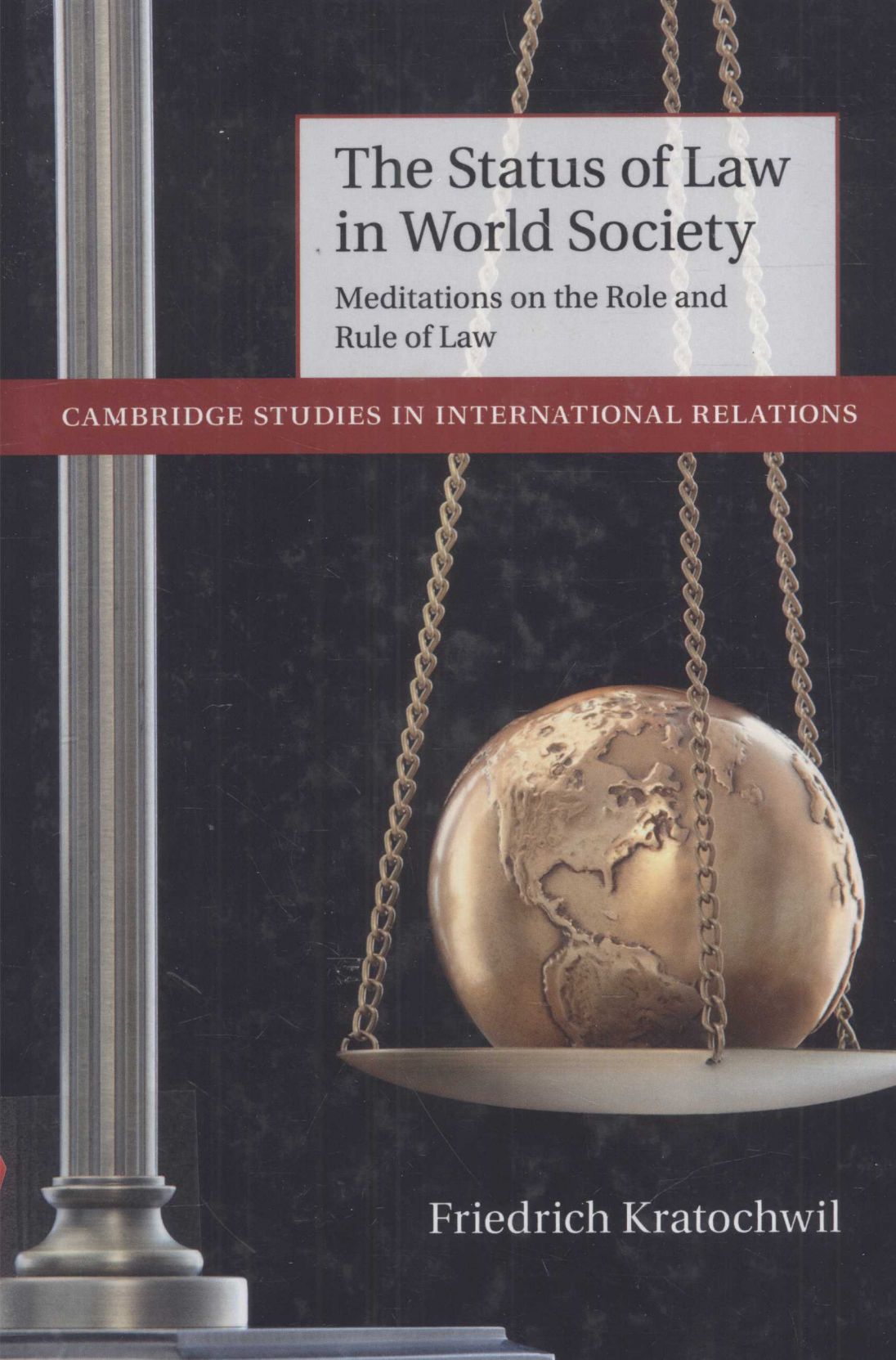
The Status of Law in World Society

Meditations on the Role and Rule of Law

CAMBRIDGE STUDIES IN INTERNATIONAL RELATIONS



Friedrich Kratochwil

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FRIEDRICH KRATOCHWIL

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For
Petra Hoelscher
uxori carissimae,
"o et praesidium et dulce decus meum"

ἐὰν μὴ ἔλπηται ἀνέλπιστον οὐκ
ἐξευρήσει, ἀνεξερεύνητον ἐὸν καὶ ἄπορον.
If you do not expect the unexpected, you will not find it;
For it is hard to be sought out and difficult

Heraclitus, frag. 18

_ _ μάχεσθαι χρὴ τὸν δῆμον ὑπὲρ τοῦ
νόμου ὅκωσπερ τείχεος.
The people must fight for its law as for its walls.

Heraclitus, frag.44

PREFACE

This book is the result of several explorations that are here brought together in a substantially revised form. Thus Meditations 1 through 6 were first delivered as series of lectures at a "winter course" of international law at CEDIN in Belo Horizonte, Brazil in July of 2011. Meditations 7 and 8 were my contribution to the Summer Academy of the European Inter-University Center for Human Rights and Democratization in Venice in the summer of 2012. Meditation 6 was written under the auspices of Kyung Hee University in Seoul, where I was an "International Scholar" in the fall of 2011. The Introduction and Meditation 9 were written while teaching as Visiting Professor at the Central European University at Budapest in 2012.

From its genesis it is clear that this project could not have come to fruition without the great personal and institutional support that I enjoyed while working on this manuscript. My wife put up with me even though I was often grumpier than usual (if people who know me can believe this)! She let me focus on the book while taking care of all the burdens of dealing with workers and authorities that result from running a big house in the Tuscan hills. The European University Institute, my former university, where I taught until April 2011 and where my last seminar on international law provided the first outline of the project, provided me with access to the library during the summer of 2012 when I finished the first draft. At a very decisive point, right at the beginning, Carol Bohmer generously shared some of her research resources when I was suddenly cut off from a research library after my retirement from the Institute, and before I had a new institutional affiliation.

Equally important have been the long conversations and comments I received from Nick Onuf, Oliver Kessler, and Jens Bartelson, who read the manuscript in its entirety and provided me with detailed criticisms. Similarly, Hannes Peltonen and Gulherme Vasconcelos, who had been my untiring research assistants, were also the first critical readers of the initial drafts, providing me with valuable suggestions concerning both content and form of the argument. In addition, I benefited from the comments on different chapters made by Dennis Patterson, Jan Klabbers, Nikolas Rajkovic, Mary Ellen O'Connell, Jean Cohen, Albena Azmanova, Xymena Kurowska, and, above all, from the international research group "Constitutionalism Unbound," assembled by Antje

Wiener in Hamburg. It organized a gruelling day-long workshop in Hamburg, in which both lawyers and social scientists examined each Meditation and gave me valuable feedback. My sincerest thanks to Sigrid Boysen, Julia Fronenberg, Maj Garsten, Hannes Hansen-Magusson, Sarah Imani, Joern Axel Kaemmerer (who also was kind enough to read a further draft), Alexandra Kemmerer, Christine Landfried, Anthony Lang, Philip Liste, Sven Opitz, Almut Schilling-Vacaflor, Joerg Philipp Terhechte, Andreas von Arnault, Antje Vetterlein, and Antje Wiener. Finally, special thanks also to Manuel Mireanu who got the last version of the manuscript in shape. Finally, I owe a great debt of gratitude to Cambridge University Press (John Haslam and Chris Reus-Smit who took an interest in this project) and to Fleur Jones and Rob Wilkinson who saw this manuscript through the editing and production process.

With so much advice and the extensive "canard hunt" by the commentators, the remaining errors of fact or judgment remain, of course, entirely my responsibility. This also concerns the form in which, after careful reflection, I present the material. Some readers remarked (with good reason) that they found the presentation at times confusing, as frequently not a single storyline dominates the discussion, but rather different strands of arguments appear and then "drop" out, only to be taken up again in a different context. They also wondered for which audience this text is written, as the Meditation resembles more an interior monologue than an explicit argument. To that extent I, as the author, seem to engage in a seemingly autistic activity, taking up themes and leaving them after a while unattended, where readers would perhaps have expected other turns.

The latter observation might of course be true, especially when judged against the standard contemporary debates in political science, which are usually as predictable as they are tedious. This is perhaps best exemplified by the mode of exposition in which allegedly "three approaches" frame most dissertations in international relations and explaining the "variance" then takes pride of place. Nevertheless, the above objection deserves some further comments. Actually, contrary to what one would at first suspect, only "demonstrations" are monologic, since universality and necessity unite author and audience and thus, as in the ideal theory of the early Rawls, it makes no difference whether a single person speaks, or a group discusses and discovers the principles of justice. Ultimately the results are justified by universal reason and emerge from what Kant would call "determinative" judgments. But, as we know, even outside of ethics, such as in the sciences, this might be a misleading picture. Normally controversies abound and "debates" rather than demonstrations dominate the different fields. Thus the notion of ideal reason or a universal audience might be a phenomenon that has seen its day, as has the genre of a linear narrative in literature, where an all-knowing author is writing. Actual "thinking," even if done by a single person in the "ivory tower," is, in contrast, hardly ever a monologue, but always consists of an internal dialogue in which (imagined) interlocutors

and their arguments – established or controversial – which have become part of the understandings, are scrutinized. Here the various "fields" and traditions constitute the bounds of sense within which we move and within which we locate a problem and perhaps even try to "redraw" the bounds of sense.

Thus engaging in this questioning and participating in the debates and conversations seems particularly appropriate when we deliberate about the practical choices we face, since we are always in the middle of things and cannot withdraw to an absolute point beyond time and the particular situation we are in. Instead, we have to reflect upon the options, largely framed by the institutions within which they are embedded, and the context in which a problem arises, when we try to determine what to do, "all things considered." This means that we have to understand how our choices are linked via the norms and rules to certain practices, but also how our decisions arise from a particular judgment by which we appraise and justify our chosen alternative – or get criticized, perhaps even sanctioned, by others for having selected it – since we usually are not at liberty to follow our idiosyncrasies (*de gustibus est disputandum!*). In addition, in this choice we cannot rely on the criteria of necessity and universality, as the latter might be hollow (and compatible with a variety of choices, even contradictory ones), and different competing necessities (duties) might be at issue. Here the standard modes of presentation quickly run out, as no ultimate foundation offers itself from which we can rigorously derive our conclusions, or show their justifiability by invoking generalizations, as we do in "determinative judgments." Instead, something like a "reflective judgment," as developed by Kant in his *Third Critique*, becomes necessary. Thus, "going back and forth" between facts and norms, falling back on analogies, utilizing metaphors and counter-factuals, and thus "weaving together" different strands of thought, are then the modes in which we try to resolve the issue(s) at hand. Finally, having found a solution, we hope we thereby can "woo" (again a Kantian term) the bystanders to agree with us, instead of apodictically demanding their assent or, in the case of their refusal, of eliminating them from the discourse as they must have violated "universal reason."

To that extent the two fragments of Heraclitus I chose as the *avant propos* capture the two main purposes of this "second journey" (*deuteros plous*) on which I am going to embark, for which the openness for "surprises" and getting rid of preconceived ideas is as important as realizing that law is not a brooding omnipresence in the normative sky or the ethereal sphere of values but an eminently social phenomenon. It is a means for contestation as well as for accommodation, but also of *dominium*, which we all use in order to pursue our personal and political projects. But as such, law has to be cared for and fought for as it will not disclose itself in its "truth" (like Heidegger's *aletheia*) but has to be "made," shaping and being shaped by social forces.

While this latter point has usually been acknowledged even by "non-realist" exponents of jurisprudence – here the topos was that law always pointed

"beyond" itself as it is not mere speculation but a social practice – the second notion that knowledge appropriate for practical issues has also had a long tradition, but its reliance on "prudence" has been much contested in modernity. Here, true "knowledge" had to measure up to field independent epistemic standards, as otherwise we would fall into the abyss of errors and relativism. The (implausible) Cartesian doubt could only be assuaged by an equally implausible conception of knowledge exorcizing all doubts by being characterized by clarity, universality, and necessity.

Thus, to let go of the ultimate props of an a-historical universality and necessity might then make for some tough reading and writing, as it is not the familiar canonical form in which we are trained to present our arguments. But it might also provide some new insights that lie outside the tradition of subjecting praxis to a "theoretical" gaze, and even outside the various disciplinary myopias based on such a "prejudice" for "theory." Obviously the proof of the pudding is in the eating. But then again we should also remember that "wisdom" (*spientia*) and "to taste" (*sapere*) spring from the same root, so that there might be perhaps more to it when we say: "*sapere aude*," that is "dare to taste/know," a topos that has inspired our reflections from Horace to Augustine, to Kant, and Foucault.

CONTENTS

Introduction: images of law

Images of law

Writing a book about the *Status of Law in World Society* inevitably conjures up certain associations. One is, of course, the perhaps subconscious reference to Richard's Falk *The Status of Law in International Society*,[1] which in turn took its cue from Hersh Lauterpacht's earlier treatise.[2] The other is to the concept of "world society," which could be used analogously to the term "world politics" that once established the research program of one of the first journals in the field, but which consciously adopted a program for analysing both international and comparative politics. Or we could take it in the sense in which Niklas Luhmann and his school are using the term.[3]

It would be tempting to connect the first and the last version and take them as points of reference, thereby constructing a coherent narrative in which the international has been replaced by the global, the state by "society," and international law, formerly merely an adjunct to diplomacy and perhaps of relevance to "international organizations," has finally become one of the main drivers shaping world politics. I shall resist that temptation and stay much closer to the second option, without wanting to deny the impact of globalization on states and societies and the fact that, for better or for worse, "law" and its "lawyers" have arrived as part of the professional class that manages our affairs. To that extent law now provides in large part the vocabulary for contemporary politics. Whether we discuss the "legality" of the second Gulf War, address human rights, the (in)admissibility of certain means of "enhanced interrogation," or trade and development issues, legal concepts figure prominently in all arguments and are made by all sorts of people, be they decision-makers, journalists, public intellectuals, or the proverbial men (and women) in the street.

But if law has become in a way "triumphant," why is it that we do not seem to have realized the "progressive" promise we so ardently hoped for? In a way we seem to experience the same disappointments at the level of public

[1] Richard Falk, *The Status of Law in International Society* (Princeton University Press, 1970).

[2] Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon, 1933).

[3] Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 2 vols. (Frankfurt: Suhrkamp, 1998).

(international) law as we did domestically, when Watergate exposed the seamier side of the legal "profession," or when, more recently, with the law of "standardized contracts" (contracts of adhesion), which have morphed from an instrument of autonomous agents who freely made agreements into something else. Here not a "few rotten apples" or a specific misuse but the law itself has become problematic. Suddenly, "boilerplate" and "fine print" supersede individual rights and any meaningful concept of "consent" (by "informing" the contracting party e.g. only *ex post* of the "terms and conditions"). "The law" instead protects often questionable business practices through exculpatory clauses and through restrictions on available remedies.[4] Similarly, now that international law has finally emerged from the closet of the state system, not all might have been lost (to paraphrase Kant), but the triumph seems rather stale. True, while it was formerly generals and defence ministers who might have only occasionally paid lip service to the law while ignoring it in practice, now legal professionals[5] decide on retaliatory measures, pinpointing houses in Afghanistan, or persons in Yemen or Gaza,[6] or they give the "go ahead" for striking targets in the former Yugoslavia. The former reasonably clear anti-torture norm, frequently ignored by governments even though its existence was hardly ever doubted, is now being artfully dismantled by inventing new categories, such as "unlawful combatant," and by invoking supreme necessity in the war on terror. Thus the suspicion arises that "law" might have become part of the problem rather than the solution, and this problem requires further analysis

Evidence from other areas reinforces this perception. The continuing global financial crisis had not only to do with the dismantling of a regulatory structure that was derided as an outmoded "control and command" system. While strict supervision certainly has its disadvantages, as it puts high demands on regulators and might create inefficiencies and resistance, the reliance on broad principles in the so-called PBR (principle-based regulation while "deputizing" the institutions to regulate themselves) is unavailable if, in the words of one of the chief regulators in the UK, we deal "with people who have no principles."[7] It made possible the excesses of the "socialization of risk" while privatizing the profits since it was powerfully supported by the intellectual hegemony of

[4] See the indictment of the practice of standardized contracts by Margaret Jane Radin, *The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2012).

[5] For an incisive analysis of the changing practices see David Kennedy, *Of War and Law* (Princeton University Press, 2006).

[6] On the problems with long-distance "targeted killings" see Nils Melzer, *Targeted Killings in International Law* (Oxford University Press, 2008).

[7] As quoted in Julia Black, "Paradoxes and Failure: New Governance Techniques and the Financial," *The Modern Law Review*, vol. 75 no. 6 (2012), 1037–63, at 42; see also Kenneth W. Dahm, "The Subprime Crisis and Financial Regulation: International and Comparative Perspectives," *Chicago Journal of International Law*, vol. 10 (2009–2010), 581–638.

certain doctrines about the efficiency of markets. In making "law" the facilitator of market efficiency and in buying into the belief that all risks are calculable, even systemic ones, law seems to have been colonized as exemplified by the "law and economics" or governance approaches that espouse "meta regulation" by relying on the self-regulation of firms and on the "market" itself. Ironically, the inroads into law came at a point when many economists had already abandoned the idea of efficient markets – given the susceptibility of the latter to informational asymmetries and panic reactions. But the "legal professionals" who had been exposed to some "cross-fertilization" by another discipline had participated wholeheartedly in the destruction of the few existing firewalls, with the predictable perverse effects. This is not to say that we can or even should go back to the status quo ante, but it does mean that politics and law will have to find new instruments, instead of treating the market as the ultimate authority.

Finally, the prospects of a global society that moves from segmentary (territorial) to functional differentiation might be good news for law students as more and more specialized services are needed, but not necessarily for the rest of us. Forum shopping, representing clients worldwide, and submitting essentially the same cases to different dispute resolution mechanisms, thereby circumventing the *res judicata* principle, offers the prospect of ever increasing job opportunities. It should not come as a great surprise that these trends are less enticing for those who do not think that the rule of law and the rule of lawyers amount to the same thing.

Although the alternative interpretation sketched here casts a gloomier spell on contemporary developments than we encounter in the usual triumphalist account of progress and cosmopolitan justice, it is not so much at odds with our highly ambivalent attitude towards "the law." This ambivalence becomes visible in a variety of images that we connect with law's "darker" side, serving as an instrument of *dominium*, even repression. I will leave aside in the following the "deeper" psychological interpretations we find, for example in Freud[8] and Lacan,[9] and concentrate more on the images and metaphors by which we commonly capture (some) characteristics of law. Below I inductively listed some typical images and common sayings – some paraphrased for brevity's sake – about the law:

(1) Law is Justice – see the representation of the Goddess of Justice on many court buildings.
(2) An unjust law is no law (Antigone).

[8] Sigmund Freud, *Group Psychology and the Analysis of the Ego*, transl. by James Strachey (London: Hogarth Press, 1945). See also his *Civilization and its Discontent*, transl. by Joan Riviere (London: Hogarth Press, 1946).

[9] Jacques Lacan, *Ecrits*, rev. edn., transl. by Bruce Fink (New York: Norton 2002).

(3) As in nature law is the right of the stronger (Gorgias, Greek sophists).
(4) Among us nobody rules but the law/ The government of … is one of laws and not of men (Aristotle, Madison-Adams).
(5) It is the law, stupid (American popular saying).
(6) Law is the command of the sovereign (Hobbes, Austin).
(7) The law is an ass (English proverb).
(8) *Summum ius, summa iniuria* (highest law, highest injustice) (Roman proverb quoted by Cicero in *De officiis* Bk. I, 10, 30).
(9) Law and lawyers are hired guns (American proverb).
(10) Law is reason (Cicero).
(11) Law is like a door in an open field. Why would you go through the door? (Bulgarian saying, possibly apocryphal).
(12) Law is what the courts will do (Holmes).
(13) Men are bad and made good by laws (Machiavelli).
(14) Law is a system of norms (rules) (Kelsen, Hart).
(15) Law is the art of the good and the equitable (Celsus).

Let us begin with the image of Justitia, the goddess of justice. She is blindfolded, carrying some scales in one hand while holding a sword in the other. I vividly remember my first encounter with her in a court building in Bavaria when I, as a pre-school kid, accompanied my father to a court. I asked him (a lawyer and soon-to-be judge) who that lady was and why she was blindfolded. He answered that it was the figure of Justice and that she was weighing, for example, the – guilt or innocence – of an accused while not wanting to be distracted. The sword then symbolized the power of punishing wrongdoers. I was impressed and kept silent for quite some time (not my usual behaviour at that age). When we finally left the courthouse, I asked my father how Justitia could know how the weighing came out, since she could not see. My father laughed without giving me an answer and, I guess, that was one of the reasons I tried to find out later how "judging" actually occurs.

But besides inducing my irreverent question, this example also shows the polyvalence of the symbol and the ambivalence of law mediating between opposites. Thus the "equality" of the parties or subjects is created by elevating the law to a goddess "above" the contending parties. The close attention to the facts of the case and their "weight" is paired with keeping other distractions at a distance, symbolized by the blindfold. This impartiality is then linked to "supremacy," symbolized by the sword "besides" the law. But this "blindness" of Justitia also gives rise to the complaint in the Roman saying that "the highest law is the highest injustice," or in the English saw that "the law is an ass." Both complaints are not so much directed against the blindness or bias of a court in appreciating the facts as they are concerned with the construction of the law itself, that is its interpretation, the *callida iuris interpretatio* that Cicero

mentions,[10] and that blindly deciding by rules instead of tempering their application with equity leads to absurdities.

Utilizing the disjuncture between foreground and background is another way of resolving the tensions within "the law," as can be seen from the Antigone vs. Gorgias argument about "nature" lending validity to law. The tangible law can then only be understood as a reflection of a deeper order that can be somehow intuited and that serves as its ultimate foundation. It is the "facticity" of the ontological order that permeates the cosmos (as in Antigone) and it is the naturalness of desires (Gorgias) that leads to the opposite conclusion of what "nature" commands. On the one hand we arrive at "natural law" and a notion of law as universal reason, exemplified by the Stoic teachings. On the other hand we encounter here the "realist" position that law is command, either by nature or by public authority, and is not rooted in some universal conception of "justice." "*Ius*" derives from "*iussum*" (the commanded), not from *iustum* (the just), that is Hobbes, Austin's command theory of law. Aristotle and Machiavelli provide some important variations on these positions.

Aristotle points to the importance of practical reason in buttressing arguments when dealing with particular cases. They cannot adduce universality and necessity as guarantors for the validity claims underlying the arguments. Aristotle also "solves" the problem of the inevitably coercive dimension of law by hiding it behind his new version of the traditional topos of *nomos basileus* (the law is king), which in republican thought[11] became the "rule of law" trope, invoked in *Marbury* v. *Madison*.[12] The difference between the ruler and the ruled is effaced by making the law the ruler, rather than any particular person or faction. Instead of "custom," law "rules" now and does so in a different fashion, as we shall see.

Machiavelli – deeply pessimistic about human nature, especially in the absence of functioning political structures which allow for the development of stable expectations – counsels the prince to err on the side of *oderint dum metuant* (they might hate me as long as they fear me), but does not exclude that civic virtues and obedience might develop by contrivance. Men are bad by nature but can be made to act properly by effective laws. In a way, Aristotle and Machiavelli, despite their many differences, develop a distinct political approach to law and legislation.

[10] Cicero, *De officiis*, Bk 1, 33.

[11] For a good discussion especially about the contribution of republican theory to the project of modernity, see Nicholas Onuf, *The Republican Legacy in International Thought* (Cambridge University Press, 1998). For an imaginative use of republican theorizing see Daniel Deudney, *Bounding Power* (Princeton University Press, 2007).

[12] See the interesting discussion in Paul Kahn, *The Reign of Law* (New Haven: Yale University Press, 1997).