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KING REX V. JUDGE JUDEX: ADJUDICATING TRANSNATIONAL LAW

*Fabien Gélinas**

Introduction

C'est pour moi un très grand honneur de me retrouver devant vous ce soir pour marquer mon accession à la Chaire Sir William C. Macdonald. Je vous sais gré d'avoir accepté de consacrer à cet événement quelques-unes des heures trop peu nombreuses du mois de février.

Je tenais à profiter de cette occasion formelle pour remercier mes collègues titulaires de chaires à la Faculté de droit au printemps de l'année 2016, et tout particulièrement notre ancien doyen Daniel Jutras, pour la confiance qu'ils m'ont témoignée en appuyant ma désignation. J'ai été, et je le suis encore, touché et honoré de cette confiance. Je remercie également notre doyen actuel pour cette initiative de redonner un élan à la tradition des leçons inaugurales.

Le thème de la Chaire est un peu large, puisqu'il s'agit du droit. C'est donc de droit que je vais vous entretenir ce soir ; d'aucuns, les mauvaises langues, diront qu'il s'agit d'un rare événement pour cette Faculté. J'aborderai cette vaste question sous l'angle du droit qui se déploie à travers les frontières étatiques.

Renouant avec une tradition qui remonte aux jeunes années des premières Facultés de droit en Occident, et comme le suggère le titre indiqué dans le programme, je prononcerai ma conférence en Latin, parsemé toutefois, rassurez-vous, de beaucoup de *lingua franca*, c'est-à-dire d'anglais.

When writing a paper that is not tied to a conference, giving it a title is the last thing I do. When a conference is announced ahead of time, however, the title comes first and the next thing on the agenda is to figure out what the title could possibly mean.

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I have a memory, which is probably more vivid than accurate, about a series of lectures on the concept of law which I followed in England many years ago. The lectures were given by a great figure of Oxonian Jurisprudence who had much to say. In this course of lectures the great professor spent the first few weeks on the word "The". The bulk of the rest of the term was then spent on the word "Concept", which, as you would have guessed, left practically no time for the last of the three words in the title of the series, that is, "Law". So I'll try not to spend too much time on the title.

Let me start with King Rex, or Rex King, to stick to Latin. Many of you will have heard of him. He's the character used by American legal theorist Lon Fuller in his celebrated volume *The Morality of Law*, to introduce the components of the rule of law through the failures of Rex in establishing it.

Rex is ambitious for his kingdom and wants to reform the legal system as soon as he becomes King. To do so he wants a clean slate and begins by setting aside all existing laws. He then fails in drafting a code, tries rule-free adjudication, then adjudication under a secret code, followed by the successive publication of four codes.

The first code was poorly conceived and drafted, and no one, including lawyers, could understand it. The second was laden with contradictions. The third was full of requirements that were impossible for the subjects to meet. The fourth was a model of clarity and coherence, and did not demand the impossible. But it took so long for Rex to get there that as soon as the code was published, it was subjected to a daily stream of amendments. Once the code had stabilized a little, it turned out that the rules of the code were mostly honoured in the breach by the administration.

You will have counted 8 ways to fail in establishing the rule of law.

When I first read the story several decades ago, I found it at once entertaining, enlightening and unsurprising. But over the years, as I gradually became acquainted with Fuller's other writings, something in the story began to bother me. What bothered me was the sustained focus of the story on legislation, that is: the deliberate design, adoption and enactment of centralized written law. This focus is puzzling because so much of Fuller's other writings focus on implicit law, on practices and interactions, and notably on adjudication as an important form of social ordering and a source of law.

This is where Judge Judex comes in. Her name plays on the dual meaning of the term Judex at different periods of roman institutions: a

public judge and a private arbitrator.[1] Judge Judy, if you will, crossed with another TV personality, closer to home, called L'Arbitre, only with a classy, cosmopolitan touch of the global about her, and a much more discrete outlook. Judex sits on a tribunal tasked with adjudicating a transnational dispute according to law.

What do I mean by transnational? For our purposes here it will be enough to adopt what Phillip Jessup had in mind when he put forward the term in his Storrs lectures in 1956, that is: "all law which regulates actions or events that transcend national frontiers."[2] This was meant to include public international law, private international law, and "other rules which do not wholly fit into such standard categories."[3]

What I'd like to explore with you tonight is whether and how Judge Judex can bring a measure of the rule of law to a seemingly growing number, at least up to now, of transnational interactions, in a space where there is no King Rex in sight, no one who can legislate for all. We won't be solving this puzzle tonight, obviously, but we can look at and identify some patterns and ideas that might help us form at least a partial account of transnational legal practice. We will first put King Rex and the rule of law in a bit of context before turning to Judge Judex's possible contribution.

King Rex in Context

It is important to place the concept of the rule of law in a broader context because we're looking at an instantiation of law, transnational law, that is global in its reach and aspirations. The rule of law is also global in its reach, at least as a formula. It has been dubbed "the only universally shared good."[4] Even governments that reject democracy and human rights as Western concepts that are basically unsuitable to other societies and

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1 See Giacomo Marchisio, *The Notion of Award in International Commercial Arbitration: A Comparative Analysis of French Law, English Law, and the UNCITRAL Model Law* (The Hague: Kluwer Law International, 2017) at 53–55; E Metzger, "An outline of Roman civil procedure" (2013) 9 Roman Leg Trad 1 at 10 (standing for the following proposition: under classical Roman law, civil justice was a type of state-sanctioned private arbitration); HF Jolowicz & Barry Nicholas, *A Historical Introduction to the Study of Roman Law* (Cambridge: Cambridge University Press, 1972) at 440 (the imperial *cognitio extra ordinem* consisted of an adjudicative process led by a professional judge on the basis of substantive law: *ibid* at 397).

2 Philip C Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) at 2.

3 *Ibid*.

4 Brian Z Tamanaha, "The Rule of Law for Everyone?" (2002) 55:1 Current Leg Probs 97 at 100.

cultures will at least pay lip service to the rule of law. This is so, of course, in part because the rule of law means different things to different people.

In order to isolate a core meaning of the rule of law that can be said to be truly universal, Brian Tamanaha has distinguished the pre-liberal core of the concept from its liberal conception. The pre-liberal core is about the protection of society against government tyranny and simply insists that the ruler operate within a legal framework, be it one of constitutional, conventional, or customary law.[5]

The general idea is recognizable in Aristotle's recommendation that because man behaves in his own interests and becomes a tyrant, "we do not allow a *man* to rule, but *rational principle*,"[6] and that "[i]t is more proper that law should govern than any one of the citizens."[7] The idea was recognized in the successive versions of Magna Carta, which soon allowed Henry de Bracton to write, in the thirteenth century, that the king is under the law,[8] which was consistent at the time with at least some accounts of customary law on the continent.[9]

It is the same idea that in 1607 allowed Chief Justice Edward Coke to keep King James from sitting as a judge in the law courts,[10] an idea which Coke later took up again when promoting the Petition of Rights in 1628, this time as a Parliamentarian, because the king had fired him as Chief Justice.[11] This was a time when reality was as harsh as what we now seem to confuse with television. I wonder why I can now so easily picture the King saying "You're fired."

From that period many references appear in the literature to this idea and even to the term "Empire of Law" or "Rule of Law".[12] The formula

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5 See *ibid* at 104–05.

6 Aristotle, *The Nicomachean Ethics*, translated by David Ross (Oxford: Oxford University Press, 2009) at 91 [emphasis in original].

7 *Aristotle's Politics: A Treatise on Government*, translated by William Ellis (London: George Routledge and Sons, 1895), bk 3, ch 16 at 117.

8 See Henrici de Bracton, *De Legibus et Consuetudinibus Angliae*, ed by Sir Travers Twiss (London: Longman & Co, 1878) vol 1 at 39.

9 *Ibid* at 3.

10 See *Prohibitions*, 12 Co Rep 64 at 1342, [1607] EWHC KB J23.

11 See Fabien Gélinas, "The Dual Rationale of Judicial Independence" in Alain Marciano, ed, *Constitutional Mythologies: New Perspectives on Controlling the State* (New York: Springer, 2011) 135 at 149–50, nn 84, 85 [Gélinas, "Dual Rationale"]; Allen D Boyer, "Coke, Sir Edward (1552–1634)" in David Cannadine, ed, *Oxford Dictionary of National Biography* (2004), online: <www.oxforddnb.com> [perma.cc/BA8U-9LKM].

12 See e.g. Voltaire, "Pensées sur le gouvernement (1752)" in M Beuchot, ed, *Œuvres de Voltaire* (Paris: Lefèvre, 1830) at 425; Montesquieu, *De l'esprit des lois* (London: publisher unknown, 1768) vol 6, ch 3; John Locke, *The Second Treatise of Civil Government*

that would eventually best capture the imagination of future generations we owe to John Adams. He uses it in a paper published in 1775[13] and again in the Constitution of Massachusetts, which he drafted in 1780: the institutions of government are designed, and I quote: "to the end it may be a government of laws and not of men."[14]

At that time, the broader, liberal conception of the rule of law had firmly taken hold on both sides of the Atlantic. Unlike the pre-liberal core, the broader, liberal conception of the rule of law is not limited to a protection against government tyranny but extends to the ways in which law secures individual liberty. One might object that individual liberty is the ultimate point of protecting against government tyranny and that what Tamanaha terms the pre-liberal core is therefore not distinct from the liberal idea of the rule of law.[15] As he shows, however, the protection against government tyranny through law is a good that is worth securing irrespective of one's political theory, and was indeed clearly being pursued before our idea of individual liberty took hold. The barons who imposed Magna Carta on King John were not protecting individual liberty but what they saw as the right relation between king and aristocracy in a medieval society built on pre-defined status.[16]

Individual liberty is an enlightenment idea, notably seen in Locke[17] and Voltaire.[18] The idea is that liberty is "the right to do whatever the law permits" as Montesquieu put it.[19] Here the quality of individual liberty depends notably on certain qualities of the law, the qualities that King Rex took a lifetime to uncover.

Within the liberal conception it will be useful for us to further distinguish two aspects. Writing in the 1940s, Friederich Hayek gave a cele-

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and A Letter Concerning Toleration, ed by JW Gough (Oxford: Basil Blackwell, 1948) at 13; Rev Samuel Rutherford, *Lex, Rex, or The Law and the Prince* (Edinburgh: Robert Ogle & Oliver & Boyd, 1843) at 194.

13 See John Adams, *Novanglus and Massachusettensis* (Boston: Hews & Goss, 1819) at 84 (Adams relied on James Harrington's *The Commonwealth of Oceana*, a book published more than a hundred years earlier, at 81). Harrington had written that the "art whereby a civil society of men is instituted and preserved upon the foundation of common right or interest; or, to follow Aristotle and Livy, it is the empire of laws, and not of men." James Harrington, *The Commonwealth of Oceana* (London: George Routledge & Sons, 1887) at 16.

14 Mass Const, part 1, art 30.

15 See generally Tamanaha, *supra* note 4.

16 *Ibid* at 113.

17 See e.g. Locke, *supra* note 12 at ch 4, 9.

18 See Voltaire, *supra* note 12 at s 7.

19 Montesquieu, *supra* note 12 at 308–09 [translated by author].

brated account of the liberal conception explaining that the quality of clear, general, prospective and public laws makes it, and I quote, "possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[20] Hayek was an economist and treated the following two aspects of the liberal conception as inseparable: the rule of law as economic liberty on one hand, and as political liberty and human dignity through individual agency on the other.[21]

Hayek's first aspect, the rule of law as economic liberty, was eventually seized upon most notably by the World Bank: the qualities of the law highlighted by King Rex's story are essential to market exchanges and commerce, making possible the growth of interactions between strangers.[22]

The second aspect is that King Rex's rule of law qualities secure human dignity by creating space for individual agency. It allows individuals to exercise agency by planning their lives in a relatively stable normative environment. It is this second aspect of the liberal conception which, by focusing on the broad notion of individual human dignity, opens it up to a thicker version, a rule of law that ultimately takes onboard the protection of all substantive human rights, including democratic rights. Hayek's point was that economic liberty was a necessary condition for dignity as agency, and eventually political liberty, not that it was a sufficient condition.[23] This means that the first aspect, like the pre-liberal conception, can be pursued independently. Let's put a marker on this so that we can come back to it later tonight.

Lex — Between Positive Law and Reason

Before we start talking about Judex, I need to highlight an important shift that has taken place in the way law is practiced, viewed and experienced in Western societies. The rule of law ideas we've been discussing gained their current prominence due in no small measure to the French and the American revolution, which were rejections of monarchical sovereign powers and prerogatives in favour of a rule by the people through

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20 FA Hayek, *The Road to Serfdom,* 2nd ed (New York: Routledge, 2001) at 75.

21 *Ibid* at 79–82. See also Tamanaha, *supra* note 4 at 112–13, further explaining Hayek's vision.

22 See Lon L Fuller, "Human Interaction and the Law" (1969) 14 Am J Juris 1 at 9, 33–34 [Fuller, "Human Interaction"]. See also Ibrahim Shihata, "Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy" in *The World Bank in a Changing World,* vol 3 (The Hague: Martinus Nijhoff, 2000) 185 at 189.

23 See e.g. Hayek, *supra* note 20 at 79–82.

law.[24] This obviously put a premium on legislators, and more pointedly on legislation as the most advanced form of law, one that could legitimately be the central preoccupation of King Rex. Unlike customary law and case law, legislation seems to lend itself easily to being prospective, clear, general, accessible, and so on.

More particularly, legislation is the ideal type of posited law; law that is laid down by an act of will and authority. Since the first half of the nineteenth century, legislation has thus served as the main vehicle for an important component of formal legal methodology. With a view to increasing predictability, formal legal methodology tends to turn complex natural reasoning into artificial binary reasoning: the rule is or is not valid; it is or it is not in force; it is or it is not applicable.[25] The shift I want to highlight is that legislation has now lost a lot of the panache it had acquired when rule of law ideas were being institutionally formalized as a result of the French and the American revolutions.

To cut a long story short I will focus on three points. The first point is that legislators lost a great deal of credibility in the period that led up to and during the Second World war, when unspeakable deeds were done under cover of legislation.[26] A very large number of countries reacted by placing vaguely worded constitutional limits on legislators, limits which are implemented through judicial review of legislation.[27] Starting with the protection of individuals against governments and then legislators, we're now seeing, here and elsewhere, a movement toward the horizontalization of human rights standards, that is their extension to private relations.[28] We see that proportionality reasoning and balancing have become perva-

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24 See Gélinas, "Dual Rationale", *supra* note 11 at 149, 151.

25 See generally Andrew Halpin, "The Applications of Bivalent Logic, and the Misapplication of Multivalent Logic to Law" in H Patrick Glenn & Lionel D Smith, *Law and the new logics* (Cambridge, UK: Cambridge University Press, 2017). On binary logic in Western legal thought, see H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law,* 5th ed (Oxford: Oxford University Press, 2014) at 368–72 [Glenn, *Legal Traditions*]. See also John Finnis, "Natural Law and Legal Reasoning" in Robert P George, ed, *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 134 at 150.

26 See Hayek, *supra* note 20 at 85–87.

27 See Carlo Guarnieri & Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford: Oxford University Press, 2002) at 134–40; Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004) at 1.

28 See generally Johan van der Walt, *The Horizontal Effect Revolution and the Question of Sovereignty* (Berlin: De Gruyter, 2014) at 1–4. For a survey of selected cases, see Mark Tushnet, "The Issue of State Action/Horizontal Effect in Comparative Constitutional Law" (2003) 1:1 Intl J Const L 79 at 80–84.

sive in judicial reasoning in countless settings.[29] All of this seems to bring legal reasoning closer to one of the many meanings of its latin root, *ratio*, that is, the measure of proportion, and to impose the burden of that measure largely on adjudicators.[30]

The second related point to which I wish to draw attention is that binary thinking and reasoning is being challenged not only in law, but in the hard sciences as well. The considerable limits of Aristotelian, first order logic have long been exposed for all to see following many unsuccessful attempts at modelling real life as well as scientific reasoning for the purposes of automation.[31] The potential of so-called multivalent or fuzzy logic is increasingly being explored in most disciplines.[32] Of particular interest to lawyers is that the artificial intelligence strategy currently showing real promise in law actually puts to the side, at least for now, all attempts at modelling legal reasoning through logic, in favour of a bottom-up approach of deep learning starting from cases.[33] This puts additional strain on binary legal methodology in particular, and on legal forms more generally, and again shifts emphasis from posited law to the law coming out of adjudicative reasoning.

The third point derives from the first two: the spread of multivalent approaches and the increasingly overt and visible reliance on vague standards and principles in the human rights context have drawn attention to the judicial exercise of authority on a day-to-day basis, in all contexts. Our Canadian Supreme Court was pushed to a fairly spectacular acknowledgement of this when it attempted, in *R. v. Nova Scotia Pharmaceutical*,[34] to define what counts as law for the purpose of the prescribed-by-law requirement and the vagueness standard of the *Charter of Rights and Freedoms*.[35] The Court, linking this to rule of law require-

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29 See R Dworkin, "The Judge's New Role: Should Personal Convictions Count" (2003) 1:1 J Intl Crim Just 4 at 5.

30 The term ratiō can be defined as "a reckoning, account, calculation, computation." See Charlton T Lewis & Charles Short, *A New Latin Dictionary* (New York: American Book Company, 1907) at 1525.

31 See Fabien Gélinas, "Modelling Fundamental Legal Change: The Paradox of Context and the Context of Paradox" (2015) 28:1 Can JL & Jur 77 at 82–85 [Gélinas, "Modelling Fundamental Legal Change"].

32 See e.g. Oren Perez, "Fuzzy Law: A Theory of Quasi-Legality" in H Patrick Glenn & Lionel D Smith, *Law and the new logics* (Cambridge, UK: Cambridge University Press, 2017).

33 See Gélinas, "Modelling Fundamental Legal Change", *supra* note 31 at 82–84.

34 *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 DLR (4th) 36 [*Nova Scotia*].

35 s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

ments, stated that to pass muster, a legal provision must, and I quote, "give sufficient indications" so as to "fuel a legal debate", taking into account "the substratum of values underlying the legal enactment."[36] For those who had been lured into sleep by an exaggerated view of the reach of legislation and by Montesquieu's image of the judge as legislation's passive mouthpiece, the power of judges, thus laid bare, made for a brutal awakening. For rule of law critics, who from the beginning were alive to the power of judges and the potential impact of what they eat for breakfast, pervasive indeterminacy was proof that it was all a façade.[37] After all, we wanted a government of laws, not of men, be they men in robes.

This should be enough to help us start thinking about Judex's difficult predicament.

Judge Judex and Transnational Law

Judex's predicament can usefully be approached through Fuller's highly original analysis of adjudication.[38] Fuller took both arbitrators and judges to be engaged in adjudication, a form of governance, or social ordering in his lexicon, characterized by the peculiar mode of participation it assigns to the parties, that of presenting reasoned arguments for a decision in their favour. A reasoned, or principled, argument is one that takes the claim beyond the realm of the naked, singular demands of capricious desire, by relying on principles that reach beyond the particular case and can thus give flesh to the idea that like cases should be treated alike (which of course also means that different cases should be treated differently).[39] This approach to adjudication has considerable explanatory power because everything else follows as an implication, from the requirements of impartiality and independence, through the obligation to give reasons, to the seemingly inevitable formation of case law. The limits of adjudication also flow from its mode of participation: parties presenting principled arguments and proofs for a decision in their favour is not ideal to resolve questions involving complex and interrelated interests where there are too many moving parts, what Fuller calls "polycentric problems".[40]

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36 See *Nova Scotia*, *supra* note 34 at 634, 639–40.

37 For an overview of the "Critical Legal Studies" movement, see generally John P McCormick, "Three Ways of Thinking 'Critically' about the Law" (1999) 93:2 Am Pol Sci Rev at 413.

38 See Lon L Fuller & Kenneth I Winston, "The Forms and Limits of Adjudication" (1978) 92:2 Harv L Rev 353 at 371 [Fuller & Winston, "Forms and Limits of Adjudication"].

39 See *ibid* at 367–68, 380–81.

40 See *ibid* at 394–404.

Bearing in mind this approach to adjudication, which helpfully focusses on commonalities between judges and arbitrators, let us take a brief look at what transnational adjudication has become before turning to the challenges it faces.

What has international, or transnational adjudication become? Well, first, it is no longer the quaint object to which we had grown accustomed in the study of traditional public international law. As Gary Born explains in a broad-ranging study of transnational courts and tribunals, practice has now shifted very distinctly to what he calls a second generation of transnational adjudication, best represented by the WTO Dispute Settlement Body, the DSB, by investment and commercial arbitration, and by claims settlement bodies.[41] What sets the second generation apart is, put simply, the sectoral but functional equivalent of compulsory jurisdiction, and the enforceability of decisions, which can often be coercively executed against a state's commercial assets.[42] What is more, looking quantitatively at treaty practice, for each treaty giving compulsory jurisdiction to a first-generation body such as the ICJ, there are fifty giving compulsory jurisdiction to a second generation body.[43] Transnational adjudication is by far more prevalent and more effective than it has ever been.[44]

Second, the prevalence and effectiveness of transnational adjudication has brought to the fore its undeniable role in the development of international or transnational law. Starting from the fair assumption that transnational adjudicators are more than the law's mouthpiece, and that their decisions may generate something like case law,[45] then a measure of sov-

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41 See Gary Born, "A New Generation of International Adjudication" (2012) 61:4 Duke LJ 775 at 819.

42 See *ibid* at 857.

43 See *ibid* at 776.

44 See *ibid* at 859–69.

45 Of note on this topic is the empirical work of Jeffery P Commission, "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence" (2007) 24:2 J Intl Arb 129. See generally Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse? — The 2006 Freshfields Lecture" (2007) 23:3 Arb Intl 357 at 361–73; Christoph Schreuer & Matthew Weiniger, "A Doctrine of Precedent?" in Peter Muchlinski, Federico Ortino & Christoph Schreuer, eds, *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) 1188; Andrea K Bjorklund, "Investment Treaty Arbitral Decisions as *Jurisprudence Constante*" in Colin B Picker, Isabella D Bunn & Douglas W Arner, eds, *International Economic Law: The State and Future of the Discipline* (Oxford: Hart Publishing, 2008) 265; Emmanuel Gaillard & Yas Banifatemi, eds, *Precedent in International Arbitration* (Huntington, NY: Juris Publishing, 2008); Jan Paulsson, "International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law" in Albert Jan van den Berg, ed, *International Council for Commercial Arbitration Congress Series No 13: International*

ereignty can be seen as having been lost by the nation-state. To a certain extent, this is simply in the nature of legal promises in general and of treaties in particular. One binds oneself and is in that measure giving up sovereignty. Effective adjudication, however, takes it one step further. By exercising authority to bridge the distance between, say, a treaty provision and the facts of a particular case, and by doing so in a principled way, adjudicators both read, and give direction to, expectations. This process, as we'll see, is capable of generating a direct form of legitimacy that is independent from the legitimacy derived from state institutions.[46]

These developments have taken place in spite of nation-states displaying a tangible fear of international institutionalization. (I mean institutionalization in the sense of international law being made or tweaked without contemporaneous state consent). It is this fear that explains the WTO's self-description as a "member-driven" organization, the years it took for the so-called "reverse consensus rule" to be adopted, and the Dispute Settlement Understanding's mention that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." [47] That same fear of institutionalization is also one of the reasons why nation-states turned to *ad hoc* arbitration for the adjudication of disputes under investment treaties: it would be more difficult, it was thought, for *ad hoc* arbitral tribunals to develop a body of case law.[48]

It did not take very long for perspectives to change on the role of adjudicators. The legal impact of decisions is now universally recognized by states, and by all other participants in the process, insofar as they systematically rely on previous decisions as persuasive precedents when pre-

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Arbitration 2006: Back to Basics? (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2007) 879.

46 For a broader discussion regarding the legitimacy of adjudication in general, and of international arbitration in particular, see Fabien Gélinas, "Arbitration as Transnational Governance by Contract" (2016) 7:2 Transnat'l Leg Theory 181 at 191 [Gélinas, "Arbitration as Transnational Governance"]: "This unique reliance on reason and principle provides adjudication with its own kind of legitimacy that is markedly different from the democratic legitimacy many people think of when they become nostalgic about the waning of the state. Yet governance under general principles, a rule-of-law value, is a contribution of constitutional states to democracy that has arguably been just as important as the establishment of free and fair elections. What arbitration may be able to do, then, is to bring a measure of the rule of law to the transnational space where the state is unable to secure it" (*ibid* at 191).

47 See e.g. Fabien Gélinas, "Dispute Resolution as Institutionalization in International Trade and Information Technology" (2005) 74:2 Fordham L Rev 489 at 489–91.

48 See *ibid*.

senting arguments before international tribunals.[49] Several states are now even pushing for deeper institutionalization through the notion of an investment court.[50]

So what are the challenges faced by Judex and her colleagues? Since transnational adjudicators admittedly exercise significant authority in the construction of transnational law, their main challenge has to do with legitimacy. How can these people be telling states what to do? How can they second-guess policy made by democratically elected people?

Now, before answering the question, I must emphasize that there is absolutely nothing unusual about independent adjudicators second-guessing democratically elected legislators. Judicial review of legislation is precisely what most of the world's constitutions provide.[51] Judicial review of legislation is part and parcel of what countries like ours call democracy.[52] It always baffles me when this point is raised as if no one had ever heard of courts reviewing the legal validity of actions taken by elected people.

That said, the question is serious, and should not be dismissed too quickly. In my view there are two answers to it. One is simple: adjudicators are asked by the participants to do what they are doing: this is called consent and it represents, as we all know, one of the most powerful and universal sources of legitimacy ever recognized. The other answer, on which I shall focus my attention here, is that adjudication generates an entirely different kind of legitimacy, which is tied to the rule of law.

Going back to our earlier discussion of the rule of law, we can begin by putting to rest any concern related to tyranny and the fear thereof. We can put this concern to rest because, unlike the executive branch of a government, which yields the sword, and the legislative branch of a government, which often controls the purse, adjudicators, like judges, deal in

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49 See sources cited *supra* note 45. See also Nathan Miller, "An International Jurisprudence? The Operation of 'Precedent' Across International Tribunals" (2002) 15:3 Leiden J Intl L 483 at 484; Raj Bhala, "The Precedent Setters: *De Facto Stare Decisis* in WTO Adjudication (Part Two of a Trilogy)" (1999) 9:1 J Transnat'l L & Pol'y 1 at 14.

50 See e.g. "The Multilateral Investment Court Project" (last modified 10 October 2018), online: *European Commission* <trade.ec.europa.eu> [perma.cc/W66J-LCP6].

51 See Tom Ginsburg, "The Global Spread of Constitutional Review" in Gregory A Caldeira, R Daniel Kelemen & Keith E Whittington, eds, *The Oxford Handbook of Law and Politics* (Oxford: Oxford Handbooks Online, 2009) 82 at 82–88. See also Guarnieri & Pederzoli, *supra* note 27 at 134–40; Hirschl, *supra* note 27 at 1.

52 See *ibid* at 88–96. On the connection between judicial review of legislation and democracy, see also Martin Shapiro, "The Success of Judicial Review" in Salley J Kenney, William M Reisinger & John C Reitz, eds, *Constitutional Dialogues in Comparative Perspective* (London: Macmillan Press, 1999) 193.

words and reason. This is why Alexander Hamilton, who knew something about institutional design, called the judicial branch the "least dangerous" branch.[53]

There are other features of adjudication, however, that make it harmless in terms of tyranny and abuse of power. I'll mention three. The first stares at us in the face but we rarely see it. It is nowhere to be seen in the literature that worries about the taking over of government by judges. It is that adjudicators can only pronounce upon questions that are put to them; they do not enjoy a power of initiative. They cannot go out and pick the issues they would like to resolve. They can only decide upon claims made by others and brought to them for decision. This makes their role a passive role; the law they make, such as it is, is only a by-product of this role.[54] The second feature is that adjudicators are bound by universally accepted norms of independence and process that are highly constraining and work to safeguard the integrity of this sophisticated form of governance.[55]

The feature I will most insist upon, however, is the duty of adjudicators to decide according to law. This imposes significant constraints on decision-making even where the governing rules of law are vague or in a process of emergence or evolution. Adjudication, as Fuller saw it, thus imposes on decision-making a burden of rationality that no other mode of governance imposes.[56] What does this burden consist in? It is essentially about coherence and consistency in reasons, both internal and external. The arguments and the decision must be internally coherent, free of contradictions. They must also be externally coherent by relying on principles of decision that extend to other relevantly similar situations.[57] As I've argued elsewhere, it is this special burden that gives adjudication its specific kind of legitimacy.[58] This legitimacy can be called "rule-of-law" legitimacy because it guides and constrains decision-making in a way that stabilizes expectations.

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53 Alexander Hamilton, "The Federalist No. 78" in Jacob E Cooke, ed, *The Federalist* (Middletown, CT: Wesleyan University Press, 1961) 521 at 522.

54 It cannot go unmentioned that the issues that are brought to court sometimes have a political nature. Notwithstanding, adjudicators have the obligation to resolve these cases, which presupposes framing the issues and scope of their rulings. One worry is that adjudication might thus erode sovereignty and democracy.

55 For a contemporary account of judicial independence in the world, see Anja Seibert-Fohr, ed, *Judicial Independence in Transition* (Heidelberg, NY: Springer, 2012) at 1–8.

56 Fuller & Winston, "Forms and Limits of Adjudication", *supra* note 38 at 366–67.

57 See *ibid* at 366–69.

58 Gélinas, "Arbitration as Transnational Governance" *supra* note 46 at 191.

That is all well, you might say, but what would King Rex's subjects think about the law generated through adjudication? My sense is that much of the question can be answered by recalling the limits of legislation that I emphasized. Even clear, general, promulgated, and prospective legislation will have in it a measure of indeterminacy and will require interpretation and adjudicative stewardship. The predictability of legislation is not viewed, as Fuller himself points out, as excluding recourse to broad "standards such as 'good faith' and 'due care.'"[59] Our rule of law demands have always been appraised, as our Supreme Court put it, in the context of the "substratum of values"[60] underlying the law. The implicit and unwritten standards governing interactions and expectations, therefore, necessarily participate in any appraisal of whether the law and its application are predictable for our purposes. In terms of King Rex's lessons, case law is distinct from legislation only in degree: its dependence on implicit understandings and established practices is likely greater. At the same time, the nation-state's organization of interactions through highly institutionalized legal practices and systems makes it easier for a transnational adjudicator to identify the areas where principles and purposes are shared on a global scale, which provides fertile ground, and increased legitimacy, for the development of transnational law.

Fuller was optimistic about the rule-of-law potential of adjudication even in legally impoverished settings. In one of his lesser known papers, he goes as far as tracing out the construction of the case law that might develop over time on an island populated by shipwrecked amnesiacs who remember little of their previous social existence.[61] He was clear that "it is sometimes possible to initiate adjudication effectively without definite rules."[62] To him, this is simply about participants and arbitrators gradually working out the implications of shared purpose through the confrontation of principled arguments. This is possible, though, only if there is a community of shared purpose and values from which adjudication can get its intellectual sustenance. Can we say that there now exists a community of shared purpose and values on a global scale? Writing at the height of the cold war, Fuller was understandably sceptical. Noting, and I quote, "that in extending "the rule of law" to international relations, law and community of purpose must develop together", he added that "a shared

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59 See Lon L Fuller, *The Morality of Law* (London: Yale University Press, 1969) at 64.

60 *Nova Scotia*, *supra* note 34 at 634.

61 Lon L Fuller, "Reason and Fiat in Case Law" (1945) 59:3 Harv L Rev 376 at 377 [Fuller, "Reason and Fiat in Case Law"].

62 Fuller & Winston, "Forms and Limits of Adjudication", *supra* note 38 at 374.

desire to avoid reciprocal destruction" would not quite cut it as a community of purpose.[63]

Our global state of affairs may seem gloomy to many, and there is certainly much to worry about. But we should also count our blessings and take stock of what we've achieved in building a global community. Quite predictably, that community has taken shape most concretely, though by no means exclusively, around commerce and trade, where the WTO system and investor-state dispute settlement have brought enforceable rules to interactions previously fewer in numbers and formerly subjected to raw power and gunboat diplomacy.[64] This is no mean feat and should not be dismissed lightly simply because it is not perfect. It is a notable advance in this key, independent pursuit we identified with the first aspect of the liberal conception of the rule of law, which focusses on facilitating interactions between strangers based on reciprocity.[65] This is important not only because trade tends to generate greater prosperity, but also because the intensification of interactions across borders is by far the most effective way of fostering, globally, a community of shared purpose and of values.

Looking at the recurring historical cycles of confidence and fear, the ebb and flow of openness and closure, of liberalization and the laying down of barriers, of the building of bridges and the erection of walls, I think we have a moral obligation to build upon what we have and thus to foster global law. Transnational adjudication is a modest, limited, and certainly imperfect way of doing so, but it is real...and it is shared.

This is all very nice as an idea, you might say, but how in the world is an adjudicator to negotiate the requirements of external coherence in the prodigiously messy transnational space, where countless, seemingly inconsistent norms, orders and approaches vie for attention?

I will say three things about this before I conclude.

First, legal pluralism may be fashionable, but it is nothing new. It's always been with us, even when the Nomopolist Monopolist claims of the nation-state were at their most credible.[66] Pluralism should be celebrated to the extent that it reflects legitimate practices and recognizes the importance of individual and group agency. But legal pluralism can, and should, be managed if we are to foster human flourishing through the rule

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63 *Ibid* at 378.

64 See Born, *supra* note 41 at 864–67.

65 See Fuller, "Human Interaction", *supra* note 22 at 2–3.

66 This refers to the monopolist claims of the state over legal norms. For a historical and critical account of "legal pluralistic insight[s]," see Martha-Marie Kleinhans & Roderick A Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12:2 CJLS 25 at 29–30.

of law. As Patrick Glenn, whom I miss very much, might put it, diversity in law should be sustainable.[67] It would be utterly irresponsible for us to celebrate pluralism without at the same time ensuring the conditions that foster a global community, one of shared purpose and values under the rule of law.

Second, I should say that I don't see much benefit in pressing the notion of an arbitral legal order.[68] Arbitration has always been pervasive and will continue to cut across all the possible settings in which adjudication is used, irrespective of the formal or informal sources from which the applicable rules are drawn. A better representation of what we are witnessing, in my view, is that transnational law is simply global law, a branch of which is public international law. A hint of this is the development by arbitrators, in transnational commercial relations, of a transnational public policy, a set of peremptory norms, under which a private contract may be held void without reference to national law.[69] It seems odd to me that one would want to consider this public policy as anything more than *jus cogens* extended to the private and mixed relations governed by transnational law.

Third, and last, it seems inevitable that the conciliation of norms, a discipline also known as conflict of laws, should be reclaimed as a fundamental part of transnational law. I have no doubt that transnational adjudication is capable of managing the normative complexity it is now facing. Adjudicators may well rely more liberally on party autonomy and legitimate expectations in their work of normative conciliation, at least for some time. This is something that we have already witnessed in commercial arbitration. Adjudicators will certainly draw on normative tools developed in federal and quasi-federal contexts, such as subsidiarity, preemption, substantive equivalence, overlapping dual compliance and the like. On the conciliation of rules concerning the management of multiple fora, a transnational law around *lis pendens*, claim and issue preclusion, double recovery and *res judicata* is already emerging.[70] And more general-

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67 See generally Glenn, *Legal Traditions*, *supra* note 25. See especially *ibid* at 376–79.

68 See generally Emmanuel Gaillard, "L'ordre juridique arbitral : réalité, utilité et spécificité" (2010) 55:4 McGill LJ 891. By and large, the thesis equates the "arbitral legal order" with a "system of law" constituted by special (transnational) norms and actors, and contrasts it to national and international legal orders.

69 Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in Pieter Sanders, ed, *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA congress series 3 (Boston: Kluwer Law and Taxation Publishers, 1987) 258 at 286–317.

70 See e.g. F de Ly (Chairman) & A Sheppard, "ILA Final Report on Res Judicata and Arbitration" (2009) 25:1 Arb Internatl 67.

ly, transnational adjudicators are beginning to adopt and to adapt the most effective and widely accepted tools of private international law developed under national law.[71] This certainly represents several generations' worth of sophisticated lawyering going forward, and it will never be perfect, though it likely will continue to be expensive (or lucrative, depending on your perspective). But transnational adjudication has never been easy. My key message in this respect is that, although the state will be staying with us for the foreseeable future, retreat to the comforting idea of a closed, all-powerful state, is simply not realistic.

Where does that leave us?

Our brief journey with Rex and Judex has not been entirely reassuring. An abstract law written in a code has a real, useful, but ultimately limited impact on the resolution of issues that arise in the day-to-day turmoil of human interactions. Adjudication is the best instrument we have to help cover the distance between our abstract and tentative formulations of law and the complex and incessantly renewed demands of reality. Of this we bear witness today in the development of transnational law through transnational adjudication. Adjudication is thus a powerful force in our efforts to meet the demands of the rule of law. Like Rex as legislator, however, our adjudicator Judex is human. On dark days we may be tempted to say that the rule of law ultimately relies on a fox to keep the skulk in line. This is why it is crucial that we always bear in mind the limitations of law as we strive for its rule, and the importance of cultivating virtue in those under whose stewardship law works its magic. In his celebrated 1936 book on Chinese law, legal scholar Jean Escarra helpfully outlines the two schools of legal theory he found in China in the 1920s: the positivist school of the rule of law and the Confucian school of the rule of men, that is, the rule of the virtuous.[72] As the great mind who created King Rex himself reminded us, there is no reason why we shouldn't strive to embrace both.[73]

Thank you!

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[71] See generally H Patrick Glenn, *La conciliation des lois : Cours général de droit international privé*, at 222–44 (Leiden: Martinus Nijhoff Publishers, 2014).

[72] See generally Jean Escarra, *Le droit chinois : conception générale, aperçu historique* (1936), online (pdf): Université du Québec à Chicoutimi <classiques.uqac.ca> [perma.cc/F8CG-SZM9].

[73] Fuller, "Reason and Fiat in Case Law", *supra* note 61 at 394–95.