*The in/exclusiveness of law soft law instruments in international business and human rights (IBHR):
Form and Function in the UN Guiding Principles for Business and Human Rights and the Framework Principles on Human Rights and the Environment*.

Larry Catá Backer (白 轲)

W. Richard and Mary Eshelman Faculty Scholar Professor of Law and International Affairs

Pennsylvania State University | 239 Lewis Katz Building, University Park, PA 16802 1.814.863.3640 (direct) || lcb11@psu.edu

SUMMARY: At the core of any conversation about the in/ex-clusivity of law lies an older and more dynamic *urtext debate* focusing on the relationship between what the medieval world understood as *gubernaculum* and *jurisdictio*.[[1]](#footnote-1) These, in turn, reflect the current debate about the forms and conceptual basis of the constitutionalization of economic production through the normative frameworks of human rights, development, and environmental rights. The former references the extent of the action-authority of a government. The later describes the legitimating normative borders of such acts. This division frames current debates around the in/ex-clusion of actors, norms, or causes, from governance principles (*jurisditio*), or from the administrative mechanisms for its realization (*gubernaculum*). That debate applies with equal force in the constitution and operation of the international legal-regulatory field and the constitution of its administrative organs.[[2]](#footnote-2) It is central to consideration of the interplay between international soft-law systems (*jurisditio*) and the private-public institutional operational mechanisms (*gubernaculum*) through compliance and accountability principles. This proposal considers the way that in/ex-clusiveness manifests both in the constitution of and within two important soft law regimes. One, the *UN Guiding Principles for Business and Human Rights* (2011) creates structures of in/ex-clusion. Directed to all actors (inclusive *gubernacula*) it builds a framework for in/ex-clusion dependent on the public or private character of actor and the economic activity but tied together by a coordinating normative rule based on international law-norms (*jurisditio*). Likewise, the Framework Principles on Human Rights and the Environment (2018) is founded on traditional principles of exclusivity. Directed to states, it seeks to build structures of inclusivity (with respect to its *jurisdictio*) articulated through mechanisms of exclusivity (*gubernaculum*). Where in the UNGP system gubernaculum is subordinate to jurisditio, the opposite appears to be the case in the Framework Principles. Insights are then drawn from these two models.

Good morning everyone. It is indeed a delicate task to serve as the opening act of what will be an exciting and envelop pushing set of presentations. The task I set for myself this morning touches on the core challenge underlying the momentous trajectories of human rights, environmental, sustainability, and development rights at the international level—the unconsciously but relentlessly pursued goal of constitutionalizing economic activity in general and economic production more specifically. I put forward the beginnings of suggest a new, or perhaps better put to draw on an ancient conceptual framework to new ends. The necessity of this exercise, understood as a thought experiment at this point in its, is to explore alternative lenes through which one can approach the many challenges that now face the project of embedding human rights in economic activity.

These challenges are indeed many and they have changed character and potency since the start of this century. It is no longer clear to me that the simple approaches that moved the discussion from discretionary corporate social responsibility as both charity and ethics, is either adequate or compelling anymore. The current discussion of the role of business (including collectives that are not driven by principles of shareholder primacy), one which interlinks sustainability, bio-diversity, development, environment, and human rights, may call for a different set of analytical tools to both map the discursive space, but also to frame discussions about the role and manifestation of public policy at the local, state, international public and private arenas—that is in the spaces served by systems of administrative discretion and public regulation, or served by and through the disciplinary power of markets.

That lens is grounded in the ancient concepts of *gubernaculum* and *jurisdictio*.[[3]](#footnote-3) The concepts were developed to theorize the constitution of law and the regal power in the medieval period. Nonetheless the concepts are powerfully relevant within the disordered regulatory and constitutional spaces of economic production in which a number of actors simultaneously exercise regal authority and hold rights and privileges that may not be burdened (negative rights) and in some cases must be privileged (positive rights). Economic space in the 21st century is constitutional space. It consists of consenting communities of actors who have come together to further their disaggregated though coordinated objectives within the functionally differentiated borders of economic activity. But it is a space that is quite different from out of which Westphalian state system based constitutionalism emerged. A different basis of conceiving a constitutional order is needed. The key features of this new constitutional model for economic production decouples organs of authority from systems of empowering an limiting rules. Where Westphalian constitutionalism assumes an identity between empowering /limiting rules and the organs of authority to which they are uniquely directed, economic production constitutionalism is grounded in the premise that empowering/limiting rule systems (and the communities from which they are sourced) are not aligned with or uniquely attached to organs of authority (which includes institutions beyond states). One sees this emerging, for example, in the importation of international human rights laws within investment treaties otherwise bounded by national law. At the same, time, while Westphalian constitutionalism works through closure, economic production constitutionalism proposed here is grounded in openness order without a center.

I start by framing the challenges with a hypothetical that is meant to reflect conditions on the ground that impact—and perhaps best structure—the space within which analytic or conceptual models function effectively. In keeping with the theme of this event, I then consider that way that allegory is a metaphor for the fundamental issues of in- and ex-clusion, understood as the line drawing between rights and responsibility, between duty and remedy, and between political, social, and economic spheres.

I then consider in more detail the character and relevance of the interactive system of gubernaculum and jurisdictio bound up in the principles of the dual character of regulation as political (or popular) and regal (administrative/governmental) regimes--*regimen politicum et regale*.[[4]](#footnote-4) These concepts are then transposed to the setting of contemporary business and human rights challenges and an in/ex-clusion approach. The lens is then applied to the UN Guiding Principles for Business and Human Rights (UNGP) and the Framework Principles on Human Rights and the Environment.

Lastly, I end with a critical implication of the analysis, and a curious one. That implication suggests that the medieval lens appears to posit an interesting contemporary trajectory—from exclusivity based regulatory silos to inclusivity enhancing systems of platforms based governance. In this case, the past really is the oracle of the future.

***The New Frontier: An Allegory for Aligning Governance***

Consider a story that is, in many respects, the story of many on the ground instances of economic activity that triggers human rights, sustainability, and development rights and duties among more than one managerial entity relating to distinct rule systems.

 A joint venture between Guatemala and the Guatemalan subsidiary of US company (“GuataJV”, organized as a corporation) plans to build a factory in a rural area of Guatemala. GuataJV is a key element of the state’s long term development plan designed to bring jobs and prosperity to a particularly fragile area of the country. It is operated subject to a set of policies and operating rules issued by the parent company in the US and applicable throughout the operating ecology of the US parent (including codes of ethics, compliance, respect for human rights and environment, and the like).

Though the factory is not built on indigenous territory, the runoff from factory operations will likely adversely affect the water quality of nearby streams. These serve as a source of drinking and agricultural water for the indigenous community living nearby.

Chemical runoff may also affect factory workers. It is not clear, though, what the short or long term effects may be because the chemicals in this case have not been studied sufficiently for scientific consensus to be formed up. Most of the workers will be wormn, though many of the supervisors will be male. Supervisors are almost exclusively there on a rotating basis moving from one downstream entity of the parent to another.

The factory operation is likely as well to put pressure on the delicate bio-diversity in an area already threatened by development. That threat may affect migratory species that are critical to the agricultural production of neighbor states. Internally that pressure will be direct (by the operation of the factory into an environmentally fragile eco-system and indirect (straining the national power grid operated mostly through coal fired plants).[[5]](#footnote-5)

 The allegory presses most of the buttons in the so-called business and human rights environment. And it also exposes many of its challenges: overlaps between hard law (national) and soft law systems; overlaps between human rights, sustainability, development, and climate change regimes; overlaps in the context of the protection of indigenous rights (and with it the rights of other vulnerable people).

***The (Cloudy) In/Ex-clusivity Lens***

 Through an in/ex-clusivity lens, the issues can be rationalized into three broad categories. The object here is to suggest the new shaping of territory—especially its fundamental ordering characteristic of including those within its borders and excluding those who fall outside of those borders. The borders of managerial-regulatory systems are both a barrier (as perceived by those on the outside) and a protective membrane (as perceived by those on the inside). These barriers may be understood as made up of the limiting functions of rights, or of the limits of the extension of authority.

First: where are the limits of regulatory authority (jurisdictio) located? These questions touch on the extent of plenary authority in an overlapping regulatory and managerial context. In the GutaJV case, we understand the limits as occurring in two distinct spheres. The first is the sphere of political authority (institutional power); the second that of legal authority (the blocking or authorizing power of rules). Yet both of these are themselves meta-concepts that conceal substantial division within the spheres—local, national, international entities, that may be public, private and hybrid entities, for example, which interface with regimes of rights and law at each one of those levels. In GuataJV we have a picture of the complex ecologies of law-rights and institutional authority that may not neatly align.

Second: how is that authority structured and applied? Here one foregrounds the misalignments. The compass in contemporary society is compliance. But the how of it becomes muddy. One complies with private law obligations unless those are inconsistent with a more authoritative public law system. And yet the private law system may itself derive from international soft law principles to which the higher public authority has acceded. And so on. Having a compass in this case may not be enough to help you navigate the waters toward a point (aggregate compliance) to which the compass may eventually point. Those waters, themselves require navigation around or through competing public and private law systems, between administrative (compliance systems) and remedial (tort) approaches, and between an entities-based regulatory environment and the discipline of bottom up market measures.

Third: where and how does this weave structures of in- and ex-clusivity within international law? Here, perhaps the focus is on soft law measures. In GuataJV, soft law regimes are hardened through private law, the enforceability of which may well exclude key stakeholders (rights holders affected). I will consider two in more detail: the UN Guiding Principles for Business and Human Rights (2011) (UNGP), and the Framework Principles on Human Rights and the Environment (2018).

The challenges of traditional analysis when applied to the GuataJV problem are unavoidable within the case of traditional core analytical premises—the primacy of the state and of politics, the vertical ordering of public and private spheres, and the alignments of law, rights and the administrative machinery of the political state. The application of a rights-remedy-compliance lens may well describe what is occurring given the premises manifested in the ecologies of CSR/RBC regulatory preemies. But they do not do as good a job of articulating the underlying structural premises which pint to the well-known outcomes. Indeed, where the analysis starts and stops is simple and elegant, but is also limiting: rights must be created; remedy must be provided; and compliance serves as the bridge between right and remedy. The rest is part of some other silo—international relations, international or constitutional law, environmental or sustainability law—but effectively excluded from the analysis. The rest is politics or obstruction that must be swept away.

This framing suggested a larger set of issues: first the issues all touch on a project conceptualizing— in reality constituting— the terrains of business and human rights through the lens of the constitutional ideologies of the Westphalian state and its public international collectives. But the constitution of economic production in which business and human rights is situated does not align well with the ideological presumptions of Westphalian state ideology. It suggests as well that a different theoretical model may be emerging, or at least necessary, to better reflect emerging realities. One promising ancient model might be useful— that if the constitutional theory reflected in medieval theories of jurisdictio and gubernaculum. Operationalized within the dynamic principles of *regimen politicum et regale* (political and regale regimes). These concepts of course provide a point of reorientation; they must be transposed to a very different age. But the foundational ecologies are close enough to suggest the value of the exercise: fractured institutions of authority bounded by autonomous systems of rights and privileges.

There is a semiosis to this proposition. It requires identifying the objects in this terrain and stripping them of their Westphalian signification. That then makes it possible to detach the meaning imposed on them by the Westphalian community of meaning making. The exercise, then, us not one of transformation of function but if the meaning attached to the functioning of the objects within a re-rationalized space. What constitutes signifies; and what signifies creates not just meaning but also the reality within which it is understood. The reconstitution of economic production can then serve as an analytical starting point. It changes the way in which both the challenges and possibilities of IBHRL can be understood. And it provides a language that can be coded into parallel emerging platform governance based systems.

That brings us (at last) to the central thesis of my remarks: that an older lens provides a clearer and more precise analytical lens, and that this lens suggests a more auspicious approach to ordering autonomous but related systems of rights and of government than what is on offer today. Let me flesh this out through the imagery and discursive tropes of old wine in even older bottles.

***Old Wine in Older Bottles***

*The Old Wine*: for GuataJV, these are structured around the core issues that follow from the decision to operate the factory: (1) the sources of discretionary authority to regulate, reward, and punish, (2) the rights that shape and limit the exercise of that authority, (3) the delegation of regulatory authority in and through GuataJV; (4) the character of rules and the positive or passive character of potentially applicable rights systems (law/norms, etc.,); (5) nature of authority (positive to enforce rules and manage systems; passive to protect rights). Their con sequences for in/ex-clusion may be divided into two distinct categories—mechanics and norms.

In its in/ex-clusion (mechanics) the focus centers on a set of well-known issue-constructs: what falls within and what falls outside of rule or institutional authority serves as the central ordering framework of each of these core issues . To that end one looks both within the authoritative structures of institutional systems, and one looks beyond them to the laws/norms/rules that limit the authority of that system to make decisions or enforce rules. The relationship between the enterprise and the norms and actors that their activities touch produce a border zone the mediation of which consumes the business and human rights debate.

A similar in/ex-clusion analysis applies to norms. These revolve around the perennially unresolvable questions: Who has rights; who has responsibilities-----and to whom?; and what binds these together or disaggregates? This analytical framework provides the conceptual and theoretical space in which the current intense battles over the business and human rights treat (a process started in 2014) and the mediation between environmental and human rights are currently framed. The discursive tropes are grounded in the requirement that one first choose a set pf starting premises before one engages in the discussion. These touch on the primacy of human rights, the rejection of the privileging of a profit model of economic activity, or a suspicion of markets, for example.

*The Older Bottle*: at the core of any conversation about the in/ex-clusivity of law lies an older and more dynamic urtext debate focusing on the relationship between what the medieval world understood as gubernaculum and jurisdictio. One can now turn to this old lens in a new context.

***Regimen politicum et regale***

One can now attempt to view the business and huma rights challenges through a different lens. To that end it is necessary to review the old concepts pf *gubernaculum* and jurisdictio, and their interaction subsumed within the concept of *regimen politicum and regale*.

*Gubernaculum* (*regimen reale*): Originally the regal authority and now that of states is grounded in the core principle that within the sphere of its authority, the governmental power is one of absolute discretionary authority (Potestas absoluta). This exercise of discretionary authority is unlimited within the legal scope of its exercise . Traditionally these were understood as the prerogatives of the “God Fearing Prince” who keeps his word and does as he promises (now the form of the government of a modern-day state). Within the scope of that authority there was effectively no appeal. One understand that now as the end point of governmental authority, whether judicial, administrative or legislative. When acting within their authority the regal power cannot be resisted. The forms of this regal power in the contemporary world can include: institutions of government and the practices of administrative discretion within the scope of authority (comprehensive civil authority). They are bound up in the premise of unlimited authority in the deployment of public law for the good order of the state. Those objectives (the old king’s peace) are contemporaneously translated as furthering prosperity and stability, or social justice, or more traditionally in the facilitation of law and custom.

*Jurisdictio (Regimen politicum*): originally was a reactive principle. It was made up of the autonomous limits of the regal power and its foundation in the form of law and privilege. Sometimes that limiting principle was conceded b the royal authority itself as s self-imposed limit; sometimes it was the received preconditions for the exercise of regal authority. This is the house that law may not have built, but which it occupies as if it invented the concept: Law is understood as the normative architecture within which government can function (even absolutely). These were traditionally rendered as privileges and rights (medieval liberties—both individual (Magna Carta) and collective (Fueros Catalanes). They are ow lodged within the institutions that define and curate the development of these norms and rights.

*Jurisdictio* is rights defining but also normative terrain setting. But the foundation of those definitions vary. They can be sourced in the customs and traditions of the people (private law), or in constitutions (public limits on regal authority) or in social and cultural norms through which ordinary and governmental power is exercised. The objectives of jurisdictio mirror those of gubernaculum. First is the object of boundary setting. This is accomplished currently through law enacted by representatives of the entire society (a parliament). It is also manifested as the law that rationalizes the relations among people (enforced through state organs—*potestas ordinaria*).

Taken together, gubernaculum and jurisdictio define the two halves of the regulatory whole. Nonetheless these are two halves autonomous of, though interconnected with, each other. Both enhance an block the other; both generate positive and negative rights and duties. Both create inside and outside spaces marked by their respective limits. The regal power is limited by a normative authority that may not have its source in the authority of the state to make law. At the same time law can be used as an instrument of governmental self-regulation. The intertwining of the two is based on the premise of fundamental detachment between governance and norms; each connected to but autonomous of the other. The state is not the law; the law is not the state; law is not merely an expression of state power; state power is not always manifested as law. Each, though, blocks the other within their respective terrains of authority. But each represents a limited authority. The state is not the world; the law is functionally differentiated.

These ordering insights are what give power to these old lenses in the contemporary space of business and human rights. Though they were originally deployed to describe the conceptual terrains of medieval constitutions, they have lost their power in that respect as the contemporary state system emerged and effectively reconstituted gubernaculum and jurisdictio within a meta space—the state—within which the highest expression of both were given effect. But contemporary human rights, sustainability, and global production spaces are not identical to modern state spaces. The crucial insight of John Ruggie, of the critical challenge of regulatory gaps—hinted at the rise of a proto medieval system of laws, norms and administrative power in functionally differentiated spaces each with a role to play in the operation of trans-institutional activity—economic activity foremost among them (though also religious, cultural, and social as well).

It is in this sense that one can argue that the state of limited but absolute discretionary authority (*regimen politicum et regale*) describes the state of the governance of business and human rights, subject to and charged with responsibility for or a duty of respecting and protecting rights and privileges that transcend the constitutional spaces of states. Absolute power (*potestas absoluta*) within the scope of its authority (the Roman imperium) limited by the rights of stakeholders (jurisdictio) whose rights and privileges serve as the (passive) barrier to the exercise of absolute power by (1) preventing its exercise; (2) or shaping it to advance rights or avoid defeating them.

***Who Cares?***

At this point one may ask: who cares? Fair enough.

And the answer lies in the growing distance between state based conceptual lenses for the analysis and framing of business and human rights—and increasingly of business, environment, sustainability, development and human rights—and the reality on the ground. That reality has effectively moved beyond a hermetically sealed system with the state at the apex of a collective that privileges and distinguishes political from every other sort of right or privilege, and that grants to the state a near authoritative monopoly over the instruments of norm making, now reconstituted as an exercise of the old medieval regal power. The regal power has become diffused; but so has the power of the norm, or the rule. The law has also been dispersed—like milkweed seeds in the wind—to every collective human society with the authority to make rules and the legitimacy to have them embraced by their willing adherents. This is a medieval space. And medieval conceptions may be more useful in rationalizing the developing terrains than any variation of a Westphalian model.[[6]](#footnote-6)

It follows that insights from the model of the *regimen politicum et regale,* one that intertwines *gubernaculum* and *jurisdictio*, are at the heart of the challenges for the construction of a business and human rights regulatory environment. The international law of business and human rights reconstituted as *gubernaculum* or as *jursidictio* enriches the analysis of the ecologies of regulation of economic activity. Within that framework, law can be understood now (as a limiting and positive commands) as constitutive of a rule-based plenary order (in the state, IOs, or enterprises) (rules based international order—abuse of discretion). Alternatively, a plenary discretionary governance order as constitutive of law-based limits (rights) and law-based positive obligations with respect to those rights and liberties (discretionary authority of the state to achieve objectives—rule by law).

At the core of the utility of the analytics of jurisdictio and gubernaculum are the central organizing structures within which both business and human rights and environmental rights (including climate change) are organized. A rights-remedy analysis takes for granted that there is some sort of framework or structural system which can be used as an implementation tool. And there is the problem, and the core of the structuring issues of rights and implementation. Rights-remedy principles do little to further understanding of the relationship between rights-remedy, for example, and the operationalizing principles of compliance-assessment-accountability. These speak to the intertwining of gubernaculum (the administrative discretion at the heart of compliance-assessment-accountability based systems), and jurisdictio. Jurisdictio provides the conceptual framework within which it is possible to more precisely examine the normative baseline against which accountability is developed as a set of qualitative or quantitative measures, as well as the principles against which assertions of administrative discretion may be exercised in its compliance and assessment processes. Gubernaculum and jurisdictio provides a basis, then, for examining the rights based systems within which the normative project of human and environmental rights may be realized—and limited.

Contrast the old concepts (still quite fresh to many) that frame the discursive tropes through which issues of legitimacy, construction and operation are debated. Examples abound. Most contemporary, the debates over the BHR Treaty—framed within the strictures of a normative or framework approach. Consider as well the debates over sustainability as a human right, and its counter--human rights realized through sustainability rights and norms. In both cases, the challenges could be more usefully recast as issues of multi-level misalignments between sources and spaces of governance, versus sources and spaces of law. Within both of course, the ideological content is critical—but now it is impossible to refine the analysis to get to that core issue precisely because one is inevitably caught up in the confusion of analysis in the shadow of the ideology of the Westphalian state acting within what Mr. Biden now calls a “rules based international order” and Mr. Xi refers understands as a political space of contestation among vanguard social and political forces, that asks more than it answers fundamental questions of government and of jurisdiction.

***The Discursive Characteristics of Business and Human Rights Through the Jurisdictio/Gubernaculum Lens.***

That brings us, at last(!) to the discursive characteristics of this analytic lens in BHR frameworks. With respect to *jurisdictio*, one can reimagine rights, responsibility, and supervisory regimes. Rights regimes are focused on those who could suffer harm, for example within the rule/norm structures of the UNGP and the OECD Guidelines MNEs. Yet that requires reconceptualizing these structures as normatively jurisdictio in character rather than merely descriptive and an exercise in passive taxonomy. Responsibility regimes, in turn, are focused on those who can cause harm—tort, contract, and due diligence. This is what modern norm narrative influencers dismissively categized as the “victim”. They are not, of course. They are rights holders whose jurisdictio may not be harmed by the exercise of state or private gubernaculum (and thus the connection between rights as limiting forces and remedies as the corrective for abuse of the regal discretion). In contrast, the state (though not alone) functions most effectively within supervisory regimes. These are focused on institutions with systemic responsibility-duty —system integrity rules—for markets and legal systems. Here is jurisdictio transformed into the language of systemic integrity, of the guardians of the borders remedial, monitoring, accountability and criminal regimes.

With respect to *gubernaculum*, one can reimagine remedial, monitoring, accountability, and criminal regimes. Remedial regimes focus on two kinds of harm. The first are harm to the rights of individuals and include the area , now hotly debated, of human rights (and environmental/sustainability) due diligence in economic activity, nicely manifested in the Office of the High Commissioner for Human Rights’ Accountability and Remedy (ARP) Project. The second are focused on system harm and include monitoring and accountability systems, as well as the now rich area of the governmentalization of business in the furtherance of system integrity protective measures. These include human rights due diligence measures, but also the reconfiguration of the law of corporate governance—for example with respect to fiduciary duty. Accountability regimes, in turn, focus on the related objectives of supply chain due diligence, of markets disclosure triggers, and in the public and private sectors, of ratings. Lastly, criminal regimes have at their heart the curation of an administrative and prosecutorial discretionary authority, as well as sanctions, national security, anti-terrorism regimes. This last connects the human rights, development, sustainability project to the management and ideology of conflict among states or between states and state effective non-governmental collectives.

It is possible to take this to a more granular analysis of key human rights and sustainability soft law measures—the UNGP and the Framework Principles. The UNGP creates structures of in/ex-clusion. To that end gubernaculum is built into the discretionary authority accorded to states (Pillar 1) and enterprises (Pillar 2) with respect to their respective duty and responsibility to protect or respect human rights. That jurisdictio against which this regal power is to be deployed is detached from wither state or enterprise and derives from an independent source—international organizations and their normative projects. For states under Pillar 1 this is based on their individual relationship to international law as a formal matter. For business under Pillar 2 it is based on the International Bill of Human Rights and key ILO Conventions. In/ex-clusion works from the bottom up. Rights holders in- or ex-cluded from (1) application of rights (based on whether the regal power is asserted by the state or by business) and (2) access to remedy, again based on the source of the remedial mechanism.

UNGP jurisdictio, though, appears to present two faces. For states under Pillar 1, international norms legalized in and through states. For enterprises under Pillar 2, identified international law made mandatory through internally applicable private law. In this way, gubernaculum and jurisditio are autonomous but interconnected. That autonomous interconnection produces that separations that include or exclude (1) themselves; (2) law; and (3) rights holders from each other. Pillar 2 subordinates the regal authority to the rights system imposed. The opposite in Pillar 1 where the state subordinates 1aw/norms to its discretionary decision making. Always excluded however, are those states and entities that do not conform to the fundamental ordering of the system. Prominent among them are Marxist-Leninist and theocratic systems which, for decades have been assumed to be in states of transition to the orthodox model against which the UNGP’s jurisditio-gubernaculum principles may be applied.

*UNGPs—An In- Ex-clusion Analysis*

 One can drill a little deeper into the jurisdictio/gubernaculum analysis. For jurisdictio:

Inclusions are centered on the rights and privileges of the human. What is unsettled is the in- and ex-clusion of the individual or the collective (are rights to protect against Gubernaculum embedded in the person or in people’s collectives?). These may be differentiated depending on holder of regal (administrative) government. In contrast exclusion focus on an important set of unidentified or marginalized rights and privileges (liberties). These include environment and climate, but especially on property and production rights. That sets up a conflict with the jurisdictio universes of many states. But it also excludes other forms of human individual/collective activity, for example non-profit, non-production activity. These exclusions are at the heart of debates about the draft international business and human rights treaty in gestation since 2014. Lastly, the ordering of jurisdictio is fractured as against gubernaculum. The fracture is evident in regulatory silos: the human centered (UN Res. Human right to a clean, healthy environment (2022)); the development centered (UN Res on Development (1986)); the production centered (national constitutional protection of rights to property); and the bio-diversity centered (right to clean and healthy environment includes human, development and production rights)

For gubernaculum: Inclusions are centered on what I call governance Imperium: States (Pillar 1); enterprises (Pillar 2); international orgsanizations (superior normative power). Protective or systemic functionally subordinate roles are reserved for NGOs, Human rights Defenders, and communities. Exclusions focus on rights holders (incarnation of jurisdictio), and on other rights regimes (investment, national security, trade, criminal, etc.). But gubernaculum is also fractured: the regal power is exercised among the state system, the international public and private systems, and economic/social/cultural systems. The facture applies as well to limiting the exercise of administrative (regal) discretionary authority. There are rights-based limits on state that are different from rights-based limits on enterprises. These can be seen in the contrast between Pillar 1 and Pillar 2 limiting principles. Those horizontal rights limitations are exercised within a matrix of vertical ordering of government power that sometimes applies and sometimes does not. This is especially notable in the constitution of Pillar 3 remedies.

***In/Ex-clusions of the Framework Principles on Human Rights and the Environment***

 The Framework Principles exhibit a very different in/ex-clusivity vibe. These are grounded in traditional principles of exclusivity. They are directed to states. Human Rights the means by which changes to climate is measured. It follows that climate has no “rights”; it is the welfare producing complex of exogenous physical relations on which human rights are dependent. Climate is protected in itself—but only in relation to its value to the human. Likewise, bio-diversity as a measure not in itself but in its relation to the human as the center of value. In this system, the human assumes the traditional regal role as “Good Shepherd” subject to no limit outside of itself. And more interesting, perhaps, the state serves as the Good Shepard of the human shepherd.

 These principles are manifested in the fourteen key provisions of the Framework:

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.

2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

6. States should provide for education and public awareness on environmental matters.

7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.

8. To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

9. States should provide for and facilitate public participation in decision-making related to the environment and take the views of the public into account in the decision-making process.

10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.

12. States should ensure the effective enforcement of their environmental standards against public and private actors.

13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

**The Disaggregated Rainbow**

 The ideal of comprehensive BHR/Sustainability governance remains difficult to reach under current circumstances. It ought to posit a seamless fusion of gubernaculum and jurisdictio (norms and governance—prevention-mitigation-remedy as its modern expression)—horizontally and vertically. The whole project is viewed as “indivisible and interdependent”.[[7]](#footnote-7) Instead, the UNGP and Framework nicely exposes a double fragmentation. First, the fragmentation between governance and norms has been described already. Second, and less appreciated, is the fragmentation between markets and physical territory as regulatory spaces within which governance-norms function. Moreover, we have noted the way that the regal authority (gubernaculum); horizontally divided among institutional actors: states, enterprises, IOs, etc., but vertically integrated within. These constitute another way of approaching the now famous governance gaps. Likewise, the law of rights(rights in law (jurisdictio) functionally differentiated horizontally but vertically integrated within functional limits . These present as global normative silos. Lastly the fracture between markets and territories ought to be underlined. These produce incentives toward the cultivation of a demand supply relationship by (re)defining markets and territories. The result: cultural learning that shapes signification of governance/norms.

 With that in mind one can again reconsider reconsider our GuataJV allegory, this time as a series of interconnections between governance and rules. But neither these rules nor governance align. uataJV occupies different places depending on the place and the rules that apply. The complexities of the relationship between government and jurisdiction and between two distinct systems for their rationalization on the events that trigger their application, makes for good theoretical exercises but tend to make for unsatisfying resolution. These take two forms: either in the form of tort-based compensation, or in the operation of a predictable and stable system. The structures of this challenge are well known enough to invite the conclusion that the implications are banal—a problem of division of labor; and yet a G/J analysis clarifies.

**From Gubernaculum/Jurisdictio to Platform Governance**

I want to touch on one last point before concluding, one that takes our recasting of the business and human rights environment through the lens of jurisdictio and gubernaculum. It revolves around the question: Can one overcome the ancient discursive and disaggregating forms of gubernaculum/jurisdictio in the BHR-Sustainability context? The answer may lie in the emerging forms of platform governance as alternative to disaggregation tropes. It will require a move away from governance and norms disaggregated and interconnected (the administrative institutional model of rationalizing power relations). It will require an openness to the possibility of a development of spaces (platforms) where users and consumers of law and governance can converge. To that end, a smart city model (system of systems), for example, integrating laws and government in a single digitalized space.

**Summing Up**

This intertwined division frames current debates around the in/ex-clusion of actors, norms, or causes from governance principles (jurisditio), or from the administrative mechanisms for its realization (gubernaculum). That debate applies with equal force in the constitution and operation of the international legal-regulatory field and the constitution of its administrative organs. It is central to consideration of the interplay between international soft-law systems (jurisditio) and the private-public institutional operational mechanisms (gubernaculum) through compliance and accountability principles.

The lens of Jurisdictio and Gubernaculum (1) refines the ability to map the inflection points of BHR governance and its challenges; (2) is characterized by misalignment, disaggregation, overlap, and gaps; and (3 ) applies on a number of fields of play simultaneously. These field consist of IOs-States-Enterprises-Other Collectives; International-national-private law/norms; Environmental-Investment-Development-Human Rights-Security; Rights Holders-Responsibility Centers-Accountability Mechanisms; Prevention-Mitigation-Remedy. The analysis recasts inflection points in terms of disjunction and siloing. Disjunctions touch on rights and privileges that affect enterprises not the same as those that define state duty in international or national law/norm systems. The resulting misalignments stress the application of government on its object (states to enterprises; enterprises to down stream production stakeholders, etc.). The problem isn’t with rights or government, but with the misalignments among them. On the other hand, we have seen how Jurisdictio and Gubernaculum silos produce regimes of fFunctional differentiation of norms and governance create uncoordinated overlap.

The Allegory of GuataJV points to approaches in the face of misalignment. The current system does not produce solution or order; it develops systems of risk that are then used to assess payouts and thus to develop strategies for avoidance or settlement. The future in platforms and “smart” governance. The objective is not to reorder but toward the creation of systems for interactions within a rationalized space where consumers in the intertwined fields of play may interact.

This ultimately points to a new form of rationalizing constitutional ordering, one in which empowering/limiting rules are detached from the organs of authority into which they may be embedded. Its semiotics cannot be avoided. It is not that what is examined has changed. It is rather a matter of the signification with which each will be invested, and the structuring principles around which these significations can be given meaning. We have been stubbornly holding on to the meaning structures of Weshtphalian constitutional ordering to signify a universe of activities undertaken by actors that do not fit comfortably within those premises without changing their signification. For many the implications are clear—what is emerging must be reformed to better fit within the significations that are acceptable within ordering principles of orthodox Westphalian constitutionalism. For others, me included, the misalignments suggest that it is the orthodoxy that must be re-imagined rather than the objects reformed. The constitutional ordering of global economic production can be rationalized, just not within the Westphalian worldview. I have suggested one possibility. It represents the constitutionalism of platforms—of frameworks for the rationalization of relationships of consumption and use(of users and producers of law/norms and of the institutional organs empowered or bound by them. This lens can be used to more clearly understand the frustrations and dead ends of the discursive narratives of contemporary human rights and sustainability in economic activity as well as point to ways to overcome what has been the great blockages of contemporary discourse. No doubt others may be appealing. These define the new frontier in the constitutionalization of new global spaces, a process that has just started.

Thank you.

1. Cf., Charles Howard McIlwain, Constitutionalism Ancient and Modern (Cornell U Press 1947) pp 67-92; Larry Catá Backer, ‘Reifying Law--Government, Law, and the Rule of Law in Governance Systems’ *Penn State International Law Review* 26(3):521, 527-546 (2008). [↑](#footnote-ref-1)
2. Cf., Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ *European Journal of International Law* 17:187, 192-195 (2006). [↑](#footnote-ref-2)
3. Cf., Charles Howard McIlwain, *Constitutionalism Ancient and Modern* (Cornell U Press 1947), 67-92; Larry Catá Backer, ‘Reifying Law--Government, Law, and the Rule of Law in Governance Systems’ *Penn State International Law Review* 26(3):521, 527-546 (2008), and the sources cited therein. [↑](#footnote-ref-3)
4. Drawn heavily from John Fortescue 1394-1479, De Laudibus Legum Angliae, and discussed in McIlwain, supra. [↑](#footnote-ref-4)
5. The morning that these remarks were delivered, the Office of the UN High Commissioner for Human Rights released its Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China (GJ/56/2022, 31 August 2022) <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf>, along with the response of the Permanent Mission of the People’s Republic of China to the United Naitons Office at Geneva (<https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/ANNEX_A.pdf>) which itself serves as an even better example of the misalignments that form of the basis of these remarks. [↑](#footnote-ref-5)
6. On Terrains, consider Larry Catá Backer, “[Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State](https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1604&context=ijgls),” (2016) 23 Indiana Journal f Global Legal Studies 61, https://www.repository.law.indiana.edu/ijgls/vol23/iss1/4/ [↑](#footnote-ref-6)
7. UNGA 41/128 Right to Development (1986). [↑](#footnote-ref-7)