaning of the international rule of law, especially in terms of *accountability*, the theme of the workshop. See A. Nollkaemper, J. Wouters and N. Hachez, *Accountability and the Rule of Law at International Level*, report available at [www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf](http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf).

<sup>22</sup> See *supra* notes 6–11.

<sup>23</sup> *Supra* note 11.

On the other hand, the second and third baskets of activities in the Secretary-General's report – namely, 'rule of law in the context of conflict and post conflict situations' and 'rule of law in the context of long-term development', respectively – are concerned with the other, twin phenomenon of the internationalization of the rule of law, because they obviously deal with domestic matters, which are promoted via the international law machinery. For example, these rule of law activities relate to the strengthening of justice systems and institutions in domestic jurisdictions (including by means of judicial review), the establishment of truth and reconciliation processes as well as fact-finding and commissions of inquiry, and the improvement of the police and the reform of the penal system, particularly with respect to corruption and organized crime. Such rule of law elements, very much originating from domestic legal orders, are essentially interested in being promoted domestically in other state jurisdictions (not onto the international plane *per se*), especially in the development and transition settings. Thus we would speak of the internationalization of the rule of law when the values do no more than *transit*, so to speak, through the international legal sphere, the final destination being the domestic jurisdictions of states.

Before further developing upon the possible heuristic models for the rule of law, another background issue needs to be injected into the discussion: interlegality.

### 3. INTERLEGALITY AND INTERNATIONAL RULE OF LAW COMPLEMENTARITY

International law scholarship has spilled much ink in the last century debating the relationship between international law and domestic law.<sup>24</sup> The usual narrative on interlegality refers to the opposition between dualism and monism. It further posits a necessary hierarchy between the international and domestic legal orders,<sup>25</sup> a feature that has recently been challenged.<sup>26</sup> Nijman and Nollkaemper have suggested, for instance, the emergence of a global legal

<sup>24</sup> See, among the classics, J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 *British Yearbook of International Law* 66 (1936); G. Scelle, *Le phénomène du dédoublement fonctionnel*, in: M. Schätzel and H.J. Schlochauer (eds), *Rechtsfragen der internationalen Organisation, Festschrift für Wehberg* 324 (Cologne: Klostermann, 1956); I. Seidl-Hohenfeldern, *Transformation or Adoption of International Law into Municipal Law*, 12 *International and Comparative Law Quarterly* 88 (1963); and L. Ferrari-Bravo, *International and Municipal Law: The Complementarity of Legal Systems*, in: R.St.J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* 715 (The Hague: Martinus Nijhoff, 1986).

<sup>25</sup> See A. von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 *International Journal of Constitutional Law* 397 (2008).

<sup>26</sup> See L. Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 *International Journal of Constitutional Law* 509 (2008).

pluralism, embedded in a community of principles and common values, 'that allow[s] co-existence and cooperation between multiple legal systems.'<sup>27</sup>

It must be pointed out also that we generally accept that there is no one-size-fits-all answer on either side of the dualism-monism fence, for two reasons. First, the effect of international normativity depends, ultimately, on the domestic legal order of each national state.<sup>28</sup> As Greenwood put it, 'the capacity of any institution created by national law and which derived its authority from national law [domestic courts] to apply a rule which emanated from a source outside the nation [is] necessarily confined by rules which circumscribed its jurisdiction.'<sup>29</sup> Note that such an understanding of the interlegality interface is, fundamentally, an application of the dualist logic,<sup>30</sup> used at some *meta-level*. As Kumm wrote: '[t]he very idea that the national constitution is decisive for generating the doctrines that structure the relationship between national and international law is dualist.'<sup>31</sup>

Secondly, there is no universal black-or-white answer to interlegality issues for the simple reason that most national constitutional law and practice show traits of both dualism and monism, which means that the line between them is blurred. Higgins' observation is on point: 'in reality there is usually little explanation or discussion of these large jurisprudential matters in the domestic court hearing. The response of the court to the problem is often instinctive [and], the truth be told, the response is often somewhat confused and lacking in an intellectual coherence.'<sup>32</sup> As a result, she noted, 'not everything is dependent upon whether a country accepts the monist or dualist view, [which] is evidenced by the fact that, even within a given country, different courts may approach differently the problem of the relationship between international and domestic law.'<sup>33</sup>

<sup>27</sup> J. Nijman and A. Nollkaemper, *Beyond the Divide*, in: J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* 360 (Oxford and New York: Oxford University Press, 2007).

<sup>28</sup> See T. Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 *Hague Recueil* 317 (1992); and G. Gaja, *Dualism – A Review*, in: J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* 61 (Oxford & New York: Oxford University Press, 2007).

<sup>29</sup> C. Greenwood, *International Law in National Courts: Discussion*, in: J. Crawford and M. Young (eds), *The Function of Law in the International Community: An Anniversary Symposium – Proceedings of the 25<sup>th</sup> Anniversary Conference of the Lauterpacht Centre for International Law* (Cambridge, 2008), available at [www.lcil.cam.ac.uk?25th\\_anniversary?book.php](http://www.lcil.cam.ac.uk?25th_anniversary?book.php).

<sup>30</sup> See R. Provost, *Judging in Splendid Isolation*, 56 *American Journal of Comparative Law* 125 (2008).

<sup>31</sup> M. Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in: S. Choudhry (ed.), *The Migration of Constitutional Ideas* 258 (Cambridge: Cambridge University Press, 2006).

<sup>32</sup> R. Higgins, *Problems and Process: International Law and How We Use It* 206 (Oxford: Clarendon Press, 1994).

<sup>33</sup> Higgins, *supra* note 32.

As a matter of fact, although many different states make claims to monism in rationalising interlegality at the micro-level,<sup>34</sup> at the meta-level, the interface of the international and the national legal orders is essentially dualist in nature.<sup>35</sup> Indeed, I have suggested in my previous work that,<sup>36</sup> fundamentally, this is so because the matrix within which states operate and international affairs are conducted continues to be based on the Westphalian model of international relations,<sup>37</sup> at the centre of which is the *idée-force* of sovereignty.<sup>38</sup> Accordingly, the traditional stance holds that the Westphalian model of international relations involves an international realm that is distinct and separate from the internal realms.<sup>39</sup>

This apprehension of interlegality, so far, centres on domestic actors and is no doubt very different from the international – or ‘internationalist’<sup>40</sup> – point of view, according to which the so-called principle of *supremacy* of international law affirms the superiority of the international legal order *vis-à-vis* domestic normativity. While working within dualism – both at the meta- and micro-levels – Fitzmaurice opined that supremacy is ‘one of the great principles of international law, informing the whole system and applying to every branch of it.’<sup>41</sup> In cases of normative conflict, from the international perspective, it is clear that international law must, and in effect does always, trump any incompatible

<sup>34</sup> For a forceful example of such a state, the Netherlands; see A. Nollkaemper, *The Netherlands*, in: D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* 326 (Cambridge: Cambridge University Press, 2009). Other examples of ‘automatic incorporation’ of international law are Mexico, Azerbaijan, Namibia, Cambodia, Syria, and Lebanon.

<sup>35</sup> See F.G. Jacobs, Introduction, in: F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law* xxiv (London: Sweet & Maxwell, 1987).

<sup>36</sup> For my latest contribution on this point, see S. Beaulac, Thinking Outside the ‘Westphalian Box’: Dualism, Legal Interpretation and the Contextual Argument, in: C.C. Eriksen and M. Emberland (eds), *The New International Law – An Anthology* 17 (Leiden: Brill Publishers, 2010).

<sup>37</sup> Of course, Westphalia is an *aetiological myth*, created by international society to explain the whens, wheres, and hows of its becoming and its being. This acknowledgement, however, does not diminish in any way the extraordinary semiotic effects of Westphalia on the consciousness of international society. See S. Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 *Australian Journal of Legal History* 181 (2004) and S. Beaulac, *The Westphalian Legal Orthodoxy – Myth or Reality?*, 2 *Journal of the History of International Law* 148 (2000).

<sup>38</sup> See A.-M. Slaughter and W. Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, in: J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* 110–111 (Oxford and New York: Oxford University Press, 2007).

<sup>39</sup> I first articulated this view in S. Beaulac, *National Application of International Law: The Statutory Interpretation Perspective*, 41 *Canadian Yearbook of International Law* 225 (2003).

<sup>40</sup> See, inter alia, B. Kingsbury, N. Krisch and R. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* 15 (2005); and, generally, D. Dyzenhaus (ed.), *The Unity of Public Law* (Oxford: Hart Publishing, 2004).

<sup>41</sup> G. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 *Hague Recueil* 85 (1957).

national legal rules.<sup>42</sup> Building on this, Nollkaemper recently suggested that the 'principle of supremacy of international law thus is key to the international rule of law.'<sup>43</sup>

Be that as it may, for the purposes of studying how domestic courts can and should resort to international law, this *dialogue de sourds* between the national and the internationalist perspectives is all but useful. Hence the need to have a sort of *relocating* of the supremacy legal character of normativity along – in fact beside – the international-national axis. This kind of twilight zone of normative supremacy should be located parallel, in a sense, to both the international legal sphere and the domestic legal orders, while at the same time, it ought to be reinforced by the respective claims of superiority of, yet again, both the international legal sphere and the domestic legal orders. In terms of actual rule of law values, this space shall allow for what I call the *reflexive complementarity*<sup>44</sup> of both phenomena discussed in the previous section, ie the rule of law internationalized, on the one hand, and of the internationalization of the rule of law, on the other. The phrase 'reflexive complementarity'<sup>45</sup> is used here to refer to the idea of a circular, mutually self-perfecting relationship between the cause of a phenomenon and the effect upon that same phenomenon. For the present purposes, it means that the occurrence of the rule of law internationalized onto the international plane reverts back and affects not only itself, but also the twin phenomenon of the internationalization of the rule of law in other jurisdictions, and in fact complements the latter. Conversely, the occurrence of the internationalization of the rule of law is not only reflexive onto itself, but is also onto the other phenomenon of the rule of law internationalized, and in fact acts as a complement to it. Hence the suggestion of *reflexive complementarity*, as the twin phenomena are mutually self-perfecting in a circular fashion (onto itself and its twin).

<sup>42</sup> This application of the principle of supremacy of international law is at the basis of the law of treaties, as per Articles 27 and 46 of the Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, 8 International Legal Materials 679, as well as the law of international state responsibility, as per Articles 3 and 32 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, scheduled to the UNGA Resolution (A/RES/56/83) (28 January 2002).

<sup>43</sup> A. Nollkaemper, Rethinking the Supremacy of International Law, Amsterdam Center for International Law Working Papers (2009), available at <http://ssrn.com/abstract=1336946>. See also A. Watts, The International Rule of Law, 36 German Yearbook of International Law 15 (1993).

<sup>44</sup> On *reflexivity* in the social sciences, see the work by Anthony Giddens, and his structuration theory: A. Giddens, The Constitution of Society – Outline of the Theory of Structuration (Cambridge: Polity Press, 1984); that by Pierre Bourdieu, and his sociology of sociology: P. Bourdieu, Homo Academicus (Stanford: Stanford University Press, 1988); and P. Bourdieu and L.J.D. Wacquant, An Invitation to Reflexive Sociology (Cambridge: Polity Press, 1992); as well as that by Ulrich Beck, and his reflexive modernization: U. Beck, Risk Society – Towards a New Modernity (London: Sage Publications, 1992); and U. Beck, A. Giddens and S. Lash, Reflexive Modernization – Politics, Tradition and Aesthetics in the Modern Social Order (Stanford: Stanford University Press, 1994).

<sup>45</sup> The terminology of 'reflexive complementarity' is *sui generis* and of my own making.



The other idea, namely of separate, parallel space for normative supremacy as regards interlegality – where reflexive complementarity of the twin phenomena of the international rule of law occurs – draws from Nollkaemper's scholarship, which has suggested 'a third domain between the two levels'.<sup>46</sup> That is to say, I believe, the relocating ought to be between the rule of law at the international level and the rule of law at the domestic level. 'This is the rule of law as it applies to the overlapping sphere of domestic and international law', he wrote; such a sphere 'is characterized by the fact that international law and international institutions can fill rule of law gaps at the domestic law and vice versa, gaps brought about by the very growth of that overlap'.<sup>47</sup> This aspect of rule of law 'complementarity'<sup>48</sup> existing along (in fact, beside) the international legal sphere and the domestic legal orders – accomplished in a reflexive matter – is central to the proposition of an '*à la carte*' heuristic model that follows.

#### 4. THE THIN-THICK RULE OF LAW SPECTRUM AND ITS LIMITS

Speaking in the context of transition, Stromseth, Wippman and Brooks are categorical that one of the main reasons why many rule of law programs have been unsuccessful is '*the failure of many policymakers to examine or fully understand the very concept of "the rule of law"*'.<sup>49</sup> Too many people involved in the field adopt an 'I know it when I see it'<sup>50</sup> attitude toward the content of the rule of law which, though some say might have advantages – easy consensus, for one – raises serious problems, as 'it permits superficiality and obtuseness that has badly limited the efficacy of many rule of law promotion efforts'.<sup>51</sup> Hence the need to look, once again, at the genealogy of the rule of law.<sup>52</sup>

<sup>46</sup> A. Nollkaemper, The Internationalized Rule of Law, 1 Hague Journal on the Rule of Law 76 (2009).

<sup>47</sup> Nollkaemper, *supra* note 46. The author makes a similar point in A. Nollkaemper, The European Courts and the Security Council: Between Dédoublément Fonctionnel and Balancing of Values: Three Replies to Pasquale De Sena and Maria Chiara Vitucci, 20 European Journal of International Law 868 (2009).

<sup>48</sup> See also A. Nollkaemper, Multi-level Accountability in International Law: A Case Study of the Aftermath of Srebrenica, in Y. Shany and T. Broude, The Shifting Allocation of Authority in International Law – Considering Sovereignty, Supremacy and Subsidiarity 345 (Oxford: Hart Publishing, 2008).

<sup>49</sup> J. Stromseth, D. Wippman and R. Brooks, Can Might Make Rights?: Building the Rule of Law after Military Interventions 69 (Cambridge: Cambridge University Press, 2006) (italics in original). See also J. Stromseth, Post-Conflict Rule of Law Building: The Need for A Multi-Layered, Synergistic Approach, 49 William and Mary Law Review 1445 (2008).

<sup>50</sup> This terminology was also used by M. Krygier, False Dichotomies, True Perplexities, and the Rule of Law, in: A. Sajo (ed.), Human Rights with Modesty: The Problem of Universalism 251 (Leiden & Boston: Martinus Nijhoff, 2004).

<sup>51</sup> Stromseth, Wippman and Brooks, *supra* note 49, p. 69.

<sup>52</sup> See R. Peerenboom, Varieties of Rule of Law – An Introduction and Provisional Conclusion, in: R. Peerenboom (ed.), Asian Discourses of Rule of Law – Theories and Implementation of

It is generally agreed that, while the various ideas associated with the rule of law are undoubtedly very old<sup>53</sup> – going as far back as Plato and Aristotle<sup>54</sup> – the emergence of the rule of law as a mighty discursive tool within political and legal circles is relatively recent.<sup>55</sup> The expression itself was coined by 19<sup>th</sup> century author A.V. Dicey,<sup>56</sup> with his ‘Introduction to the Study of the Law of the Constitution’.<sup>57</sup> The British scholar wrote that the rule of law had ‘three meanings, or may be regarded from three different points of view.’<sup>58</sup> First, it entails ‘the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power.’<sup>59</sup> He further wrote: ‘In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.’<sup>60</sup>

The second prong in Dicey’s rule of law model relates to ‘equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts.’<sup>61</sup> ‘We mean, in the second place, when we speak of the “rule of law” as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’<sup>62</sup> Thirdly, according to Dicey, the rule of law entails that ‘the law of the constitution [...] are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.’<sup>63</sup> Thus, fundamental rights ‘are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.’<sup>64</sup> He suggested that this last element is very much a special attribute of British constitutionalism.

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Rule of Law in Twelve Asian Countries, France and the U.S. 1 (London & New York: Routledge, 2004).

<sup>53</sup> See J.N. Shklar, Political Theory and the Rule of Law, in: A.C. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology* 1 (Toronto: Carswell, 1987).

<sup>54</sup> Cf. Plato, *The Laws*, trans. by T.J. Saunders (London: Penguin Classics); and Aristotle, *Politics*, trans. by T.A. Sinclair (London: Penguin Classics).

<sup>55</sup> See J. Rose, The Rule of Law in the Western World: An Overview, 35 *Journal of Social Philosophy* 457 (2004).

<sup>56</sup> See H.W. Arndt, The Origins of Dicey’s Concept of the ‘Rule of Law’, 31 *Australian Law Journal* 117 (1957).

<sup>57</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885).

<sup>58</sup> Dicey, *supra* note 57, p. 202.

<sup>59</sup> Dicey, *supra* note 57.

<sup>60</sup> Dicey, *supra* note 57, p. 188.

<sup>61</sup> Dicey, *supra* note 57, p. 202.

<sup>62</sup> Dicey, *supra* note 57, p. 193 (footnotes omitted).

<sup>63</sup> Dicey, *supra* note 57, p. 203.

<sup>64</sup> Dicey, *supra* note 57, p. 195 (footnotes omitted). A common misreading of the last element in Dicey’s model holds that the rule of law requires protection for some substantive rights and freedoms. As Paul Craig pointed out, however, this ‘is not what Dicey actually said’; see P. Craig, Formal and Substantive Conception of the Rule of Law: An Analytical Framework, in: *Public Law* 473 (1997). Rather, his argument was simply that, providing a society wishes to

Accordingly, for Dicey, the rule of law means (1) to be ruled by law, not by discretionary power, (2) to be equal before the law, private individuals as well as government officials, and (3) to be submitted to 'the general jurisdiction of ordinary courts, the best source of legal protection'.<sup>65</sup> These core ideas, in one form or another, are found in the scholarship of most modern authors who write on these issues, both in legal studies and political sciences.<sup>66</sup> It does not follow, however, that there is any kind of consensus or agreement on the meaning and scope of the rule of law: on the contrary, it seems. Some criticisms have been voiced, for instance, on the vagueness and uncertainty of the concept,<sup>67</sup> with Raz famously daring to call the rule of law a mere slogan.<sup>68</sup>

For some time now, legal scholars have attempted to come up with versions or formulations of the concept and to put them into different categories or models. Craig suggested distinguishing between the *formal* conceptions of the rule of law, concerned with how the law is made and its essential attributes (clear, prospective), and the *substantive* conceptions of the rule of law, concerned with these formal precepts but also with some basic content of the law (justice, morality).<sup>69</sup> Tamanaha built on this classification and divided up the formal and substantive models further, making them progressively go from 'thinner' to 'thicker' formulations: that is, from *minimalist* accounts with few requirements to more requirements, each subsequent version including the components of the previous ones, leading to a *maximalist* version of the concept. Thus, starting with

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give protection to individual rights – that is, if and only if there has been a political will to have such legal guarantees – then, one way of doing it is better than another way, as far as the rule of law is concerned. Namely, the British common law technique ought to be favoured over the Continental written constitutional document technique. That is to say, judge-made-law individual rights would give more effective protection than bills or charters of rights and freedoms, because the latter are easier to abrogate or change by governments.

<sup>65</sup> This part of the discussion, in particular Dicey's contribution, draws from Beaulac, *supra* note 20.

<sup>66</sup> See J. Stapleton, Dicey and his Legacy, 16 History of Political Thought 234 (1995) and Rose, *supra* note 55, p. 458. For a recent example see, in international law, I. Brownlie, The Rule of Law in International Affairs 212 (The Hague: Martinus Nijhoff, 1998) and, in Anglo-Saxon public law, H. Barnett, Constitutional and Administrative Law, 91 (London: Cavendish Publishing, 2002, 4<sup>th</sup> ed.), where Dicey's three-prong formulation is reproduced verbatim and analysed in detail.

<sup>67</sup> See Shklar, *supra* note 53, p. 1: 'It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.'

<sup>68</sup> J. Raz, The Rule of Law and its Virtue (first published in 93 Law Quarterly Review 195 (1977)), in: J. Raz, The Authority of Law: Essays on Law and Morality 210 (Oxford: Clarendon Press, 1979): 'Not uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated.'

<sup>69</sup> Craig, *supra* note 64. See also P. Craig, Constitutional Foundations, the Rule of Law and Supremacy, in: Public Law 92 (2003).

the formal conceptions of the rule of law, the thinnest is (1) the ‘rule-by-law’ (law as instrument of government), then (2) ‘formal legality’ (law that is general, prospective, clear, certain), and the thickest of the formal versions adds (3) ‘democracy’ to legality (consent determines content of law); then follow substantive conceptions of the rule of law, which all encompass the formal elements, but refer also to other legal features such as (4) ‘individuals rights’ (property, contract, privacy, autonomy), then a thicker version yet includes (5) ‘rights of dignity and/or justice’ and, finally, the thickest of the models of the substantive rule of law – of all versions in fact – entails a dimension of (6) ‘social welfare’ (substantive equality, welfare, community preservation).<sup>70</sup> This scheme I like to call the *sliding scale* of rule of law values, from the minimalist thin end to the maximalist thick end, according to a sort of rule of law ‘spectrum’.

A number of scholars in legal studies and political sciences have followed a modest, largely positivist version of the rule of law, advocating limited models that emphasise the formalistic or process-oriented aspects. Fuller, for instance, argues in favour of a system of general rules created and applied consistently with procedural justice and fairness.<sup>71</sup> Eight conditions need to be met: (1) a system of rules; (2) promulgation and publication of the rules; (3) avoidance of retroactive application; (4) clear and intelligible rules; (5) avoidance of contradictory rules; (6) practicable rules; (7) consistency of rules over time; and (8) congruence between official actions and declared rules.<sup>72</sup> A similar enumeration of eight factors essential to the rule of law is given by Finnis.<sup>73</sup> Raz,<sup>74</sup> too, has a list of (yet again) eight elements that should be found in a rule of law system; although slightly differently formulated than Fuller’s and Finnis’, they considerably overlap and all relate to formal aspects of law, on the thinner side of the scale.<sup>75</sup>

<sup>70</sup> B.Z. Tamanaha, *On the Rule of Law – History, Politics, Theory* 91 ff (Cambridge: Cambridge University Press, 2004).

<sup>71</sup> L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969, 2<sup>nd</sup> ed.). On Fuller’s, as well as Raz’s, formalistic conception of the rule of law, see M. Bennett, ‘The “Rule of Law” Means Literally What it Says: The Rule of Law’: Fuller and Raz on Formal Legality and the Concept of Law, 32 *Australian Journal of Legal Philosophy* 90 (2007).

<sup>72</sup> Fuller, *supra* note 71, p. 38–39. See also R.P. George, Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition, 46 *American Journal of Jurisprudence* 249 (2001).

<sup>73</sup> J. Finnis, *Natural Law and Natural Rights* 270 (Oxford: Clarendon Press, 1980). For his part, R.S. Summers, *The Principles of the Rule of Law*, 74 *Notre Dame Law Review* 1691 (1999), stretches the list to eighteen such formal requirements, though only providing a more detailed account of the same basic ideas.

<sup>74</sup> Raz, *supra* note 68, p. 214–218. For an interesting assessment of Raz’s theory on the rule of law, see Y. Hasebe, *The Rule of Law and Its Predicament*, 17 *Ratio Juris* 489 (2004).

<sup>75</sup> See also, favouring the formalistic version of the rule of law, J. Waldron, *The Concept and the Rule of Law*, 43 *Georgia Law Review* 1 (2008); and M.J. Radin, *Reconsidering the Rule of Law*, 69 *Boston University Law Review* 781 (1989).

At the other end of the spectrum, a thicker formulation '*does not necessarily reject the notion that the rule of law has important structural and formal elements – predictability, universality, nonarbitrariness, and so on – but insists that true rule of law also requires particular substantive commitments.*'<sup>76</sup> Now, what are those thick rule of law features? Peerenboom described them as 'elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal communitarian, collectivist, "Asian Values," and so on).'<sup>77</sup> Some of the well-recognized proponents of a maximalist model of the rule of law are Dworkin,<sup>78</sup> Sunstein,<sup>79</sup> and Shklar.<sup>80</sup> Quite recently, Lord Bingham dwelled upon the meaning of the rule of law in the context of the 2005 constitutional reform in the United Kingdom, offering a definition containing substantive elements, notably fundamental human rights.<sup>81</sup> The thicker formulations of the rule of law have been harshly criticised by several commentators, such as Raz, who notoriously wrote that '[i]f the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy.'<sup>82</sup>

Be that as it may, the paradigmatic question becomes: Is the thin-thick sliding scale approach the right methodology to inquire into possible heuristic models for the rule of law in transition and post-conflict societies? To make the point, consider the following. Some argue that we should lean toward the minimalist end of the spectrum and evacuate the substantive rule of law features, with a view to improving support for structural reforms and good governance measures. 'The more the theory of the rule of law is "de-substantivized" to embrace only those institutional forms that as such serve values associated with a formal rule of law', Summers writes, 'the more likely it is that the formal rule of law will receive its due.'<sup>83</sup> Conversely, so goes the argument, thicker versions of the rule

<sup>76</sup> Stromseth, Wippman and Brooks, *supra* note 49, p. 71 (italics in original). See also D. Kairys, Searching for the Rule of Law, 36 Suffolk University Law Review 307 (2003).

<sup>77</sup> R. Peerenboom, Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China, 23 Michigan Journal of International Law 472 (2002).

<sup>78</sup> See R. Dworkin, Political Judges and the Rule of Law, in: R. Dworkin, A Matter of Principle 9 (Cambridge: Harvard University Press, 1985). On Dworkin and the rule of law, see J. Waldron, The Rule of Law as a Theater of Debate, in: J. Burley (ed.), Dworkin and His Critics 319 (Oxford: Blackwell, 2004).

<sup>79</sup> See C. Sunstein, Democracy's Constitution (Oxford & New York: Oxford University Press, 2001).

<sup>80</sup> See J.N. Shklar, Political Thought and Political Thinkers (Chicago: University of Chicago Press, 1998).

<sup>81</sup> T. Bingham, The Rule of Law, Cambridge Law Journal 67 (2006), conference paper presented at the Sixth Sir David Williams Lecture, given at the University of Cambridge on 16 November 2006. See also T. Bingham, The Rule of Law and the Sovereignty of Parliament, 19 King's Law Journal 223 (2008); and, his latest contribution, T. Bingham, The Rule of Law (London: Allen Lane, 2010).

<sup>82</sup> Raz, *supra* note 68, p. 211.

<sup>83</sup> R.S. Summers, A Formal Theory of the Rule of Law, 6 Ratio Juris 137 (1993).

of law are more likely to be controversial and polarizing in society. Summers, again, contends that 'if the rule of law is taken in general discourse within the society to mean not just governance through rules (and facilitative institutional features) but also capitalism (or socialism), a Bill of Rights (or no Bill of Rights), general democracy (or limited democracy), *et cetera*, then the formal rule of law is not so likely to command the range of *neutral* support it merits (and requires).'<sup>84</sup>

However, this argument seems to be flawed and, as a matter of fact, warrants going past the thin-thick spectrum. Suggesting that, strategically, the better approach is to start with a formal conception of the rule of law, and then (presumably) to move toward a more substantive one, is based on very little hard evidence, if any. Brooks disputed the assumption that the promotion of a thin rule of law version 'will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law.'<sup>85</sup> More importantly, too thin an account of the rule of law, with no basic human rights content for instance, could well be counter-productive, as the reforming measures may lack apparent legitimacy and, as a result, might be considered unsatisfactory by people in societies. On this facet, Trebilcock and Daniels wrote that 'it seems plausible that interested parties are at least as likely to be aggrieved by what is *left out* by a formalistic approach as by what is *brought in* by a more substantive one.'<sup>86</sup> A bare minimalist model, in other words, simply cannot be up to the task given the hype and high aspirations that the rule of law – this formulation of 'hurrah' words<sup>87</sup> – does provoke and generate.

Trebilcock and Daniels are interested in development, of course, but the same observation no doubt applies *mutatis mutandis* to transition situations, where rule of law performative power ought to contribute to moving away from the old oppressive governance system to a new constitutional structure arrangement acceptable to people. Accordingly, a transitional formulation of the concept must take into account formal rule of law values, though maybe not all of them along a spectrum, and it must also include substantive rule of law values, though again not all the way up a spectrum toward a maximalist version. Hence, instead of the typical sliding scale approach, going progressively from thin to thick formulations, what I suggest is an *à la carte* model for the rule of law.

<sup>84</sup> Summers, *supra* note 83 (italics in original). See also W.C. Whitford, The Rule of Law, Wisconsin Law Review 726 (2000).

<sup>85</sup> R.E. Brooks, The New Imperialism: Violence, Norms, and the Rule of Law, 101 Michigan Law Review 2284 (2003).

<sup>86</sup> M.J. Trebilcock and R.J. Daniels, Rule of Law Reform and Development – Charting the Fragile Path of Progress 25 (Cheltenham & Northampton: Edward Elgar, 2008) (italics in original).

<sup>87</sup> See *supra* note 4 and accompanying text.

## 5. RULE OF LAW *À LA CARTE* AND RECOMMENDATIONS OF THE *CHEF*

Preliminarily, let us address a concern with the suggestion that an *à la carte* model for the rule of law may not be heuristic at all, be it in general or for the present purposes. It was Palombella who opined that although the rule of law is flexible, ‘its normative meaning does not essentially change’; indeed, ‘any notion of the rule of law as something relative, its meaning varying from jurisdiction to jurisdiction, is unacceptable.’<sup>88</sup> He referred to some linguistic usages of the concept – namely, rule of law, *Stato di diritto*, *Rechtsstaat*<sup>89</sup> – to support this contention, which he extended to the context of the European Union.<sup>90</sup> While I tend to agree with my distinguished Italian colleague that uniformity in one’s model of the rule of law is imperative within the vanguard supra/trans-national legal order in Europe<sup>91</sup> (and perhaps in applying as well an international rule of law reasoning to interlegality issues in general<sup>92</sup>), I do not think that a strict commonality is possible, and is certainly not ontologically required, for the concept to apply to states in transition, particularly in regard to the role their domestic courts can play by means of resorting to international law.

Reflecting upon the future and ‘the challenges and prospect for the field’ of the rule of law in the 2009 inaugural issue of the Hague Journal on the Rule of Law, Peerenboom identified a clear ‘need to disaggregate rule of law and develop more differentiated rule of law promotion plans.’<sup>93</sup> Although efforts are being made in that way, he deplored the continuing overall tendency ‘to treat rule of law and rule of law promotion as a single entity or enterprise, and to rely on generally applicable, and hence overly simple, highly reductive and exceedingly abstract, international best practices and off-the-shelf rule of law toolkits.’<sup>94</sup>

<sup>88</sup> G. Palombella, The Rule of Law Beyond the State: Failures, Promises, and Theory, 7 International Journal of Constitutional Law 455 (2009).

<sup>89</sup> For references on these linguistic manifestations of the rule of law in different European languages, see L. Heuschling, *État de droit, Rechtsstaat, Rule of Law* (Paris: Dalloz, 2002); E. Carpano, *État de droit et droits européens* (Paris: L’Harmattan, 2005); and P. Costa and D. Zolo (eds), *The Rule of Law – History, Theory and Criticism* (Dordrecht: Springer, 2007). See also the following papers: J.-Y. Morin, The Rule of Law and the *Rechtsstaat* Concept: A Comparison, in: E. McWhinney, J. Zaslove and W. Wolf (eds), *Federalism-in-the-Making – Contemporary Canadian and German Constitutionalism, National and Transnational* 60 (Dordrecht: Kluwer, 1992); and R. Grote, Rule of Law, *Rechtsstaat* and ‘*État de droit*’, in: S. Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* 269 (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

<sup>90</sup> Palombella, *supra* note 88. See also The Rule of Law and Its Core, in: G. Palombella and N. Walker (eds), *Relocating the Rule of Law* 17 (Oxford: Hart Publishing, 2009).

<sup>91</sup> See N. Walker, The Rule of Law and the EU: Necessity’s Mixed Virtue, in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* 119 (Oxford: Hart Publishing, 2009).

<sup>92</sup> Which was at the centre of Palombella’s paper, *supra* note 88.

<sup>93</sup> Peerenboom, *supra* note 13, p. 7.

<sup>94</sup> Peerenboom, *supra* note 13.

Instead, he argued in favour of a 'more refined typology of ideal types or patterns of developing countries and rule of law challenges.'<sup>95</sup> For states in transition, in particular, he opined that each situation 'presents a different set of issues or challenges that requires something more than the standard set of one-size-fits-all prescriptions.'<sup>96</sup> In full agreement with Peerenboom, I would further argue that it is considerably reducing the potential performative power of the concept to compel it to a pre-set menu. In contrast, an *à la carte* approach to the rule of law can prove a most valuable heuristic model, at least in relation to post-conflict and post-dictatorial societies, the circumstances relevant here.

Now, recalling that this book is founded on the hypothesis of an empowerment of domestic courts, at a so-called 'international constitutional moment', through their participatory role in the national application of international law,<sup>97</sup> the proposed *à la carte* approach to the rule of law is meant to provide a model to organize the relevant values, actual and aspirational, within a new or true stable constitutional arrangement. These rule of law values, both formal and substantive, will be at play in the separate, parallel space of supreme normative authority, where they will engage in a process of reflexive complementarity,<sup>98</sup> involving components of the international legal sphere and of the respective transitional domestic legal orders.

Having said that, am I stuck once again with yet another 'sort of laundry list of features that a healthy legal system should have',<sup>99</sup> to borrow from Jeremy Waldron, albeit in transitional *sui generis* settings? For the purposes of the present conceptual chapter, there is no need to speculate on an exhaustive list of rule of law values that the 'perfect' states in transition ought to pick from the *à la carte* menu and include in their parallel space of normative supremacy, within which domestic courts can justify recourse to norms of international law. Other contributors in this book are likely to provide much more useful insights as to the case-by-case content of the *à la carte* model for the rule of law. As far as I am concerned, I shall venture no further than what is likely to gather consensus, among the different actors, in terms of transition society common features and rule of law values: that is, what is likely needed in all jurisdictions that have gone through violent conflicts or have moved out of authoritarian regimes.

<sup>95</sup> Peerenboom, *supra* note 13, p. 8.

<sup>96</sup> Peerenboom, *supra* note 13.

<sup>97</sup> Of course, such participation by domestic courts in transitional processes would certainly amount, in part at least, to a 'judicialization of politics', to borrow from A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford & New York: Oxford University Press, 2000). See also R. Hirschl, *Toward Juristocracy – The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

<sup>98</sup> See *supra* note 44–48 and accompanying text.

<sup>99</sup> Waldron, *supra* note 16, p. 154. See also T. Ringer, Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the 'Rule of Law' and its Place in Development Theory and Practice, 10 *Yale Human Rights & Development Law Journal* 193 (2007).



Metaphorically, while some courses are indeed *à la carte*, some others are forcefully recommended by the *chef* given his type of cuisine, ie the transition kind.

One such strong recommendation would be the basic rule of law values linked to being ruled by law, meaning that law should constitute the instrument of governance in all transition societies. These values correspond, incidentally, to the first prong in Dicey's conception of the rule of law, namely to be ruled by law, not by discretionary power. Still, on the formal part of the menu come the values associated with legality, requiring that law be general, prospective, clear, and certain. In the circumstances of jurisdictions in transition, however, these features will certainly have to be assessed case-by-case, and are thus fully *à la carte*.<sup>100</sup> Then the next course along, toward more substantive items, are the important democratic values: that is to say, popular consent should dictate the content of the law. Intuitively – and it shall be empirically verified – actors in transition societies, in all of them, will agree that democracy constitutes a non-negotiable *chef* recommendation on the menu *carte*.<sup>101</sup>

Then come the values associated with the more maximalist substantive thick rule of law version, namely fundamental human rights, including human dignity, as well as fairness, equity, justice (restorative, retributive, distributive),<sup>102</sup> and for dessert, social welfare (substantive equality, community preservation). Here, the *à la carte* approach comes in handy, not only for allowing case-by-case analysis (which is not my concern here), but also to assess whether there could be features common to transition societies. Take human rights: we need not go wholesale in identifying what should be viewed as applicable to all states in transition; rather, going piecemeal, we can bring in rights and liberties – criminal legal guarantees, for example – deemed warranted for transition circumstances. One such fundamental right – a must on the selected menu of any society in transition – is the right to equality without discrimination, which incidentally relates to Dicey's second leg of rule of law (equality before the law, for private individuals and for government officials). On the other hand, substantive equality, as well as the type of justice sought – restorative, retributive, distributive – will need to be decided *à la pièce*, for sure.

It is *à propos* to close with the substantive rule of law values linked to judicial decision-making processes, namely fairness and equity,<sup>103</sup> given that the

<sup>100</sup> Of course, this would be harshly denounced by Justice Antonin Scalia and like-minded authors; see A. Scalia, The Rule of Law as a Law of Rules, 56 University of Chicago Law Review 1175 (1989).

<sup>101</sup> See, generally, M. Rosenfeld, The Rule of Law and the Legitimacy of Constitutional Democracy, 74 Southern California Law Review 1307 (2001).

<sup>102</sup> See S. Golub, Make Justice the Organizing Principle of the Rule of Law Field, 1 Hague Journal on the Rule of Law 61 (2009).

<sup>103</sup> On the necessity of fairness and equity in international adjudicative decision-making, see J.M. Farrall, United Nations Sanctions and the Rule of Law (Cambridge: Cambridge University Press, 2007). See also, on the role domestic courts can play in that regard, E. de

problematics at hand concern the role domestic courts can play in states in transition by resorting to international law. These elements, of course, fall squarely within the third and last category of values identified by Dicey in the 19<sup>th</sup> century, namely to be subject to the general jurisdiction of ordinary courts, which is the best source of legal protection, including some form of judicial review.<sup>104</sup> Precisely here, at this junction, meet (and in an acute fashion) the matters of interlegality discussed above<sup>105</sup> – ie, the parallel space of supreme normative authority, along with reflexive complementarity of the rule of law internationalized and the internationalization of the rule of law phenomena – and the proposed *à la carte* approach to rule of law values in states in transition.<sup>106</sup> Fairness and equity in decision-making processes of domestic courts are, quite simply, quintessential to the latter role in these societies. Procedural fairness and judicial equity, indeed, go to the core of any transitional rule of law project. Using the same metaphor, one last time, these values constitute the most important course (ie *le plat de résistance*) in the cuisine of transition and, albeit found on the *carte*, they surely are non-negotiable with the *chef*.

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Wet, A. Nollkaemper and P. Dijkstra (eds), *Review of the Security Council by Member States* (Antwerp: Intersentia, 2003).

<sup>104</sup> On judicial review and the rule of law, see L.B. Tremblay, *Two Models of Constitutionalism and the Legitimacy of Law: Dicey or Marshall?*, 6 *Oxford University Commonwealth Law Journal* 77 (2006). Within a judicial review mechanism, the instrumental role of the idea of *proportionality* should be noted: see D.M. Beatty, *The Ultimate Rule of Law* (Oxford & New York: Oxford University Press, 2004); and D.M. Beatty, *Law's Golden Rule*, in: G. Palombella & N. Walker (eds), *Relocating the Rule of Law* 99 (Oxford: Hart Publishing, 2009).

<sup>105</sup> See *supra*, section 3.

<sup>106</sup> This is an attempt to answer Randall Peerenboom's invitation, at least in regard to theoretical input; see Peerenboom, *supra* note 13, p. 8: 'Another area where there needs to be more theoretical and empirical work is in the relationship between international rule of law and domestic rule of law.'