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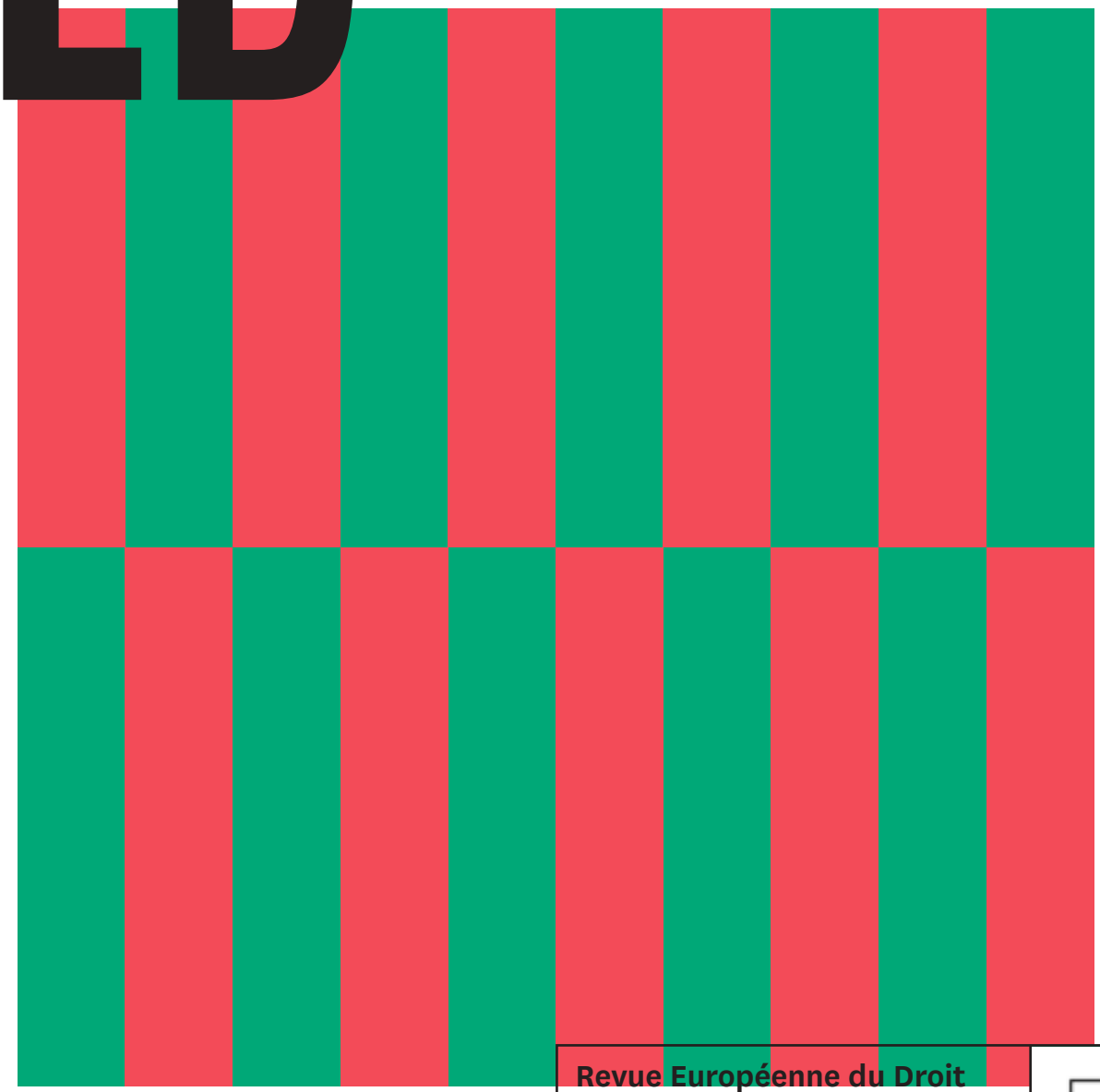

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A plural global governance

At a first glance, it might seem anachronistic to write about global governance, since the era of grand universalist declarations, globalizations of trade and transnational agreements is on the brink of being replaced by that of rediscovered national interests, isolationisms and the selfishness of the "Me First" politics. The crisis - or perhaps the polycrisis - in which we find ourselves, as a result of the emergence of economic interdependencies uncoupled from the bonds of solidarity, is above all the reflection of a certain form of globalization, characterized by a structural fragility inherited from profound and precipitous transformations. A new world is already under way, a heterogeneous, unstable and unpredictable amalgam, whose features and fault lines could not have been anticipated. This trend is apparent in the new protectionisms and the crisis of multilateral cooperation, but also in the emergence of numerous alternative but sometimes incompatible political, social and economic models.

Global challenges are multiplying, whether related to current and future pandemics, migratory crises, the fight against crimes against humanity, financial and social crises, tax evasion, or the ambivalence of powerful new technologies, to cite but a few. Together, these challenges, which show a humanity able to threaten its own future, create, in fact, an (involuntary) community of fate. Whether one likes it or not, they call for a global concertation and, without doubt, a break with nationalist reflexes in favor of new rules of coexistence between different communities. Rather than a denial of these inescapable realities, the current polycrisis is an opportunity to question, before a new acceleration, the concepts underlying the unflappable race towards an increased globalization.

It seems necessary, in this regard, to acknowledge the growing inadequacy of traditional legal thinking. In the absence of a comprehensive shared ideology underpinning the multiple, disparate and fragmented normative spaces, our societies are still seeking an appropriate legal narrative, able to both reflect and tame them, while avoiding the twin pitfalls of the "great collapse" and of the "great enslavement".

Indeed, globalization is far from being limited to international trade, and calls therefore for new rules of coexistence between heterogeneous political communities, without any hope that relevant normative guidelines (the "North Pole") could arise out of the traditional "hearths" of shared values. During the bygone era of national communities, arising out of both shared memories and common oblivions, collective agreements and disagreements seemed to shape legal rules and structure political institutions, stabilized by shared (albeit evolving and sometimes imposed) values and interests. These "national compasses" became increasingly ephemeral; today, they are disappearing one after the other, under the pressure of the corrosive forces of globalization, unable to meet the challenges that humanity faces as a whole. Without a new compass, humanity travels like a "drunken boat", carried by the four winds of the Earth, nostalgic of a vanished memory and of undefinable common values. So, where can be found the tools for such a reconstruction, and how can we reinvent a form of global governance fitting for all the parties?

Without doubt, reflections about a "global" law are not new. They are apparent in theories seeking to construct a global constitutionalism, a global administrative law, or a transnational non-State legal order. None of these (multiple and diverse) projects have yet succeeded, and their struggles testify to the inherent tensions, even irrationality, of any attempt to rely on well-ordered legal categories, stemming from idiosyncratic histories and memories, in order to understand and act in a world that is fundamentally disordered, interactive, unstable and non-hierarchical.

In other words, the complexity of these unprecedented challenges, as well as the diversity of lifestyles and particular interests, make legal transplants, or extrapolations of national solutions to the global level, ineffective and, above all, inappropriate.

The two pitfalls of globalization, the hegemonic order of a universal monarchy, what Kant called "despotism", on one hand, and the great disorder of a world that is not only divided, but fragmented, on the other, can only be avoided through a contextualized universalism, where legal rationality would not provide "ready-made" solutions, but rather the tools for a rational deliberation and cross fertilization, able to create unity out of plurality. In other words, acknowledging that diverging national legal systems cannot be unified and replaced by a single model, a true global governance of the commons, if possible, can only be plural and unstable, hybrid and flexible.

On closer inspection, this call for a plural governance is merely the reflection of a common practice, that of the legal "tinkering" engaged in by the actors of globalization, that is to say, the attempt to "globalize" national legal orders through harmonizations rather than unifications, and to "contextualize" international norms by adapting them to local circumstances. Its incarnations are numerous.

This effort of mutual tolerance is apparent, for instance, in private international law, where the operations of qualification and recognition are based on the acknowledgement of a certain proximity of legal concepts and institutions, beyond the diversity of their national manifestations, provided, however, that such operations do not offend the fundamental principles (or the international public order) of the "recognizing" authority, in other words, that the latter can accommodate in its national legal order the foreign concepts and institutions without thereby denying its own core values.

A similar story can be told about the methods used in the implementation of international instruments when any uniformization is unfathomable. Such is the case of the so-called "functional equivalence" method, building on a fruitful mix of legal realism and systemic functionalism. When the OECD took the initiative of a Convention on Combating Bribery of Foreign Public Officials, its drafters, aware of the deep divergences between the legal cultures of member states in criminal matters, limited themselves to defining a system of basic principles and turned to this notion of functional equivalence in order to allow for a margin of national adaptation, without requiring uniformity and without threatening the fundamental principles of national legal systems (for instance, with respect to the criminal liability of legal persons).

In this regard, the equivalence between national measures is both a method and an objective, the success of which depends on successful monitoring and control of national implementations, both the law "in the books" and as applied in practice.

Another example, in the field of human rights, is the concept of a "national margin of appreciation", which was originally absent from the ECHR, but which was introduced by the European court early on: in cases where restrictive or even derogatory measures are authorized under the Convention to protect national public policies, judges take into account the context (e.g., cultural, social, economic) of each State in order to relax the requirements of a uniform application and thus preserve the principle of subsidiarity.

These instances show that harmonizing the divergences (in a bottom-up way, from the local to the global level) and contextualizing the universal (in a top-down way, by diversifying it from the global to the local) does not mean abandoning all axiological rationality. Indeed, plural governance relies, first of all, on a set of guiding principles that must be respected in order to acknowledge the proximity beyond the diversity.

One can find traces of this search for guiding principles in the long (but somewhat overlooked) tradition of the *ius gentium* of Roman antiquity, supposed to reflect the requirements of natural reason, that is, the needs common to all humans as rational beings. The tradition continued in the Middle Ages through the *ius commune*, the result of a hybridization of Roman law, canon law and *lex mercatoria*, applied as a method of reasoning and a guide to the interpretation of diverse and complex local norms.

This last point leads us to another dimension of a plural global governance, which requires that formal validity, a notion intertwined with the definition of common standards of deliberative rationality, be combined with an axiological validity tolerant of divergent approaches, insofar as they are mutually comprehensible. It also implies procedural requirements, aimed at ensuring that the final decision, whatever its content, is rationally acceptable: fair representation of the parties, transparency in the motivation of decisions, rigor and coherence in the use of weighting methods, as well as, where appropriate, respect for reliable scientific data.

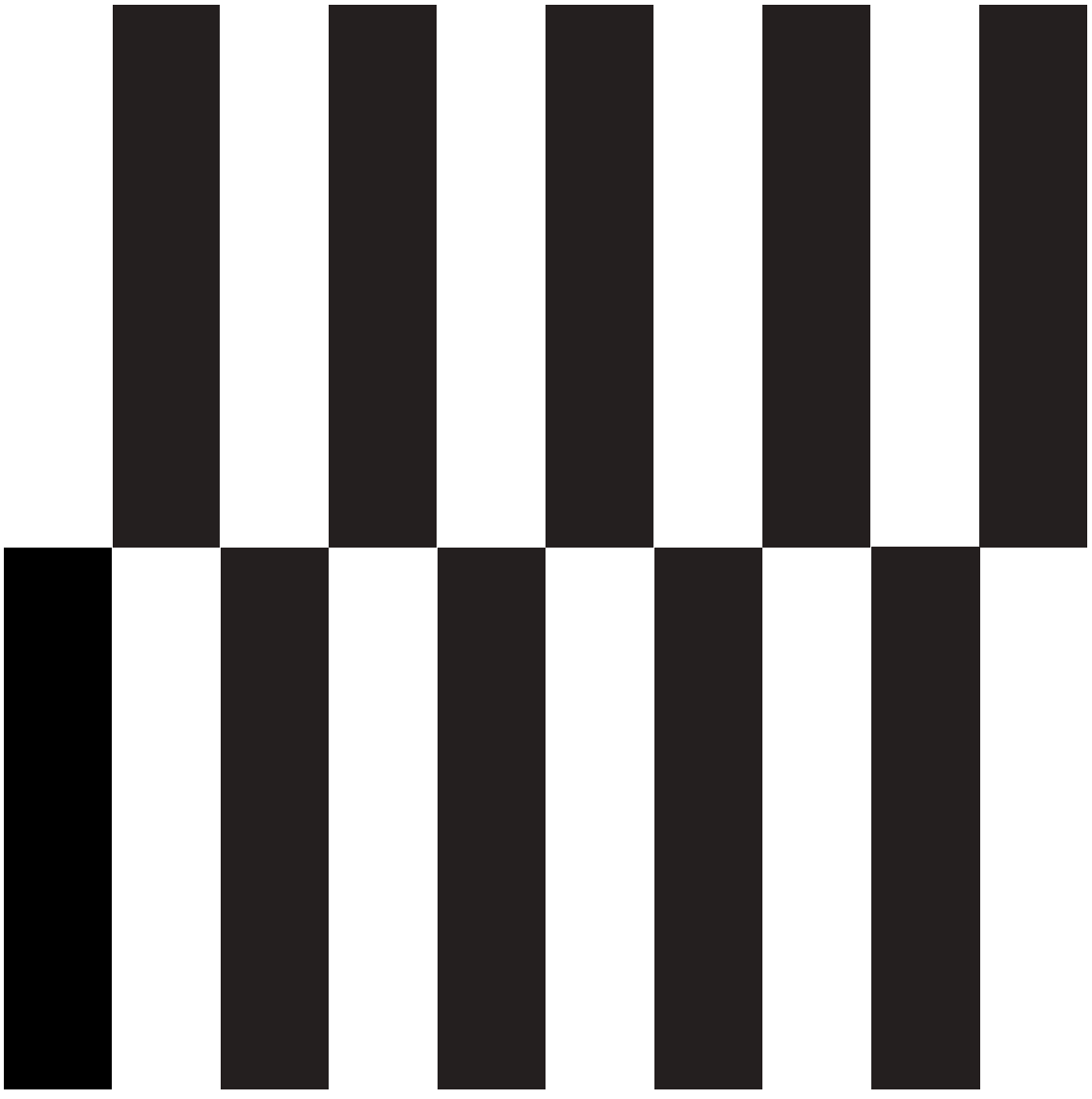
These are the *sine qua non* conditions of a rational deliberation, which substitutes contextualization for uniformity and compatibility for pure and simple conformity, without falling into arbitrariness, based on an updated formalism relying on non-classical logics, such as fuzzy logics or topology (the logic of neighborhoods).

It is in this sense that plural governance could allow for the emergence of a narrative of humanity as a common adventure, in search of a "dynamic balance" that would stabilize societies in their reciprocal relationships without rigidifying their differences, or, in short, would pacify humans without subjecting them to a standard model. In this respect, the European project is undoubtedly one of the most ambitious laboratories that we have at our disposal for observing and testing the emergence of common solidarities. It is only because Europe is fuzzy that it might perhaps succeed in creating a true ordered pluralism. Valuing the best of each national tradition through reciprocal borrowings (the office of the European Public Prosecutor is an example), a sovereign Europe could thus invent a sovereign order that is neither authoritarian nor uniform, but democratic and pluralist.

This "utopia" is all the more feasible that the European Union is also trying to invent another way of governing through the law, not only by separating powers, but by aggregating levels of organization (State, *infra*- and *supra*-State levels) and categories of actors (public and private, such as multinational corporations, as well as civic and scientific actors), in a governance that is still regional, but that is already substituting interactive and

evolving, and therefore complex, relations to the hierarchical and stable relations of the nation-State. It is in this sense that the idea of European "sovereignty" must be understood: if the construction of a "sovereign, united and democratic" Europe enables politics to regain its "capacity for action" in the context of globalization, it is due to the passage from a solitary sovereignty, protected but also enclosed within its borders, to a sovereignty based on solidarity, a sovereignty that is open and augmented, aiming to protect, beyond national interests alone, true global common goods.

Methods



Luis Arroyo Zapatero • Honorary Rector of Universidad de Castilla-La Mancha, President of the International Society of Social Defence

Which method for penal harmonization?

1. Traditional shortcomings of comparative criminal law for harmonization

In the age of globalization, a qualitative leap in the content and methodology of comparative law, particularly with regard to policy on crime, is indispensable. However, this issue remains difficult, due to the significant political discontinuities, and in particular the two World Wars, which directly affected the academic proponents of comparative law, traditionally French and German. The ensuing drama was captured by the President of the French branch of the *Société de législation comparée*, Jean Paulin Niboyet, during the February 19, 1949 session: *"Berlin was a formidable competitor for us: there were two institutions there, with extremely learned men at their head, who ensured that works of great value got published, and who had magnificent libraries: an institute of comparative public law and an institute of comparative private law. They were driven out of Berlin. It is up to us to ensure that Paris becomes the main centre of comparative law in Europe."*[1] The objectives have also become more complex. Two modern classics such as Zweigert and Kötz could until recently claim that traditional comparative law scholarship aimed at being referred to in the process of drafting new law or for the elaboration of technical-legal concepts that would contribute to scientific knowledge.[2]

The processes of international legal harmonization are very recent. They began with the League of Nations and then multiplied within the United Nations, with harmonization instruments addressing multiple legal issues. In the field of human rights, the Universal Declaration of 1948 has slowly found its regional reflections, with European and American courts and, in a more limited way, at the global level. In the field of criminal law protection of common international interests, the process came to a halt before giving rise to what should have been the first standard of harmonization: an International Criminal Court, with its own laws on crimes and international procedures. However, since the end of the Cold War, the process of international harmonization of criminal law has been faster and more extensive than usually claimed.

It is no exaggeration to say that more than a fifth of criminal law is now harmonised at an international level, amounting to 30% in the European Union, with harmonized first principles in addition to the principle of mutual recognition. However, the harmonization that has been achieved at a global level has historically been driven by diplomats rather than lawyers, and in particular comparative lawyers, although some brilliant players managed to combine diplomacy and the law. Suffice it to mention the role of René Cassin and Hartley Shawcross in the drafting of the Universal Declaration of Human Rights, the Convention for the Prevention and Punishment of the Crime of Genocide or the European Convention on Human Rights. Among politicians, the first woman to preside successfully over an international organization deserves to be remembered and praised: Eleanor Roosevelt. But in these international efforts, there was little theory.

Until the 1900s, efforts were only geared towards modernizing and extending the *lex mercatoria*, so relevant and so easy to use, taking into account the fact that the unification of private and commercial law on a global scale facilitates international commerce. However, in criminal matters, the problems are quite different, totally subject to the sovereignty of the State, which is indeed most clearly reflected in the national currency and the criminal code. Nevertheless, criminal matters were already on the international academic agenda before 1914, especially in legal scholarship, with the multiplication of international congresses on penitentiary issues since the beginning of the 19th century.[3]

The first major leap forward was taken on the initiative of Franz von Lizst in Berlin, where he compiled a gigantic collection of penal codes which he sought to compare in order to induce their essence (*Vergleichende Darstellung des deutschen und des ausländisches Strafrechts* (1905 - 1909)). Five years earlier, in 1900, the first International Congress of Comparative Law was held in Paris, where Raymond Saleilles and Edouard Lambert proclaimed that comparative law should be the scientific tool of the rapprochement of civilizations and the development of international law through the elaboration of a common law of humanity, significantly supported by the *Société de Législation Comparée*, created in 1869.[4] At the beginning of the 20th century,

1. The reconciliation of Europe was still far away, in particular that along the famous Franco-German axis, see, L. Arroyo Zapatero, "Soixantième anniversaire de la Société Internationale de Défense Sociale, 1949-2009: L'esprit des temps", *Cahiers de Défense Sociale*, 2009-2010, p. 11 et seq.
2. See, K. Zweigert, Konrad, H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, Band I und II, Tübingen JCB Mohr, 1984 (1st ed of 1969), p. 51.
3. On the evolution of criminology, see L. Arroyo Zapatero, "Las tres pasiones de las Ciencias penales", *Criminalia*, 2020, p. 96.
4. See, B. Fauvarque-Cosson, "Deux siècles d'évolution du droit compare", *Revue internationale de droit comparé*, Vol. 63 N°3,2011. pp. 527-540; M. Ancel, *Utilité et méthodes du droit comparé. Eléments d'introduction générale à l'étude comparative des droits*, Neuchâtel, Editions Ides et Calendes, 1971, p. 17.

John Henry Wigmore founded in Chicago the Comparative Law Bureau of the American Bar Association (1906), with an intense activity of translations and publications of works on criminal law and criminology.[5]

For their part, academics set in motion a powerful movement under the banner of the International Association of Penal Law, under the leadership of Von Lizst of Berlin, the Dutchman Van Hammel and the Belgian Adolph Prins, which succeeded in bringing together criminal lawyers from all the countries of continental Europe and building up a broad overview of criminal law principles and institutions, even though the war meant Germany's practical disappearance from international life. As Ignacio Berdugo pointed out, almost everything that was subsequently implemented was the result of this gigantic scientific effort.[6]

This effort was given a new impetus with the creation of the League of Nations, which put international legal cooperation on the agenda, including the establishment of the International Court of Justice and of the International Labor Organization. The aim was to build a world government that would prevent wars and pave the way for progress.[7]

The efforts of the League of Nations during the first ten years were first of all a response to the need to eliminate insofar as possible the divergences between national legislations which were likely to prevent co-operation between States in the fight against crime, by unifying the legal frameworks, in particular the differences regarding rules of extradition and the double criminality principle, relating to criminal acts detrimental to the interests of nations, such as counterfeiting currency, trafficking of women, drug trafficking, slavery, piracy, obscene publications and even terrorism, the latter through a Convention adopted in 1937. In the same year, a proposal was made for the establishment of an international criminal court to protect international peace. In addition to these proposals for the unification of groups of offences, a long list of proposals was drawn up on general criminal law issues such as the harmonization of the concepts of justification and self-defense, of state of necessity and recidivism, and, complementing the existing proposals on conditional sentences and conditional release, the successful formulation of the incorporation of security measures into the codes. In reality, it was more a question of a "topical" harmonization of some institutions than a unification of criminal legislation, although this terminology had not yet been formulated (by Theodor Viehweg).

2. Scope and limits of the vertical harmonization: the Nuremberg disputes on 'conspiracy'

However, the common law that the comparatists aimed to create above national laws would be mainly developed by people non-affiliated with the movement.[8] This was in particular the case of the first 'unified' global law: the London Statute (the 'Statute') for the creation of the International Military Tribunal, with its list of crimes and its complementary jurisdictional details. The Statute defined the four crimes to be punished and some principles that amounted to the greatest legal innovation in the history of humanity: the criminal responsibility of the leaders of the countries that committed the atrocities and not just of the States as such, therefore overcoming the impunity of the heads of States and governments, the irrelevance of each country's national legal treatment of crimes against humanity and the rejection of impunity for atrocities committed by superior order. All this constituted a unified corpus in which a single clause gave rise to frictions between legal cultures: the autonomous criminalization of conspiracy. Its genesis shows the difficulties that arise when comparatists do not participate in the efforts of harmonization of criminal law.

The 'conspiracy' clause had great strategic value for the Americans, but this idiosyncratic theory of ascription of liability, stemming from the common law, was neither acceptable nor understandable from the perspective of continental law. It was not only an "issue of legal cultures", since the aim was to apply to participants and lesser accomplices of certain crimes the sanctions reserved to the perpetrator of an accomplished crime, irrespective of the degree of responsibility of the crime and irrespective of whether the crime was accomplished or was merely attempted. This issue is not irrelevant, but for the American strategy it was utterly fundamental.

It is worth recalling the profound divergences that existed between the British, the Soviets and the Americans as to the attitude to be adopted with regard to the punishment of the main war criminals. The former favored a "political" solution, that is to say what they called "summary executions" which would affect up to 50 Nazi leaders - which the Soviets multiplied by 100 - although this may have been a joke from Stalin to Churchill at a bilateral meeting in Moscow in October 1944 following the Quebec meeting, for when Roosevelt was informed of this, Churchill also said that Stalin had pointed out that in his view there should be no executions without trial.[9] For his part, F.D. Roosevelt did not want to take the risk of a "lawyer's" solution, the outcome of which would risk to harm the victory. But his closest advisers, former prosecutors, warned him against the so-called "political" solution, both in principle and because of the risk that the American people - who did not experience the Nazi atrocities on their soil - would reject mass executions as being barbaric.

On the contrary, they thought that the trial would be a way of presenting to the American public the reasons why they had to sacrifice their children in Europe for the

5. See, L. Arroyo Zapatero, "Las tres pasiones de las ciencias penales", *op. cit*.

6. See, I. Berdugo Gómez de la Torre, *El movimiento de política criminal tendente a la unificación legislativa*, Madrid 1976: <www.cienciaspenales.net>.

7. See, M. Ancel, *Utilité et Méthodes du Droit Comparé*, Ides et Calendes, 1971, p. 22 *et seq*.

8. See, M. Delmas-Marty, *Le relatif et l'universel*. Les Forces imaginantes du droit, 1, Seuil cit. *infra*, p. 36-37.

9. See, T. Taylor, *The anatomy of the Nuremberg Trials*, A. Knof, 1982, chapter 4.

second time in two generations. Henry L. Stimson, Secretary of War and former Secretary of State, Judge Samuel Rosman, Special Advisor to the President, and Attorney General Biddle were of this opinion. To persuade Roosevelt, Stimson presented the idea of incorporating 'conspiracy' into the trial charges as particularly effective. He pointed out that at the beginning of the century, when he had to argue as prosecutor of the Southern District of New York against companies involved in tax evasion and sugar smuggling on the East Coast (and, incidentally, against strikes and trade unions), the impunity of business leaders ended only when they began to apply the first economic criminal laws that included the former British concept of conspiracy. From that moment onwards, prosecutors did not limit themselves to punishing the lowest ranks of the organization, i.e., the employees who handled the sugar shipments, but could also prosecute the managers and the companies themselves. With presidential authorization, they took this alternative system to London, calling it the "conspiracy + criminal organization trial system".[10]

When the American delegation arrived in London on 4 April, it found that the British rejected any kind of legal solution and stuck to the so-called "political" solution, but the presentation of the alternative of the so-called criminal "conspiracy + organization" system was gaining ground. However, on 12 April, Roosevelt's death occurred without anything being decided with the British and the Soviets. At the same time, the London War Cabinet accepted the American proposal, which it considered a good compromise between a trial and summary executions. Washington then sent a committee to London, chaired by Judge Rosenman, who was retained by the new President Truman, and Secretary of War Stimson. But anything could still happen. The President, who promised Stalin that he would let the Soviets take Berlin, was no more, and tensions that could shake the alliances were beginning to arise. The liberation of the Buchenwald concentration camp on 11 April, that of Bergen Belsen by the British a day later, and finally that of Dachau by the Americans on 24 April put an end to the tergiversations. The photographs attesting to the committed atrocities made the headlines and American citizens could now understand what they had fought for and believe what the Soviets had been denouncing since the summer of 1944, when they liberated Majdanek and the three other camps in the East, as well as Auschwitz in January 1945. The Allies themselves discovered the Struthof-Natzweiler camp in France at the end of November 1944.

For the Americans, the notion of conspiracy, which appears in the Statute itself as a sub-section and with a subsidiary character, was the key concept for reaching the major war criminals. Thus, it became possible to prosecute even the most difficult characters to charge, such as Schacht and von Papen, who seemed to have confined themselves to witnessing the beginnings of the dictatorship. This is why Prosecutor Jackson, in his opening speech of the act of indictment, argued for it as an autonomous crime. However, the court rejected the American interpretation out of hand and applied the ordinary criteria of perpetration and complicity. Against the charge of complicity it stated that the last paragraph of Article 6 of the Statute "*was not intended to add a separate offence to the crimes previously enumerated… Therefore, the court will henceforth neglect the charge of conspiracy…*".[11]

It is interesting to look at an extreme moment in the adoption of a policy of radical unification and universalization of criminal law, and to show the limits of a hierarchical and vertical imposition of idiosyncratic institutions of a State or legal culture. Thus, the ascription of the crime of conspiracy radically collapsed in front of the wall of astonishment of Henri Donnedieu de Vabres and even of the Soviet judges.[12]

None of the judges clarified his position, perhaps because the reference to "other legal cultures" avoided a substantive discussion over the differences between the 'conspiracy' clause in US and continental law. In fact, there were in the great circle in London and later in Nuremberg some lawyers with strong comparative law pedigrees. Among the judges were Henry Donnedieu de Vabres and Nikichenko, both of whom had written books on international criminal law. The former had already published *Les principes modernes du droit pénal international* in 1928, as had the Soviet substitute judge A. Trainin, author of *La défense de la paix et du droit pénal*, before the war and again during the war. Among the people involved with the respective teams, but without sufficient decision-making capacity, were Hersch Lauterpacht, a refugee at the University of Cambridge since the late 1920s and professor of international law, and Raphael Lemkin, a refugee in the United States. The former had very good relations with the English group and especially with the American Attorney General Jackson, thanks to whom, in addition to the concept of 'war of aggression', the development of the concept of crimes against humanity and the future declaration of human rights became a hot issue. The latter contributed to the decisive systematization of Nazi laws and regulations and to the first appearance of the concept of genocide, which was included in the text of indictment as presented by Jackson, whom he had already met in Washington, but without achieving greater results due to the American concern about the possible

10. See, B. F. Smith, *The American Road to Nuremberg, The documentary record 1944-1945*, Hoover Institution Press, Stamford 1982, p. 98 *et seq.* ; Stimson 586; T. Taylor, *The anatomy of the Nuremberg Trials*, *op. cit.*

11. See, J.-B. Herzog, *Nuremberg. Un échec fructueux?*, LGDJ, Paris 1975, p. 99.

12. See, H. Donnedieu de Vabres, *Le procès de Nuremberg*, Cours de Doctorat, p. 247 et 254. This is also explained by the American judge Francis Biddle, see J. Owen, "Nuremberg. Evil on trial", *Hedline Review*, 2006, p. 316; H. L. Stimson et M. Bundy, *On active service in peace and war*, Harpers, 1948 ; B. F. Smith, *Reaching Judgment at Nuremberg*, Andre Deutsch, 1977; *Susan Mary Twist, Retrospectivity at Nuremberg: the nature and limits of a schmittian analysis*, University of Central Lancashire, 2012 ; S. Cordini, "Delitos de organización: los modelos de "conspiracy" y "asociación criminal"en el Derecho interno y en el Derecho internacional", *Revista Derecho Penal y Criminología*, Vol. 38, 2017, pp. 75-120. The complexity of the different legal approaches in the European Union is analyzed in J. Pradel, *Droit pénal comparé*, 3. ed., Dalloz, 2008, p. 72 et s., p. 117 *et seq.*

consequences for the system of racial discrimination in the United States. The concept and its protagonist were to flourish when the Genocide Convention was drafted in 1948. Philip Sands presented an excellent account of these two jurists in his East West Street,[13] which uncovers the true genesis of the most relevant criminal concepts of our time: crimes against humanity and genocide.

This book should be complemented by Guillaume Mouralis' very recent one, *Le moment Nuremberg*, which is the most original essay regarding Nuremberg and which pays particular attention to the typology of jurists, the racial question and its reflection on both sides of the Atlantic, and the legacy of Nuremberg.[14] There was also a special group, since a good group of German exiles belonging to the Frankfurt School had joined the universities in New York and had even been able to "transfer" the Institute for Social Research there. Its most qualified members joined the team of the CIA's predecessor, the OSS, being tasked with explaining to the high military commanders that in Germany they were not only facing a dictatorship but also a full totalitarian National Socialist State. Thus, we find Otto Kirchheimer, Herbert Marcuse and Franz Neumann as instructors of the American intelligence service. The latter, author of *Behemoth : The Structure and Practice of National Socialism*, in 1942, a political and social theory of Nazism, 10 years before the book by Hannah Arendt, did his PhD in criminal law with Max Ernest Mayer, a disciple of Hugo Sinzheimer, and was a specialist in labor law in Weimar and an advocate of German trade unions and the Social Democratic Party until his persecution in 1933, which led him to the London School of Economics with Harold Laski, where he studied for a second PhD, now in sociology, and then to Columbia University. However, the highest American official, who was very active in the Nuremberg team, was in favor of the Nazis being judged according to German law and the German courts.[15]

A comparative analysis of the term "conspiracy" and its meanings could have been very useful. In the continental conception, conspiracy includes in the provided sanction for the crime the participation in the phase of design and agreement for the execution, this latter phase not initiating the commission of the crime. If the offense is actually committed, the penalty for the offense committed absorbs the conspiracy. The penalty for complicity in continental law is lower than that for perpetrators and co-perpetrators. Thus, for example, the successive Spanish codes from 1822 were more or less liberal depending on whether they punished conspiracy for all crimes or only for the most serious ones. However, whatever the period, the penalty was always lower than in case of perpetrated or attempted crime. In the American conception, the function of the clause was to incriminate with the most serious penalty[16] (the penalty applicable to the main perpetrator of the committed crime) all contributions from the moment of conception and agreement, whether or not the crime was actually carried out.

It is clear that the two clauses were not functionally equivalent. However, even among comparatists, the doctrinal debate on functional equivalence had not yet emerged. But it would certainly be necessary today to take these different effects or functions into account in judging the many U.S. economic criminal laws that tend to be applied extraterritorially. Those laws undermine international legal cooperation in such a way that it would be easy to cooperate in punishing acts with severely disproportionate penalties or even non-punishable acts. The assessment of this functional equivalence should precede any judicial cooperation between the European Union and the United States. At present, the criminalization of conspiracy with disproportionate penalties is also used to seek the cooperation of the accused to surrender to the prosecutors.[17]

After the beginning of the Cold War, with the recent adoption of the Universal Declaration of Human Rights and the Genocide Convention, the international legislative activity of the United Nations was reduced and limited to matters far removed from human rights and criminal matters, with the exception of the approval of the International Covenants on Civil and Political Rights in 1966. The two most relevant objects of harmonization were the Declaration of Human Rights of the Council of Europe and the American Declaration of Human Rights, with their respective Courts and Tribunals, through which a great deal of harmonization waq produced. First by their own normative texts and then by the effect of their application through case law. Conventional action and its systematic and programmed application has been the most powerful harmonizer of standards. It is especially the case in criminal matters, where it has limited the excess of the punitive power of the State and has given a powerful support to the evolution of comparative law. The jurisprudential category of the "national margin of appreciation," which intervenes in the application phase of the Convention and is the meeting point between universality and sovereignty, has been particularly fruitful.

13. See, P. Sands, *Retour à Lemberg*, Albin Michel, 2016 (see, in original English version, P. Sands, *East West Street*, Weidenfeld & Nicolson). See on this issue, L. Arroyo Zapatero, *Delitos contra la humanidad y genocidio: genética de dos conceptos en Philippe Sands, Calle Este-Oeste, leer.tirant.es*, 2017 ; Raphael Lemkin, *Axis Rule in occupied Europe*, Carnegie End., 1944 ; H. Lauterpacht, *An International Bill of the Rights of Man*, 1945 ; A. Tisseron, *La France et le procès de Nuremberg. Inventer le Droit international*, preface by Annette Wieviorka, Les Prairies ordinaires, 2014.

14. See, G. Mouralis, *Le moment Nuremberg*, Presses de Sciences Po, 2019, esp. pp. 53-57.

15. See, Neumann, Marcuse, Kircheimer, *Im Kampf gegen Nazideutschland*, edited by Raffaele Laudani, Institut für Sozialforschung, Campus, Frankfurt, 2016, p. 585 et s.

16. See, M. Barbero Santos, *Política criminal en España*, Túcar, 1977.

17. On the current approach of conspiracy, see, Carsten Momsen/Sarah Lisa, "Conspiracy als Beteiligungsmodell", *Zeitschrift für Internationale Strafrechtsdogmatik*, ZIS 3 and 4, 2019, p. 182 and p. 243 ; Santiago Cordini, "Delitos de organización: los modelos de 'conspiracy' y 'asociación criminal' en el Derecho interno y en el Derecho internacional", *Revista Derecho Penal y Criminología*, Vol. 38, 2017, Bogotá, Universidad Externado de Colombia, pp. 75-120.

3. New paths for international harmonization in the era of globalization

After the fall of the Berlin Wall, globalization became visible and material forces emerged that required harmonization in some areas. The most urgent of these was the fight against corruption and organized crime, which was followed by others.

It is precisely in addressing the question of the fight against international corruption, fortunately at its beginnings in the small and experienced group of States that make up the OECD, that one can see the difficulties in bringing together the rules of countries with very different legal cultures and, at times, very different principles. The solution to avoid a foreseeable impasse requires a double "invention." On the one hand, harmonizing the rules of the different countries, avoiding the nominal unification of categories by identifying those that provide a functional equivalent in each country. On the other hand, as opposed to the traditional attempt to standardize all offences and penalties from the very beginning of the drafting of the convention, the system put in place innovates with a mechanism that we can reductively call "monitoring" of implementation by each party to the convention.

This innovation, relating to the concept of functional equivalence, appears with Marc Pieth and is based on the notable modifications produced in the theoretical construction of comparative law over the last few decades. In particular, the combination of traditional Anglo-Saxon legal realism with the systemic functionalism that has permeated all German sociological, and legal criminal science over the last few decades. It is especially in private and commercial international law that the traditional legal principles built by the comparatists have been overtaken by functionalism through the construction of international institutions and norms on the basis of the comparison, not of principles and names, but of functions and their equivalence.

Also in 1978, at a large meeting at the Institute of Foreign and International Criminal Law in Freiburg organized by Hans Henrich Jecheck, Marc Ancel declared that until then the only, albeit valuable, fruit of comparative criminal law had been elements of criminal policy. The other contributions did not show that the opposition between arguments of principle and utility has been overcome. But it is Marc Ancel himself who claimed: "many modern comparativists advocate the example of the functional method which, instead of starting from the text or the institution in order to deduce the logical consequences, tries to start from the problem itself which requires a solution from the jurist".[18]

The beginning of the process of creation of the OECD Anti-Bribery Convention coincides with the moment of maturity of the penal harmonization in the European Union. It is among its protagonists that the greatest impulse to the theory and practice of harmonization will occur, on which Mireille Delmas-Marty led the great collective work called "*Les chemins de l'harmonisation*",[19] in which she built a theory of harmonization, that she enriched powerfully both in its foundation and in its scope during her years at the *Collège de France*.[20] Her general theory includes at least three key elements: harmonization with the primacy of human rights and by way of hybridization, national margin of appreciation,[21] and the trilogy of actors, facts and processes of international harmonization. These are the foundations of modern comparative law. During the seminars on the paths of harmonization, an element that Marc Pieth addressed in the process of elaboration of the OECD convention was examined, but it did not receive the importance it deserved, neither in the academic commentaries on the successive anti-corruption conventions, nor in the general reflection in comparative law. It is useful to revisit the issue, as we are on the eve of the discussions about two major international conventions on climate change and the protection of human rights against multinational corporations.

4. Harmonization and systemic comparison: the criterion of functional equalence. The value for future conventions on criminal law

At the end of the 1990s, as globalization gained momentum, there were major and serious international corruption scandals involving large companies (even including criminal contributions to foreign officials as expenses in their accounts), but also several economic crises linked to massive corruption in some regions, like the Asian crisis of 1997, meant that the fight against corruption was becoming a collective necessity for economic progress and, under the impetus and competitive experience of the US Foreign Corrupt Practices Act of 1977, led the OECD to take the initiative for an international Anti-Bribery Convention. In a first phase, only recommendations to Member States were issued, but then a real convention was adopted to harmonize both the most basic definition of bribery of foreign public officials by exporting companies and to establish the basic elements of criminal prosecution.[22]

The drafters of the Convention, conscious of the fact

18. See, M. Ancel, *Le droit pénal comparé en tant que moyen de recherche dans le domaine de la politique criminelle*, in H.H. Jescheck G. Kaiser, *Die Vergleichung als Methode der Strafrechtswissenschaft und der Kriminologie*, Dunker&Humblot, Berlin 1980, p. 91.

19. See, M. Delmas-Marty, M. Pieth, U., Sieber (eds.), *Les chemins de l'harmonisation pénale. Harmonising criminal law*, Société de Législation Comparée, Paris, 2008.

20. See the inaugural lecture : M. Delmas-Marty, *Etudes juridiques comparatives et internationalisation du droit*, Fayard, Paris, 2003 ; See also, *Les forces imaginantes du droit*, I : *Le Relatif et l'Universel*, Paris, Seuil, 2004, II; *Le pluralisme ordonné*, Paris, Seuil, 2005, III; *La refondation des pouvoir*s, Paris, Seuil, 2006, IV; *Vers une communauté de valeurs*, Paris, Seuil, 2011.

21. See, M. Delmas-Marty, M.-L. Izorche, "Marge nationale d'appréciation et internationalisation du droit. Réflexions sur la validité formelle d'un droit commun pluraliste", Revue internationale de droit comparé, Vol. 52.4, 2000, pp. 753-780.

22. See, M. Pieth, L. A. Low, P. J. Cullen (eds.), *The OECD convention on bribery: A commentary*, Cambridge University Press, 2006, p. 14 *et seq*. and on the principle of functional equivalence, p. 37 *et seq*.

that they were acting in a universe of very different legal cultures, rejected the unification of the texts, but adopted a system of basic ideas that the parties must implement in their respective national legislations, according to a number of indicative criteria, all inspired by the principle of functional equivalence of the different measures.

The Convention defines the target offence, bribery of public officials, and requires States to reflect such an offence in their national criminal law, including by detailing the forms of perpetration and participation, as well as the acts of conspiracy or attempts to commit the crime, and requires that sanctions be applied similar to those applied pursuant to national law to the bribery of local officials. It also proclaims that each State must adopt the necessary legislative measures, in accordance with its own legal principles, to establish the liability of legal persons for corruption offences.

It generally provides for effective, proportionate and dissuasive criminal sanctions, comparable in seriousness to the offences of bribery of one's own public officials, which in the case of natural persons include a prison sentence sufficient to allow for judicial cooperation and extradition. In addition, it requires countries to provide for the seizure and confiscation of the proceeds of the act of corruption or to provide for pecuniary sanctions of "comparable effect." It calls for civil and administrative sanctions to be provided for in addition to the main sanctions.

States undertake to regulate the exercise of their jurisdiction to prosecute corruption offences, whether committed at home or abroad, and to prosecute both nationals and foreign persons. They also undertake to review their system of jurisdiction to ensure its effectiveness and undertake to provide for judicial cooperation in criminal matters and, in the case of legal persons, civil and administrative cooperation. They also undertake to review their system of jurisdiction to ensure its effectiveness and correct it accordingly, and to establish a limitation period appropriate to the time needed for investigation and prosecution. The State party is also obliged to apply the offence of money laundering in cases of bribery of foreign public officials by nationals.

It also includes provisions relating to corporate accounting standards, precluding practices that conceal corruption, whose violation must result in civil, administrative or criminal liability with effective, proportionate and dissuasive sanctions. Finally, it excludes the concept of double criminality with regard to these offences, as well as the application of bank secrecy principles, for the purposes of judicial cooperation. It allows for an extradition for mere participation and obliges States to prosecute their own nationals if they do not grant extradition. Finally, Article 12 of the Convention establishes the obligation for States to submit to "systematic supervision" (monitoring and follow-up) to promote the full implementation of the Convention.[23]

After proclaiming in the preamble to the Convention that its objective is to achieve functional equivalence in the application of the Convention by different States, it already states in the first official commentary of the negotiating conference itself, in general terms, that "This Convention seeks to assure a *functional equivalence* among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring *uniformity* or changes in fundamental principles of a Party's legal system."

The Convention does not require that legal persons be criminally liable (Article 2), as this issue was not uniformly treated in most States at that time. However, it does require that, in addition to prosecuting offences committed by natural persons inside and outside companies, the State should have a serious system of civil or administrative liability. The monitoring of the implementation of the Convention verifies that the systems of civil or administrative sanctions for legal persons are functionally equivalent, i.e., that they have deterrent effects and are as effective as the criminal justice system. In particular, the scope of criminal liability of natural persons acting within and on behalf of legal persons committing acts of corruption should be reviewed (Recommendation 2009, Appendix 1, Good Practice Guidance, paragraph B).

It appears that harmonization implies the clear identification of types of behavior that are intended to be prohibited at the international level, such prohibitions being transposed in each case by the national legislator, both for cases of perpetration and for cases of participation, preparation and attempts to commit the crime. The indication relating to sanctions (Article 3.1) deserves particular attention, as it emphasizes the idea that criminal sanctions must be "effective, proportionate and dissuasive" and that, in the case of the responsibility of natural persons, they must be sanctions comparable or equivalent to those applicable to the bribery of local public officials and should include deprivations of liberty sufficient to enable effective mutual legal assistance and extradition (Article 3.1). In addition, it requests the exclusion of allegations of unjustified circumstances which could prevent prosecution, such as prescription, limitations on extradition, such as the undue requirement of double criminality in this case. Moreover, when referring to sanctions relating to the confiscation of illicit profits, it argues that there may be other legal consequences such as those of a monetary nature which are not fines and which have a *comparable effect*. Accounting rules (Article 8) should in turn exclude all mechanisms which encourage corruption, such as parallel off-book accounting, misidentified records, non-

23. See, M. Pieth, L. A. Low, P. J. Cullen (eds.), *The OECD convention on bribery: A commentary*, *op. cit.*, p. 37 *et seq.*; M. Delmas-Marty, M. Pieth, U., Sieber (dir.), *Les chemins de l'harmonisation pénale. Harmonising criminal law*, *op cit.*, p. 231; V. Mongillo, "Harmonization within the European Union", in A. Fiorella, *Corporate criminal liability and compliance programs, volume II, Towards a common model in the European Union*, Jeunes editions de Naples, 2012. M. Pieth, "The Responsibility of Legal Persons", *in the OECD Commentary*, *op. cit.*, p. 2 *et seq.*

existent expenditure registers or the recording of unidentified liabilities, all of which are offences deserving the application of effective, *proportionate and dissuasive* civil, administrative or criminal sanctions.

Therefore, the need for harmonization is not limited to the normative level, but extends to the jurisdictional level, to the requirement of an effective application of the normative system at the procedural level, both at national level and at the level of international judicial cooperation (Article 4). As Mark Pieth points out, the concept of functional equivalence is not simply a formula for accepting all national variations but calls for certain minimum requirements.[24]

It would certainly be desirable for States that provide for criminal liability of legal persons to provide some guidance to avoid the confusing and messy regimes which exist in some countries and which tend to led to impunity, either for companies or for the directors of companies who actually commit the offences, if not for both.

This whole system of harmonization and legislative transposition through "equivalent measures" and with "effective, proportionate and dissuasive sanctions" ends with a provision that establishes a control and monitoring system aimed at identifying the rules and their transpositions, their legality and their application to cases that arise over time, and the evolution of their legal treatment by governmental and judicial authorities. This is traditionally called focusing not only on "Law in Books" but also on "Law in Action." These terms do not come from continental law, but it was a good metaphor for the need for not only a nominal but also a substantive or material examination of laws,[25] because the issue is not only to discover possible errors in the enacted legislative measures, but also to identify errors in the effective functioning of the whole system, one could also say, in his implementation.[26] It is deplorable that subsequent anti-corruption conventions (Inter-American, of the Council of Europe and of the United Nations) have not reiterated the guiding idea of functional equivalence, but the fact remains that their respective control and monitoring bodies operate in the same way as the OECD.

Furthermore, the assessment of functional equivalence in European legislation is also taken into account through directives, where States have, in their transposition, a margin of discretion which must be subject to limits through functional equivalence. It is always an attempt to ensure, as stated by Cesare Predrazzi, that "the prince cannot decide arbitrarily on his religion or his system of responsibility or, better still, impunity."

In short, any future draft international convention on criminal matters must take account of this presupposition of the treaty definition of the object of the prohibition, the protective measures and the conditions of functional equivalence of the mechanisms provided for measures. We are witnessing the acceleration of several trends supporting the protection through criminal law of the common goods of humanity: the environment and the prevention of the climate crisis, the protection of human rights against their violation by multinational companies and the global protection of health against the risks of epidemics, which reaches the new governance of the World Health Organization, and the insurance against certain forms of counterfeiting, fraud, hoarding, etc.

On the problem of the crime of ecocide, there is a very elaborate proposal for an international convention prepared by an international group of lawyers led by Laurent Neyret,[27] which reflects well to the experiences of the OECD Anti-Bribery Convention. Naturally, the definition of concepts and measures is more detailed, but they correspond more to functional elements than to a unifying objective. It is clear that more than 20 years have passed since the OECD Convention and therefore they promote the idea of a criminal liability of legal persons. The system can be modulated with other clauses and it is very likely that the wording can be further synthesized, and the requirements can be reformulated with the adoption of functionally equivalent measures. The second proposed convention for environmental crimes is, in general, more difficult, which is perhaps exacerbated by its international hypothesis, apart from the fact that it deals with harmonizations of measures that it might be more appropriate to first enact in States themselves.

24. See, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, *op. cit.*, p. 39.

25. See in this regard, M. Ancel, *Utilité et méthodes du droit comparé*, *op. cit.*, p. 101.

26. For an overview of relevant elements to be analysed in this regard, see, C. Fijnaut y L. Huberts (ed.) *Corruption, Integrity and Law Enforcement*, Kluwer, La Haye, 2002, p. 11 *et seq.*

27. See, L. Neyret, *Des ecocrimes à l'ecocide - Le droit pénal au secours de l'environement*, preface by Mireille Delmas-Marty, Bruylant, 2015.

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Natural Reason and the Ethical Foundations of European Law

Most defences of the European Union are consequentialist. They say that for this or that reason the EU serves interests in prosperity or security. The most common attack on the European Union, however, is not consequentialist but based on a constitutional theory of 'popular sovereignty'. If you believe that popular sovereignty is the ground of a constitutional order, you may find the European Union's claims to have a say on domestic government questionable. This criticism is very effective because political institutions are normally justified on the basis of ideas of right and wrong, not on their potential consequences.[1] Nevertheless, the 'popular sovereignty' argument against the EU is the result of a serious misconception about the nature of constitutions. I sketch here an alternative argument, which explains the legitimacy of transnational institutions and the European Union on the basis of constitutional justice and equal citizenship. The argument continues a long – and in my view fruitful – tradition of legal scholarship, which defends the constitution and the ideal of the rule of law not merely on the value of procedures but also on the basis of 'natural reason'.

The Problem with Popular Sovereignty

A constitutional theory of 'popular sovereignty' justifies political institutions on the basis that they are an expression of a people's 'will'. Constitutional lawyers often rely on 'popular sovereignty' because it is both strictly procedural and strictly conservative: legislation produced by the current majority can be seen to be fully justified, whatever its content. Some take this to extremes. Carl Schmitt thought that the people's will was the entire meaning of constitutional law. More careful thinkers say that a state is legitimate only if its people fundamentally approve of its lawful decisions.

The doctrine of popular sovereignty has always been a precarious constitutional theory, however. Law and sovereignty are in permanent tension. The original scholars of sovereignty knew, but some contemporary constitutional lawyers seem to have forgotten, that political sovereignty's demands are all-consuming. They do not allow for higher law or judicial oversight. The very idea of a sovereign person or body entails that political power is above the law. This is why monarchs like it. The modern theorists of sovereignty, and especially the British legal theorists Bentham and Austin agreed on the absolute nature of political sovereignty. Their follower A. W. Dicey, rather hopefully, believed that it can be exercised by Parliament, a representative body and not the Executive (even though by the time he wrote the leader of the Executive normally controlled Parliament through party discipline). As many other scholars have noted, the British idea of absolute 'parliamentary sovereignty' opens the way towards 'elective dictatorship'. In a related way, however, a simplistic account of sovereignty also challenges international law, because it presents our commitments to other nations as usurpations. This is a different problem, but it is equally important.

I think that the answer to both problems is a better understanding of the nature of a legal order and of the way in which law is a practice of judgment and not merely a social event or an expression of 'popular will'. Constitutional law and international law are not created by the will of the people or a state. Like all law they are constructions of reason in light of universal features of the human experience, or in the language the Romans used, 'natural reason'.

Natural Reason and Civil Law

The Greek and Roman republics sought to break down sovereignty and the traditional power of Kings. We are not so different from them. The challenge of constitutional design for contemporary republics, be they in the United States, France or India, is to break down power and organise it into offices that balance each other out, in order to avoid the twin dangers of oligarchy or mob rule.[2] Sovereignty and government power are thus different things for a republic. Constitutional law is in effect the very denial of absolute sovereignty: it is government under the law, where every decision is accountable in light of public laws. The emergence of constitutional law in Europe in the course of the nineteenth century has been a process of changing the old meaning of sovereignty into something entirely new and perhaps inconsistent with its old meanings. As soon as we create a legal basis for government in the way of constitutional law as higher law, and not merely as a programmatic statement, sovereignty is under threat from the very institutions that exercise it.[3] Following some of the insights of Plato, Aristotle and Cicero, the Roman law tradition clearly establishes that a community based on the rule of law has no use for absolute power at any level.

1. I cannot argue for that point here. I said more about it in P. Eleftheriadis, *Legal Rights* (Oxford: Oxford University Press, 2008).

2. A historical process described well by D. Acemoglu and J. Robinson, *The Narrow Corridor: States, Societies and the Fate of Liberty* (New York: Viking, 2019).

3. I explain this in more detail in P. Eleftheriadis, 'Power and Principle in Constitutional Law' 45 *Netherlands Journal of Legal Philosophy* (2016) 37-56.

Let us recall that the Roman Republic relies on the legend of the expulsion of the last King, the tyrannical Tarquinius Superbus, or 'Tarquin the Proud'. Similar events of rebellion against tyranny marked the creation of the French and American republics. And the intellectual process is very similar, irrespective of the historical differences. How can you reconcile sovereignty with the power of a judge to enforce a constitution against a Consul or a Prime Minister or against a Parliament? It is thus no coincidence that all republics celebrate public laws and cultivate the ideals of the rule *of* law. Similarly, all absolute monarchs and all authoritarians trivialise the idea of the rule of law by turning into a purely formal rule *by* law.

Confusion about sovereignty, however, has an equally significant effect on our understanding of international institutions. The absolute sense of sovereignty has great trouble accommodating the cooperation of states. Bodies created through international treaties, such as the European Union, the World Health Organisation (WHO) or the International Telecommunications Union (ITU), may appear to act without legitimacy when they are merely exercising their delegated powers. Every time a transnational law is made, some power is removed from domestic political institutions. A government, for example, cannot ban EU nationals from selling insurance under the rules of the European Union, cannot ignore the risk of a pandemic under the rules of the WHO and cannot allocate *radio spectrum* or determine satellite orbits unilaterally, under the rules of the ITU. But what if such banned rules were the overwhelming desire of a domestic majority (or of its leaders posing as the majority)? It appears then that under the doctrine of 'popular sovereignty' any international commitments are illegitimate and 'undemocratic'. If we are to defend and vindicate transnational law, we need to expose these fallacies of sovereignty. But we are also compelled to ask: what is to replace it?

At the root of the mistake lies the premise that everything about law is the result of somebody's 'will', which opens the way to 'popular will' as the only legitimate option. That many legal philosophers believe that law derives entirely from the positive will of some official, is partly the result of the battles of the nineteenth century for law reform. Radical lawyers sought to undermine and destroy the main argument for established hierarchical and oligarchic legal structures. The conservative argument was that these structures, awful and anachronistic though they seemed, were based on 'the wisdom of the past', as eloquently put by William Blackstone. Blackstone's nemesis in England was the brilliant polemicist Jeremy Bentham, who exploded Blackstone's constructions by exposing them to a rigorous test of both reason and experience. The movement of thought that Bentham and other reformers started is called 'legal positivism'. Just like Blackstone insisted that *all* law was reason, similarly Bentham responded that *none* of it is. Driven by his polemical zeal, Bentham turned traditional legal scholarship on its head. The doctrine of legal positivism therefore says that the law is exclusively made by the power or political authorities and nothing else. The excessive zeal was perhaps necessary, in order to promote legal reform in sclerotic Britain at the time, but it went too far.

Outside the heat of political battle, European legal philosophers and practitioners understand that at the centre of our legal concepts lie things we cannot deny: the core of law, private, public or international, derives from reasons that are common to all thinking persons. It is wrong to call this 'natural law', but it may be appropriate to call it 'natural reason'. This idea is currently unfashionable, but it has a very long and distinguished history.

The Byzantine lawyers that compiled Justinian's codification in the sixth century organised their thinking around two central ideas. They had in mind, first, the idea of a law of reason, or '*ius gentium*' and, second, that of civil law, the socially made law of a city, or '*ius civile*'. A judge or scholar was supposed to rely on both in order to reach an appropriate judgment or conclusion. The *Digest* begins with the words of Ulpian, who distinguishes in Latin *ius* (as 'law') and *lex* (as 'statute'), and tells us that law, in the broader sense of *ius*, is closely connected with the art of judging what is good or just. Ulpian quotes with approval the definition of Celsus, namely: 'the law [*ius*] is the art of goodness and fairness'.[4] Ulpian goes on to say that the main actors in law are its 'priests', the professional lawyers: 'Of that art we [jurists] are deservedly called the priests. For we cultivate the virtue of justice and claim awareness of what is good and fair, discriminating between fair and unfair, distinguishing lawful from unlawful, aiming to make men good.[5]

For the Romans the law was an art, or a practice that humans did together. This art involves distinguishing among good and bad arguments on the basis of the parties' advocacy and with the support of the best available evidence. But the Romans were very clear that most of law was made by society and its institutions. Humans created law in response to their needs and aims. The Romans did not believe in some fully prescriptive 'natural law', perhaps fully formed and ready to apply in the way of a blueprint (a caricature often polemically deployed by modern legal positivists). Law was mostly 'civil law' made for each state according to its own lights. Civil law, as Ulpian himself was very careful to observe, is based on a positive act of legislation in light of natural reason and the dictates of '*ius gentium*', the law of nations.[6] Ulpian further is also quoted as saying that knowing the law involves knowing of both God's and man's affairs: 'Justice is a steady and enduring will to render unto everyone his right. 1. The ba-

4. A. Watson (ed.), *The Digest of Justinian*, Volume 1 (Philadelphia: Penn Press, 1998) (I. i. 1, § 1), p. 1. The Latin text is: '*ius est ars boni et aequi*'.

5. *Ibid.*

6. He writes: 'And so whenever to the common law we add anything or take anything away from it, we make a law special to ourselves, that is, *jus civile*, civil law. 1. This law of ours, therefore, exists either in written or unwritten form; as the Greeks put it'; *Digest*, I. i. 1, § 6, p. 2.

sic principles of right are: to live honourably, not to harm any other person, to render to each his own. 2. Practical wisdom in matters of right is an awareness of God's and men's affairs, knowledge of justice and injustice'.[7]

What does it mean to say that natural reason may guide legislation and legal judgment? There are, obviously, very many philosophical questions raised by this idea. Yet, *Justinian's Institutes*, the introductory textbook that the same Byzantine lawyers put together in order to assist in the reading of the *Digest*, had no problem applying it in practice and offering us some excellent examples. The textbook says that natural reason requires that any wild beasts, fish and all animals belong to the first person to capture them, 'for natural reason gives to the first occupant that which had no previous owner'.[8] Furthermore, natural reason requires that when one man makes anything with materials belonging to another, owns the resulting product, e.g. wine, honey or oil, if the thing made cannot return to the original materials.[9] And if a man plants another man's plant in ground belonging to himself, then the owner of the ground owns the tree.[10] And finally, natural reason also requires that if a person has *bona fide* purchased land from another who turns out not to have been the owner, the deceived buyer can still keep the fruits of the cultivation of that land.[11] All these examples have a common theme that natural reason determines their outcome under rules of fairness and justice (and not the natural inclinations that we share with the other animals). A sense of fairness and justice appears to be at the heart of these judgments about how to act.

The idea of an inherent or natural reason to legal judgment is not just Roman. It has been equally present in English law. In *Ashby v. White*, a famous case in the common law world which was decided in 1703, the Chief Justice, Lord Holt, accepted the claim of a voter obstructed from voting by the returning officer against those prevented him from entering the polling place. The legal issue in the case was whether the claimant could bring a claim before the courts at all, or if the case was subject to the exclusive jurisdiction of Parliament, as a matter relating to elections. Lord Holt said that "if the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."[12] And he then went on to explain the rationale of this conclusion on the basis of 'the reason of the law'; which requires that wherever there is a right, there ought to be a remedy. Conveniently for those of us who wish to stress the analogy, he used the same Roman phrase for that: '*ubi eadem ratio, ibi idem jus*'.

We should not exaggerate the significance of this judgment, which has had limited effect in English law. In terms of the electoral law of the United Kingdom the case had no impact at all. It did not elevate the right to vote into some kind of constitutional right, nor did it change the practice of having electoral disputes go exclusively to the petition jurisdiction of Parliament. John Baker notes that this was a claim that shows 'an affinity to more conventional nuisance and disturbance actions'.[13] Moreover, the exclusive jurisdiction of Parliament was changed only by an Act of Parliament in 1868 whereby electoral disputes could be taken to a special procedure at the High Court.[14] Yet, ideas of basic requirements of justice are ever present in both Roman and Common law.

They are also equally prominent in European Union law, which has brought together the practices of both the civil and the common law worlds in a unique and fertile synthesis. Here the idea of '*ius gentium*' appears in the guise of legal principles that are 'common in the constitutional traditions of the member states'. This is another way of referring to the Roman *ius gentium*, or 'the law of nations'. Here too the premise that a substantive right entails a remedy and must be protected by the courts is also taken to be something like a principle of natural reason. The Court of Justice of the EU routinely affirms that the right of a person to access institutions of justice in order to seek a remedy is part of the 'constitutional traditions common to the Member States' and is also enshrined in the Treaties.[15] Advocate General Fennely, just like Lord Holt three hundred years earlier, explicitly referred to the Roman principle of '*ubi ius, ibi remedium*' in support of the general EU principle of effective protection (which is also supported by Article 19 TEU and Article 47 of the Charter of Fundamental Rights).[16] So the idea that natural reason determines legal judgment is very much alive in modern law.

The Act of Foundation

We can now return to the question that started these reflections. What is to replace the argument from political sovereignty and the absolute authority of the will of the people? We see now that the two positions are not symmetrical: legal positivists deny the role of natural reason in the law, because they say that *all law* is made by a conscious decision of someone sufficiently powerful or influential. By contrast, those who believe in natural reason need not deny that civil law is human law, made for

7. *Digest*, I.i,1 § 10.
8. *Justinian, Institutes*, translated with an introduction by P. Birks and G. McLeod (London) Duckworth, 1994) 2.1.12.
9. *Justinian Institutes*, 2.1.25.
10. *Justinian Institutes*, 2.1.31.
11. *Justinian Institutes*, 2.1.35.
12. *Ashby v. White* (1703) 92 ER 126. Holt's opinion was an initially dissenting opinion which was upheld by the House of Lords on appeal.
13. J. Baker, *An Introduction to English Legal History* (London: Butterworths, 2002) 431-432.
14. Until courts got involved and voting became secret by way of the Ballot Act 1872, elections in England were highly irregular and in many cases corrupt.
15. See for example Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* [2010] ECR I-13849 at par. 28. See also Opinion 1/2009 [2011] ECR I-1137, par. 70 and Opinion 2/13 [2014] ECLI:EU:C:2014:2454, par. 1174.
16. Case C-18/94 *Barbara Hopkins v. National Power plc* [1996] ECR I-2281, Advocate General's Opinion at [50].

our current circumstances by someone sufficiently powerful or influential, as we saw in the case of Roman law. It is just that for the 'natural reason' view, law must meet further rational tests before becoming civil law in the *proper sense*. Civil law, in that usage, must have some social foundations, but these foundations are not to be taken to be a simple causal chain. Law is not caused to exist by the action of some original founder. It is created in the course of practical deliberation about what to do. This introduces a distinction in two senses of 'founding', one causal and the other deliberative. This distinction needs a lot more to become clear. I can only offer a preliminary clarification. What exactly is a 'deliberative' foundation?

The major contributors to our understanding of a constitutional foundation are not the practising lawyers this time. They could not be, since, with the exception of the canon law of the Christian churches, there was not much public law to practise during much of Europe's legal history. Modern constitutional thinking emerges with the philosophers of the Enlightenment. These innovative philosophers brought a message of social liberation based on the idea that the institutions and hierarchies of all human communities were the result of human actions and not divinely ordained or permanent features of our nature. As a result, all human institutions had to respect ethical principles based on natural rights. The philosophers arrived at the principles of natural reason through a more circuitous route than their Roman forbears, via the idea of the 'social contract'. The social contract was an idea of political foundation that sought to replace the original myths of absolute monarchy. For Locke and his many followers, citizens have natural rights against their leaders. Political leaders, just like the Romans believed, had correlative duties to promote the good of the commonwealth. People were not bound to obedience towards their King or other bearer of 'political sovereignty', but were bound to each other on the basis of an act of reciprocal limitation of powers or rights.

The force of these ideas is nowhere more eloquently set out than in the debate between Edmund Burke and Thomas Paine on the French Revolution. Burke establishes the right of Kings in the history of a political community, whereas Paine establishes the right of citizens to determine their government democratically on the natural rights of man. The argument can be easily misunderstood, however. The act of foundation in a social contract and natural rights that Paine, and before him Locke, Rousseau and Kant, had in mind is not a historical event. It is a moral judgment made solemnly and publicly because of natural reason.

The Constitution as an Ethical Project

I think that the most powerful philosophical argument for constitutional law as a project of practical reason is found in Kant's writings on law and the state. Here what the Romans called 'natural reason' is renamed and elaborated upon as 'pure practical reason'. In the *Metaphysics of Morals* Kant offers, thus, a comprehensive argument for the synthesis of ethical and political duties under the 'moral law' emanating from pure practical reason.[17] His argument is not always clear but we can summarise it for current purposes in the following way. If natural reason tells us that wild animals must become the property of the first person that takes possession of them, as the Roman lawyers said, then reason may also give assistance in other practical matters. It may for example, tell us that there must be some public recognition of property rights, to secure our ordinary possession of things and land. And if there is to be private property, then there must be a law of agreements or contracts by which we transfer property from one person to another. And if there is to be property and contract, then we need courts and other public institutions, making sure that the substantive rights emerging through private transactions are fairly enforced.

These are the steps that Kant makes to establish the moral meaning of a legal order or, in Kant's words, the 'civil condition'. They are both steps of fact and steps of reason. When I find myself claiming the fish that I have retrieved from the river, as a result of my actions in light of civil law and of natural reason, similarly, I may find myself having duties of citizenship to the state where I happen to be, both because of natural reason and because of the constitution that is in place here, where I happen to live. In effect, Kant argues that equal citizenship is a universal presupposition of all law, properly enacted. In the *Metaphysics of Morals* he wrote: 'Every human being has a legitimate claim to respect from his fellow human beings and is turn bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end.'[18] He also said that a universal requirement for defending human dignity is setting up a 'civil condition' or in other words, establishing institutions of 'public right' that protects everyone's rights. This means that the very idea of a constitution presupposes a set of public rules encompassing all as free and equal citizens.

When the French revolutionaries tried to make sense of the idea of equality and rights in order to destroy the ancient privileges of the landed gentry, they modified sovereignty so that it should be subject to natural rights. The first three articles of the Declaration of Man and Citizen of 1789 concern, first, equality, second, the rights of liberty, property, security and 'resistance to oppression' and, third, the principle of popular or 'national' sovereignty. Freedom and equality of individuals take priority. Sove-

17. I. Kant, *Metaphysics of Morals* in *Practical Philosophy*, edited by Allen Wood and translated by Mary Gregor (Cambridge: Cambridge University Press, 1996). For very clear accounts of the Kant's argument see A. Ripstein, *Force and Freedom* (Cambridge, Mass.: Harvard University Press, 2011), B. S. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge, CUP, 2010) and J. Ebbinghaus, 'The Law of Humanity and the Limits of State Power' 10 *Philosophical Quarterly* (1953) 14-22.

18. *Metaphysics of Morals*, 6:462

reignty follows and is conditional on them. The constitution is not, therefore a matter of the free discretion of the people that make it. Nor is the decision to have or not to have a constitution as higher law open to us. The 16th article states: 'A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all'. These matters belong to the core of a constitution and cannot be omitted from it. This document was both a foundation of a new constitutional order and, at the same time, the declaration of truths that are permanent constructions of reason. The constitution signifies both change and permanence, a new departure and the return to old truths. Just like the private law of property in Roman law, the act of the creation of law is effective and marks a new political beginning, precisely because it is based on permanent truths of reason.

In *Theory and Practice* Kant addresses this complexity when he says that the social contract binds 'every legislator to give his laws in such a way that they could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as he had joined in voting for such a will'.[19] This applies to the constitutional legislator as much to the ordinary legislator and binds both process and result. A constitution, therefore, is a moral idea: 'Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*) so that they may enjoy what is laid down as right'.[20] All legal foundations rely on ethical and moral duties unearthed by human reason.

So when Hannah Arendt reflects on the act of foundation of a new commonwealth by the American founders and the French revolutionaries in her *On Revolution*, she notes that 'it is in the very nature of a beginning to carry with itself a measure of complete arbitrariness'.[21] But she concludes her overview of the thinking that supported the revolutions with the observation that 'what saves the act of beginning from its own arbitrariness is that it carries its own principle'.[22] Arendt did not explain very clearly what that 'constitutive' principle is, but in my view this is the moral recognition that we are free and equal persons with mutual duties of respect, or what I will call Kant's ethical theory of the state. Modern philosophers of law have offered much detail and depth to this insight. In *Between Facts and Norms*, Jurgen Habermas explores in great detail Kant's 'concept of legality', which lies between facts and norms.[23] Offering a rival, ethically richer view, in *Justice for Hedgehogs*, Dworkin offers a synthesis of ethics, morality and political philosophy on the basis of what he calls 'Kant's principle', namely the position that 'a person can achieve the dignity and self-respect that are indispensable to a successful life only if he shows respect for humanity itself in all its forms'.[24] Seen in this light, the constitutional beginning or 'foundation' is not a beginning in a causal or temporal sense, as implied by Kelsen and Hart and other legal positivists, who saw the bedrock of the legal system in some kind of event of consensus.

For the ethical view as set out by Kant and others the legal order rests on a series of moral judgments, that we make when we assess the institutional framework around us. A new constitution emerges not when it is announced by its makers, but when it takes its place within a generally known story of collective deliberation, persuasion and disagreement about our ethical life. In the most successful case, a constitution communicates to all that our deliberation has reached a temporary pause, so that we now have a principle of action: this is how we choose to be governed. It is what we say to each other as equal citizens of a commonwealth, in the same way that a maxim of action is the personal ground of an individual's action. I stress that this does not apply in the same way to all constitutions. Some constitutions are defective, either because the procedure of their creation was unfair or because their substantive principles are unjust. Their legitimacy may be weak or non-existent. But in the case of a successful constitution, its requirements are not orders, or commands that demand obedience, but are statements of a deliberative act of judgment based on reasons. As with all acts of willing, willing a constitution is not a completely new beginning. Since the foundation of a new constitutional order is an ethical commitment from one citizen to another, it is also a deliberative engagement with our past. A successful constitution carries its own principle, as Arendt said.

The European Union as an Ethical Project

What does such this sketch of an ethical account of the constitution mean for European Law?[25] First, it rules out purely procedural accounts of the constitution, such as those based on 'popular sovereignty' and by extension, purely transactional accounts of international law and institutions as the unlimited 'will' of states. Second, it rules out interpretations that are strictly *statist*, i.e. they see the EU as competing with the member states for 'sovereignty'. For the popular sovereignty view, the constitution as the work of a people's will is strictly one dimensional: there cannot be any 'higher' law, since any later expression of the people will overrule the earlier one. Any international commitments the popular will makes will eventually result in an 'external' imposition. This is how the Eurosceptics in Britain view the European Union: even though the EU treaties - designed to be 'higher law' - were

19. I. Kant, 'Theory and Practice' in *Practical Philosophy*, ed. by Allen Wood, 8:297.

20. *Metaphysics of Morals* 6:311.

21. H. Arendt, *On Revolution* (London: Penguin, 1977) 198.

22. Ibid, 205.

23. J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans by W. Rehg (Cambridge, The MIT Press, 1996) 28.

24. R. Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011) 19.

25. I here summarise some of the arguments I made in my recent book, P. Eleftheriadis, *A Union of Peoples: Europe as a Community of Principle* (Oxford: Oxford University Press, 2020).

freely entered into by successive UK governments, while the UK was a member, the Eurosceptics constantly complained of 'foreign' control and of a supposed 'democracy deficit' because decisions were taken collectively by all the member states and not purely in London. The ethical account of the constitution explains that some pre-commitments are not only legitimate but essential for a just 'civil condition'. Having a constitution as higher law is, in fact, a requirement of natural reason. So constitutional standards are designed precisely to limit the powers of occasional majorities. Similarly, we can say, the EU is just another self-imposed constraint on our legislative powers. It is ethically justified because it allows us to cooperate with our neighbours in order to 'manage our interdependence', to use Steve Weatherill very suggestive phrase.[26] As Weatherill shows in his magisterial analysis, the European Union does not make the claims to federalism that some authors believe it does. EU law is part of the law of nations, not constitutional law.

*W*e then see that our international commitments and the European Union Treaties may also 'carry their own principle'. If they are entered into freely on the basis of equality and reciprocity and if they promote cooperation without compromising internal democracy and the rule of law, they will assist us in complying with our ethical duties to one another.

The European Union may thus be a more advanced ethical project, one that supplements and amplifies our constitutional government. It is our considered response to our tyrannical past, that defined by the crimes of Nazism and fascism and of those who stood silently by. But the EU's primary aim is not, at least not directly, democracy and the rule of law, but peace among nations. The EU does not compete with member states and is not seeking to replace them. It does not create a new civil condition replacing the old ones. It is instead a union of civil conditions or, in the terminology that I prefer, a *union of peoples*.

Natural reason plays a part there too, however. As Kant saw very clearly, all republics have a duty to recognise the moral standing of other states and their citizens. This creates the basis for fairness in international law and for a special kind of law which he called 'cosmopolitan' law, the law between a state and the citizens of other states. Just like the constitution, transnational law is the work of equal citizens, this time responding to the ethical challenges of peace. It is another way we have of showing respect for each other's humanity.

26. See S. Weatherill, *Law and Values of European Integration* (Oxford: Oxford University Press, 2016).

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Governing globalization through law: The hypothesis of a new natural law

1. Obligation and determination

To discuss governing globalization through law, we would like to start by talking about two techniques of government of our lives: obligation and determination. *A priori*, the first belongs to law or morality while the second belongs to nature and its laws. On reflection, things may not be so simple. From the laws of nature, it is possible to make a kind of law: a new natural law, strangely close to what we call classical natural law[1]. A law that is perfectly capable of governing our lives in the globalized world and thus of governing globalization. A law that is far more effective in this role than positive law linked to declining States or attached to increasingly fragmented communities. A law we must distrust for that very reason that it is terribly efficient. This is the *working hypothesis* that we would like to present in the following lines. But let's not go too fast and let's start from who is intended to be governed: beings.

In the political domain, the *obliged being* can be opposed to the *determined being*. Of course, for a living being the performance of an obligation can lead to the same result (to do or not to do) as the realization of a relation of determination. However, their nature is profoundly different. The obligation is civil or moral, it finds its measure in freedom; the determination is natural: a relationship of cause and effect, it is revealed by the science that observes and describes it. In modern political philosophy, the former intervenes in order to legitimize what the latter cannot: servitude. Law is opposed to force in order to explain the limits of our liberties.[2] It is "the operation of social becoming."[3] This is the mythical passage from the state of nature to civil order.

The description of this "becoming" mobilizes the forms of law: these are the categories of civil law, i.e. Roman law.[4] It is these forms which, in the philosophical discourse of modernity, *explain* the uprooting from the laws of nature. Submission to laws other than the laws of causality (force) is thus due to a contract; it will also find its justification in a quasi-contract; or it could find its cause in liability. Thus, the specificity of the social being is to *oblige* himself, whatever the formal source of his obligation: his will or his fault.

It is in this sense that we can distinguish the figure of the *obliged being* from that of the *determined being*. Being no longer simply determined, a new relationship is necessarily woven between the being and his environment: an artificial and normative order. The uprooting that gives certain beings laws other than those of nature *imposes* a novation: a legalization or moralization of the norms that bind us to the world. As far as politics is concerned, intertwined cause-and-effect relationships *metamorphose* into bundles of civil or moral obligations. So that the order that leads to the preservation of the earth and other living beings no longer has to be spontaneous;[5] it is no longer simply the fruit of a law of nature, such as that of evolution. It becomes a function of will or responsibility, and therefore of freedom. The care of the earth, as that of other beings, is a function of the power of the obliged being. The one having the faculty to oblige himself (morally, legally) rather than to be determined (scientifically). Let us finally say that each being contributes, depending on the information at his disposal and on his will, to such a *mechanism of novation*: the passage from the reign of facts to the rule of law.

Thus, the passage from is (an observation of the depletion of the planet's resources) to ought (an injunction to take care of the earth) is the fruit of moral or legal reasoning: awareness of a *fact* becomes the real cause of obligations (limiting the emission of greenhouse gases; sorting one's waste; limiting one's air travel; etc.). A civil form thus mediatizes, starting from the will and awareness of the world, the movement from fact to law. Let us insist on one point: the existence of this *form* changes everything. Its strength is, we have said, *novatory*. It is therefore not the facts that have a binding force.[6] It is an act of will that produces an obligation. Awareness of the facts (a consequence of their scientific description) is the motive for the decision to act in law.[7]

1. On this hypothesis, see also, "Droit et gouvernementalité. Le nouveau droit naturel", *Droit et Philosophie*, forthcoming.
2. See, J.-J. Rousseau, *Du contrat social*, presentation by B. Bernardi, GF, Flammarion, 2001, p. 46.
3. The expression is from Gilles Deleuze, *Cours Vincennes du 09/12/1980*: "La puissance, le droit naturel classique" : https://www.webdeleuze.com/textes/9.
4. On the notion of obligation see M. Villey, "Métamorphose de l'obligation", *Critique de la pensée juridique moderne, Douze autres essais*, preface by M. Bastit, Dalloz, 2009, p. 201 *et seq*.
5. We can reflect, however, following the Scottish Enlightenment, on the spontaneous aspect that remains in the order of modernity.
6. On this fearsome issue see B. Latour, *Face à Gaïa, huit conférences sur le nouveau régime climatique*, Les empêcheurs de penser en rond, La découverte, 2015, p. 33 *et seq*.
7. On the importance of purpose in law se R. Jhering, *L'évolution du droit*, translated by O. de Meulenaere, Librairie A. Maresq, 1901.

2. Classical and modern natural law

We have described as modern the distinction between *being obliged* and *being determined*. In particular, we have linked it to the theory of the social contract. We must now stop on this point. We could say more precisely that it is attached to modern natural law and that for this reason it is opposed to another doctrine: that of classical natural law. According to the latter, the issue is not escaping from any state of nature, removing oneself from it with the help of the forms of law; quite the contrary: the social state *is* the order of nature: "the law of nature is not pre-social; it is found in the best possible society." Consequently, "the state of nature is the state that conforms to the essence in a good society" and natural law takes shape in the "duties" establishing the conditions in which the essence can be realized. For this reason, knowledge of the law of nature implies the "competence of the wise man", i.e. the one who is able to determine the essences and thus to say what the duties are.[8] In short, the practice of such a law consists in a scholarly activity that derives duties from a study of the world of facts. Thus, as Michel Villey put it, "the Roman obligation, whether mediately or immediately, has its foundation in nature. In the social reality, which we are free to observe", a "reality presumed good".[9] To this end, "the role of the judge", he teaches elsewhere, "will be to say the *dikaion*, to state in indicative mode what the fair division is, which he discovers in 'nature' or, if scientific research is not enough, which he determined authoritatively. The entire community of the jurists assists the judge in this effort to state the measures of the fair ratio. Thus are marked the delineations of the legal discipline".[10]

By comparison, modern natural law can be presented as the law of "power."[11] With it comes the question of force: that of the law of the strongest that pre-exists the social state. It is the pre-social nature which it is possible, as we have said, to escape through the intellectual force of the forms of law. The way will thus be open to the reign of positive law. The law (in a normative sense) is in fact the act of will (the artifice) through which society is produced as the *becoming* of nature. Positive law is thus, by definition, what is intended to limit and constrain power.

At this point, modernity introduces a political and epistemological distinction between "normative laws" and "descriptive laws",[12] between proposals formulated in the imperative and statements expressed in the indicative, between civil law and the laws of science. We recognize the distinction between "is" and "ought." A stream of knowledge in legal theory is born from this separation:[13] hence, for jurists, the distinction between the sociology of law and normativism. Such a separation also engenders logical prohibitions, such as that of the naturalistic paralogism: a factual judgement is not a normative judgement (even if it can lead, as we have explained, to the production of an obligation). Finally, this distinction modifies the role of the scholar (the scientist): he no longer has the vocation to formulate duties.

3. Behavioral incentives

By simplifying things considerably, we thus observe a division between fact and norm (the art of law is not natural science) taking on the meaning of liberation (man is freed from the state of nature by the forms of law). However, it would be naive to believe that such a liberation is definitive; or even that it is possible. So to speak, "the animal aspect of man resists the law."[14] A being is always determinable. His life remains subject to the jurisdiction of the laws of nature. The biological man (he whose life is bare) always emerges on the surface of the civil man (he whose life is dressed with the forms of law); he is his double and his envelope, his weakness too; he is the measure of his freedom, that of his humanity too. The political animal is also an animal.[15] This is self-evident. Natural laws govern our bodies, our cognition and our environment; they control the climate, the seasons and the earth; they also govern our understanding of climate change, the order of the seasons and the book of the earth. But that is not all. They sometimes compete on political territory with civil laws for their empire. In some cases, the laws of nature are instrumentalized to *govern* our lives in ways other than positive law.[16]

The making and use of so-called "nudges"[17] – also known as "behavioral incentives"[18] – can serve as an illustration. In this way, certain domains of knowledge (e.g. behavioral sciences, social psychology, behavioral economics) serve public policies[19] or private strategies.[20] This

8. We use and quote here G. Deleuze, *Cours Vincennes de 09/12/1980:* "La puissance, le droit naturel classique", *op. cit.*
9. See, M. Villey, "Métamorphose de l'obligation", *op. cit.*
10. "*Torah-dikaion* (paristique et haut moyen-âge)", in *Critique de la pensée juridique moderne*, prec. Dalloz, 2009, pp. 19-20.
11. See, G. Deleuze, *Cours Vincennes of 09/12/1980:* "La puissance, le droit naturel classique", *op. cit.*
12. See, R. Brague, *La loi de Dieu*, Gallimard, Folio essais, 2005, p. 395.
13. See, e.g. H. Kelsen, "Qu'est-ce que la théorie pure du droit ?", *Droit et société*, n° 22, 1992, pp. 551-568.
14. See, Alain, *Propos sur les pouvoirs, Eléments d'éthique politique*, Gallimard, Folio, Essais, 2003, p. 307.
15. See, G. Agamben, *Le pouvoir souverain et la vie nu*e, Homo sacer, L'intégrale, 1997-2015, Opus, Seuil, 2016, pp. 11-13.
16. See, A. Flückiger, "Gouverner par des 'coups de pouces' (nudges) : instrumentaliser nos biais cognitifs au lieu de légiférer ?", *Les cahiers de droit* 59 (1), p. 199-227.
17. Among an abundant literature see (in French): J. Chevallier, "Les nudges dans la modernisation de l'action publique", in Bozzo Rey, A. Brunon Ernst (eds.), N*udges et normativités. Généalogies, concepts et application*s, Hermann, 2018, pp. 227-238. See also in this journal A. Alemanno, "Le 'Nudge' et l'analyse comportementale du droit : perspective européenne", *Revue européenne du droit*, September 2020.
18. See, T. Griessinger, *Transition écologique : quels apports des sciences comportementales ?*, Direction interministérielle de la transformation publique, 2019.
19. For a very clear presentation see *le Portail de la transformation de l'action publique* and more specifically the page dedicated to « sciences comportementales au service de la transformation publique » : ‹https://www.modernisation.gouv.fr/nos-actions/les-sciences-comportementales›.
20. For a presentation of the usefulness of "nudges", particularly in the context of "business prolematics", see the pages of BVA company's website relating to the "expertise" of this company in order to "facilitate the adoption of new uses": ‹https://www.bva-group.com/nudge-et-comportement/›.

knowledge is instrumental and offers a technical power that captures the determinable share of our beings and, to some extent, determines it.

3.1 Analysis

To show this, we do not want to discuss directly the political meaning given to this technique by its promoters (that of a "libertarian paternalism"). Rather, we intend to reflect on the mechanism that constitutes it. The word "nudge" literally means an encouragement. By using this expression (or that of 'nudging'), which is rather imprecise, we always evoke a series of processes that exploit the cognitive biases of individuals in order to smoothly orient their decisions towards predefined solutions that are deemed to be good. Thus, for example, placing fruit at children's eye level will provoke their consumption. Similarly, painting white lines at increasingly narrow intervals gives the impression of increased speed, which will encourage the driver to decelerate when approaching a dangerous turn.[21] Similarly, in order to "encourage" the nursing staff to use a hydro-alcoholic solution dispenser, "it is possible to place a lemon aroma diffuser at the entrance to the intensive care unit".[22] In short, "nudges" are based on several (cognitive) levers that allow for *unconstrained suggestion*.

A few clarifications are needed. At the risk of being mistaken, given how many references and how many different types of behavioral incentives exist,[23] we can say that thanks to the (empirical) behavioral sciences, the function of this type of tool is to "influence the behavior of agents who are neither completely rational nor perfectly informed."[24] More specifically, Pell Hansen (quoted by Péter Cserne)[25] states that a nudge "is a function attached to any attempt to influence people's judgement, choices or habits and make them predictable." This is "made possible" by the fact that there are "cognitive limitations," "biases," "routines" and "habits present in individual and social decision-making." All of which "prevents people from acting rationally in their own interests." In order to influence these "people" in this direction, the "functioning" of the nudges "is based on these limits, biases, routines and habits."

Thus, one can hope to guide (i.e. to govern) a person's decision by instrumentalizing the way in which the branches of the options open to her (the "architecture of choice") are presented according to their cognitive limitations and biases.[26] The objective is, without limiting the number of choices, to encourage her to make the right one. The advantage of such processes is understandable. For the French administration, for example, for a low cost and with limited risk-taking, "nudges" are used to facilitate relations with users, to guide them in their administrative procedures or to prevent risky behavior.[27]

3.2 Qualification

Nudges can thus be said to be instruments for controlling the "behavior" of individuals.[28] They are organized between two poles: a mobilization of the discoveries of behavioral economics as well as the will to achieve certain political goals: means and ends. Since this will is not expressed in the imperative; since it does not implement State violence; it can also be said that the technique it mobilizes cannot easily be reduced to the common definition of positive law - even if this definition is itself open for discussion.[29] In fact, this is precisely the intention of the promoters of such tools:[30] to "encourage" or suggest "without coercing" and thus not to resort to "obligation or fear of punishment."[31] Nudges, like positive law, belong to the means available to the State, public authorities and private companies in order to direct the life of beings. One can speak, for both, of a "normative guide" or, more broadly, of a technique of government.[32] It can also be said that behavioral incentives demonstrate the existence of an art of governing that mobilizes "practices" constructed outside the forms of law.[33] This is so even if, in the exercise of sovereignty, these practices (these governing facts) sometimes come under the jurisdiction of the law: *nudges* can thus ensure the application of a statute.

21. These examples are borrowed from Richard H. Thaler and Cass R. Sunstein, *Nudge, Improving decisions about health, wealth and happiness*, *op. cit.*

22. This example comes from the BVA company's website: ‹https://www.bva-group.com/nudge-et-comportement/accelerer-changements-comportements/›.

23. "The authors identify six techniques for this purpose: 1) opting by default; 2) anticipating errors; 3) establishing benchmarks; 4) retroacting; 5) restructuring complex choices; 6) creating incentives," says A. Flückiger, *op. cit.*, p. 205.

24. See, P. Cserne, "les Nudges sont-ils extra-juridiques?", in *Nudges et normativités, généalogies, concepts et applications*, under the direction of M. Bozzo-Rey et A. Brunon-Ernst, Hermann, 2018, p. 126.

25. See, P. Hansen, "The definition of nudge and libertarian paternalism: does the hand fit the glove?", *European Journal of Risk and Regulation*, 7 (1), 2016, p. 4 ; reference quoted by P. Cserne, *op. cit.*, p. 124.

26. However, not all authors admit that nudges necessarily rely on cognitive biases - see S. Lemaire, "Nudges, information and manipulation", *in Nudges et normativités*, sp. p. 178 *et seq.*

27. See, "Le portail de la transformation de l'action publique" : ‹https://www.modernisation.gouv.fr/outils-et-methodes-pour-transformer/le-nudge-au-service-de-laction-publique›.

28. "The application of nudges represents a real opportunity to help change behavior," says the BVA website: ‹https://www.bva-group.com/nudge-et-comportement/former-equipes-nudge/›.

29. On the idea that the law can be analysed as a technique of government, we would like to refer back to V. Forray and S. Pimont, "En partant de la gouvernementalité libérale, deux interprétations du droit", *Foucault face à la norme*, edited by J. Guittard, E. Nicolas and C. Sintez, Mare & Martin, Coll. Libre droit, 2020, p. 155ff.

30. Thus very clearly, Thomas Cazenave, inter-ministerial delegate for public transformation, declares that "this approach" (the mobilisation of behavioural sciences at the service of public policies) "supposes allowing oneself a number of audacities, among which that of definitively divesting the State of its customary reflexes: producing standards or acting through taxation or financial incentives": ‹https://www.modernisation.gouv.fr/sinspirer-pour-transformer/thomas-cazenave-sciences-comportementales-et-politiques-publiques-inciter-plutot-que-contraindre›.

31. See, "Le portail de la transformation de l'action publique": ‹https://www.modernisation.gouv.fr/outils-et-methodes-pour-transformer/le-nudge-au-service-de-laction-publique›.

32. See, P. Cserne, "les Nudges sont-ils extra-juridiques?", in *Nudges et normativités, généalogies, concepts et applications*, under the direction of M. Bozzo-Rey et A. Brunon-Ernst, Hermann, 2018, p. 126.

33. On the relationship between law and government practice see M. Foucault, *Naissance de la biopolitique*, Cours au Collège de France 1978-1979, EHESS, Gallimard, Seuil, 2004, p. 15.

Of course, civil law lawyers have long known how much, without any external constraint, the force of the law resonates in its very subjects.[34] However, the phenomenon described goes beyond the marks of such wisdom. And it is not necessarily satisfactory for a jurist, committed to the rule of law project, to imagine that the administration and private companies have a catalogue of tools or recipes to govern the bare lives of citizens. Nor that some of the items in such a catalogue escape the empire of legal knowledge and action. To emphasize this point, let us say that one of the characteristics of such governmental phenomena is to be hidden. In this sense, nudges seem to lose their effect if they are known (from the nudged). Secrecy is thus their problematic condition.[35] Somewhat like the government recipes (*Chou* as opposed to *Fa*) of ancient China.[36] Which is a clear difference from the principles of modern legislation. The problem of concealment of such government practices is not just a question of publicity. It goes deeper and is epistemological. Our theory of legal knowledge does not allow us to identify such a phenomenon as belonging to the world of law: it is a matter of public policy, behavioral sciences and even economics. Such practices of government thus remain legally unknowable or, more precisely, outside the world of jurists; for this reason, in order to say what they are, they call for an "external point of view." In short, the observation is as follows: "it is there; it governs our lives and yet it is not law."

Giving some depth to the subject, let us say that what has been hidden, at least from the eyes of modern jurists, is that a natural science of politics has been possible from the outset. A science whose purpose is the domination of men by other men;[37] a science that can thrive in the shadow of obligation and, more broadly, of the forms of law. Such assertions will come as no surprise. They are in line with one of the faces of the Enlightenment: scientism.[38] Saying things in this way also corresponds to a figure to which critical thought has accustomed us: showing one thing, in this case the rule of law, always obscures another: science governs our bare lives by updating an ancient conception of the state of nature. Law is thus the operation of a social future that never happens. A reasoned study of these assertions would deserve to be conducted differently.[39] It should be pointed out that we could also start thinking from other objects, such as the discipline of bodies, for example.[40] Let us also say that such a reflection can be included in a broader proposal. That according to which, following the work of Michel Foucault, we think that "on the threshold of the modern era (…) natural life is beginning to be integrated into the mechanisms and calculations of state power, with politics becoming bio-politics."[41] Out-law.

4. A new atypical natural law?

With such ideas in mind, a solution may exist to legally interpret such naturalistic practices. In order to give them such a meaning it is possible to compare them to what is called classical natural law. A distinction with positive law would thus be possible, while hoping to keep such practices within the domain of legal philosophy and theory. It should be noted that this is not to say that *nudges* are natural law in the sense that Aristotle, Cicero, Michel Villey or Leo Strauss understood it. However, without making such a connection, it is possible to establish links between classical natural law and "nudges" and to draw certain conclusions.

If we look first at the system implemented, we observe an instrumentalization of the laws of science. That is to say, the mobilization of a *descriptive conception of law* in the domain of political organization, which in this matter corresponds to a return to nature or, if you like, to the immutable order of the world. It is again, in this field, the reappearance of the scholar (the scientist); that is to say, the one who studies nature, who brings to light the relations of determination. A scientist who is *a priori* in his modern position: he discovers, describes, formulates hypotheses, and experiments with the laws of nature. For example, it is on the basis of an "ethnographic analysis of the behavior of users, their journeys and their needs in the course of their administrative procedures" that the French *Direction générale des finances publiques* determines the types of "nudges" relevant to encouraging the use of online services. More generally, while reading the guides produced by the French government, it can be seen that a genuine scientific methodology always governs the design of the relevant behavioral incentives.[42]

Of course, the scholar, like the one who, as in the example mentioned, writes and interprets an ethnographic analysis, does not directly formulate duties. This is no longer his competence. However, he does offer *recipes* (the appropriate types of nudges not known to the people nudged and the architecture of choice) in order to induce them to act according to a conception of the good which, itself, is calculated by economic science (by answering the

34. Man is reasonable and sees the application of the law as useful. "And then," adds Jean Carbonnier, "the law can count on the support of sentiment, of more or less troubled emotional forces:" *Droit civil, introduction*, 27th ed, PUF, Themis, 2002, n° 6.

35. On the debates on this point see S. Lemaire, *op. cit.*, sp. p. 186 *et seq.*

36. See, M. Granet, *La pensée chinoise*, preface by L. Vandermeersch, Albin Michel, Bibliothèque de l'évolution de l'humanité, 1999, p. 378: on the opposition between *fa* and *chou*, "two terms that first meant indistinctly 'recipes, ways of doing things' (…). *Fa* takes on an imperative meaning and means law as soon as it is applied to regulations that are made public, while chou retains its value as a recipe because (*chou* or) recipes must remain secret."

37. On the birth of such a science see M. Horkheimer, *Les débuts de la philosophie bourgeoise de l'histoire*, Petite bibliothèque Payot, Payot-Rivages, 2010, p.16 s.

38. See, M. Esfeld, *Sciences et liberté, l'image scientifique du monde et le statut des personnes*, EPFL PRESS / Presses polytechniques et universitaires romandes, 2020.

39. This is the project of a book being written on *the new natural law*.

40. On the question of the mistreatment of bodies by contemporary management, see J. Le Goff, "L'effet de la norme sur le sujet : la cruauté dans le rapport managérial au corps", *Foucault face à la norme*, prec. p. 355 *et seq.*

41. See, G. Agamben, *Le pouvoir souverain et la vie nue*, Homo sacer, L'intégrale, 1997-2015, Opus, Seuil, 2016, p. 12 *et seq.*

42. About this methodology as well as these applications in the field of ecological transition see T. Griessinger, *Transition écologique : quels apports des sciences comportementales ?,* Direction interministérielle de la transformation publique, 2019.

question of what rational man should do in such a situation, i.e. a cost/benefit calculation: the one that should prevail in any decision). Such an assertion leads us to introduce a nuance into our argument. By formalizing what is in conformity with the world order, it seems to us that the scientist does indeed determine duties. In this sense, he always formalizes "the conditions under which" (...) "the essence" is realized; he then allows, using the words of classical natural law,[43] "life conform to the essence in the best society possible." Now, if the essence of man is to be "reasonable," the scientist helping to conceive "nudges," does indeed contribute to the definition of "moral action in conformity with the essence." Understand: what is the best choice for an individual – or for society. That is, defining what is *right*. And this does not, of course, amount to laying down the principle of human "power" – that of the pre-existence of freedom as a natural right.[44] This would be leaving "the influence" that the "architecture of choice" intends to exert "in the hands of chance."[45] We have left the shores of modern natural law.

We could therefore very cautiously argue that a new natural law (of the classical type) is emerging. It is understood as the instrumentalization of one or more laws of nature in order to suggest the realization of one or more acts or abstentions. In its formula, however, such a natural law is atypical. Like positive law, it derives from the act of will of an authority whose object is to produce a behavioral incentive. By comparison, positive law itself sometimes has a similar role: it may be comminatory (e.g. the penal clause), prophylactic (e.g. civil or criminal liability)[46] or simply inciting (e.g. the supplementary provisions of will). But the act of will to which the behavioral incitement corresponds is not a prescriptive statement that can be derogated from. It has no "binding force:" its force derives from the facts (the physical "blow" literally given by the "nudge"). While the law has violence at its service; behavioral incentive is a factual process. "The act is material; it is not normative."[47] Its content refers to the mobilization of descriptive formulas of facts (scientific laws). And its aim is to *govern* the bare life of people. One can say it is normative in the sense that the objective of the instigator of the nudge is to favor the choice of the best behavior – tending towards the realization of what is good. The new natural law would thus be a hybridization: it is an act of will whose aim is normative, whereas its content is made up of politically instrumentalized descriptive laws.

At the extreme, the advantage of the new natural law is that, given the type of laws it mobilizes, by definition it cannot be violated. Scientific laws are invariable; they do not suffer from non-execution.[48] To put it quickly: machines, even human ones, do not disobey. With regard to the laws of nature, there is no "deviation that is analogous to what crime or fault are in relation to civil or moral law."[49] And in fact, these laws are not addressed to the will to impose an act or an abstention. They are the consensual formula of a determination which grasps the natural aspect of the being, seeking in him the causes capable of mechanically producing predictable effects. Of course, in the case of "nudges," freedom of choice seems to remain; it remains *by definition*, one might even say, since it is not a question of prescribing but of encouraging in order to inspire the "*right* decision" in "gentle" ways; there is therefore no formal constraint on choice or reduction in the number of options. However, as a result of the technique used (see above), freedom is overtaken, circumvented, diverted; more precisely, it is relegated: the determined being, who is the object of the "targeted reorganization" of his or her "decision-making environment,"[50] is not the obliged being. The process put in place regards his determinable aspect.

Thus, rather than freedom, there remains "the mere – misleading – feeling of having it."[51] The citizen, consumer or employee is dealing with an "architect of choice," not a legislator. Obviously, given the diversity of "nudges" (and the consequent vagueness of their definition), the limitation of the field of application of freedom (its removal from the game) will be more or less clear-cut depending on the technique used.[52] But it can always exist.[53] And at least in some cases, it is qualified by some as "manipulation" (a civil law lawyer could speak of fraud); even if this manipulation is temporary and if it is carried out in the interest of the person being manipulated.

43. Here again we use Gilles Deleuze's course on Spinosa; more precisely: *Cours Vincennes du 09/12/1980* "La puissance, le droit naturel classique" : ‹https://www.webdeleuze.com/textes/9›.

44. On freedom and nudges see the rather radical position of S. Conly, "Doit-on accorder de l'importance à la liberté de choix ?", in *Nudges et normativités*, *supra*, pp. 199 *et seq.*

45. The expression which comes from the aforementioned work by Thaler and Sunstein (cited above) is quoted here in the *Manuel méthodologique de l'approche comportementale à l'usage des décideurs publics,* Direction interministérielle de la transformation publique, p. 11.

46. See, Ph. Malaurie, L. Aynès and Ph. Stoffel-Munck, *Droit des obligations*, L.G.D.J., 8ème éd., 2016, n° 31.

47. "The creation of an incentive behavioural environment is not a matter of soft or hard norms, but of facts," rightly points out A. Flückiger, "Gouverner par des 'coups de pouces'" (nudges) : instrumentaliser nos biais cognitifs au lieu de légiférer ?", *Les cahiers de droit* 59 (1), p. 215.

48. See, Montesquieu, *De l'esprit des lois, Œuvres complètes II*, text presented and annotated by R. Caillois, NRF, Gallimard, 1951, p. 234.

49. See, A. Lalande, v° "LOI", *Vocabulaire technique et critique de la philosophie*, Volume I, A-M, Quadrige, P.U.F., 1999, p. 583.

50. See, *Manuel méthodologique de l'approche comportementale à l'usage des décideurs publics*, Direction interministérielle de la transformation publique, p. 10.

51. See, A. Flückiger, "Gouverner par des 'coups de pouces" (nudges) : instrumentaliser nos biais cognitifs au lieu de légiférer ?", *Les cahiers de droit* 59 (1), p. 205.

52. For a reflection on the autonomy violations of information nudges see S. Lemaire, "Nudges, information et manipulation", in *Nudges et normativités*, *op. cit.*, pp. 175-198.

53. *Ibid*, sp. p. 181, "I will therefore admit that there are situations in which nudges can lead individuals to make better choices than they would make without them, either because they are best suited to satisfy the interests of the individuals in question or because they are preferable from a social, moral or political point of view. Of course, if this thesis is challenged, then nudges are never justifiable. However, this radical objection does not seem to me to apply to all nudges. It seems to me simply absurd to maintain that it is always impossible to make sense of the idea that a person could have made a better choice based on, for example, his or her interests."

5. Relations with positive law

The new natural law - if we admit its existence, which we propose here as a hypothesis - is the fruit of an observation of nature by scholars; it produces descriptive laws formulated in the indicative; laws that can metamorphose into tools at the service of a policy. This is a kind of naturalization of the law, and it is quite serious and is not limited to a question of borders and disciplinary diplomacy. It is thus outside the realm of law that a new law governs our lives. Very simply put, *a thing governs us* and yet *this thing is not a legal norm*. Having said this, about this *thing*, however, we find it necessary to talk about law. A *law* that is close to classical natural law; a law that shares a structure with it: it is the fruit of the work of scholars (co-architects of choice) producing, from the observation of nature, tools ("architecture of choice") that make predictable certain behaviors deemed good: behaviors that conform to the essence, one might say. There would therefore exist two laws rather than one. Such an assertion itself calls for precision. There is no question of pointing out that there exists, in addition to an applicable positive law, an ideal law produced by God or reason; the latter being above the former, the two being linked by an interlacing of subtle relationships (natural law inspires reforms, it is a complementary source for the interpreter, it justifies the right to rebel, etc.). What we mean instead is that there are *two fully positive law*: each, by different means (*normative*, *factual*), with the ambition to *really* govern our lives. Two laws that function simultaneously. Two laws, one of which, since its modern foundation, has concealed the existence of the second from lawyers.

Such a hidden coexistence can be explained.

The founding mythology of modern law (be it a convention or a code) relegating the laws of nature outside (the definition of) the law did not - and could not - have the consequence of making the vocation of science for government disappear. On the contrary, for more than two centuries, the progress of science, applied to politics, has only increased the means available to govern the lives of beings.

At this point, by way of conclusion, it is possible to argue that positive law and its dogmatic science can play a critical and protective role in autonomy - we could say emancipatory.[54] It is possible to mobilize them against what we have called (new) natural (classical) law. In this sense, there are of course "legal remedies" against "material acts"[55] that constitute "practices of government."

Activist legal criticism is therefore possible. It is similar to the struggle for law described by Jhering. It can mobilize private and public law and fundamental rights. Beyond the activity of the courts, given the nature of behavioral incentives, constitutional action must democratically determine the areas of our social lives where we decide to give less room to freedom of choice (see above). Finally, beyond the practice of law, such a struggle can also invest the field of epistemology or language - the place where the theory of positivism prohibits knowledge of other techniques of government. Given the normative purpose (see above) of these practices, it is indeed possible to try to "describe" them legally. In other words, it is possible, by projecting the categories of law onto these facts, to understand them legally and to formulate them as part of the legal order. Such an "imputation" of the nudges to the universe of legal texts could, in a sense, give hope for their civilization.[56]

54. See, "Politique des formes civiles", *R.T.D. Civ.*, 2020, p. 526 *et seq*.

55. See, A. Flückiger, "Gouverner par des 'coups de pouces"' (nudges) : instrumentaliser nos biais cognitifs au lieu de légiférer ? », *Les cahiers de droit* 59 (1), p. 215 *et seq*.

56. On the strategy for incorporating a non-legal text into the textual universe of law see V. Forray and S. Pimont, *Décrire le droit … et le transformer, Essai sur la décriture du droit*, Dalloz, 2017, n° 428 *et seq*.

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Answering the crisis of multilateralism with polylateralism

To overcome the crisis of multilateralism that surged in a world full of tensions, one of the keys is polylateralism.[1] *This concept aims to rethink international relations, going beyond the quasi-monopoly of sovereign States, by developing hybrid forms of organizations able to bring together new and diversified actors driven by efficiency.*

The outdated Westphalian theory

The Westphalian system, which entrusts the international order to the sovereign States, and to them alone, faces a deep crisis, blatant for all since the 1990s. The asymmetry between this continued weakening and the rise of systemic crises in a globalized world has led global governance to chaos, making it broadly powerless to address the immediate and longer-term challenges of our contemporary societies. The latest evidence of this has just been cruelly provided to us by the Covid pandemic.

The reason for this disintegration is simple. The current multilateral order rests on one principle, the sovereignty of the nation-State.[2] Yet, this notion is a mere fiction.[3] Fictions can obviously be useful, they are even very convenient. Let us not forget that it was precisely built by rival States torn apart by religious wars, with the aim of establishing peace between them but also within their populations. We also have to keep in mind that some principles intended to frame the excesses of sovereignty have emerged in international law over the past century and a half.[4] However, in the era of a rising globalization, sovereignty is creaking. States have less and less control, and fiction is incapable of providing a satisfactory answer to many problems. This impotence is dangerously eroding their legitimacy, another Westphalian fiction that is a corollary of the previous one. I experienced it professionally as Jacques Delors' chief of staff in Brussels, as European Commissioner, then as General Director of the World Trade Organization (WTO).

To extend the metaphor, founding an international system on a squeaky fiction does not produce a harmonious concert. Our multilateral system is built on all kinds of formalisms. Jurists continue to claim that nation-States are all equal.[5] This is of course true from a formal point of view. However, in the real world, their relations are governed by asymmetry. The same applies to legitimacy. States are, by definition, all legitimate. The government is therefore legitimate to speak on behalf of the State. It should therefore be inferred that organizations made up of legitimate nation-States are themselves legitimate by transitivity, because of the monopoly of nation-States. This is coherent in this universe of legal concepts, but does not match with the reality of political, economic, social and cultural relations.[6]

Speculating the death of the nation-State is not the point here. On the scale of a country, the nation-State has the power to embody and aggregate tensions and conflicts between agents or groups of agents who, although animated by different and sometimes opposing preferences, share a common belonging that allows for a sense of the these collective preferences. Nevertheless, in the sphere of international relations and in the absence of this sense of community, the relationship between States alone proves insufficient to effectively aggregate all the human organizations that operate at the global level.

These organizations are very numerous. They are a growing number of non-governmental organizations (NGOs) that are, in fact, if not in law, international agents. They are, of course, also multinational companies.[7] If we define international organizations also as groups of people, in the broadest sense possible, that are organized to act at a global level, it is doubtless that the WWF, Greenpeace or certain large corporations are multinational organizations whose influence is perhaps not so different from that of, for example, the United Nations.[8] Yet, those

1. For an initial study of polylateralism, see the conversation between Pascal Lamy and Gilles Gressani for *Le Grand continent*, "Polylateralism or chaos", *Le Grand continent*, November 11 2020.
2. Theorists like Jean Bodin have forged the concept of sovereignty in the 16th century. However, Hegel is probably the first author to link both concepts of sovereignty and nation-State.
3. See, B. Anderson's work, particularly in his famous 1983 book Imagined Communities, *Reflections on the Origin and Spread of Nationalism*, is the first to describe the process of emergence of the concept of "nation".
4. See, Alain Pellet's work, especially "Histoire du droit international : Irréductible souveraineté", *in* G. Guillaume , (eds.), *La vie internationale*, Hermann, Paris, 2017, pp. 7-24.
5. United Nations Charter, article 2.1: "The Organization is based on the principle of the sovereign equality of all its Members".
6. Numerous authors sought to demonstrate that States were deliberately using the international relations system to stand back (e.g., L. Pauly, "Capital Mobility, State Autonomy, and political Legitimacy", *Journal of international affairs*, New York, Columbia University, 1995).
7. For a complete review of studies dedicated to the influence of transnational firms see L. Badel, "Milieux économiques et relations internationales : bilan et perspectives de la recherche au début du XXIème siècle", *Relations Internationales*, 2014/1 n° 157, pp 3 to 23.
8. For a description of how NGOs can help governments, multinational corporations and others to respect the values and standards they uphold, s. e.g., M.E. Keck, and K. Sikkink, *Activists beyond borders: Advocacy networks in international politics*, Cornell University Press, 1998.

actors are not a homogeneous class, because they do not all share the same objectives and evolve in spheres that are sometimes common, but often distinct, which does not prevent them from dialoguing and clashing with each other. This observation goes well beyond the framework of these two categories of actors. The big cities, the scientific communities, some major academic institutions, to name but a few, seem to perfectly fall within such a definition.[9]

Powerlessness to produce efficient policies

The second half of the 20th century will undoubtedly remain in history books as the era of multilateralism. There is, however, an obvious paradox. Those who knew the system from the inside were able to see its inadequacies very early on. The youngest generation of civil servants, of which I was a member in the 1970s, were, because of their training and the discourse that prevailed at the time, the most likely to marvel at the perfect structure of the UN galaxy from a conceptual and aesthetic point of view. However, they have no other choice but to face the inefficiencies of the international system. I had the very great privilege of being a Sherpa, very young, in the Group of Seven (G7), which was already an attempt to overcome these pitfalls. We can now say without too much hesitation that it failed, just like the G20, which is also at an impasse today.

These attempts sought to go beyond the diplomatic system by establishing contacts at the highest level and thereby bypassing the classic intermediaries. Some heads of State and government were aware of these pitfalls and had a real desire to get rid of the discussion frameworks in which their administrations operated and which handcuffed them. However, this attempt to go beyond the usual diplomatic features was an existential threat to the Westphalian system, which eventually regained control of this direct channel of discussion "by the fireside" that was disrupting habits.

The sequence we are currently experiencing sheds a harsh light on the system's impotence. Even if the extent of the current paralysis is particularly spectacular, it is not the first occurrence of the carelessness of multilateralism in health matters. An episode nearly three decades old has struck many of us, the fight against another great pandemic, AIDS.

The implementation of efficient prevention policies and the development of a treatment have stalled as long as the issue had remained in the classic arcane of intergovernmental institutions, including the World Health Organization (WHO), and treaties. Things began to move when an association, Act-Up, engaged in provocations, sometimes very unpleasant, against major laboratories and political leaders such as myself. They also changed dramatically because the pharmaceutical industry managed to put an end to an internal conflict of several years on the issue of tiered pricing,[10] and because philanthropists like Bill Gates and others thought it was time to give a decisive boost. The establishment of the Global Fund to Fight AIDS and better control of the virus probably owes more to these actors, true intruders who have not bothered much with the supposed primacy of State sovereignty, than to multilateralism. Let us compare, to be convinced of this, the composition of the board of directors of the Global Fund and that of the UN Security Council.

Counter-examples of truly effective intergovernmental organizations are rare. Unfortunately for the proponents of classic multilateralism, States are often stepping back. The World Organization for Animal Health[11] (OIE) is a good illustration of this paradigm. OIE is based on the meat trade. If a cow catches foot-and-mouth disease in an Argentine province, the province is blacklisted in the meat trade, it is suddenly left with no market, and the Argentinean authorities draw the consequences. The explanation for such a success lies in the fact that organizations of international epizootics are subject to a monopoly, that of the trust that veterinarians place in each other across borders. A veterinarian respects another veterinarian, but not necessarily a minister of agriculture. OIE then becomes the international organization of veterinarians who act because they trust each other. The World Customs Organization, which does not have the status of an international organization, also belongs to this model. Obviously, this kind of solution is not available.

From multilateralism to polylateralism

Facing this impasse of what I have wickedly reminded of, the syndrome of "diplocracy," the concept of polylateralism, because it increases the inter of "international" and the multi of "multilateral", sums up well the method for learning from these experiences and reinvigorating international cooperation by filling in the Westphalian gaps.

Polylateralism consists of putting around the table those international agents who have almost no place in the formalist multilateralism of nation-States and yet have not waited to exert their influence. The response to the main priorities of our world, from Covid-19 to ecological transition or even the management of the global economy, are not today within the reach of a classic inter-governmental approach. Everyone must accept this. Polylateralism opens up another perspective and is based on other modalities.

It is now within the framework of polylateralism that we should organize the mobilization of these new actors

9. It is striking that this phenomenon is further amplified by the current pandemic crisis. Co-publications between Chinese and Americans in medical journals have doubled in 2020. Laboratories have connected to each other and intentions to share intellectual property for vaccines have emerged.

10. There now seems to be evidence that differential pricing is one of the key factors in the fight against global epidemics (see Z. Ud-Bin Babar, "Differential pricing of pharmaceuticals: A bibliometric review of the literature", *Journal of Pharmaceutical Health Services Research*, July 2014).

11. Founded in 1924 under the name *Office International des Epizooties*, it has 182 member States and territories.

who have their own energy and dynamic, but who are struggling to find a relevant framework to cooperate. From this point of view, this approach deeply differs from the realistic theory of international relations according to which global institutions would no longer serve any purpose.[12] I do not endorse the notion of realism. What fits better with reality is not necessarily what is good. We can want something else, we can make the world a better place. This is why it is necessary to accept that there is a virtue in the diversity of approaches.

The first major consequence of the acceptance of this polylateral model should be to open up the game of this new format much more to the heterogeneity of legitimacy. There are non-State entities whose international influence far exceeds that of many nation-States. There are cities, regions in the world that are quasi-international entities. However, they are not endowed with the attributes of nation-State sovereignty, and are in search of a balance that often leads to sub-optimal situations, because seeking to adorn themselves with these attributes may immediately put them in difficulty vis-a-vis States that are eager to maintain their monopoly on the international stage.

The cities of New York and Paris are obviously today international geopolitical and geo-economic players.[13] It is at the level of this type of structure, particularly at the urban level, that the relationship between legitimacy and power is strongest. Mayors are more legitimate than other representatives, because they are closer to grassroots level. Legitimacy is a function that is inversely proportional to distance. At the same time, large cities are powerful because they have the competence to control the networks that, in the modern world, are the infrastructures of governance. Beyond fictions, the secret of power and legitimacy increasingly lies in the proper organization of networks for transportation, energy, information, education, and the supply of increasingly scarce raw materials.

This mastery of networks perfectly explains why large cities have spontaneously come together around the challenges of global warming and, more broadly, environmental transformations. The C40[14] (i.e. the climate coalition known as the "40 big cities of the world") which played an important role in the success of the COP21, which was largely born out of the failure of the Copenhagen conference and its diplomatic approach, is a shining example of this. It is also on this principle that China designed its "Belt and Road Initiative".

There is, for the moment, only one polylateral organization, the International Labour Organization (ILO). The ILO was born out of the Treaty of Versailles thanks to Léon Bourgeois, and other members of the French solidarist movement, who understood that peace depended on conflict prevention and that putting States, bosses and workers around the same table was the most appropriate response to the causes of the First World War and to loosening the inherent contradictions of the capitalist model. However, this "trilateralism" hardly prospered for reasons that would take too long to explain here. Let us simply keep in mind that the formats of polylateralism will not follow this standard and will develop in a sui generis way. Their existence and structure will undoubtedly be spurred by their success and failure. We will have to accept the idea that there are energies available to obtain results in sometimes improbable configurations. In essence, polylateralism corresponds to coalitions whose engine is the search for results, and whose existence does not need to be assured once the result is achieved. They are more networked, more horizontal, probably more ephemeral organizations, and probably less legitimate from a theoretical point of view.

The Paris Peace Forum, an initiative not "for" peace but "about" peace that brings together a multiplicity of actors with global initiatives, reflects well in its processes, actions, projects, coalitions and different approaches what this polylateral method can be. Its first results, after three editions, are encouraging.[15]

Reshaping legitimacy through the concept of effectiveness

When departing from the fiction of the equality of nation-States and the paradigm of sovereignty, the question of legitimacy immediately arises for all good minds trained in political theory. What is the legitimacy of a coalition formed between Bill Gates, Anne Hidalgo and the head of Greenpeace? If there is legitimacy, where does it come from? These questions, apparently very relevant, nevertheless are part of an exhausted theoretical framework.

I support the establishment of a theory of legitimacy inscribed in reality. If the goal of any organization is to improve the living conditions of individuals and the environment, *lato sensu*, in which they evolve, legitimacy must draw its source in the results rather than in the form.[16] Adherence to this vision should be facilitated by the unanimous observation that a given form fails to achieve this.

Thinking of the question of legitimacy through the democratic ideal in the existing model would be a mistake. This ideal is no more capable of reproducing what Hedley Bull has called the "domestic analogy"[17] than the polylateral model will be able to do. In either case, there will always be a lack of institutions that connect the pub-

12. See, J. Mearsheimer, "The False Promise of International Institutions", *International Security*, 19-3, Winter 1994/95.

13. On the influence of cities in the global governance game, s. S. Curtis (ed.), *The Power of Cities in International Relations*, Routledge, May 2016.

14. ‹https://www.c40.org/about›.

15. ‹https://parispeaceforum.org/fr/›.

16. The issue of legitimacy is in fact twofold. Obviously, efficiency plays a predominant role, however, authors have noted that legitimacy was a two-level concept, efficiency and accountability. The latter is rooted in a certain procedural transparency, s. R. O. Keohane and J. S. Nye, *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, KSG Faculty Research Working Paper Series, February 2001.

17. See, H. Bull, *The Anarchical Society: A Study of Order in World Politics*, New York: Columbia University Press, 1977.

lic, through elections, to international organizations.

Sticking to the example of the OIE, the system works because competent veterinarians make decisions among themselves, trusting each other. Of course, the farmer who has to kill all his chickens or ducks in his farm in the southwest of France experiences a tragedy. At the same time, this is part of the rules of the game, because we are in an infrastructure of market capitalism, which is the meat trade. There is no ideological reason. In a society where we eat a lot of meat, probably too much, the meat producer has a problem if we no longer buy what he produces. There is a reminder in the infrastructure of the globalized economy, which should perhaps from time to time also be applied to humans and not just to markets.

Of course, the notions of democracy and polylateralism are not alien to each other. Polylateralism is only possible if non-governmental organizations, in particular, find spaces of freedom to develop and to criticize, which lack in many States.

The case of China is one of the most acute challenges in the emergence of the polylateral model. While it is playing a growing role throughout the world, China is today reluctant to polylateralism as well as to "poly" in general. Businesses are largely State-run and NGOs are very strictly controlled.

The rivalry, which structures international relations, between the United States and China is therefore probably not the field in which polylateralism is likely to produce spectacular results. Unless the Chinese system relaxes, it is hard to see Chinese NGOs taking American NGOs by the hand, or American companies approaching Chinese companies and finding solutions together without governmental involvement, merely because it would work better.

However, while polylateralism seems less suited to non-liberal systems, the polylateral method is operative where political systems are weak, such as in some regions of Africa.

Finally, it is not forbidden to think that polylateralism could also indirectly contribute to guiding the choices of regimes that are in principle hermetic. To take the example of the European Green Deal, the involvement of many NGOs, the C40, or even coalitions in business like the B4IG[18] has been very important in the genesis of this new strategic axis of the European Union. Hence, when the Chinese president announces to the world its carbon neutrality in 2060, the fact that Europe has committed itself to it for 2050 undoubtedly has something to do with it. Polylateralism and multilateralism could thus be a good match in the future.

18. *Business for Inclusive Growth* (B4IG) is a partnership between the OECD and a coalition of multinational firms which aim at fighting against income and opportunities inequalities (https://www.oecd.org/inclusive-growth/businessforinclusivegrowth/).

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Towards Plural Governance: Functional Equivalence in the Fight Against Transnational Corruption

The concept of functional equivalence, introduced in the Preamble of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter the "Convention" or the "OECD Convention"), paved the way for a new method of governance. Based on guiding principles and objectives to be achieved rather than on precise and unambiguous rules, it allows interpretation to develop in a circular, evolutionary and interactive way, combining the international norm and national specificities.

1. A method of "soft-enforcement" through peer evaluation

Astrid Mignon Colombet: The Preamble of the OECD Convention sets out the ambitious objective of ensuring that each State Party adopts "equivalent" measures to combat the bribery of foreign public officials in an essentially penal framework: "*Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence*". Equivalence among the measures taken by State Parties to combat foreign bribery is both a method and a goal. First, it is a method that allows States to approximate their anti-corruption legislation while adapting the provisions of the Convention to their own legal systems.[1]

It also represents a goal, so essential that the Convention does not permit the stipulation of derogatory measures "affecting this equivalence" at the time of ratification of the Convention. What was the reason for using the concept of "functional equivalence" rather than "harmonization"?

Nicola Bonucci: The notion of functional equivalence or functional method comes from comparative law and is well known to specialists in private international law. The notion was defined by Erik Jayme in his general course at The Hague in 1995: "*laws are then considered with the goal of solving a given problem. The solutions to an issue are compared without taking into account the position of a legal rule in the given system; in this way, an equivalence of solutions is achieved despite the fact that the letter of the law may diverge*".[2]

However, although the concept is known, its inclusion in the preamble of the OECD Convention is indeed unusual. This is primarily due to the treaty framework itself. The OECD Convention obeys as much a logic of international economic law as it does of international criminal law. Thus, the preamble indicates in its first recital that corruption "distorts international competitive conditions." Within the framework of this atypical conventional instrument, functional equivalence aims to resolve two problems, one structural, the other contextual. From a structural point of view, the Convention is not intended to standardize the criminal law of the Parties to the Convention.

This is explicitly recognized in Commentary No. 2 to the Convention, which states that the Convention "*seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.*" From a contextual point of view, the text of the preamble also aims to resolve a specific but major problem: the hostile position of the US Senate towards any treaty that does not admit reservations.[3] This constant position made the American negotiators fear a refusal to ratify the OECD Convention. But, on the other hand, admitting reservations could have led to the unraveling of the Convention. Thus, a balance was found on the basis of a very tight functional equivalence of the measures. The first limitation was to affirm the equivalence of the measures as an essential "purpose and object" of the Treaty. This terminology refers to the 1969 Vienna Convention on the Law of Treaties, which provides in article 19 c) that in the event of a treaty being silent on reservations, the Parties may introduce a reservation provided that it is not "incompatible with the object and purpose".[4] Thus, while the text of the OECD Convention is silent on reservations, the preamble specifies that the Convention must be ratified without derogation. The second limitation of the notion of functional equivalence comes from the monitoring mechanism of the Convention.[5]

1. P. Moulette, "Le rôle de l'OCDE dans la lutte contre la corruption internationale", *Revue européenne du droit*, Sept. 2020, p. 124.

2. E. Jayme, "Identité culturelle et intégration : le droit international privé postmoderne", *Cours général de droit international privé*, 1995, p 105. Académie de droit international de la Haye, tome 251, pp. 9-267.

3. See p. 16 of "Treaties and Other International Agreements: The Role of the United States Senate", 2001: <https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>.

4. Vienna Convention on the Law of Treaties, 1969, <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf >.

5. There are few analytical texts on the OECD Convention. See: M. Pieth, L. Low, N. Bonucci (Eds.), T*he OECD Convention on Bribery: A Commentary*, Cambridge University Press, 2013; see also a presentation by Mark Pieth to the OAS: <http://www.oas.org/juridico/english/pieth2000.htm>.

Astrid Mignon Colombet: Indeed, this monitoring mechanism is based on a peer evaluation and peer pressure procedure.[6] Thus, States must not only carry out a self-assessment of their legal system, but also submit to a mutual evaluation by the OECD Working Group to check whether the effects of national legislation comply with the requirements of the Convention.[7] The task could seem daunting!

Thirteen years later, in 2012,[8] and again in 2014, France was subject to the "pressing" scrutiny of the OECD,[9] which invited it, through the choice of a vocabulary that was both diplomatic and very firm, to strengthen its efforts to implement more effective legislation in the fight against foreign bribery. This regular and, above all, public monitoring by the OECD is one of the reasons that led France to adopt the Law of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life, known as "Sapin 2". While this method of equivalence has clearly worked for France, surely is it difficult to request changes to national penal legislation in the absence of a truly binding framework?

Nicola Bonucci: Admittedly, the risk of a differentiated or even divergent implementation was stressed at the time, particularly in the French Senate.[10] Article 12 of the Convention was negotiated in order to avoid this, but it is to be read in conjunction with the comments attached to it as well as Section XIV of the 2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which complements and reinforces the Convention.[11] The monitoring mechanism is based on a simple principle described in the 2009 Recommendation as follows: "*where each Member country is examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available*". The principles on which it is based, i.e. peer review and peer pressure, are not unique to the Convention and to the OECD Working Group on Bribery.[12] Such mechanisms exist in other anti-corruption conventions, but their value lies in the rigor and objectivity of the analysis and the ability of the Group, as a collective body, to resist political pressure.

Thus, apart from the evaluation itself, the process provides for the possibility of adopting the reports by "consensus minus one" (i.e. the country under review cannot block the adoption of the report) as well as by the fact that all reports are automatically made public. The final piece of the puzzle to ensure true functional equivalence is name and shame through the adoption of a public statement, which is often picked up by the international media. The effectiveness of such a toolbox is indisputable. The UK Bribery Act was adopted following pressure from the OECD, and the explanatory memorandum of the law that would become Sapin 2 thus explicitly refers to the reports "published by the Organisation for Economic Co-operation and Development (OECD)".[13] Eventually, we see that the binding or non-binding nature of a norm rests much more on the understanding or acceptance of being bound than on the formal mode of adoption of the norm. It is indeed this point that makes the strength of the so-called "soft law" of the OECD, for example in the area of taxation.[14]

2. A *de facto* harmonization of the offence of foreign bribery and its methods of prosecution

Astrid Mignon Colombet: Such awareness of being bound by the norm is particularly illustrated through the implementation by States of Article 1 of the Convention which defines the offence of bribery of foreign public officials. Even if OECD Commentary No. 3 specifies that "*Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offence under their domestic laws*", the French definition of the offence of bribery of foreign public officials uses substantially the same elements.[15]

As for rules on jurisdiction, Article 4 provides that each State shall take the necessary measures to establish its jurisdiction over the offence "*when the offence is committed in whole or in part in its territory*". The OECD Commentary No. 25 encourages States to interpret their territorial jurisdiction broadly "*so that an extensive physical connection to the bribery act is not required*" as a basis for prosecution.[16] Here again, the French Penal Code is faithful to the principle that each State is responsible for prosecution on its territory, even if only one constitutive

6. Commentary relating to article 12 of the Convention.
7. M. Delmas-Marty, M. Pieth, U. Sieber, *Les chemins de l'harmonisation pénale, Harmonising criminal law*, UMR de droit comparé de Paris, volume 5, p. 425.
8. OECD Press Release: "OECD seriously concerned at lack of foreign bribery convictions in France, but recognises recent efforts to ensure independence of prosecutors", 3 October 2012, ‹https://www.oecd.org/france/oecdseriouslyconcernedatlackofforeignbriberyconvictionsinfrancebutrecognisesrecentefforstoensureindependenceofprosecutors.htm›.
9. OECD Press Release: "Statement of the OECD Working Group on Bribery on France's implementation of the Anti-Bribery Convention", 23 October 2014, ‹https://www.oecd.org/corruption/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm›.
10. Information report by Senator José Balarello on the draft legislation to amend the Penal Code and the Code of Criminal Procedure and on the fight against corruption ("Projet de loi modifiant le Code pénal et le Code de procédure pénale et relatif à la lutte contre la corruption"), Report 42 (1999-2000) : ‹https://www.senat.fr/rap/l99-042/l99-0428.html›.
11. See M. Gavouneli, "L'effet normatif des mécanismes de suivi : l'exemple de la lutte contre la corruption", *in* Le Pouvoir normatif de l'OCDE, journée d'études de Paris organisée par la SFDI, Editions Pedone, 2014.
12. See F. Pagani, "L'examen par les pairs : un instrument de coopération et de changement Analyse d'une méthode de travail de l'OCDE", Study available on the OECD website: ‹https://www.oecd.org/fr/cad/examens-pairs/1955301.pdf›.
13. See the draft law on transparency, the fight against corruption and the modernization of economic life ("Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique"), n° 3623, introduced on 30 March 2016: ‹https://www.assemblee-nationale.fr/14/projets/pl3623.asp›.
14. On soft law, see the annual study of the French Conseil d'Etat (2013): ‹https://www.conseil-etat.fr/actualites/actualites/etude-annuelle-2013-le-droit-souple›.
15. Art. 435-3 of the French Penal Code.
16. Commentary relating to art. 4§1 of the OECD Convention.

element has occurred there.[17]

Since 2010, the U.S. authorities have fully applied this principle by making an extensive application of their jurisdiction to prosecute foreign companies under the FCPA.[18] More recently, France also introduced the possibility, in the Sapin II law, of prosecuting any person "exercising all or part of his economic activity on French territory".[19] And since 2018, France, as a prosecuting authority, has participated in the coordinated settlement of two major transnational cases.[20]

Twenty years later, the assessment of functional equivalence appears at first sight to be largely positive: bribery of foreign public officials is now an offence punishable by the 44 States Parties to the Convention[21] and the rules of jurisdiction of States are converging. However, difficulties may remain in the coordinated implementation of such prosecutions, even though article 4§3 of the Convention invites States to consult each other to determine the "most appropriate jurisdiction for prosecution."

Nicola Bonucci: Indeed, article 1, which defines the offence, is quite complex in its structure. Despite commentary No. 3 cited above, the fact remains that article 1 and its various commentaries are extremely detailed and the States' latitude is tightly circumscribed. Consequently, the functional equivalence of article 1 is more formal than substantive. More generally, the dynamics of the monitoring mechanism and of the collection of evaluation reports mean that, on several themes, we are witnessing a convergence or even a *de facto* harmonization of standards. The most striking example concerns the planned introduction this year of corporate criminal liability in Germany,[22] even though the OECD Convention in its article 3§2 "Responsibility of Legal Persons" does not make it a *sine qua non* condition,[23] provided that the system results in "*effective, proportionate and dissuasive non-criminal sanctions*". In this case, Germany therefore wishes to go beyond the functional equivalence provided for in the Convention, in order to align its law in substance with that as applied in the other States Parties to the Convention. The same movement leading countries to harmonize their substantive law can be observed with regard to article 4 of the Convention. In the first place, it should be noted that US legislation implementing the provisions of article 4 has never been challenged by the OECD Working Group. On the contrary, during the first assessment of the United States in 1999, the Group considered that "generally, the FCPA implements the standards set by the Convention in a detailed and comprehensive manner. The formulation of the statute is structured and practical in its scope and applicability".[24]

The controversy of the last few years on an extraterritorial application of the American law would deserve another debate,[25] but it suffices here to note that both the United Kingdom with the Bribery Act and France with the Sapin 2 law have aligned their legal framework with the American one by providing for some form of extraterritoriality.[26] The difference lies in the implementation because where the United States makes a strong use of its prerogatives this is not always the case in the United Kingdom and France.

3. A granular equivalence applied to the liability of legal persons

Astrid Mignon Colombet: If we look again at the issue of the convergence of substantive legislation, the liability regime for legal persons appears to be particularly sensitive, as it concerns the respect of the fundamental principles chosen by each State. While the adoption of criminal liability of legal persons seems to be spreading among the States Parties in order to meet the objective of fighting corruption, there may be divergences between, on the one hand, the advocates of liability of the legal person as a "reflection" or "ricochet" of the liability of the natural person who represents it[27] and, on the other hand, the advocates of an autonomous liability of the legal person accused on the basis of a defect in organization or supervision.[28] Is it possible to go further in the direction of functional equivalence in this area?

Nicola Bonucci: This is perhaps one of the limitations of the notion of functional equivalence, and it touches on the degree of granularity of the equivalence. Let us imagine two countries that both have the principle of criminal liability of legal persons, but in one case liability can be triggered only if the governing body of the company has validated the act of corruption, while the other presumes a fault on the part of the company for any offence committed by one of its employees. In this case, it is clear

17. Art. 113-2, paragraph 2 of the French Penal Code: "An offense is deemed to have been committed on the territory of the Republic when one of its constituent events takes place on that territory".

18. A. Mignon Colombet, "Transnational Negotiated Justice: the Cornerstone of an Organized Extraterritoriality?", *Revue européenne du droit*, Sept. 2020; DOJ, SEC, FCPA, A Resource Guide to the U.S. Foreign Corrupt Practices Act, 2012, p. 12.

19. Art. 435-6-2 and 435-11-2 of the French Penal Code.

20. OECD, Report, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 119: the table "Ten largest Foreign Bribery Enforcement Actions among the Parties of the Convention" mentions Societe Generale with France and the United States as prosecuting authorities; and the Airbus SE case on January 31, 2020.

21. OECD, Review of the 2009 Anti-Bribery Recommendation: Written Consultation with Stakeholders, 2019.

22. See. A. R. Jevtic, "Corporate criminal liability in Germany: an overdue reform?", Online Contributions of the Revue des Juristes de Sciences Po, 1 Nov. 2020: ‹https://www.revuedesjuristesdesciencespo.com/index.php/2020/11/01/corporate-criminal-liability-in-germany-an-overdue-reform/›.

23. See commentary No. 20 relating to art. 2 of the Convention "Responsibility of Legal Persons".

24. OECD, United States Review of Implementation of the Convention and 1997 Recommendation ‹http://www.oecd.org/unitedstates/2390377.pdf›.

25. See the Phase 4 Report on the Implementation of the OECD Convention by the United States: ‹https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf›.

26. On the very broad scope of this provision of the Sapin 2 law, see the Memorandum of Criminal Policy on the Fight against International Corruption of June 2, 2020: ‹https://www.legifrance.gouv.fr/circulaire/id/44989›.

27. Art. 121-2 of the French Penal Code; e.g. Cass. crim., 2 Dec. 1997 : JCP G 1998, II, 10023, rapp. F. Desportes.

28. As an example, see: M. Galli, "Une justice pénale propre aux personnes morales", *Revue de sciences criminelles*, 2018, p. 359.

that equivalence at the level of the principle alone is not sufficient.

For this reason, in addition to the evaluation and monitoring mechanism, the Working Group has developed a "*Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*" which is attached as Annex I to the Recommendation adopted in 2009[29]. This "Good Practice Guidance" constitutes a "*subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*" within the meaning of Article 31 of the Vienna Convention on the Law of Treaties which allows the Working Group to refer to it in its follow-up work. This way is thus closed: (i) article 2 of the Convention establishes the principle of the liability of legal persons, (ii) the monitoring mechanism notes a differentiated implementation, (iii) the good practice guidance defines in a more granular manner the principle set out in article 2, (iv) the monitoring mechanism can verify implementation on the basis of the good practice guidance and not only on the basis of the text of the convention.

4. In the "uncharted waters" of functional equivalence: "out of court" agreements

Astrid Mignon Colombet: We are leaving the shores of the Convention to join other OECD work on negotiated criminal justice agreements. A recent OECD report (2019) indicates that since 1999, out of 890 cases of foreign bribery, 695 (78%) have been resolved in the form of out-of-court agreements,[30] defined as "*a wide range of mechanisms used to resolve criminal matters without a full court proceeding, based on an agreement between an individual or a company and a prosecuting or another authority*".[31] In France, the Sapin 2 law followed this trend by introducing the judicial public interest agreement ("CJIP") inspired by the American and British deferred prosecution agreements (DPAs), which give legal entities the possibility of entering into a form of criminal settlement without admission of guilt.[32] These out-of-court agreements are not explicitly contemplated by the Convention. Nevertheless, can we say that the objective of functional equivalence has been achieved with respect to the adoption of negotiated justice agreements within the States Parties to the Convention?

Nicola Bonucci: It seems to me that on the subject of out-of-court resolutions we are in "uncharted waters" because the Convention is absolutely silent on the subject, even though the Working Group has indeed examined the different mechanisms put in place by this or that country. Admittedly, the 2019 report makes a certain number of observations but, at this stage, it is difficult to assert that there is functional equivalence with regard to out-of-court resolutions, even if a certain form of convergence can be seen there as well. The final texts of the settlement of the so-called Airbus case in France in the United Kingdom and the United States give a somewhat simplistic but revealing illustration of the situation: the CJIP is 22 pages long, the DPA in the United Kingdom is 32 pages long and the DPA in the United States is 104 pages long! Ongoing discussions regarding the revision of the 2009 Recommendation and the wording that may be agreed by the Parties on this subject may provide a future basis for the Working Group. It is interesting to note that, on this subject as on so many others, international law adapts to national practice more than it inspires it. It should be remembered, in this respect, that the OECD Convention has been very largely inspired by the American FCPA. Closer to home, the current work of the EU on due diligence is inspired by the terms introduced by the French law on the duty of care. More systematic attention should be paid to the way in which national law or unilateral action by one or more States can shape international law, which in turn shapes national law in a kind of circular movement.

5. Functional equivalence outside the Convention: compliance mechanisms

Astrid Mignon Colombet: Compliance mechanisms have largely been developed outside the sphere of treaties. However, although the OECD published a good practice guidance regarding compliance as early as 2009,[33] not all States have the same appreciation of the compliance obligation imposed on companies. While the United States assesses a company's compliance in the context of a criminal investigation,[34] France has adopted a mixed system based on an assessment of compliance by the French Anti-Corruption Agency (AFA)[35] and, where applicable, in the context of the conclusion and enforcement of CJIP agreements.[36]

It is also true that the increasingly important objective of detecting corruption could lead to compliance mechanisms becoming increasingly similar in the long run. Like the U.S. Department of Justice's guidelines, the joint guidelines of the National Financial Prosecutor's Office (PNF) and the AFA of June 26, 2019 encourage companies to self-disclose facts to the authorities and to cooperate with the judicial investigation by providing the elements

29. OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions: ‹https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/oecdantibriberyrecommendation2009.htm›.

30. OECD, *op. cit.*, p. 14.

31. OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 3.

32. Art. 41-1-2 of the French Code of Criminal Procedure.

33. Annex 2 of the above-mentioned 2009 OECD Recommendation.

34. T. Baudesson, C. Merveilleux du Vignaux, "Les conditions d'ouverture des accords de règlement", *RICEA*, February 2021, p. 15; DOJ, Evaluation of Corporate compliance Programs, June 2020: "Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs".

35. Art. 1 of the Sapin 2 law.

36. Art. 41-1-2 2° and R 15-33-60-7 of the French Code of Criminal Procedure; Joint FRP-AFA Guidelines on the Implementation of the Public Interest Judicial Agreement of June 26, 2019 ("*Lignes directrices conjointes PRF-AFA sur la mise en œuvre de la convention judiciaire d'intérêt public*").

of their internal investigation.[37] Following the Chancellery Circular of June 2, 2020 encouraging voluntary disclosure,[38] the latest recommendations of the AFA published on January 12, 2021 even specify, in the absence of any obligation of self-disclosure, that the governing body is "free" to bring to the attention of the competent prosecuting authority any violations likely to constitute a criminal offense and that it is essential to formalize an internal investigation procedure.[39]

Could the proposals of the recent report of the Club des Juristes "For a European Law of Compliance" be transposed to the OECD level?[40] And can functional equivalence go so far as to incite States Parties to provide for a system of voluntary disclosure and internal investigation?

Nicola Bonucci: In this recent report, the Club des Juristes calls for a Europe-wide compliance law. The report is very rich and contains many interesting proposals, but one wonders whether, in a globalized world, the European level is the right one and whether it is advisable to introduce a hard law of compliance. In this respect, a more flexible approach might be more promising. At the same time, it is true that the field of compliance has largely evolved since 2009 and that the Good Practice Guidance, while remaining valid in broad terms, would deserve to be reviewed and amplified when the Recommendation is revised. However, I think that it is difficult to imagine a single framework for compliance and its control. For example, with the creation of the AFA, France seemed to favour an essentially *ex ante* control of compliance, whereas other countries such as the United Kingdom or the United States favour an *ex post* control.

Does this mean that one system is more efficient than another? Similarly, on the crucial subject of what is called "voluntary disclosure", it would be difficult today to even establish the principle for all States Parties to the Convention. "Judicial deals"[41] are an integral part of the American system - which even provides for a pre-established scale of "plus" and "minus" - but are only gradually entering the systems of other countries and are the subject of a certain number of preventions, for good and bad reasons. What about a "voluntary disclosure" made in a country where the rule of law is flawed? As for internal investigations, the diversity of regimes and approaches is such that any functional equivalence seems premature to me. Indeed, for there to be functional equivalence there must be prior agreement on two points: that the problem exists and that it must be resolved. We have not yet reached this point, even though legal practitioners are faced with sometimes contradictory requirements.

6. The limits of functional equivalence: the criminal liability of natural persons

Astrid Mignon Colombet: Perhaps we have reached the crux of the issue of functional equivalence; that is, the liability of natural persons when the former is brought into play in the context of lawsuits brought against the legal person. Whether it concerns directors or employees, the prosecution of natural persons, exercised simultaneously or following the signature of out-of-court agreements with legal persons, raises many questions. In France, the Sapin 2 law and the implementing instructions have clearly indicated that the legal representatives of legal entities should not benefit from immunity from prosecution, while recalling that the principle of the opportunity to initiate a prosecution must be applied on a case-by-case basis. The result is uncertainty and a difference in the prosecution regime applicable to legal persons and natural persons, with only the former benefiting from an agreement without admission of guilt. Admission of guilt seems to remain in some States Parties the foundation of negotiated justice applicable to natural persons, as is the case in France with the *comparution sur reconnaissance préalable de culpabilité* ("appearance on prior admission of guilt"). However, other States have adopted procedures in this area that do not imply such a prior admission of guilt, such as the Italian *patteggiamento.*[42]

Can such a differentiated treatment of natural persons compared to that of legal persons prosecuted for the same conduct fall within the scope of functional equivalence? More generally, natural persons are both at the heart of the company accused of corruption when they are identified as potential perpetrators or accomplices and at the center of the anti-corruption system when they act as whistleblowers. Can the Convention deal with the treatment of the natural person, the subject of criminal law, using the concept of "functional equivalence"?

Nicola Bonucci: In my opinion, this point goes beyond the question of functional equivalence. It goes to the very notion of what we mean by corporate criminal law and the fact that this body of law can be applied to both individuals and corporations. Such a contraction between two fields with very different origins, i.e. criminal law and business law, has two structural limits. Firstly, criminal law as imagined by Beccaria in *Dei delitti e delle pene* is based on the individualization of responsibility and punishment, which works perfectly for natural persons but with much greater difficulty for legal entities. Secondly, the interests of some can objectively clash with the interests of others. We see this with the concept of voluntary disclosure by companies, which can lead to implicate their own managers or employees, but we also see it in the context of whistleblowing.

37. Joint FRP-AFA Guidelines, *op.cit.*, p. 9.

38. Memorandum of the Ministry of Justice June 2, 2020 on the fight against international corruption ("*Circulaire du ministère de la justice 2 juin 2020 en matière de lutte contre la corruption internationale*").

39. AFA Recommendations, 12 January 2021, points n°81, 270, 278.

40. Report of the Club des juristes "*Pour un droit européen de la compliance*", November 2020: ‹https://www.leclubdesjuristes.com/wp-content/uploads/2020/11/DP_rapport-compliance_FR_WEB.pdf›.

41. To use the title of the book directed by A. Garapon and P. Servan-Schreiber, *Deals de Justice: Le marché américain de l'obéissance mondialisée*, PUF, 2013, p. 208.

42. OECD, Resolving Foreign Bribery Cases with Non-Trial Resolutions, 2019, p. 55.

The United States has set up a reward system for whistleblowers and the Securities and Exchange Commission has announced a record year in 2020.[43] It is clear that the system put in place by the United States aims to decouple the situation of the individual from that of the company by playing one off against the other. In Europe we are not (yet) there! This fundamental divergence has been partially erased by functional equivalence, which has made it possible to implement these provisions in a harmonized manner, but without offending the legal principles and cultures of each country.

This approach has proved to be effective and could be used in other areas of international law; indeed, the OECD has drawn some inspiration from it as regards taxation issues.[44] Nevertheless, the functional approach alone cannot provide all the answers to a world in which the economy is totally globalized and the law remains essentially characterized by territoriality.

43. Press Release: SEC Whistleblower Program Ends Record-Setting Fiscal Year With Four Additional Awards", 30 Sept. 2020: ‹https://www.sec.gov/news/press-release/2020-240›.

44. See on this point the approach in the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS" adopted in Paris the 24 November 2016: ‹https://www.oecd.org/tax/beps/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm›.

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The Right Scope of Global Governance and Democracy Enhancement

Greater interdependence is often taken to require more global governance, but the logic requires scrutiny. Cross-border spillovers do not always call for international rules. The canonical cases for global governance are based on two sets of circumstances: global commons and "beggar-thy-neighbor" (BTN) policies. The world economy is not a global commons (outside of climate change), and much of our current discussions deal with policies that are not true BTNs. Some of these are beggar-thyself policies; others may produce domestic benefits, addressing real market distortions or legitimate social objectives. The case for global governance in such policies, I will argue, is very weak, and possibly outweighed by the risk that global oversight or regulation would backfire. While these policy domains are certainly rife with failures, such failures arise not from weaknesses of global governance, but from failures of national governance and cannot be fixed through international agreements or multilateral cooperation. I advocate a mode of global governance that I call "democracy-enhancing global governance," to be distinguished from "globalization-enhancing global governance."[1][2]

In a world economy that has become highly integrated, problems always seem to require more international cooperation and better global governance. The populist backlash, as well as the former U.S. President Donald Trump's trade policies, have added fuel to calls made by economists, technocrats, and commentators for more internationalism. "[V]irtually every problem destabilizing the world in this plastic moment is global in nature and can be confronted only with a coalition that is global . . .", wrote *The New York Times* columnist Thomas Friedman recently.[3] Or as Nemat Shafik, then the Deputy Managing Director of the International Monetary Fund, put it in 2013, "What happens anywhere affects everybody–and increasingly so.

So it is pretty clear that the world needs more, not less, international coordination and cooperation".[4] When the European economics network *VoxEU.org* solicited advice from leading economists on how address the frailties of the global financial system in the wake of the 2008 crisis, the proposed solutions often took the form of tighter international rules administered by some kind of technocracy: an international bankruptcy court, a world financial organization, an international bank charter, or an international lender of last resort.[5] Nationalism may seem ascendant in politics, but global governance reigns in economics.

It is tempting to think that greater interdependence requires more global governance, but the logic requires scrutiny. On the one hand, interdependence blurs the distinction between what is domestic and international. On the other hand, there remains considerable institutional diversity among nations, rooted in different historical, cultural, or development trajectories. This diversity reflects itself both in different preferences ("objective functions") and in different perceptions of how the world works. These in turn make it difficult for countries to agree on common policies or rules. Today's U.S.–China trade conflict is the paradigmatic example of the tensions that arise in the absence of a satisfactory solution to this dilemma.[6] When should global rules override national differences and impose common solutions?

Consider the following policies: educational policies; highway speed limits; gasoline taxes; agricultural subsidies; import tariffs on cars; and tax havens.

In an economically interdependent world, each one of these policies produces spillovers–or cross-border externalities–to other nations. The last three policies are typically considered international, and subject to global governance. The first three are normally considered "domestic" policies, but they too have global implications. Educational policies can shape a country's comparative advantage and will thereby influence its (and other countries') terms of trade. Highway speed limits and gasoline taxes affect the domestic demand for oil and therefore the price of oil on world markets. The presence of cross-border spillovers does not seem like a sufficient condition for global governance.

1. The author is grateful to the World Bank for financial support and to Robert Cook, Robert Keohane, Robert Staiger, and especially Harlan Grant Cohen for very useful feedback.

2. Editor's note: this is a revised version of a paper prepared at the World Bank ABCDE conference on June 17–18, 2019 in Washington, DC and subsequently published as Rodrik, D. 2020. "Putting Global Governance in Its Place", *The World Bank Research Observer*, vol. 35, no. 1. As such, the ideas contained in this paper were developed at a time when Donald Trump was still the U.S. President, and Covid-19 was not yet a global pandemic.

3. See, Friedman, T. L. 2019. "Has Our Luck Run Out?", *The New York Times*, April 30, 2019 : ‹https://www.nytimes.com/2019/04/30/opinion/trump-climate-change.html›.

4. See, N. Shafik, "Smart Governance: Solutions for Today's Global Economy." International Monetary Fund, December 5, 2013: ‹https://www.imf.org/en/News/Articles/2015/09/28/04/53/sp120513›.

5. See, B. Eichengreen and R. Baldwin, "What the G20 Should Do on November 15th to Fix the Financial System." Vox, November 10, 2008 : ‹http://voxeu.org/index.php?q=node/2544›.

6. See U.S.-China Working Group on Trade Policy (2019) for a statement along these lines, and an approach that follows the ideas in the paper : ‹https://rodrik.typepad.com/US-China%20Trade%20Relations%20-%20A%20Way%20Forward%20Booklet%20%28for%20print%29.pdf›.

In fact, it is not at all clear how the dividing line that is conventionally drawn be tween the two sets of policies is actually drawn. Should we focus on the magnitude of See U.S.-China Working Group on Trade Policy (2019) for a statement along these lines, and an approach that follows the ideas in the paper. cross-border spillovers? This is an empirical matter requiring case-by-case analysis. For example, taxes on gasoline in the United States and Europe likely have far greater impact on world markets than auto tariffs in small or medium-sized countries. Should we ask instead whether there is harm to other nations? But export subsidies on farm products are beneficial on net to the rest of the world since they deteriorate the subsidizing country's external terms of trade and improve the terms of trade of the rest of the world. Perhaps we should focus on the stated objective of policy–domestic versus international? Yet educational investments are often justified on the grounds of increasing a country's global competitiveness, making them as international in this sense as trade policies. None of these criteria does a good job of explaining why the first set of policies is "domestic" and the second is "international." The muddle of global governance is that many policies have become "internationalized" through happenstance or the operation of political lobbies, rather than on account of principled distinctions.

The canonical cases for global governance are based on two set of circumstances.[7] The first occurs when there is global public good (GPG). The classic case is carbon control policies in the presence of climate change. The second is represented by "beggar-thy-neighbor" (BTN) policies. A BTN policy is one that produces an income transfer to the home economy from the rest of the world while producing global inefficiency as a by-product. Exploiting monopoly power in a rare metal on global markets by restricting sales abroad would constitute an example. Both of these circumstances provide impeccable arguments for global governance establishing and enforcing guidelines on what countries can do on their own. However, their relevance to the burning policy issues of the day is much more limited than is commonly realized. As I will show below, the world economy is not a global commons, and virtually no economic policy has the nature of a global public good (or bad). And while there are some important BTN policies, much of our current discussions deal with policies that are not true BTNs. Subsidies, industrial policies, employment-protecting tariffs, non-tariff measures that target health or social concerns, poor financial regulations, inappropriate (excessively austere) fiscal policies, or national Internet walls are neither GPGs nor BTNs. Some of these are beggar-thyself policies; others may produce domestic benefits, addressing real market distortions or legitimate social objectives. The case for global governance in such policies, I will argue, is very weak, and possibly outweighed by the risk that global oversight or regulation would backfire.

None of this is to suggest that we live in a Panglossian world where all policy is for the best. The policy domains I have just lifted are certainly rife with failures. When large countries make serious policy mistakes–as in the case of the United States with lax financial regulation in the run-up to the global financial crisis of 2007-2008–other countries pay a price as well. My argument is that such failures arise not from weaknesses of global governance, but from failures of national governance. These failures cannot be fixed through international agreements or multilateral cooperation. External constraints may in fact aggravate domestic failures of governance, insofar as they empower particular distributional coalitions at the expense of the broad publics. At the end of this paper, I advocate a mode of global governance that I call "democracy-enhancing global governance." Unlike "globalization-enhancing global governance," democracy-enhancing global governance would leave most pol- icy domains to national regulation, with global oversight restricted to procedural safeguards–such as transparency, accountability, the use of scientific/economic evidence–intended to reinforce democratic deliberation.

The Analytics of Economic Interdependence: The Case for Global Governance

It helps to have an explicit framework to discuss the issues that arise in the presence of spillovers and to distinguish among different kinds of problems.[8] By thinking of these issues in terms of utility functions of the relevant countries, it cannot be overlooked that well-being at home and abroad is affected not only by a country's own policies, but also by (the sum total of) policies of foreign countries. Spillovers could be negative or positive, depending on the policy in question. When countries act independently, maximizing their own utility and disregarding the effects of their choices on other countries, we have the standard result that the resulting (Nash) equilibrium will be inefficient. Policies with negative spillovers would be oversupplied, and policies with positive spillovers will be undersupplied. Pigovian taxes and subsidies that enable the internalization of these cross-border externalities are obviously impractical in this context.

7. There is a rich body of analytical literature on the economics of trade agreements, which is complementary to my discussion here. See, K. Bagwell, and R. W. Staiger, "Domestic Policies, National Sovereignty and International Economic Institutions." *Quarterly Journal of Economics* 116 (2): 519–62 ; Bagwell, K., and R. W. Staiger, *The Economics of the World Trading System*, MIT Press, 2004 ; J. Frieden, M. Pettis, D. Rodrik, and E. Zedillo, 2012, After the Fall: The Future of Global Cooperation: Geneva Reports on the Global Economy International Center for Monetary and Banking Studies : <https://www.sss.ias.edu/files/pdfs/Rodrik/Research/After-the%20Fall-Future- Global-Cooperation.pdf>; G. Grossman, *The Purpose of Trade Agreements*, Princeton University, 2016; and the references therein. See also K. P. Gallagher and R. Kozul-Wright, *A New Multilateralism for Shared Prosperity: Geneva Principles for a Global Green New Deal*, Boston University Global Development Policy Center and UNCTAD, 2019 for an articulation of a new set of principles for the future of multilateralism, and H. G. Cohen, "What is International Trade Law For?" *American Journal of International Law* 113 (2): 326–46, for an argument for "re-embedding" international trade law in domestic policy priorities.

8. Editor's Note: for a formalised version of the arguments developed in this Article, see D. Rodrik, "Putting Global Governance in Its Place", *The World Bank Research Observer*, 2020, vol. 35, no. 1.

There are two benchmark cases where all countries could be made better off through global rules that discipline home and foreign policies. I take them up in turn.

1.A. Global Public Goods (GPGs)

Suppose that in addition to their direct, domestic effects, home and foreign policies jointly contribute to provide a global benefit (or damage), which is non-rival and from which individual countries cannot be excluded. Suppose also that, for an identical set of policies, the contribution of each country to the global benefit (or damage) is proportional to its size.

In this case, it can be shown that when countries are small, they overlook the effect of their policies on the global benefit (or damage). Since these effects are systematically discounted, a global public good will be underprovided and a global public bad will be overprovided. The best-known example of this is greenhouse gas (GHG) emission, a global public bad in view of climate change. Policy here consists of controls on GHG. Since such controls are costly at the domestic level while providing benefits only in terms of global benefits, countries will have the incentive to minimize these controls. A global agreement that capped domestic GHG emission levels would leave all countries better off, assuming countries are sufficiently similar, or the caps are appropriately calibrated to individual country circumstances.

When commentators describe the world economy as a "global commons" or free trade as a global public good, they have a similar argument in mind. But this is a misleading analogy. Economic policies that are beneficial to the world economy also tend to be beneficial for the home economy; they are primarily private, rather than public goods.

First, consider trade policy. It could well be that open trade policies contribute to a global public good: the benefits from trade may increase with the number of countries that practice free trade. But the relevant question is whether a country that disregards this external benefit would have the incentive to pursue globally suboptimal trade policies. For a small country, the answer is no. Free trade is the optimal policy for domestic reasons, regardless of other countries' policies. In other words, domestic utility is maximized when tariffs and non-tariff barriers are set to zero (I will take up the large country optimal tariff case later). This is very different from the GHG case where policies are costly at the domestic level, and the home country wants to set GHG controls at their lower limit. Countries trade not to confer benefits on their partners, but to reap the domestic gains from trade. And when they forsake those gains from trade, the problem is not with lack of global governance; the much larger failure lies at home, with domestic governance.

Much the same logic applies in many other policy domains where good economic policy is its own reward. Consider financial markets. Prudential financial regulation ensures that financial intermediaries do not take on too much risk and financial in- stability is kept in check. When financial centers pursue appropriate policies, they enhance financial stability and soundness for the global economy as a whole. But these centers have all the incentive in the world to adopt such policies since they will be the first to bear the costs of financial crises. The 2008 global financial crisis may have been due to lax financial regulations in the United States. But these policy mistakes did not originate from the U.S. government's lack of concern for the global economy. Rather, they were the result of a series of misjudgments with respect to the domestic consequences of financial liberalization. U.S. regulators did not require greater cosmopolitanism; they needed a better sense of the national interest.

Similar arguments can be made for fiscal policy, tax policy, and regulation in general. Excessive austerity can be damaging to the world economy, but the costs are borne first and foremost at home. Inappropriate tax policies or poorly designed regulations hurt the home economy in much greater measure than they affect other nations. In all these areas, policies that sustain a healthy global economy are—or should be, with appropriate domestic governance—in the national interests of each country. The extent to which global governance can help fix domestic governance problems is a different question, to which I will turn later. The point for now is that most standard economic policies cannot be considered to be GPGs.

1.B. Beggar-Thy-Neighbor Policies (BTNs)

Beggar-Thy-Neighbor policies provide benefits at home only to the extent that they harm other countries. Additionally, they generate global inefficiency, a deadweight loss. A well-known instance in trade policy is the so-called optimum tariff, whereby a large country can manipulate its terms of trade by restricting its imports (or exports). Since other nations face similar incentives, in the end all (or most) countries end up worse off by engaging in destructive trade practices.[9] This type of problem represents the second canonical case for global governance. Distinguishing between BTN and non-BTN policies can be useful in practice to ascertain the limits of desirable international rules. For example, my colleagues and I have proposed an approach to U.S.-China economic relations that centers on drawing a bright red line around BTNs.[10]

Take a two-country example. The utility functions of the two countries can be represented as the sum of two components, a regular part that depends only on own policies and a second part that captures the pure transfer component of the policy. Note that in this case the transfer component is zero-sum: whatever home gains from its policy comes at the expense of losses to foreign, and vice

9. See, H.G. Johnson, "Optimum Tariffs and Retaliation." Review of Economic Studies 21 (2), 1953, 142–53.

10. See, U.S.-China Trade Policy Working Group. 2019. U.S.-China Trade Relations: The Way Forward. October 27, 201 : <https://cdn.shanghai.nyu.edu/sites/default/files/_us-china_trade_ joint_statement_2019_0.pdf>.

versa. Assume for simplicity that the two countries are identical. Then in equilibrium, neither country is able to extract transfers from the other. But in attempting to beggar each other, they are both driven to take inefficiently high levels of actions. This is exactly what happens in the optimum tariff case.

Another example would be the use of mercantilist currency policies. Assume there is generalized unemployment, and both countries would benefit by running a trade surplus. Each country tries to undervalue its currency or follow other policies to improve its trade balance. But one country's trade surplus is the other country's trade deficit. In the end, such efforts offset each other. Neither country ends up with higher employment, but both suffer the incidental costs of mercantilist policies.

Since BTNs are negative-sum policies, there is a strong presumption that they should be restrained using global rules. Note that in the two examples I have used above, it is also the case that both countries are better off when their policy autonomy is restricted (by placing ceilings on possible unilateral actions) compared to when they have full autonomy. Subject to the usual caveats about commitment, these are the relatively easy cases for global governance.[11]

But there are other cases of BTN policies where one or more of the countries would be worse off in the cooperative equilibrium. (Side payments from the beneficiaries to the losing country would rule out such a possibility, but these are difficult to implement in a global context). In the optimum tariff game I discussed, in the presence of asymmetry it is possible for one of the countries to prefer the Nash equilibrium to the cooperative equilibrium: a larger country gains more from manipulating its terms of trade than a smaller one and has more to lose from international disciplines. The example of a global cartel, mentioned in the introduction, is another example.

Suppose a number of exporters of a key commodity have cartelized and are facing a large number of small importers. A cooperative equilibrium that prevented them from exercising monopoly power would definitely leave the cartel members poorer. In this instance, there is no incentive for these countries to join any global governance scheme.

A second, similar example is that of pure tax havens. A pure tax haven is a jurisdiction that applies a very low corporate tax rate for the sole purpose of enabling international corporations to engage in tax evasion. This represents a BTN policy because it undermines the tax base of countries and shifts the global tax burden towards labor, a poorer group, without stimulating physical investment. Pure tax havens shift paper profits to low-tax jurisdictions, not physical capital.[12] In this case too, global governance that prevented tax competition would leave some countries, namely the pure tax havens, worse off. They would be deprived of the revenues they generate by attracting a very large base of paper profits at very low tax rates. An analogous case can be made for personal income or wealth tax havens. A global registry that would identify ultimate owners of bank accounts in all financial jurisdictions would assist tax administration and collection and benefit most countries of the world, but the tax havens would lose out.

Whether they make all countries better off or not, the demands that BTN policies make on global governance are rather limited. That is because relatively few policies fall under this rubric. In fact, I have mentioned here all the straightforward examples of BTN economic policies I can think of: optimum tariffs, international monopolies or cartels, trade-balance mercantilism, and pure tax havens (for corporate and personal income).[13] Perhaps U.S.-China competition in digital technologies opens new areas of BTNs, but the vast majority of economic policies that are contentious and come under international scrutiny are not BTNs, even though they are frequently presented as such—just as the global economy is often misleadingly viewed as a global commons.

2. The Weak Case for Global Governance: Policies that are Neither GPGs Nor BTNs

Consider the following two policies: R&D subsidies in a country that imports technology-intensive goods; and an import ban on goods produced with slave labor. Both policies create negative cross-border spillovers. The first improves technological capabilities in the home economy and can be expected to have an adverse terms-of-trade impact on the rest of the world. This is because as the country becomes better at producing technologically advanced goods, its demand for imports of such goods fall. The second policy has a direct adverse economic impact on exporters of slave-made goods. In both cases, current practice is that such policies are not regulated internationally. Countries are free to do what they please in both domains. My guess is that this conforms to the intuition of most analysts with respect to what constitutes an appropriate dividing line between domestic and international spheres of regulation. I will argue in this section that a large number of policies that global policy makers do

11. A commitment problem arises because each country would still like to deviate from the cooperative equilibrium and resort to BTN policies. The issue of commitment also raises the question of why a cooperative outcome could not be obtained through repeated-interaction incentives in dynamic games, instead of relying on an international agreement or organization such as the WTO. Formal governance structures may have an advantage in that they allow for coordination when there are multiple equilibria to select from and provide information on compliance in settings with many players (see discussion in G. Grossman, *The Purpose of Trade Agreements*, Princeton University, 2016).

12. See, T. Tørsløv L. Wier, and G. Zucman, "The Missing Profits of Nations." *NBER Working Paper*, August 2018, No.2.

13. There is also a wide range of circumstances with imperfect competition where governments may want to shift rents from foreign to domestic firms. Policies used in such cases sometimes look like BTN policies, but the presence of imperfect competition means that their global efficiency consequences can be quite different from standard BTN policies. For example, when a country subsidizes its domestic oligopolist (say Airbus) to shift rents from a foreign oligopolist (Boeing), the rest of the world benefits through lower prices.

try to bring under global governance are precisely of the same nature as one or the other of the two examples just mentioned. In particular, they have the following characteristics: (a) they either do not create global inefficiency; (b) or when they do, it is the domestic economy that bears the direct economic costs.

Technology subsidies are in category (a), assuming there are knowledge spillovers (even if these spillovers are purely domestic). The reason global governance is not believed to be appropriate in this instance is presumably that there is an economic justification for the policy in question, and the presence of cross-border spillovers is not grounds on its own for limiting what each nation can do independently. The import ban is in category (b). The reason for allowing a country wide latitude in this case is different: an import ban might be economically inefficient, but it is the home country that pays the economic price for it first and foremost. Effectively, the home country trades off the economic cost against the value of upholding a moral standard against slavery. It does not seem fitting for an international organization or a global governance regime to second-guess the appropriateness of this tradeoff.

Yet many other policies that are routinely internationalized are no different. I will examine them below.

2.A. Non-BTN Policies: Enrich-Thy-Neighbor Policies

Enrich-Thy-Neighbor policies produce positive aggregate effects on the rest of the world and are yet contentious globally. This seems paradoxical, and it is. There is one significant category of policies that fit this description: subsidies on exportables. Whether they be on agricultural products or manufactured goods, export subsidies are considered to be a no-no internationally. This is puzzling since export subsidies are an economic "gift" to the rest of the world. True, some foreign countries may lose, but this does not alter the fact that the aggregate effect on the rest of the world is positive.[14]

Consider a world with two foreign countries. Assume that an increase in certain policies of the home country has asymmetric effects abroad. One foreign country benefits, while the other country loses. When the policy at hand is an export subsidy, we know that the sum of these two effects of opposite sign has to be positive. That is because the export subsidy deteriorated the home country's terms of trade, and therefore improves the terms of trade of the rest of the world in aggregate (the two foreign countries taken together). The asymmetric effects in turn would be due to the pattern of comparative advantage across countries. One foreign country may have a comparative advantage structure similar to the home country, so that its terms of trade and those of the home country move together. So agricultural export subsidies, for example, will make net exporters of agricultural products in the rest of the world worse off, while making net importers better off.

There are three arguments for why export subsidies should nevertheless be globally disciplined, none of which is very compelling.

First, it is the case that some foreign countries lose. Members of the Cairns group of large agricultural exporters have made their case loudly and successfully within the GATT/WTO regime in the case of agricultural subsidies. But this is a curious argument insofar as there are multitudes of policies that are left under national prerogative, but likewise produce asymmetric effects abroad. These include policies that are roundly applauded by economists and technocrats as appropriate policies. Consider unilateral import liberalization as a blatant example. When a large country unilaterally reduces its import barriers, it normally incurs a terms-of-trade loss. More to the point, foreign countries that share this country's comparative advantage pattern also experience a terms-of-trade loss (when I increase my imports of textiles and autos, driving their relative prices up on world markets, all other net importers of textiles and autos suffer too). And in their case, there is no compensating increase in gains from trade. So, some foreign countries are definitely left worse off. To my knowledge, this has never been used as an argument for placing global limits on countries' ability to unilaterally liberalize their trade regimes.

The second argument is that subsidies, unlike unilateral import liberalization, are globally inefficient. This justification for global governance has to do with the economic desirability of subsidies in general, and not with the incidence of their external effects. The trouble here is that it is difficult to take such a categorical stance against the use of subsidies. There may be genuine learning externalities associated with exporting, which the subsidizing country aims to reap. Or there may be social or political objectives that are equally justifiable on broader grounds, even if not strictly economically. Just as the moral stance reflected in the import ban on slave-produced goods cannot be second-guessed by other countries, it may not be appropriate for foreign countries to question whether a particular social objective is valid or best addressed through subsidies. I will scrutinize these issues at greater length in the next subsection. What can be said unambiguously is that when the subsidies do not serve a real economic purpose, unlike BTNs, their most immediate costs are shouldered by domestic taxpayers and consumers.

The third argument is that subsidies (and similar policies) are "unfair" because they undermine level playing fields in global trade. This argument is based on the view that all nations should compete on an even basis.[15] But what constitutes a level playing field, like fairness, is very much in the eye of the beholder. For example, developing

14. A possible exception arises in the case of truly predatory pricing: subsidies may enable the home firm to drive foreign competitors out of business and subsequently exert monopoly power on world markets. But such cases are rare (and would fall under BTN policies discussed previously). Current trade rules do not single out predation (as they should).

15. I am grateful to Robert Cook for reminding me of this argument.

nations have long made the argument, not entirely unreasonably, that subsidies (like lax patent rules) serve to compensate for the disadvantages of backwardness, and in any case are practices that advanced nations themselves pursued when they were poorer. In other words, they make trade fairer rather than less so. Of course, if global agreement can be reached on what is "fair," it makes sense to pursue common standards. But often such common ground will be lacking. In those cases, it would be inappropriate to seek global disciplines.

This is not to say that "unfair trade" is an empty and useless concept. When nations face trade transactions that they think undermine domestic moral codes or norms of fairness, they should be free to regulate them accordingly.[16] The difference is between living by one's own moral standards and imposing them on others.[17]

2.B. Non-BTN spillovers: Policies with Ambiguous Domestic Efficiency Implications

We finally consider policies that produce adverse spillovers to other countries but are used for domestic reasons rather than for BTN purposes. These domestic reasons might be economic or non-economic, well-grounded or not. There is a very wide variety of such policies that are either already regulated internationally or frequently come under international scrutiny. Here is a partial listing:

- "weak" intellectual property rights protections;
- industrial policies that do not involve export subsidies, such as domestic subsidies, local content requirements, "trade-related investment measures," etc.;
- bans on GMOs, hormone-fed beef, and other similar "health" measures;
- "excessive" fiscal austerity;
-"lax" financial regulation;
- import protection to prop up employment in certain industries or regions;
- "very low" levels of corporate taxation (i.e., as in Ireland, where there may be effects on domestic capital formation, not pure tax havens such as the Cayman Islands);
- data localization, local-cloud policies, and other Internet-nationalizing policies.

The domestic economic effects of all these policies *ex ante* are either negative or ambiguous. And they typically generate negative spillovers for other countries. All of this may suggest a rationale for global governance in these areas. The difficulty is that, as in the export subsidy case, there are strong countervailing arguments that cannot be dismissed. First, while policy failures are obvious *ex post*, they may not be so clear ex ante. To take a prominent example, there is now widespread agreement that financial regulators in the United States did a poor job of reining in risk-taking in mortgage lending and in the shadow banking sector prior to 2007. But views on the appropriateness of prevailing regulatory practices diverged significantly at the time. It is not at all clear that greater international coordination on financial regulation would have produced better outcomes. In fact, given the influence the U.S. financial sector exerted on the determination of Basel rules, the opposite was just as likely.

Second, there may indeed be market failures of distortions at home that justify the use of such policies, as second-best remedies even if not first-best ones. It is not obvious that trade negotiators or international bureaucrats are better placed than domestic legislatures and policy makers to make the right call in complex cases. Third, there may be overwhelming non-economic considerations—social, environmental, health, national security or moral—that trump economic costs and benefits. Once again, the relevant trade-offs are better evaluated at the national level, within pre-existing democratic decision-making bodies, than via delegation to international agencies.

The primary argument for global governance in these cases, one that economists are especially fond of making, is that global rules can prevent countries from using "beggar thyself" policies by correcting domestic political failures. A more sophisticated political-science version is provided by Keohane, Macedo and Moravcsik;[18] it is a version of the standard delegation argument. Essentially, it views external constraints acting as a counterweight to special interests or rent-seeking lobbies. Trade agreements, for example, allow governments to say "no" to their protectionist lobbies at home by adhering to the following logic: "we would love to raise tariffs on this product, but WTO rules do not allow us to do so."

There are three counterarguments. First, non-standard, heterodox policies can have economic justification in second-best contexts.[19] Global rules or bureaucracies cannot reliably distinguish between "beggar thyself" and economically desirable policies. This is especially true in policy domains that require significant local knowledge, as with industrial policies or financial regulations. Second, even when there is a strong presumption that countries are engaged in "beggar thyself" policies, democracies should be allowed to make their own "mistakes". For example, the European Union may be deluded in banning GMOs or hormone-fed beef, but allowing supranational bodies to pass judgment in such matters undermines both democracy and the legitimacy of global governance arrangements. Third, and perhaps most importantly, there is no presumption that global governance institutions are

16. I provide a concrete example in my proposal for an anti-social dumping clause in D. Rodrik, "Policy Brief No. 9: Towards A More Inclusive Globalization: An Anti-Social Dumping Scheme." *Economics for Inclusive Prosperity*, 2019 : ‹https://econfip.org/policy-brief/towards-a-more-inclusive-globalization-an-anti-social-dumping-scheme/#›. This proposal seeks to marry national autonomy in upholding domestic social bargains with the global procedural restraints discussed below.

17. In some areas, there may well be well-established global norms (I will treat democracy as one such global norm later in the paper when I discuss democracy enhancing globalization.) But in other areas, including especially the treatment of labor markets, practices obviously differ.

18. See, R.O. Keohane, S. Macedo, and A. Moravcsik. 2009. "Democracy-Enhancing Multilateralism." *International Organization 63* (Winter): 1–31.

19. See, D. Rodrik, "Second-Best Institutions", *American Economic Review* 98 (2), 2008, 100–4.

more immune to capture by special interests than domestic policymaking. Indeed, large corporations, international banks, and Big Pharma have exercised disproportionate influence on global economic governance. It would be naïve to presume that they have prioritized the public interest over their particular interest in shaping global agreements in line with their needs.

I have developed the last point in a previous publication in the context of trade agreements.[20] The conventional view of trade agreements is that they offer welcome relief against protectionist interests at home, that is, inefficient import-competing firms and labor unions. When trade agreements were largely about import tariffs and quotas—that is before the 1980s—this made a lot of sense. Multilateral trade negotiations were about lowering these barriers, which meant going against what protectionist interests at home wanted. But after the establishment of the WTO in 1995, and especially with the mushrooming of regional trade agreements after the 1990s, the political economy of trade agreements began to look very different. The new-style agreements increasingly focused on domestic rules and regulations, such as intellectual property rights, investor rights, health and sanitary regulations, subsidies, and so on.

Unlike in the case of tariffs and quotas, there is no natural benchmark that readily allows us to judge whether a regulatory standard is excessive or protectionist. Different national assessments of risk—safety, environmental, health—and varying conceptions of how business should relate to its stakeholders—employees, suppliers, consumers, local communities—produce different standards, none obviously superior to others. In other words, regulatory standards are public goods over which different nations have different preferences. An optimal global governance scheme would trade off the benefits of expanding market integration (by reducing regulatory diversity) against the costs of excessive harmonization. But it is difficult to know where that optimal point may lie. Asking trade negotiators to perform this task adequately across a wide variety of policy domains seems unrealistic.

And this is before we allow for the political influence of internationally oriented special interest lobbies, which have played a critical role in these new domains, by shaping the formulation of global intellectual property regulations, investor arbitration clauses, banking standards and many others. Public information in the United States on lobbying for trade issues shows that pharmaceutical manufacturing firms and PhRMA (the industry association) top the list by a wide margin. Other significant contributors are auto manufacturers, milk and dairy producers, textiles and fabrics firms, information technology firms, and the entertainment industry. Labor unions such as United Steelworkers and the AFL-CIO, which are traditionally associated with protectionist motives, tend to lag considerably behind these industry-based groups.

20. D. Rodrik, "What Do Trade Agreements Really Do?" *Journal of Economic Perspectives* 32 (2), 2018, 73–90.

These considerations suggest a different political economy model than the one economists have long been partial to. The domestic game that is played is not one between a free-trading government and protectionist interests, with international commitments serving to tie the government's hand against protectionism. Rather, it is one where large international firms capture the international policy-making process to design global governance regimes in IPRs, banking, investment rules, etc., that are highly partial to their own interests. Unlike in the conventional model, the rent- seekers here are not the traditional protectionists. Instead, they are pharmaceutical companies seeking tighter patent rules, financial institutions that want to limit the ability of countries to manage capital flows, or multinational companies that seek special tribunals to enforce claims against host governments. In this setting, trade agreements serve to empower special interests, rather than rein them in.

3. Democracy-Enhancing Global Economic Governance

Whether international agreements can systematically alter domestic political equilibria in a desirable direction is a question with no clear-cut answer in theory. The recent evidence from trade agreements, reviewed briefly in the previous section, is not encouraging. Moreover, using external restraints to shape domestic policy has a certain cost in terms of democratic legitimacy: it reinforces nativist populists' message of sovereignty being ceded to cosmopolitan technocrats. It should not be up to the "global community" to tell individual nations how they ought to weight competing domestic goals and priorities.

This does not preclude a global conversation over the nature of diverse benefits and harms to the parties. Such conversations can be helpful in reducing international misunderstandings about policy objectives, and sometimes in establishing new behavioral norms. When adverse economic spillovers are large, other countries may be able to convince governments that are the source of these spillovers to engage in better policies. International dialogue can enable some Coasian bargains to be struck when the losses incurred by other nations exceed domestic benefits.

The question I have tried to answer in this paper is: what are the circumstances under which countries should enter into binding international agreements? A somewhat different question relates to the form that these agreements should take—not just which policies should be covered, but also what types of domestic policy processes should be encouraged or discouraged. The article I mentioned above by Keohane, Macedo and Moravcsik[21] argues that multilateral agreements help democracies function better.[22] While I disagree with this conclusion as a gene-

21. See R. O. Keohane, S. Macedo, and A. Moravcsik, "Democracy-Enhancing Multilateralism." *International Organization* 63 (Winter), 2009, 1–31.

22. At least one of the authors (Keohane) seems to have changed his mind subsequently (see J. D. Colgan, and R. O. Keohane. 2017. "The Liberal Order is Rigged: Fix it Now or Watch it Wither.", *Foreign Affairs* (May/June): 36–44).

ral rule,[23] it is possible to turn their argument on its head and use it as a normative proposition (about how things should be) instead of a positive one (about how things are). Accordingly, we can envisage an alternative conception of global economic governance that directly targets potential domestic governance failures without presuming either that the appropriate national policies are known *ex ante*, or that global governance can have a significant impact. I call this democracy-enhancing global governance (DEGG), after Keohane, Macedo and Moravcsik.[24]

We can usefully distinguish DEGG from "globalization-enhancing global governance" (GEGG), which comes closer to the spirit of prevailing practice in the world economy today. Under GEGG, we can justify any and all external rules that restrict domestic policy autonomy if the result is to minimize transactions costs associated with national borders. Under DEGG, we would impose only those (mostly procedural) obligations that enhance domestic deliberation or are consistent with democratic delegation.

I have in mind procedural requirements designed to enhance the quality of domestic policy making. Examples of such requirements would be global disciplines pertaining to transparency, the broad representation of stakeholders, accountability, and the use of scientific/economic evidence in domestic proceedings. These procedural requirements would not prejudge what the end result might be whether a country might impose a tariff, subsidy or any other "beggar thyself" policy.

Disciplines of this type are already in use in the WTO to some extent. The Agreements on Safeguards and Anti-Dumping specify domestic procedures that need to be followed when a government contemplates restricting imports from trade partners. Similarly, the SPS Agreement explicitly requires the use of scientific evidence when health concerns are at issue. Procedural rules of this kind can be used much more extensively and to greater effect to enhance the quality of domestic decision-making. For example, anti-dumping rules can be improved by requiring that consumer and producer interests that would be adversely affected by the imposition of import duties take part in domestic proceedings. Subsidy rules can be improved by requiring economic cost-benefit analyses.

We should not exaggerate the positive contribution such requirements can make to domestic decision-making. Consider, for example, Trump's national security argument for hiking tariffs on steel and other imports. This waq a classic beggar-thyself policy. WTO principles in this area are vague and remain largely untested in practice. On the one hand, the relevant text seems to open the door very wide by saying "Nothing in this Agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests." (Article XXI of the Marrakesh Agreement). On the other hand, in a recent ruling in a case not involving the United States, the WTO adopted the position that it can review national decisions in this area and judge their appropriateness. Predictably, the United States has criticized this decision.[25]

One can imagine more explicit rules about the process the United States (or any other country) must go through before the national-security case is established. For example, has the government prepared a public report, with input from economists and national security experts, which lays out the case in favor? Have the domestic opponents of the policy been given the chance to make the case against? Nevertheless, it is doubtful that any WTO approach would have made a difference to Trump's trade follies. But at least it might have denied Trump (and other nativist politicians) the grounds for the habitual complaint that the WTO and other international bodies are trampling on national sovereignty.

At best, the light governance rules of DEGG I propose here can help somewhat. At worst, they do no harm. These rules entail soft disciplines for countries that already uphold democratic norms at home and that would benefit from the additional reinforcement that comes from international fora. But it is also possible to envisage harder disciplines, where countries get the full benefits of trade agreements only to the extent that they live up to democratic commitments. Such requirements already exist in some trade agreements (e.g., the U.S. system of trade preferences for low-income countries).

Concluding Remarks

International agreements are contracts into which nations freely enter. And since they are voluntary contracts, there would seem little reason to question them on the basis of loss of national autonomy or democratic legitimacy. But this approach begs the question of why states enter into such contracts in the first place. To have democratic legitimacy, international agreements have to pass political and economic tests: they must produce broad benefits and be consistent with democratic delegation (impose restraints that enhance democratic functioning). By developing principled arguments for global economic governance, we can clarify the set of circumstances under which such contracts are broadly desirable, as well as distinguish these circumstances from instances where the contractual nature of international agreement is used as a cloak to hide the privileging of particular special interests.

When, for example, U.S. trade negotiators obtain TRIPS concessions from another country in return for opening the U.S. market to that country's exports of garments, they effectively trade-off gains to Big Pharma against concentrated losses on some segments of the domestic labor market. How do we think about the appro-

23. See, e.g., D. Rodrik, "What Do Trade Agreements Really Do?", *Journal of Economic Perspectives*, 2018, 32 (2): 73–90.

24. See R.O. Keohane, S. Macedo, and A. Moravcsik, "Democracy-Enhancing Multilateralism", *op. cit.*

25. This is a case involving Russia's transit restrictions affecting Ukraine. See: ‹https://www.wto.org/english/news_e/news19_e/dsb_26apr19_e.htm›.

priateness of such a contract? Fundamental economic arguments of the type I have examined here are critical for supplying appropriate justifications. In the presence of BTN/GPG considerations, the contract could be win-win. In their absence, what superficially appears to be win-win–a mutual exchange of market access–is essentially a policy that induces a first-order redistribution at home. International agreements would have more democratic legitimacy at home in the first instance than in the second.

Of course, even in BTN/GPG cases, there is no guarantee that democracies will solve their domestic political problems and reach appropriate international bargains. The U.S. withdrawal from the Paris climate agreement is a notable example. Such problems are yet another reflection of one of the key arguments in this paper: most policy mishaps in the world economy today occur due to failures of national governance, not due to lack of international cooperation[26].

To take yet another American example, Trump's national security tariffs were bad policy not because they harm certain other nations; they are bad policy because they impose substantial costs directly on the U.S. economy.

Conventional wisdom on global governance relies on international coordination failures arising from global public goods or beggar-thy-neighbor policies. When the troubles originate with beggar-thyself policies instead, or legitimate grounds for diversity in economic policies, this perspective is no longer helpful. For such circumstances, we need to update our thinking. We need to adopt a different approach to global cooperation, one that respects the policy space of nations and targets democratic decision-making norms instead of one that emphasizes the harmonization of policies or the removal of (real or perceived) trade barriers.

26. The word "today" is important in this sentence. It is possible to envisage situations where failure in international cooperation plays a much more significant role. Trade and macroeconomic policies during the 1930s provide an example. Similarly, a future world where statist/nationalist governments pursue a wide range of BTN policies is not unimaginable.

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The Role of Soft Law in Global Governance: Heading Towards Hegemonic Influence?

To tackle the topic of soft law is to engage *prima facie* in a vast discussion on the forms of normativity in law. This will not be the case here. There are many technical and comprehensive studies on the question, and it seems unnecessary to replicate them.[1] Rather, the aim will be to ascertain the implications of the use and methods of soft law in the context of global governance, including insidious or hidden ones.

We will simply point out that the modulations of the norm are infinite in law, especially since formal sources, which simply attest to a process that makes it possible to target certain norms, are now competing with multiple ways of producing the norm that reflect the actual process of its formation, particularly in international law. The discussion is not recent. The law is greater than the formal source, as Jean Carbonnier[2] reminded us quite some time ago, and Hans Kelsen expressed himself no differently: "Ordering is not, however, the only function of a norm; enabling, permitting and repealing are also functions of the norm".[3]

As a result, there are many combinations of mandatory, supplementary, permissive, prescriptive or prohibitory standards, especially since the instruments carrying such standards may also be soft or hard. In international law, this translates into practices, guiding principles and guidelines, when they are not standards that we know are very difficult to classify in a specific category.

Let us add that soft law can no longer be considered as an intermediate or provisional form because it often appears as a substitute and not a complement to hard law, particularly in the context of financial activities, which will be privileged here as illustrating the increasing influence of soft law in global governance.[4] What must be essentially involved is the process of formalizing a norm that will become legal because agents are then convinced that this rule will be useful to them and they will therefore give it legal form. But such formalization is far from corresponding to a univocal and fixed process and sweeps away the binary logic between the forbidden and the authorized, too often presented as the ultimate goal of the rule of law.

If *mondialisation* relates to the universalization of exchanges, therefore to its substantive law, *globalisation*[5] relates to the universalization of legal concepts with the creation of horizontal patches of specialization in certain fields. In this renewed universe, soft law plays a central role, which is not new since international law predisposes to it by reason of the absence of a centralized normative system. This role has been accentuated with the growth of the financial sector, which demonstrates the interweaving of public and private, national, regional and international actors.

In order to demonstrate the growing influence of soft law in global governance, it is necessary to retrace the chains of events that place increasingly strong constraints on the latitude of policymakers' decisions, and that lead to an ever-greater hold of this form of normativity.

1. The variety of factors leading to the influence of soft law

Obligation versus constraint. The confusion between obligation and constraint leaves uncertainties about soft law. Soft law may not be binding but may be more constraining than a legal obligation. While binding force is always constraining, constraining force is not always binding, and while obligations always carry constraints, constraints do not always arise from legal obligations. Rejecting soft law as non-law is often tantamount to ignoring this reality; however, many constraints are more deterrent than obligations. It should be added that the legal bond created by an obligation does not have the same meaning in different legal systems.[6]

In reality, it is the well-known link between obligation and sanction that is targeted. Without obligation, there is no sanction in case of non-compliance, therefore no judge, therefore no right. This is to forget that the sanctioned law is not the whole law, and that the latter is not *prima facie* characterized by the sanction but by the perception of its necessity by individuals. In economic matters, States are clearly aware that it is in their interest to abide by rules and that the sanction of economic excommunication would be much heavier than a simple legal

1. Among the most recent in France (non-comprehensive list) : P. Deumier and J.-M. Sorel (dir), *Regards croisés sur la soft law en droit interne, européen et international*, LGDJ, Paris, 2018, 492 p ; S. Cassella, V. Lasserre and B. Lecourt (dir), *Le droit souple démasqué, Articulation des normes privées, publiques et internationales*, Pedone, Paris, 2018, 194 p. We will borrow here developments from our previous works.
2. J. Carbonnier, *Flexible droit – Pour une sociologie du droit sans rigueur*, Paris, LGDJ, 10th ed., 2001, p. 21.
3. H. Kelsen, *Théorie générale des normes*, Paris, PUF, Re-edited 1996, p.1.
4. J.-M. Sorel, "Quelle normativité pour le droit des relations monétaires et financières internationale ?," *RCADI*, tome 404, Brill / Nijhoff, 2020, pp. 235-403.
5. Editor's note: the terms "*mondialisation*" and "*globalisation*" are left as they appear in the French original, since the distinction made by the author could not be rendered using the English term "globalization".
6. See e.g., P.- E. Will and M. Delmas-Marty (dir.), *La chine et la démocratie*, Fayard 2007.

sanction. Moreover, agents (and not only the States) are aware that soft law can impose compliance with a norm if it arises from a collective need and is in conformity with the spirit in which they wish to intervene. There is therefore a link between the interest of a norm and the consensus to make it real, and this without the need for legal sanction. Compliance therefore results from the fact that social agents, in the broadest sense of the term, perceive it as an advantage, and that they anticipate the benefits that they will be able to derive from the effectiveness of norms.

Lack of grasp of the facts. If the technicity of the law is supposed to calm passions,[7] it can also become a source of confusion or incomprehension, including for jurists. Soft law illustrates this form of disconnection between an increasingly sophisticated technique and the difficulty for the jurist to grasp its contours. Of course, a share of the elusiveness of soft law is consubstantial to its existence, and while no social domain escapes its legal transposition, my impression is nevertheless that we leave it to complex facts to conceive themselves the legal framework they deserve. Unless he is omniscient (utopian) or endowed with hyperspecialization (which, moreover, is not desirable), a jurist, while having to grasp the complexity of a system, cannot be in a position to judge such technicity, which sometimes includes algorithms that are difficult to understand. On the other hand, she is entitled to judge the appropriateness of the use of such techniques. Once again, the financial sector is a particularly illustrative example. It is, in a way, a wild world (because few primary norms seem to dictate its conduct), which is moreover subject to highly sophisticated, extremely technical processes that are difficult for the general public to understand. The uniqueness of economic liberalism (nuanced) thus counters the pressure of the law to regulate its excesses, with even greater resistance.

But this brings us back, above all, to the relationship between law and fact. If the law governs the fact, and if the fact must merge with the law, such adequacy can work only if we can grasp the facts. This is what seems to be lacking today in many fields, including finance: apart from a few specialists in financial engineering, the economic, social and political grasp of facts is imperfect, and the law can only provide an imperfect framework for it. Accounting for norms that are so technical that they escape the understanding of the public at large becomes a holistic question because it leads to a form of desacralization of the law that diminishes the exclusivity of the skills of those who are supposed to master it.

Changes in the validity of the norm. With soft law, the norm supersedes the rule, which is understood to be general and impersonal. Compliance no longer comes from a norm set in advance and complied with, but from its effectiveness and efficiency. Depending on the variations in the validity of the norm, between formal validity (legality), axiological validity (legitimacy) or factual validity (effectiveness),[8] only the latter seems to prevail. It is the legal categories that adapt to the facts, and not the other way round. Soft law is therefore also a lesson in modesty with respect to legality and legitimacy, which are always subject to the refutation of sociological evolution.

Such evolution is the result of a long unfinished process following the dilution of verticality in horizontal networks (for example, economic regulation), a partial loss of the sacralization of the vertical (and of the belief in immutable institutions), the complexification of relationships, or the interference of the private person within the legal dialogue which is no longer only that of a given order from above which must flow downwards.

Regulation and self-regulation. This set of factors is embedded in the primacy of regulation, this moving law whose purpose supersedes the instrument, and which derogates from the characteristics of an abstract, general and immutable law, to enter into a moving, more concrete and particular sphere, closer to economic "laws", hence the preference for a more flexible law that favors, for example, standards or principles, as opposed to rules that symbolize stability. Rather than being rigid, this type of law proves to be effective if effectiveness means responding to a given role. The role supersedes the instrument, even if regulation helps to create a semblance of security, because it is a way of making the law work that seems to satisfy the various agents involved.

The concern to obtain the adhesion of the recipient of the rule and his legitimate expectation shape soft law. The authorities that issue soft law assume that, if the recipients are involved in the process of normative production, they will not resist compliance with these rules, which are then considered legitimate. Thus, rather than imposing "hard" norms that can be circumvented head on, it is preferable – even unconsciously – to let the agents regulate themselves, in the hope that they will give priority to legal security over profitability with no safety net and will create a self-regulating system in their particular "order".

Soft law thus constitutes the privileged vector of a sphere that seeks self-regulation. In this restricted circle, "one feels compelled", which amounts to a form of *opinio juris*. In this respect, we can also invoke the autopoietic dynamic transposed from the biological paradigm of the organism to the law, in order to describe legal phenomena that manifest a "normative closure" towards the outside, in the sense that they themselves determine what is legal or illegal, licit or illicit, by adapting to an increasingly complex society[9]. Such a hypothesis corresponds to the

7. See, P. Servan-Schreiber, H. Pascal and V. Rotaru, "Le droit à l'échelle pertinente", *Revue européenne du droit*, Sept. 2020 : <https://legrandcontinent.eu/fr/2020/09/14/le-droit-a-lechelle-pertinente/>.

8. F. Ost and M. van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des facultés universitaires Saint-Louis, Bruxelles, 2002.

9. N. Luhmann, "L'unité du système juridique", *Archives de philosophie du droit*, vol. 31, 1986, pp.163-188. On the development of this dynamic in the banking sector, see Hélène Kouyaté's very comprehensive and relevant analysis : *L'encadrement juridique international du secteur bancaire, entre recherche du réalisme et confrontation à la réalité*, PhD Dissertation at Paris 1, 2010, 473 p.

world of international finance, which generates and specifies its own organization, and is continually subject to external disturbances that it compensates for. It simply amounts to a Darwinian logic of survival, where markets respond above all to the law of evolution and adaptation. This is all the more insidious since an institution will tend to study all problems from the point of view of its functionality, and to treat them in this way. The dangers are not ignored but, more than asserted, they are whispered.

Soft law thus generates norms that adapt to the expansion of their recipients and are simply hindered by regulatory norms that are both those imposed by the old structures (States, organizations) and those accepted by the agents.

The role of social organization. The legal order is characterized by a set of norms that can be enforced in order to ensure that such order is respected. However, with soft law, control is superior to sanction. Consequently, it was quickly understood that this relative normativity did not correspond to the role of social organization of the international legal system, a role that we can expect to be played by any legal system. Indeed, soft law as an autonomous system of regulation of international relations would extract itself from a uniform legal order to respond to the particular concerns of a restricted corporatist group, most often economic, and it is the strength of the economy that makes soft law sometimes hard law without a predetermined legal order.

Taking this line of reasoning as far as possible, one may even wonder about the need for soft law to evolve within the framework of a legal order. There is a form of "*de facto* power",[10] and soft law uses all channels (political, economic, social, etc.), which leads us to observe that it does not matter for soft law to be law, or that it is itself ignorant of being law, unless such quality is "revealed" to it.

The law has a double role: besides its role of "giving orders to men", it also has a mission of regulation which is that of "giving an order to things"[11]. Thus, from the moment the framework succeeds in imposing such social order, in putting order into disorder, we are potentially in the presence of law, even in the absence of a legal order in the strict sense of the term.

Law captured by communication. Soft law is an Anglo-Saxon expression, but it is mostly stateless. The French term "*droit souple*" is still an incomplete translation, giving a false impression of softness, roundness; in short, of benevolence[12]. It is above all one of many stateless expressions, from the same universe as: governance, regulation, transparency or accountability (its translation by "rendre compte" ("account for") remains just as imperfect), or compliance -a form of semantic relaxation of "bringing into conformity" that resonates above all as the encapsulation of economic transactions likely to soften the potentiality of the execution of a decision. Together, they are the hallmark of an unbridled neo-corporatism linked to communication. Words are used to soften the rigor of the rule: governance broadens government, accountability makes it possible to reduce responsibility to its visible side, transparency -a one-way mirror- allows everyone to be accountable without necessarily taking responsibility. Jean-Arnaud Mazeres states: "The law of the market, making law a commodity, leads to the market of law",[13] which is also a form of normative dumping.

2. Hegemonic temptation and regression of the democratization process

The combination of the preceding remarks leads to one observation: the soft power of soft law can lead to a form of hegemony in world governance, which some might call soft totalitarianism, through technical and financial domination of the planet. While soft law seems to be imposing itself as an increasingly common and renewed way of considering normativity, it is also legitimate to gaze at its hidden side; in other words, does this arrangement not lead to a new form of hegemony through law? Even if it is more an intuition than an informed assessment,[14] we cannot help noticing that while we find many qualities in soft law, we can also think of it as a form of steamroller replacing the traditional order of constraint by a constraining order. The phenomenon of soft law is being assessed in terms of its foundations, effects and consequences for the legal order, without necessarily being willing to go beyond such legal analysis to place this phenomenon in a broader context. Meanwhile, as a certain form of irrationality poses as science and with self-regulation being the norm, private agents can now make pronouncements on the failure of States (and impose remedies on them); as the general interest is replaced by category-based private interests, the risk of a kind of hegemony emerging is not negligible.

Hegemony is understood here as Antonio Gramsci defined it. The absence of a real reaction to the global nature of the logic of things that is pursued and integrated into society leads to what is commonly referred to as cultural hegemony, a concept that describes the cultural domination by a group and the role that everyday practices and collective beliefs play in creating systems of domination. It is an old analysis, which may seem outdated, but which

10. See, P. Deumier : "La réception du droit souple par l'ordre juridique", *in : Le droit souple*, Association Capitant, Paris, Dalloz, Paris, 2009, p. 139.

11. Barrès, quoted by Claude Champaud : "Des droits nés avec nous. Discours sur la méthode réaliste et structuraliste de la connaissance du droit", in *Mélanges en l'Honneur de Gérard Farjat, Philosophie du droit et droit économique*, Editions Frison-Roche, Paris, 1999, pp. 69-109, p. 74.

12. See in this respect the distinction made by Mireille Delmas Marty between "soft, smooth and blurred (mou, doux et flou)", "Gouverner la mondialisation par le droit", *Revue européenne du droit*, n°1, Sept. 2020, p. 7.

13. "*L'un et le multiple dans la dialectique Marché - Nation*", *in :* Stern. B. (dir) : *Marché et Nation, Regards croisés*, Montchrestien, Paris, 1995, pp. 81-188.

14. Although based on concordant studies, some of which are already old. See in particular: A.A. Fatouros, "On the Hegemonic Role of International Functional Organizations", *GYBIL*, 1980, pp. 9-36; A.-C. Martineau, Le débat sur la fragmentation du droit international. Une analyse critique, Bruxelles, Bruylant, 2016, XIX-584 p., esp. pp. 337-387; Nico Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", (2005) 16 *E.J.I.L.*, p.369.

already pointed out some shortcomings no less relevant today: sirens of nationalism, consumerism and social ascension against a backdrop of individualistic competition. The monopoly of soft law when hard law is unable or unwilling to impose itself can also be a danger that is all the more pernicious, the more diffuse leadership is. Such law presented as false volunteering is also imposed with its suggested constraints, most often economic. An advertising slogan unwittingly but very well summarized this phenomenon: Soft is the New Strong.

The sequence is logical (and could be said "fateful"): starting from an expertise that is both technical and neutral, the norm is introduced at the national, regional or international level in symbiosis with the dominant economic dogma that is spreading and permeating the entire international system in a gentle but perfectly compelling way. The risk of the replacement of the general interest by category-based private interests is no chimera and is reinforced by a form of denial of real democracy, as such norms rarely reach national parliaments or the jurisdictional bodies of states. This is not recent and has, for example, been the hallmark of the "Stand-By Arrangements" –which are not treaties in the legal sense– concluded between the IMF and applicant countries for decades. It is also believed that the monitoring mechanisms (sometimes opaque because of their technical nature, despite their displayed transparency) of the standardization bodies serve as a substitute for public debate.[15]

The international financial architecture is a particularly heterogeneous whole from the point of view of the bodies that participate in it. Indeed, it includes multilateral institutions open to all States, such as the IMF, the World Bank, IAIS and IOSCO. Other bodies have a smaller base. This is the case of the BIS, which comprises some 60 national central banks, or the OECD and the FATF, each of which has about 40 member states. The circle is even narrower for the Basel Committee, the FSB and the G20, which have respectively 27, 24 and 19 member states represented (plus the EU) and operate on a "club" basis. The G20, the body that is to steer such international financial governance, has in this respect the smallest membership base from an inter-state point of view. There is therefore a gap between the plurilateral composition of the bodies and the multilateral scope, or even universal ambition, of their standards in the form of soft law.

However, once transposed into domestic legal systems, international financial standards become norms that overwhelmingly affect the regulatory framework applicable to the provision of financial services. The result is a pernicious social constraint, because it is not acknowledged. Let us take as an example the standards of the Basel Committee in banking and prudential matters: the adoption of one standard leads to the need to adopt a whole set that becomes necessary as a matter of consistency. "It is therefore a question of placing the recipients of the rules, using different techniques, in such a situation that they will have no choice but to comply with them. In other words, the international authorities do not seek to sanction a violation of the norms, but to force compliance with them, even before any violation occurs".[16]

Although the hegemony in question here is there different from the one envisaged by Mireille Delmas-Marty, who refers to the hegemony of a State[17] (which, by its power, would be a form of "empire"), we agree with her when she states: "Apparently less constraining, soft law is sometimes more effective, and ultimately more repressive, than hard law."[18] The soft law system can indeed become more "repressive" in the sense of an imposed constraint, and not a specific sanction.

While law in general should probably be more subject to the criterion of refutability, in particular to avoid the scientific isolation that conditions the way in which this subject is considered, soft law offers an opportunity to do so, because it is indeed experience that takes precedence over the scientific nature. Through soft law, law rediscovers itself as fragile and ephemeral even as it thought it was immutable in its fundamental build-up. Nevertheless, fragility concerns more the ways of considering law than the involvement of soft law in this context, because it is also a matter of norms of power. The aspiration towards rationality -which we hoped to reach- being diluted in the meanders of the norm is troubling, but this does not change the parameters of power, because it is more an issue of a shift towards agents who were until then in the shadows. The Promethean aspiration of states to master reality fades and experimentation can hardly enter into preconceived boxes because practice requires no more than adapting to reality.

Should we despair of ever seeing law come out of the trap of power? Several signals are pointing towards a return to a certain balance. First of all, in the financial sector, taken here as a pertinent example of the spread of soft law, the logic of security tends to counterbalance the logic of profitability and pushes agents towards a legal framework.

To put it plainly, we are prepared to lose "a little" in order to gain in security. On the other hand, if, as Mireille Delmas-Marty points out: "Our conception of sovereignty needs to be renewed. In order to create a rule of law without a true global state, universalism is too ambitious and sovereignism, by withdrawing into national communities,

15. See T. Bonneau, "La gouvernance technicienne des marchés financiers", *in Le droit souple démasqué, Articulation des normes privées, publiques et internationales*, *op. cit.*, pp. 125-133, esp. pp.130-133, as well as our : "Sur quelques aspects juridiques de la conditionnalité au F.M.I et leurs conséquences", *E.J.I.L.* 1996/1, pp. 42 - 66.

16. H. Kouyaté, *op. cit.*, p. 380.

17. M. Delmas-Marty, « Gouverner la mondialisation par le droit », *Revue européenne du droit*, *op. cit.*, p. 7 : "Admittedly, it would be possible to govern globalization through law in a simple way. It would be enough to set up a hegemonic system, by extending the law of the most powerful country to the rest of the planet (…) But until now no empire has functioned on a planetary scale."

18. *Ibid*, p.7.

is too timid",[19] we have reason to wonder whether this "timid sovereignism" is in fact a godsend, and whether the internationalization it calls for is merely a comeback to the sources. In a way, it would be necessary to return to Jean Bodin, without the detour via Hobbes or Hegel.

State sovereignty was initially envisaged as coexistence for states that have always been plural, unlike an empire. In other words, the support of independence is just as much a means of interdependence. The absolutism of sovereignty concealed this double facet for a long time.

The retreat of a form of absolute sovereignty undoubtedly weakens it; but it gives the state the opportunity to refocus on a balance allowing it to take on the role of regulator in the face of such proliferation of soft law, role it has abandoned in favor of entities that are not guided by the general interest. This is how sovereignty, wich intended (or thought it was) to be "solitary", could become again "in solidarity".[20] But there must be a global political will in this sense, and the trap of economism must not close definitively on States.

19. *Ibid*, p.6.

20. *Ibid*, p. 11.

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World, globalization and *mondialité*

"The world exists outside the consciousness we may have of it. But it is only amendable if we hold it in full consciousness.
As everything dies,
I've expanded myself - like the world -
and my conscience wider than the sea!
Last sun.
I burst.
I am the fire, I am the sea.
The world is falling apart.
But I am the world"[1]

Aimé Césaire, "Les pur-sang", *in Les Armes miraculeuses*, 1946

"The world is falling apart. But I am the world." This was already in 1946. The world that was falling apart was the world of colonial empires. The world is unravelling at its center, where it has claimed its center to be for centuries. It is unravelling because it has imported at that time and into that center, into its very heart, methods that it had implemented, with impunity, in its peripheries: "the supreme barbarity, the one that crowns, the one that sums up the daily life of barbarity…" and that had been endured because until then only "non-European peoples" had been victims of it. This is the conclusion of Césaire, again, this time in the *Discourse on Colonialism*. This reproduced "barbarity" encompasses both the massacres and the smoking and mutilations of forced labor, and the rebels who were covered with hail of bullets and "full barrels of ears harvested, pair by pair, from friendly or enemy prisoners." Confession of the count d'Hérisson, ordinance officer.

This addiction to abominations, these crimes and wrongs perpetrated in the colonies have –according to scholars, philosophers, historians and jurists– foreshadowed the tragedies of the twentieth century. This is how the genocides of the Herero and the Nama took place at the beginning of the same century. The territory was not yet called Namibia. In these first concentration camps, some outrageously bony silhouettes of Herero and Nama are terribly evocative of the future silhouettes of the Jews in the extermination camps. This is a doctrinal genealogy. It was like a sordid training. And already a Göring was hanging around there. The mechanism is the same, calibrated on the same icy madness: the expulsion from the human family, by the thousands, by the millions, of a group of people. The motive can be greedy. Obviously, it was so for the transatlantic slave trade and African slavery. Racism came later. It may not be the driving force, greed follows very quickly. This is evidenced by the spoliation of property belonging to Jews. Under whatever pretext atrocities are committed, and whatever the differences in appearance or affiliation between the perpetrators and the victims, these crimes are the concern of humanity. "It is neither the number of victims nor the intensity of their suffering, but the denial of the eternal man within each one" that constitutes a crime against humanity, sums up Mireille Delmas-Marty forcefully and soberly.

In Creole folk wisdom, there is a saying that every calabash gives two *kwis*. The "*kwi*" is the bowl formed by half of the calabash fruit, oblong in shape, split in the middle in the longitudinal direction. These two halves are hollowed out – the fruit being inedible – and serve either as a container for water or as a wall ornament, the peel being worked at the tip to inlay motifs with esoteric or simply decorative shapes. The lesson drawn from using such a fruit, which is disconcerting in that it has no nutritional or gustatory value, is like a dialectical pillar, summoned in all situations where an action generates contradictory or unexpected results. Every calabash yields two "*kwis*."

And so it is with this first globalization. It was accomplished in the din of the cannons that settled imperial rivalries; the roar of the sea, the immense and dumbfounded cemetery; the round of flags planted, snatched and replanted; the clash of victorious or annihilated insurrections; the barking of the dogs thrown at the heels of the negro-brown; the obstinacy to laugh, sing, dance after crying; the false peace proclaimed by papal bull; the anathemas of religious dissidence; the intercultural mutualities; the interracial fraternities; the resolute or indecisive injunctions of abolitionists; ritual rapes, ordinary rapes, whips and shackles, violence of all kinds and their refinements; unexpected solidarity; unexpected love affairs; incongruous minuets danced in the salons of the master's residence; governors' balls; the prolix artistic, linguistic, mystical, plastic expressions born in the fields of cane and tobacco; the symbolic innovations tinkered by improvised shamans; the sharing and fabrication of empirical knowledge; cosmogonic interpretations; creativities of survival.

1. Editor's note: Free translation from French.

This globalization has produced a legislation where the law was based on the primacy of force and the codification of lawlessness. The black code promulgated by Louis XIV established the status of "movable property" attributed to slaves, alternately called negroes; the Spanish *codigo negro* proceeded in the same way. The master, who was in fact granted the rights of ownership, abuse and death over his slaves (his livestock), saw these rights consolidated and was himself sanctioned, albeit very weakly, with a fine, if he consented, without punishing him, to one of his slaves selling a few sugarcane culms, an activity that was formally forbidden by law. The preservation of the colonial order, placed above the negligence or guilty complacency of a master, however accidental, is at stake. The same black code expels all Jews residing in the colonies within three months, on pain of "confiscation of bodies and property." The Edict of Fontainebleau, for its part, targeting Protestants, includes the Colonial Exclusion prohibiting any processing economy in the colonies. These two texts raise, to obviously different degrees for slaves, Jews and Protestants, but for all of them absolutely, the question of the relationship of these European legislators to otherness. In the same Europe where Erasmus, Grotius, Montaigne had already sharpened and shared their thoughts on the rights attached to people, on hospitality, on otherness. And even Montesquieu, *how can one be Persian?* Although the man of the *Spirit of the Laws* was ambiguous, to say the least, about what the Americans called "the particular Institution".

But the time came when the deportations through the Atlantic and the Indian Ocean dried up. The slavery system is too scuttled by a thousand kinds of resistance, too contested, too vilified, too challenged, too competitive. It was time to get out of it. Physically and legally. By decree, the masters are compensated. Not the slaves. In spite of Condorcet's final words as early as 1781, according to which "the master had no rights over his slave and the action of holding him in servitude is not the enjoyment of property, but a crime." And well before Condorcet, the Capuchin priests Epiphane de Moirans and Francisco José de Jaca, as early as 1680. However, by royal ordinances or by decree, in Santo Domingo-Haiti in 1825 (at the expense of the young Republic of Haiti) as in the other colonies in 1848 (despite Schoelcher's efforts), it was the masters who received "compensation" from the monarchical State. Not the slaves. Nor their descendants.

Under the combined or thwarted blows of recurrent rebellions, economic mutations, commercial competition, financial emergences, moral clamor, specious reasoning and meticulous calculations, devious speeches and good faith misunderstandings, the time came for the decentralization and spoliation of territories. From then on, the slave traders and merchants ceded it to the officers and generals. It was Bugeaud's time: "Smoke them in their caves like foxes". It was the time of Saint-Arnaud: "Let's ravage, burn, plunder and destroy houses and trees." It was the time of Loti: "Then, the great slaughter had begun. We had made salvo fires! and it was a pleasure to see this hail of bullets falling on them." It was also the time of bluster. Not really a shameful conquest. But a glorious and generous dress: a civilizing and evangelizing mission to the "inferior races" of Retzius, Gobineau and others like Galton. Lost among them were Renan and Ferry.

Laws adapt: there are subjects, evolved people, Natives, Muslims with half-citizenship, Chinese mestizos distinct from Annamites. So many new legal categories. Imperial rivalries carry on. Then came the Berlin Conference and the Acts that followed. A division-butchering. But the forms are saved: Treaties are signed. The principles of Westphalia are only valid between butchers. On the ground, the real life is that of millions of people suffering. There is also, fortunately, André Gide and above all Albert Londres.

European legal systems necessarily bear the stigmas of these contortions. The international law that followed this first globalization is still that of arbitrariness and force; it is also that of the power relationships. When the monstrous butchery of the First World War occurred, wounded consciences realized that this culture of force and violence had the pernicious capacity to turn against its perpetrators. It followed a return to that humanism that was already there and which the Enlightenment had renewed, explored and extended. Although it does not seem that it is finally time to give up empires and various forms of domination, there is a prescience of the fact that the world is made in one piece, which will be confirmed shortly, in less than a quarter of a century, by space activity and observation. However, the will that comes from this prescience was still too weak. The League of Nations, immature, unfinished, did not prevent the new conflagration, although spotted, although emerging, yet popping up, yet bursting into flames ready to explode to the point that Stephan Zweig, desperate, fled to the southern hemisphere after having auscultated *The World of Yesterday*; and that Romain Rolland, faithful to an ethic of life as much as to a haunting vital passion in the face of "this insane humanity", will try desperately and in vain to stand his ground and invite his peers, these and those who still kept the Republic of Letters alive, not to be seduced and disoriented by the clash of cannons. To remain *Above the battle*. The worst turned out to be more certain and even more abominable than his promises.

The world came out of this murderous chaos stunned. Trauma is common and cross-cutting. This time, seriously, the future had to be safeguarded. With a feverishness that was both restless and determined, the new powers of the world settled down around tables of palaver, drafting and proclamation. Perhaps the flaw in the armor was to be found in this assurance of the victors' good right. This lack of hesitation was salutary for the rapid and efficient setting up of the Nuremberg Military Tribunal for the purpose of judging living and accessible defendants,

and making the search for and prosecution of fugitives legitimate. However, it gave, in the second "*kwi*" this time again, a binary posture of the good victors, emblems of Good, exonerated of all fault, charged and virtually mandated by humanity to eradicate Evil. Yet the stains of pre-war international law with its angiomas had still operated through legal (in the US) or *de facto* segregation, as evidenced by the separate units: the Black Power, the Senegalese *Tirailleurs*, the Harlem Hell Fighters, and after the war, the differentiated pension schemes.

In this new ordering of the world, the victorious powers have the influence of their economic and military weight, of their dynamism and of their imperialist/anti-imperialist vision of the world, depending on the geopolitical regions. Thus, the emerging past of the Soviet empire already clashes with the rising arrogance of the United States, while China, sure of its civilizational permanence, placidly puts its mark on this world order. Just as Russia never ceased to seethe under the Soviet empire, so China never erased its certainties of immutability, even during the years of Western subjugation. It made a serene and detached contribution to the work of recasting and reconstructing international law. As for Europe, perhaps it is beginning its existential introspection in the terms posed by Paul Valéry: "Will it retain its pre-eminence in all genres? Will Europe become what it really is, i.e. a small cape on the Asian continent? Or will Europe remain what it appears, that is to say: the precious part of the earthly universe, the pearl of the sphere, the brain of a vast body?" There is now more room for realpolitik than for clay-footed giants' fantasies of grandeur. Yet Europe and its future remain one of the most interesting questions posed by this post-war period. Césaire asked the question in a very different way and answered it with the following words:

"… if Western Europe does not take of itself, in Africa, in Oceania, in Madagascar, i.e. at the gates of South Africa, in the West Indies, i.e. at the gates of America, the initiative of a policy of nationalities, the initiative of a new policy based on the respect of peoples and cultures; I mean, if Europe does not galvanize moribund cultures or awaken new cultures; if it awakens homelands and civilizations, without taking into account the admirable resistance of the colonial peoples… Europe will have deprived itself of its last chance and, with its own hands, will have pulled on itself the sheet of the mortal darkness".

This anxious and confident tirade from Césaire expresses concern about the imperialist appetite of the United States, with its economy, financial rules, doctrines and navy, regarding what it considers to be its backyard: the Caribbean and Central American countries. It is understood that the awakening of nationalities is conceived as elements of vitality, not withdrawal, as effervescent parts of a whole, not as tension. For "every culture is born from mixing, encounters and shocks. Conversely, it is from isolation that civilizations die," as Octavio Paz asserts.

We must also agree that with its eagerness to draft and adopt conventions, to arm them with human rights and demands, Europe has been able to reawaken its immunity from barbarism and restore its own cultural and ethical foundations. It has not been free of ambivalence. And these ambivalences will save it by condemning it, when colonized or dominated peoples will brandish in the face of their oppressors these values and these discourses forged at the very heart of European humanism, when they will display their own cultural, intangible, spiritual, moral and aesthetic baggage restored and rehabilitated, and there when they will base their contributing share to the heritage of humanity. And thus, their right to freedom and sovereignty.

At the end of the globalization that resulted from centuries of slave trade and slavery, then from the crimes and misunderstandings of colonization, the international law that attempted to flourish was inspired by antagonisms between the fragmentation of empires, the sharing of empires, and the lust for new conquests. At the end of the Second World War, the dynamics of emancipation intensified and, with varying degrees of success, forced the European States to confront their values, their discourse and the missions of their troops. It will still take time to overcome the culture of domination and of legal dominion of the self-proclaimed superior races.

The new international law, much more successful this time, will incorporate contradictions, if not resolve them. Thus, the United Nations Charter recognizes both the inviolability of borders, including those of colonial empires, and the right of peoples to self-determination. It nevertheless lays down a solid democratic foundation through the principle: one country, one vote, regardless of size or wealth. Even if the Security Council, as much an instrument of power as a resurgence of the world of empires, strongly nuances the practicability of this display of equality.

The international law developed after the Second World War addressed gross violations of rights and freedom, formulating a series of prohibitions: slavery, trafficking in persons, forced marriages, debt bondage, organ trafficking, etc. It tackled the ultimate crime: crime against humanity. And there lies the yardstick for credibility and usefulness. "There are matters, including in the field of human rights protection, where sometimes the same rules are needed. Crime against humanity is precisely an example of this" explained Mireille Delmas-Marty on the need to harmonize international law in the light of contemporary upheavals.

With this work accomplished, it remains to be understood why the effectiveness of such a clear-sighted, coherent, eloquent and pragmatic body of law remains so partial, uneven and inconsistent. This is the yardstick of the probity of multilateral forums.

We should retain the definition of rights, for their effectiveness, as set out by Simone Weil in her book *The Need for Roots*, subtitled *Prelude towards a declaration of duties towards mankind* which was published before the proclamation of the Universal Declaration. "A right is not effective in itself, but only through the obligation to which it corresponds," she says.

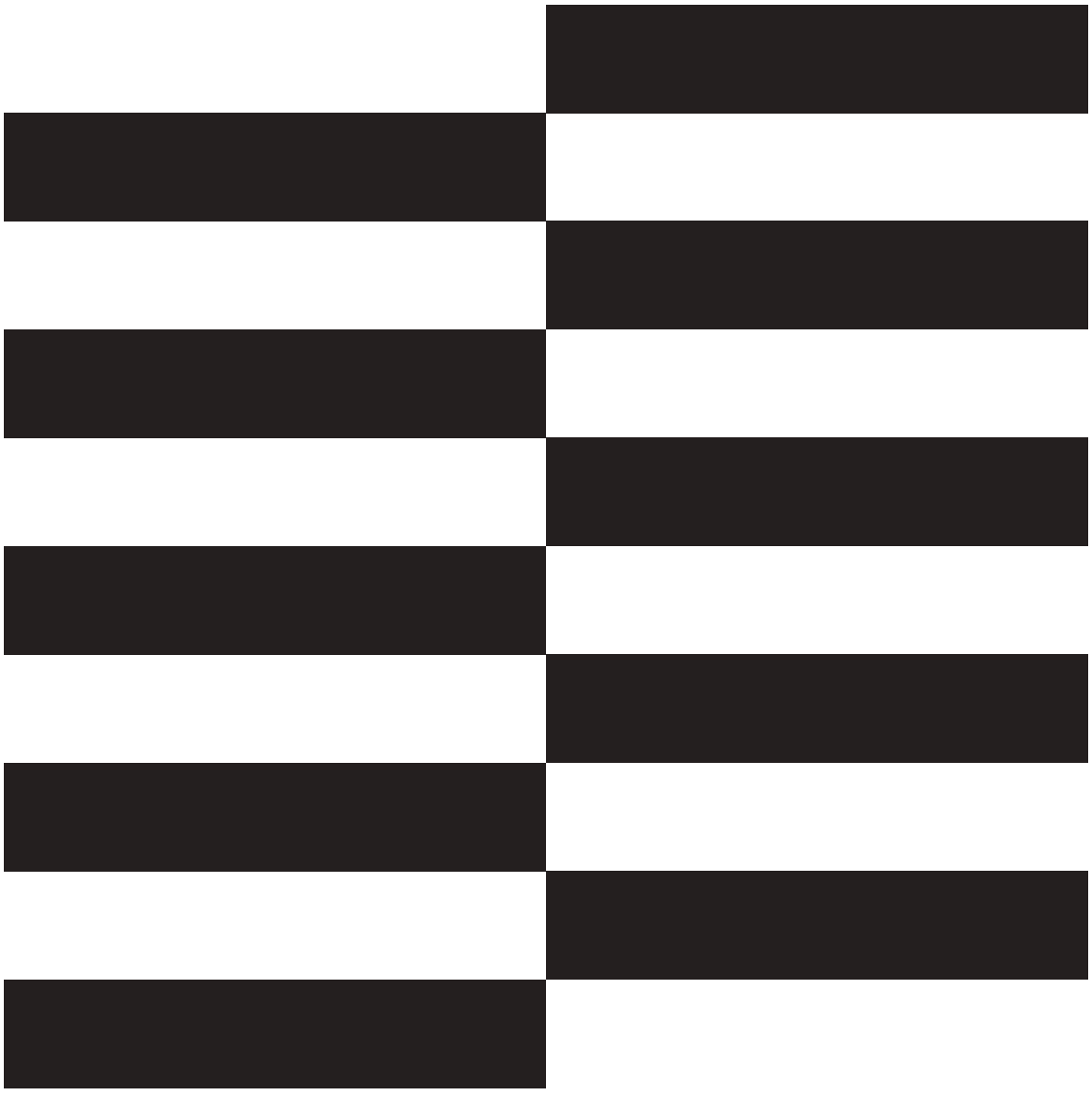
Understanding the dead weight of international law is essential in order to grasp the extent to which both its creators and the institutions responsible for implementing it have been able to free themselves from the imprint of a world ruled by a customary law of force. Suspicion has not disappeared. It even hangs over the International Criminal Court.

However, it is not armed with the best assessments and analyses that we will take the next step. For it is now a matter of "entering together into this new region of the world" as Edouard Glissant foresaw. This new region of the world is neither geographical nor physical. There is no more land left to discover and conquer. Boundary and territorial wars are fought on known, and often already administered, ground. Our world is circumscribed. It is spied on, contemplated, measured by satellites. It is connected by its oceans, rivers and watersheds, its swamps and mountains that cross the lines of the history of wars and treaties, its sandy deserts and dunes that the wind makes travel. It is a whole when pandemics jostle it and highlight the violence of inequalities. This world, which today can implode under the tyranny of materialistic and financial fury, carries within it the forces of a shift towards a possible conviviality. As in the case of globalization, currently under the grip of exhibitionist fortunes, bawling speculation, insatiable predictions and indecent opulence, the desirable future of the world remains in the hands of the multitudes. Globalization was foreshadowed by those who presided over the logics of murderous chaos, quickly relayed by those who saw in it a market too vast to be seriously regulated or controlled.

Likewise, those who refused to abandon the world to chance and to yield before the confiscation of a common future have had multiple intuitions of *mondialité*. This *mondialité* whose beginnings are already in globalization. Like the *kwis*. Edouard Glissant lets us suppose that *mondialité* comes from Being in Relations. These Relations are the only alternative to great brutality, fears, intimidation, deadly competitions. *Mondialité* contains both the consciousness of the world and the will to connect it not only though the market economy, but also though a desire to become interdependent. Is this a mission of the Law? Unlikely. Law can build trust and appeasement, peace and justice. Relations are based on other fields, those of dynamic identities experienced in curiosity about oneself, those of otherness and its hazards, those of inalienable dignity. We must at least stop expelling poetry from politics, beauty from daily life.

With their "*Boussole des possible*" ("compass of possibilities"), Mireille Delmas-Marty and Antonio Benincà set out to make intelligible concepts that can navigate between (legal) norms and (aesthetic) canons to give body and image to a common language. Hazardous but essential bridges. Meetings in harmony and/or through shocks. It is in these fields: literature and all artistic expressions that the unexpected can unfold, which will heal the wounds inflicted by the murderous chaos, which will be followed by the unpredictable and inextricable chaos-world as prophesied by Glissant. The adventure is universal in the unusual sense that in this world of diversity, of opposites and opposables, recognized as such, all civilizations, all cultures, all human experiences can rub shoulders, recognize each other, amend and confront. Without eliminating each other.

Actors



Frédéric Baab • European Prosecutor*

Will the European Public Prosecutor's Office be a stab to the heart?

The European Public Prosecutor's Office is expected to be operational in the spring of 2021. This upheaval at the institutional and political level has already been written about many times. Some have denounced a new relinquishment of sovereignty in favor of the European Leviathan; others have criticized the new procedure introduced in the transposition law of December 24, 2020, regarded as creating a risk of a progressive eradication of the French *juge d'instruction*,[1] with an immediate weakening of the rights of defense. An article published a few months ago in the legal journal *Dalloz actualité* summarizes these criticisms quite well. After pointing out that this transposition was a "a new worrying development", the authors concluded with a touch of irritation that the "the specificity of French-style criminal procedure is undermined here".[2] The president of the *Association française des magistrats instructeurs* said nothing else when he asserted with aplomb that the European Delegated Prosecutor is a "false prosecutor",[3] before regretting "that no thought was given to creating a European examining magistrate". One could wonder why no one else has thought about it for twenty years. Could it be because the office of the examining magistrate exists today in only five out of twenty-seven Member States, or more simply because the very principle of a European criminal policy is incompatible with its existence? This is something to be investigated.

In another article, they even go so far as to describe the European Public Prosecutor's Office as a "legal monster" - nothing less - "a little as if an examining magistrate were put into the clothes of a public prosecutor, but without saying so".[4] Deprived of all humanity, it would thus in truth be nothing more than an appalling chimera, a sort of *Indominus Rex* speaking Volapük, or more exactly English, which in the context of Brexit is obviously amusing.[5] Thus, one sees in these severe comments a distrust with regard to the principle of a European Public Prosecutor's Office, a distrust that is stubbornly opposed to the defense of French law, whose figurehead would magically become again the *juge d'instruction*. The one who was criticized so much yesterday, this judge suspended between the office of a sitting judge and that of the public prosecutor, this judge who was denounced both for its sinful slowness and for its hyper-powers - another mutant! -, is suddenly propelled to the front line, like a last bulwark against this "disturbing" drift, this bad blow to our laws by who knows what conspiracy, whose splendor and fall Balzac could have recounted in a new *Histoire des Treize*.

It is undoubtedly expected that this European Prosecutor's Office would fall back in line. However, that is precisely what it should not do. What is the point of creating a European Public Prosecutor's Office if it should change nothing in the current organizations? What is the point of creating a supranational prosecuting authority if it should submit without any reluctance to national systems? The purpose of European Public Prosecutor's Office is not to be discreet.

A prosecutor's office that is independent because it is European

If the positive reactions were less numerous, they were - dare we say it - of a better level. First, there was the opinion piece published by the *Procureur Général* at the *Cour de Cassation*, François Molins, and one of his predecessors, Jean-Louis Nadal, who called for better guarantees of the independence of French prosecutors, stressing that "the arrival of a European Public Prosecutor's Office, endowed with an independent status and integrated into our national judicial system, once again raises the question of the necessary statutory independence of the French prosecutors".[6] Independence is indeed one of the essential attributes of this new judicial body. It is guaranteed by the European Regulation (the "Regulation"), which sets out the principle in its Article 6, and also by the status and the method of recruitment of its members, whose appointment must always be validated, at the end of the day, at the European level.[7]

In accordance with this same Regulation, which is indeed all-encompassing, it will systematically be assessed that the candidates have the required professional skills

* The opinions expressed in this article are solely those of the author and should not be regarded as constituting an official position of the European Public Prosecutor's Office.

1. Editor's note: in the French criminal proceeding, the *juge d'instruction* (examining magistrate) is a judge who carries out criminal investigations in most serious or complex cases prior to the trial.
2. See, C. Mensous and F. Pelloux, "Les forces et les faiblesses de la transposition du parquet européen en droit français", *Dalloz actualité*, December 8, 2020.
3. See, Pascal Gastineau, President of the Association française des magistrats instructeurs, interview by Jean-Baptiste Jacquin, "Futur parquet européen : "le procureur européen délégué est un faux procureur"", *Le Monde*, August 21, 2019.
4. See, J.-B. Jacquin, "Les pouvoirs hors normes du parquet européen", *Le Monde*, August 19, 2019.
5. See, "Malgré le Brexit, le futur parquet européen parlera anglais", *Le Point.fr*, October 26, 2020.
6. See, F. Molins, J.-L. Nadal, "Il est urgent de garantir l'indépendance statutaire des magistrats du parquet", *Le Monde*, September 2, 2020.
7. Regulations of the Council (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') EU OJ 10.31.2017.

and that their independence is established, as the text says, "beyond doubt". This applies both to the European Prosecutors based in Luxembourg and to the European Delegated Prosecutors based in each Member State. The former are appointed not by their own country, but by the Justice and Home Affairs (JHA) Council, which will decide on the basis of an opinion delivered by a panel of twelve independent experts who will have ranked the candidates in order of merit. As for the latter, their appointment by the national authorities will only become effective once it has been validated by the College of European Prosecutors.

This control at the European level is even more thorough when it comes to the Chief Prosecutor, who, it should be remembered, applies directly with the European Commission without going through the national authorities (which is not the least of the guarantees). The candidate appears before the same panel of twelve European experts, which then proposes a shortlist of a few candidates, and is appointed "by common accord" by the European Parliament and the Council. The search for such a common accord may, in fact, initially come up against a real disagreement between the two institutions, each of which will defend its own champion. Far from being a problem, this initial disagreement will, on the contrary, open a debate on the respective qualities of the last two candidates in the race. The appointment of Laura Kövesi against the will of her own government, which literally obstructed her candidacy throughout the procedure, is the best example of this. It is not only her appointment, but the manner in which it was obtained, that allows her to claim full independence today.

Whether it acts at the central level in Luxembourg or through its 140 Delegated Prosecutors in the 22 countries that today participate in the enhanced cooperation, the freedom of action of the European Public Prosecutor's Office will certainly be at least equivalent to the freedom of an examining magistrate. It will even be superior to that of an examining magistrate, because unlike the latter, who can only act upon referral by the public prosecutor, the European Public Prosecutor's Office will itself identify the facts on which to conduct its investigations. This right of evocation, which is the first condition of its effectiveness, is expressly provided for in Article 27 of the Regulation.

"Independent because European" could be the motto of this new judicial body, which will operate at two levels: a central level represented by the head of the European Public Prosecutor's Office, the "College of European Prosecutors", the "Permanent Chambers", and a decentralized level represented by the "European Delegated Prosecutors" who will be its operational contacts in each of the 22 participating countries. The central level will conduct the public action that will be carried out in practice by Permanent Chambers to which cases will be will be assigned one after another. They will decide on the action to be taken after the investigation has been completed (referral to the court, dismissal or third track); it is also the Chambers which will decide on the exercise of appeal procedures. The College of the European Public Prosecutor has planned to create fifteen Permanent Chambers within it. They will each be composed of three European Prosecutors, who by definition will have no proximity or personal link with the country in which the investigations will be conducted. An investigation opened in France can thus be handled by a Permanent Chamber composed of a German European Public Prosecutor, an Austrian European Public Prosecutor and an Estonian. Independent by nature, the European Public Prosecutor's Office will thus be detached in practice from any national contingency. To put it in another way, the decision it will make and the jurisprudence that will subsequently emerge from them, will always be a collective work.

The Permanent Chambers may of course transfer their powers to the European Public Prosecutor in the relevant country, but this option is limited by the Regulation to cases of minor importance. It is excluded to recreate within it purely national chains of command, where each European Public Prosecutor would lead its own team of European Delegated Prosecutors. This raises the question of the "national link", which was raised like a scarecrow by some during the negotiations, but whose maintenance is in fact essential to its functioning. Let us recall first that it is consubstantial with the very project of a European Public Prosecutor's Office. In the famous "*Corpus Juris*" published in 1997 under the direction of Mireille Delmas-Marty, it was in fact foreseen that cases would be judged by the courts of the Member States.[8] This was, moreover, one of the strong points of this study, which did not propose to establish a supranational competent court as a counterpoint to the public prosecutor's office that it wanted to set up. It would have been a real "legal monster" and the best way to nip the project in the bud, because it would have been deprived of all legitimacy: when it does not judge extraordinary crimes, justice will always need a national framework to be accepted.

This national link is all the more necessary since public action is not limited to the final decision on whether or not to prosecute. The European Public Prosecutor's Office, if it really wants to establish its authority, must be able to exercise its control throughout the investigation. This does not mean that it is necessary to submit the European Delegated Public Prosecutors in the Member States to someone's control. They must be able to keep a margin of action and even a share of initiative in the conduct of their investigations. In short, there must be control, but control that is sufficiently distant so as not to stifle the actors in the field. The Regulation has qualified it as "supervision", which reflects the idea fairly well. In application of this national link this supervision will be entrusted to the European Public Prosecutor of the country in which the investigation is conducted.

Why is he or she the one in charge ? Because it is the

8. See, M. Delmas-Marty (ed.), *Corpus Juris introducing penal provisions for the purpose of the financial interest of the European Union*, Economica, Paris, 1997.

only one able to do so. WWho else will be sufficiently familiar with the applicable law to assess the decisions to be taken in a case on a case-by-case basis? Who else would be able to assess in concrete terms the legal difficulties that may arise in order to carry out such and such act? Only a magistrate of the said country will be able to make a decision in full "knowledge of the facts." Any other solution would immediately undermine the authority of the European Public Prosecutor's Office in the others member States. Let us give just one example, the most modest of all: my own. I was a liaison magistrate in Germany for four years. I was familiar with German criminal procedure well enough to answer without too much difficulty the very detailed questionnaire sent to me by the parliamentary commission of inquiry into the Outreau case,[9] which wanted to have some comparative law elements; I even wrote, before leaving Berlin, an article, which went completely unnoticed at the time, on criminal justice in Germany, which was published in the journal *Questions Internationales* in March 2008 (it is true that the issue was mainly devoted to Japan).[10] Would I be qualified today to oversee investigations conducted by German European Delegated Prosecutors? The answer is no.

The representation of the European Public Prosecutor's Office in the Member States is ensured by the European Delegated Prosecutors. They constitute what the Regulation calls the "decentralized" level, which is in fact a deconcentrated level. Let us recall first of all that they are full members of the European Public Prosecutor's Office. It is provided for in the Regulation that a European Delegated Prosecutor may work part-time for the European Public Prosecutor's Office and spend the rest of his or her time as a national prosecutor, "to the extent that this does not prevent them from fulfilling their obligations under this Regulation".[11] This provision is the result of a compromise reached with some Member States which, for various reasons, were anxious that the representatives of the European Public Prosecutor's Office should be able to have double roles; others, on the contrary, feared, quite rightly, that this double hat, a little too large for a single head, would soon enough become a double tutelage, or even a double allegiance. In practice, most of the participating countries have ruled out this possibility.

Thus, whether with respect to the appointment of its members or of its functioning, the European Public Prosecutor's Office will be independent precisely because it is... European. In a system where decision-making will be by nature free of any national allegiance, the independence of this public prosecutor's office will be truly established in all its components "beyond doubt".

Did you say, "national law"? In Europe, as elsewhere, some countries are more equal than others

The other essential element, with regard to the European Delegated Prosecutors, is that they are, contrary to what has been said, real prosecutors. The Regulation expressly provides that they will "have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment".[12] This is the very essence of the project since 1997, its heart: without a complete transfer of competence, there can be no European Public Prosecutor's Office! Once the principle had been confirmed, and the text adopted, it remained to transpose it into national law. Even if the regulation is directly applicable, its implementation required adaptation measures to be adopted in each of the twenty-two participating countries. And in this process, while all countries are in principle bound by the same obligations, it must be recognized that some of them, as in the *Animal Farm* getting back to the state of "Manor Farm", are more equal than others. In the German system, for example, which abolished the examining magistrate (*Untersuchungsrichter*) in 1974, the public prosecutor is the only judicial authority to conduct investigations. He or she does so, of course, under the supervision of an "examining magistrate" (*Ermittlungsrichter*) who will himself order coercive acts and, more broadly, all measures impacting fundamental rights and freedoms (searches, seizures, pre-trial detention, etc.). This model is the standard on which the European Public Prosecutor's Office has been designed: the Regulation reflects it very well and in this country there is no need of transposion.

But in a country like France, which still has an examining magistrate, the exercise is much more complex, not to say complicated. The point was delicate to deal with from a legal point of view, but also politically, because keeping the examining magistrate in the area of damages to the financial interests of the Union was, in principle, incompatible with the establishment of a European Public Prosecutor's Office. What would have been the point of creating a supranational prosecution authority if it had had to relinquish jurisdiction in certain countries in favor of a national judicial authority that would have acted, once seized, at its will? The map of the European Public Prosecutor's Office would have become an incomprehensible patchwork: depending on whether it investigates in France or in Germany, the European Public Prosecutor's Office could have retained in one case control over investigations and prosecutions in the other case, whereas it would have lost it entirely in the latter. It was therefore necessary to remove the examining magistrate from its scope, with all the possible implications of such a choice. This is the first point that we had encouraged Christiane Taubira to decide when we started working on this project at the beginning of 2013. If the Minister had refused this option, we would not have gone any further in our reflection.

9. Editor's note: The Outreau case is a major criminal case of sexual assault on minors concerning events that took place between 1997 and 2000. It gave rise to a strong public reaction in France, many thinking that it highlighted the dysfunctions of the judicial institution.

10. See, F. Baab, "La justice pénale en Allemagne", *Questions internationales*, n°30 March-April 2008, la Documentation française.

11. Art. 13(3) of the Regulation of the Council UE 2017/1939.

12. *Ibid*, Article 13(1).

Therefore, France chose to confer the powers of the examining magistrate on the European Delegated Prosecutor; or to put it more precisely, it chose, as the impact study points out, not to create a new investigative framework for the European Delegated Prosecutor, an option that was rejected "not only because of its complexity but also because it is useless".[13] The issue was settled by a simple reference to the three existing procedural frameworks, namely: the smoking gun misdemeanors investigation, the preliminary investigation and the judicial information. These provisions introduced in the law of December 24, 2020 relating to the European Public Prosecutor's Office thus bring us into perfect compliance with the regulation, while preserving the French legal order (Articles 696-113 and 696-114 of the French Code on Criminal Procedure).[14] The choice by the European Delegated Prosecutor to use judicial information and the criteria surrounding it are the most important hinge of the text. Contrary to what has been written, this decision will not be made purely on the spur of the moment.

The law lays down the framework for action in Article 696-14 of the said code, the exact wording of which is worth recalling: "(w)here it is necessary either to bring an indictment against a person or to place him or her under the status of an assisted witness, or to resort to investigative acts that can only be ordered in the course of an investigation, because of their duration or nature, the European Delegated Prosecutor shall conduct investigations in accordance with the provisions applicable to the investigation". Apart from these hypotheses, the European Public Prosecutor's Office will continue its investigations within the framework of the preliminary investigation.

Here is a prosecutor who will sometimes wear the clothes of an examining magistrate. The substitution is complete, since it is also the prosecutor who will issue a dismissal or referral order the prosecutor, once the investigation done, who will propose the use of a third way (Article 696-132 of the Code of Criminal Procedure). As a full member of the European Public Prosecutor's Office, he or she will follow the instructions of the Permanent Chamber to which the case has been assigned. This does not pose any problem since the decision is his or her own.

His or her actions will, of course, be subject to the control of the *juge des libertés et de la detention*[15] who will order all coercive measures for which the intervention of a judge is necessary. We find here the same balance as in German law between the public prosecutor's office as "master of the investigation" and the examining magistrate, who acts as a counterpoint.[16] Thus, a dividing line is drawn between the judges and the public prosecutor's office that neither of the two has the right to cross. For if the judge will always remain the sole guardian of individual rights, he or she cannot decide on the appropriateness of the measure requested by the public prosecutor: the direction of the investigation and the exercise of prosecution are the prerogatives of the public prosecutor, it is an area in which he or she must remain the sole master. However, sometimes the line becomes blurred when the judge, going beyond a simple legality review, extends his or her examination to the "proportionality" of the measure. The terms of the debate are well known.

This does not mean that it should not be debated. The implementation of this new procedural framework will raise questions and concerns, as well as misunderstandings. The respect for the rights of defense and other parties in the trial will be one of the issues to be dealt with as a matter of priority; and this will have to be done with the lawyers and the bars' representatives without whose collaboration everything will go wrong.

The European Public Prosecutor's Office will therefore conduct its investigations within the framework of national criminal proceedings. This was not the option initially chosen in the Corpus Juris or in the Green Paper published by the Commission in 2001 on the protection of the financial interests of the Community.[17] Although the Commission has always denied that it was advocating the idea of establishing a "European penal codification", the idea of a minimal harmonization on the basis of the principle of legality of prosecution was in the background. This idea was expressed more clearly in the studies financed by the Commission in the framework of the anti-fraud program "Hercule II" managed by OLAF. Their conclusions were presented by a professor of law at the University of Luxembourg, Ms Katalin Ligeti, at a conference in Berlin in November 2012. She proposed a complete set of "model rules" to serve as a basis for the investigative framework of the future European Public Prosecutor's Office. The idea was supported with great enthusiasm by the Director General of OLAF, who was also present at the conference. Without prior harmonization, he said, it will not work! The question of the admissibility of evidence before trial courts was one of the main arguments put forward by them. How to guarantee their probative force at the time of the trial when this evidence will have been collected in another Member State? Hence the need to harmonize the rules as much as possible. Otherwise, as Giovanni Kessler hammered it vigorously from the rostrum, it won't work!...

Since France and Germany thought exactly the opposite, the Minister of Justice, Christiane Taubira, and her

13. See, Impact study, *Projet de loi relatif au parquet européen et à la justice pénale spécialisée*, p. 72.

14. Loi n°2020-1672 du 24 décembre 2020 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée – JORF, December 26, 2020.

15. Editor's note: the *juge des libertés et de la detention* is a judge competent in matters of criminal procedure, to authorize certain investigative measures that are particularly prejudicial to freedom (telephone tapping, night searches, etc.) or certain exceptional extensions of police custody.

16. The mission of the public prosecutor's office in Germany is summed up in a famous formula: "*Die Staatsanwaltschat ist Herrin des Ermittlungsverfahrens*" (the public prosecutor's office is the master of the investigation).

17. See, *Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor*, Brussels, November 12, 2001, p. 52.

German counterpart, Sabine Leutheusser-Schnarrenberger, decided a few days later to create a Franco-German working group on the subject of the European Public Prosecutor's Office. Its missions were carried out with great enthusiasm and resulted in a joint declaration signed by the two ministers on March 20, 2013, the first day of spring. Published in French and German, it very clearly states that "the rapid establishment of the European Public Prosecutor's Office can only be done at this stage within the framework and in application of the national laws of the Member States, supplemented by the block of procedural guarantees that we are currently negotiating." The declaration therefore says two things: 1) if one wants to engage in the negotiation of a specific procedural framework for the European Public Prosecutor's Office, the instrument is condemned in advance, because there will never be an agreement possible on such a sensitive and complex subject; 2) let us therefore be satisfied for now with the few harmonization directives currently being negotiated in the field of procedural guarantees in criminal matters. These are already complicated enough, even though they deal only with the obvious (access to the file, the right to a lawyer, the right to an interpreter, the right to translation of the main procedural documents, legal aid). To put it more bluntly: this project is not only the result of a reflection among academics, but also a political project.

Where do you come from? The European Public Prosecutor's Office is not an isolated phenomenon, its history is rooted in that of the European judicial area

Its legal basis is Article 86 of the Treaty on the Functioning of the European Union (TFEU), which provides that, in order to combat offences against the financial interests of the Union, the Council, acting unanimously after obtaining the consent of the European Parliament, may establish a European Public Prosecutor's Office from Eurojust. It should be added that in the absence of unanimity, a group composed of at least nine Member States may adopt the project in the framework of "enhanced cooperation." This seems clear, and yet…

What are we talking about first when we say, "European Public Prosecutor's Office"? Is it a public prosecutor's office, as we commonly understand it, or a prosecutor? The very title of the institution, as it appears in the English version of the Regulation - European Public Prosecutor's Office - suggests that it would rather be a prosecutor. Except that the same title in French refers to a "*parquet européen*".[18] So, who should we believe, the English or the French versions? One might think that this difference between the two versions is purely fortuitous, which is not quite the case. The Treaty itself, by changing language versions, also moves from one notion to another. As a result, depending on whether it is expressed in French or in English, the European legislator does not think the same thing. In this matter, the Commission has always thought in English. This notion of "European Public Prosecutor's Office" reflects exactly what it aimed at: a single European Public Prosecutor, surrounded if need be by a collection of deputies representing the legal and cultural diversity of the Union, to which would be directly attached European Delegated Prosecutors in the Member States.

This conception of the European Public Prosecutor's Office is directly inspired by the *Corpus Juris* and the conclusions of the *Green Paper on the protection of financial interests*, which explains that the expressions "European Public Prosecutor" and "European Public Prosecutor's Office" are in fact two sides of the same coin: in one case the head is designated, in the other his or her administration.[19] There are also some naiveties, such as the tirelessly repeated hope that everything will work out the day the principle of mutual recognition of judicial decisions comes into force within the European judicial area.

Twenty years later, let us start by paying tribute to these high-level experts who have worked in the same spirit and in the service of the same ambition. It is they, with the help of a few magistrates, such as Giovanni Falcone or Renaud van Ruymbeke, who are at the origin of our Europe of Justice: without the groundwork that they did at the time, there would have been no European arrest warrant, no Eurojust agency, no European Public Prosecutor's Office. I wanted to pay tribute in my turn to Mireille Delmas-Marty by inviting her to the swearing-in of the twenty-two European public prosecutors and their head before the Court of Justice of the European Union on 28 September 2020. I gave her the text of my oath in French; she gave me a version of the *Corpus Juris* in English, a more recent version, that of "Florence", almost laughing: "that will be more useful to you than to me." The weather was rather nice that day in Luxembourg, the sky was milky, but full of sunshine, a sun still blazing despite its entry into autumn. It was for both of us, I think, a beautiful day.

This initial reflection, these first works carried out almost blindly, we must put them back in their chronology. At the time when the *Corpus Juris* was published in 1997, the European judicial area did not yet exist, nor did Eurojust. The idea is already in everyone's mind, but it will take another two years and the Tampere European Council of 15 and 16 October 1999 for this objective to become a political priority. If the quality of the reflection led by Mireille Delmas-Marty was unanimously recognized at the time, her project of a European Public Prosecutor's Office came too soon. As she herself pointed out during a colloquium at the *Cour de cassation* held on April 13, 2018, the collective resignation in March 1999 of the Commission chaired by Jacques Santer, which was accused of financial irregularities and a lack of budgetary rigor, could have been an opportunity to set up a European Public Prosecutor's Office. It simply led to the creation of the Anti-Fraud Office (OLAF). Since it was a simple directorate of the European Commission, a hierarchical body *par excellence*, it

18. Editor's note: a public prosecutor's office.

19. *Ibid*, p. 28.

was decided to add a supervisory committee to guarantee its independence, a committee of which Mireille Delmas-Marty will become "by an irony of history", she tells us, the first president.[20] However, the idea of a European Public Prosecutor's Office was not abandoned, and it will be taken up again, twenty years later, in the Treaty of Lisbon.

A bold and simple idea to express – a European Public Prosecutor's Office – but whose implementation was singularly complex, for two reasons. The first was purely technical. There is nothing more complicated, in fact, than to create a European Public Prosecutor's Office from scratch. Everything had to be planned if it was to work: the distribution of powers between the central and national levels, the structure and internal functioning of the body, the law applicable to investigations and prosecutions, transnational cooperation, relations with partners, etc. The other difficulty was of a political nature. Beyond the legal and technical aspects, the creation of a European Public Prosecutor's Office represented a complete transfer of sovereignty to a supranational judicial authority. However, the Member States were not ready to accept such a sacrifice without obtaining some guarantees in return. One need only refer to the study published by the French *Conseil d'Etat* in 2011, which considered that "as regards the mode of organization, a collegial structure comprising one representative per Member State would be more acceptable with regard to considerations relating to national sovereignty", being said that "the reference to Eurojust, itself a collegial body, appearing in paragraph 1 of Article 86, as the basis or model of the future European Public Prosecutor's Office, goes in this sense".[21]

That is precisely what we pleaded for! The project thus gave rise, from the outset, to two very different visions: on the one hand, that of the Commission, which wanted a fully integrated body; on the other, a more realistic approach, supported by France and Germany, which wanted a collegial organization with one European Public Prosecutor per participating country. In their joint founding declaration of March 20, 2013, the French and German ministers said the following: "We believe that the collegial structure is capable of guaranteeing the operational effectiveness and independence of this European Public Prosecutor's Office, while ensuring that it is firmly anchored and has real legitimacy in the Member States. We must be careful to ensure that it is fully integrated and accepted in the internal judicial orders of the Member States. It is on this condition that it will fulfil the mission assigned to it by the Treaty". Commissioner Viviane Reding immediately opposed this idea, believing it to be a deception, worse still, an attempt to quietly restore the intergovernmental model of Eurojust. This was not our intention. We did not want to reproduce the college of Eurojust in which each "national Member" represents his or her country, we wanted a college of a different nature, a college in which the European prosecutors would act in the name and on behalf of an interest superior to the national interests, an interest common to all the Member States, a European interest. This collegiality, as we understood it, was simply intended to make the project politically acceptable. Indeed, we were not certain, at the outset, that we would be able to bring together the minimum required nine Member States to adopt the text in enhanced cooperation. But we wanted an agreement! Collegiality was the price to pay for a minimum of support in the JHA Council.

As the Commission had not yet submitted its proposal for a regulation, France and Germany set up a working group open to all Member States that were ready to discuss this alternative project. And it was immediately a great success! This did not help our relations with the Commission, which even forbade us to meet in the premises of the Justus Lipsius on the grounds that we were not an official working group of the Council. "The revolution is not a gala dinner," President Mao was reported to have said one day, neither are the negotiations in Brussels! Ignoring our proposals and our studies, the Commission submitted its draft regulation a few months later, on July 17, 2013.

The worst arguments were used during the debates, with each party showing the worst faith. For example, much has been made of this strange formula used in Article 86 TFEU, which provides for the creation of the European Public Prosecutor's Office "from Eurojust". How should it be interpreted? Hmm… All that was meaningless in truth, because in spite of all its efforts to make itself as big as an ox – and God knows it did! –, the Eurojust agency did not have the vocation to metamorphose itself into a European Public Prosecutor's Office, but it didn't matter. We immediately concluded that the legislator had decided in favor of a structure similar to that of Eurojust, a collegial structure. The Commission immediately responded to this vile attack by asserting (without the slightest semblance of proof) that the formula was elliptical. It was to be understood as a reference, not to Eurojust, but to the experience of Eurojust… This is what the experts were wasting their time on in the working group of the Council charged with negotiating the settlement, the COPEN group, which was making little progress because of these fierce antagonisms. But after many twists and turns and a "yellow card" issued by the national parliaments to the Commission in October 2013 for failure to respect the principle of subsidiarity, the vision of the Member States finally prevailed.

What pushed in our favor was not only the fact that the officials of the Directorate General for Justice were quick to apply the strategy of the weak to the strong, like a band of buccaneers against Spanish frigates;[22] what worked in our favor above all, what gave us a decisive advantage over them, was the experience we had accumulated over

20. See, M. Delmas-Marty, "Lectures du règlement instituant le parquet européen – Propos introductifs, le double contexte du règlement instituant le parquet européen", *Revue de science criminelle et de droit pénal comparé*, March 2018.

21. See, *Réflexions sur l'institution d'un parquet européen – l'Assemblée générale plénière du Conseil d'Etat*, February 24, 2011, La Documentation française.

22. See, A.O. Exmelin, *Histoire des frères de la côte, Flibustiers et boucaniers des Antilles*, ed. Nouveau Monde, 2017.

more than ten years already in the field of judicial cooperation. All these alleged difficulties related to the admissibility of evidence acquired abroad did not move us, since they never occurred in practice; as for the criticisms addressed to the collegiality, they seemed to us anachronistic and even a little ridiculous, whereas the Eurojust agency was at the same time taking new dimensions in the fight against organized crime; and it is precisely because we already knew all its insufficiencies and limits, that we were sure of ourselves when we considered a collegiality of another nature, a tationalized collegiality within the Permanent Chambers, a combative collegiality able to decide and to act quickly. Opposing heavy weapons to our light canoes and muskets, the experts of the Commission had written their proposal with their noses turned to the past, while we were already anticipating all the possible evolutions within this new judicial area where the European Public Prosecutor's Office would easily find its place between Europol, Eurojust and OLAF.

Once matured, our project, which in the minds of all was actually a counter-project, comprised four main ideas. First idea: since the European Public Prosecutor's Office is a true public prosecutor's office, its creation will entail a complete transfer of all the prerogatives of public action to the central level; second idea: the European Public Prosecutor's Office will have to be independent, not only from the Member States, but also from the Commission and OLAF, which will put itself at its service (and not the other way round); third idea: the European Public Prosecutor's Office will be based on a College of European Prosecutors, one per country, who will defend a collective interest, while maintaining a strong national link with the European Delegated Prosecutors in the Member States; fourth and last idea: the European Public Prosecutor's Office will act within the framework of the legislation of the Member States, conceived not as a hindrance but as the only means of being effective in this labyrinth of national rules and traditions that only an insider can understand. In short, let everyone take care of their own law and everything will be fine!

It is on these bases that the regulation relating to the creation of the European Public Prosecutor's Office was adopted on October 12, 2017.[23] This adoption was not unanimous, but within the framework of an "enhanced cooperation" that already included a number of countries that is much larger than the nine Member States required by the Treaty. This failure of negotiation was in fact a success, because the European Public Prosecutor's Office was going to enjoy *ab initio* a sufficient territorial and political base to impose itself immediately in the European game.

At the same time, the directive (EU) 2017/1371 "on the fight against fraud to the Union's financial interests by means of criminal law" was negotiated, which serves as a basis for its material competence.[24] It covers all threats to the European budget, namely: expenditure fraud, revenue fraud (including VAT fraud), active and passive corruption of public officials, misappropriation of European funds, money laundering, as well as "inextricably linked" offences in the cases.[25] In addition, there is also participation in a criminal organization whose activities "focus" on committing offences against the Union's financial interests.[26]

The European Public Prosecutor's Office is financial oriented

As soon as the regulation was adopted in 2017, some people were already thinking about extending the jurisdiction of the European Public Prosecutor's Office to other types of offences. In his speech on Europe delivered at the Sorbonne on September 26, 2017, the French President proposed «to establish a European Public Prosecutor's Office against organized crime and terrorism, beyond the current powers that have just been laid down".[27] The idea was taken up a year later by the President of the European Commission, Jean-Claude Juncker, in his State of the Union address delivered on September 12, 2018. A communication on the subject was published by the Commission on the same day, but this first attempt, hastily prepared, ended in failure.[28] The Netherlands and Germany were opposed, while Italy and Spain were content with a simple agreement in principle. Without being formally abandoned, the proposal had been frozen due to a lack of sufficient support in the Council.

There were many reservations about the proposal at the time, including in France. The Senate had judged it premature in a report rendered in 2019 on the criminal judicial cooperation and the European Public Prosecutor's Office.[29] It recommended waiting until this new judicial body had first demonstrated its effectiveness before considering an extension of its jurisdiction to terrorist offences, considering in conclusion that the response to the terrorist attacks "would remain national for a long time."

It is undoubtedly on this point that opinion has evolved the most in recent months. As the French Secretary of State for European Affairs, Clément Beaune, recalled in an article published in the newspaper *La Croix*, the latest attacks in France and Austria last October and November did not target one country in particular, but the "European way of life as a whole" and the values on which it is based. Hence the need to build a common European

23. Regulation of the Council (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') EU OJ 10.31.2017, EU JO L 283 10.31.2017.

24. Directive UE 2017/1371 of 5 July 2017, EU JO 07.28.2017.

25. Art. 22(3) of the Regulation EU 2017/1939.

26. *Ibid*, Article 22(2).

27. Sorbonne Speech of Emmanuel Macron "Pour une Europe souveraine, unie, démocratique", September 26, 2017.

28. See, "A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes", Communication from the European Commission to the Leader's meeting in Salzburg on 19-20 September 2018.

29. See, *Rapport d'information n°509 (2018-2019) fait au nom de la Commission des affaires européennes du Sénat*, May 16, 2019.

response by extending the jurisdiction of the European Public Prosecutor's Office to terrorist offences. Beyond the added value it could bring at the operational level, the creation of a European anti-terrorist prosecutor's office is first and foremost a political act. The attacks committed in France and Austria a few weeks apart led the Commission to bring forward the publication of its new agenda against terrorism. The creation of a European anti-terrorist prosecutor's office is expressly mentioned.[30]

This extension of jurisdiction could also concern other forms of organized crime, such as cybercrime, or serious environmental offences, which are transnational by nature. Here too, there would be a collective interest to be defended at the European level.

The fact remains that these extensions of jurisdiction are subject to two conditions, one at the French level, the other at the European level. The first limit is linked to the very nature of the European Public Prosecutor's Office, which will be vested with prerogatives previously exercised by national public prosecutors. The French *Conseil Constitutionnel* thus considered in its decision of December 20, 2007 that the implementation of Article 86 TFEU required a revision of the Constitution, "considering the implications of such a provision for the exercise of national sovereignty".[31] This revision, linked to the ratification of the Lisbon Treaty, took place a few months later with Constitutional Law no. 2008-103 of February 4, 2008. In its study on the European Public Prosecutor's Office published in 2011, the *Conseil d'Etat* concluded that the "consequences inherent in the effective institution of the European Public Prosecutor's Office, in terms of excessive infringement of national sovereignty, were necessarily accepted by the constitutional law of February 4, 2008". However, this analysis is only valid "subject to the reservation that Article 86 TFEU, that is to say, the material scope of the European Public Prosecutor's Office, remains unchanged".[32] An extension of its jurisdiction to other offences should therefore give rise to a second revision of the Constitution, in order to authorize this new transfer of sovereignty.

The second limit to this extension of jurisdiction results from the Treaty itself. Article 86 TFEU in fact makes it subject to unanimous agreement of the European Council, after approval by the European Parliament and consultation of the Commission, knowing that it can only concern forms of serious crime with a transnational dimension. This institutional lock posed by the Treaty therefore requires a political consensus to be reached, including with the countries that do not themselves participate in the European Public Prosecutor's Office (Poland, Hungary, Denmark, Ireland, Sweden).

30. See, "A Counter-Terrorism Agenda for the EU : Anticipate, Prevent, Protect, Respond", p. 18.

31. See, Decision n° 2007-560 DC of December 20, 2007, 19.

32. See, *Réflexions sur l'institution d'un parquet européen – Assemblée générale plénière du Conseil d'Etat*, February 24, 2011, La Documentation française.

Favoring a slightly different approach, the *Club des Juristes*[33] recently published a study on "European compliance law" in which it plans to extend the jurisdiction of the European Public Prosecutor's Office to international corruption as a whole.[34] The idea is to cover the entire phenomenon, not only in Europe, but also in the relations of Member States with third countries, by detaching it from the notion of damage to the financial interests of the Union. Here too, therefore, it is a real extension of competence which would be subject, as for terrorism or cybercrime, to the conditions set out in Article 86 TFEU. The strength of this proposal is that it falls within the scope of economic and financial offences. The European Public Prosecutor's Office is not envisaged as a "catch-all" public prosecutor's office, but as a real financial prosecutor's office. It does not change that the agreement of all the participating countries will have to be secured (and this reform would inevitably have an impact on international trade), not to mention the non-participating countries that would see an almighty financial prosecutor's office set up at their doorstep.

In any case, it would be desirable to develop the European legal framework in the fight against corruption, an area in which Europe should assert itself more strongly against the United States, as Bernard Cazeneuve and Pierre Sellal pointed out in an article published in 2018 in *Le Monde*.[35] Raphaël Gauvain, a member of the French Parliament, says the same thing in the report published in 2019 on extraterritorial laws and measures.[36] On the basis of this observation, the *Club des Juristes* thus proposes adopting an "anti-corruption package" composed of three European directives that would in particular integrate the principles and recommendations of the OECD in this area and impose obligations to prevent and detect corruption within companies of significant size.

With regard to the European Public Prosecutor's Office, we are thinking more modestly of initially developing the use of "simplified procedures" such as the *convention judiciaire d'intérêt public* (CJIP),[37] which we consider useful in major cases. This possibility of implementing this type of procedure which aims at "the final settlement of a case according to the modalities agreed upon with the suspect" is expressly provided for in the Regulation, on condition, however, that national law so provides.[38]

This possibility exists in French law. The law of 24 December 2020 authorizes the European Delegated Prosecutor to use two types of simplified procedure: the *compa-*

33. Editor's note: a French legal think tank.

34. See, "Pour un droit européen de la compliance", report of the *Club des Juristes*, working group headed by B. Cazeneuve, reporter A. Gaudemet, November 2020.

35. See, B. Cazeneuve and P. Sellal, "Il faut corriger l'asymétrie entre l'Europe et les États-Unis dans la lutte contre la corruption", *Le Monde*, July 7, 2018.

36. See, "Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extraterritoriales", June 26, 2019, (report requested by the French Prime Minister from Raphaël Gauvain).

37. Editor's note: the equivalent in France of a deferred prosecution agreement.

38. Regulation EU 2017/1939, Article 40(1).

rution sur reconnaissance préalable de culpabilité (CRPC)[39] and the CJIP.[40]

While the scope of application of the CRPC extends, with some exceptions, to all offences, the much more limited scope of the CJIP does not currently cover all the offences falling within the jurisdiction of the European Public Prosecutor's Office. It would therefore be interesting to think now about the creation of a "judicial convention of European public interest", or "CJIPUE",[41] which would make it possible to cover a wider range of offences while integrating this concept of "European public interest" to which the Regulation expressly refers when it requires the Permanent Chambers to ensure that recourse to a simplified procedure is indeed "in accordance with the general objectives and basic principles of the EPPO".[42]

Our initial discussions within the College on this subject revealed very wide variations between national laws: in some Member States, simplified procedures are reserved for minor cases, while in other countries they may be used in larger cases in which the prejudice may be very significant. There is clearly a need for harmonization in this area which should be taken into account at the European level.

A stab to the heart

Before thinking about these possible developments, the European Public Prosecutor's Office has to be operational and to prove its worth. Like any other financial prosecutor's office, its success will be measured by the importance of the cases it handles and the amount of misappropriated funds it will recover.

This success is all the more expected since the Member States recently adopted a €750 billion recovery plan (out of a global envelope of €1800 billion) to help their economies overcome the consequences of the global pandemic that is currently hitting us. We could not have imagined a better time to start its activity.

Everything suggests today that this entry on the scene will not be discreet. It is a risk for the European Public Prosecutor's Office, but it is also an opportunity. It will have to fully assume its role as a precursor and its judicial mission in support of this still fragile notion of "European sovereignty".[43] Its first steps and missteps will be scrutinized with the greatest attention. Like all beginners, it will have to convince a little and seduce a lot; it will have to accept the debate as well, and the contradiction. It will have to discuss with the magistrates and the public prosecutors, deal with the investigation services, and also discuss relentlessly with the lawyers.

In conclusion, I could have quoted one of the founding fathers of Europe. There are several great Frenchmen among them, and their quotations are numerous. But since it is more appropriate to think of seduction rather than reason at this time of night, I prefer to quote the one who is keeping me company at the very moment I am writing these lines, the guitarist of the Stones, Keith Richards. A song is only successful, he tells us, if the audience receives it each time as "a stab to the heart".[44] In order to succeed and establish itself as a new player, the European Public Prosecutor's Office will have to trigger not only interest, but emotion as well. If it does not wreck after a few months, it could in turn become, better than a rock standard, better than a new model, a true European success and the proof that this monster with 22 heads and 140 arms, not counting its chiefs, can act quickly and strongly to protect an interest common to all the citizens of the Union, an interest that is their own and yet goes also beyond each one of them: a European interest.

39. Editor's note: a French plea bargaining.
40. Loi n°2020-1672 du 24 décembre 2020 relative au parquet européen, à la justice environnementale et à la justice pénale spécialisée, Article 696-132.
41. Editor's note : not translated from the french original version of this article.
42. Regulation EU 2017/1939, Article 40(2).
43. See, V. Malingre, "La souveraineté européenne promue par les dirigeants de l'UE est mal comprise par les Européens", *Le Monde*, March 1, 2021.
44. See, Keith Richards and James Fox, *Life*, ed. Weidenfeld & Nicolson, 2011, p. 311.

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Reconstructing International Law starting from Regional Organizations

Your chair at the Collège de France is titled "International Law of Institutions". How is your course this year, "Diligence and Negligence in International Law", different from a general course on international law and how does it relate to the title of your chair?

My first course at the Collège de France develops and deepens an argument pertaining to obligations of (due) diligence and responsibilities for (undue) negligence that I first presented as a special course at The Hague Academy of International Law in January 2020 (following an invitation received in 2016).[1] I expected to give this course at the Collège in April 2020, but it had to be postponed for a year due to the pandemic.

This course addresses a topic of general international law, but provides a very good illustration of some of the international institutional issues I plan to address in the context of my chair. As I explained in my Inaugural Lecture, the chair's project is to approach international law both as the law of the institutions it rules and as the law of the institutions that make it.[2] This is exactly what is achieved by studying due diligence as a standard that qualifies the content of various obligations of conduct under international law, on the one hand, and as a standard for assessing compliance with these obligations within the international responsibility law regime, on the other. Indeed, one of the reasons for the emergence of so-called due diligence obligations or, at least, the increased reliance on the standard of due diligence in recent international law practice, is the current state of the international institutional order. What this renaissance of due diligence reveals in particular is the need to ensure that the behavior of public and private international institutions (other than States), such as international organizations or multinational corporations, is more diligent. At least, it demonstrates the necessity of holding States themselves accountable for their own undue negligence in preventing, protecting against or remedying the (risks of) harm caused by these public and private institutions that are not yet sufficiently regulated by international law and whose direct obligations and responsibilities under international law are still rare.

For instance, there is a growing interest in the due diligence of States, and even of multinational corporations themselves, with regard to the extraterritorial protection of human rights or the environment in the context of business operations. One may also observe a keen interest in the due diligence of international organizations with respect to the risks of human rights violations by private military groups over which these organizations exercise a degree of control, or even by their own member States where the latter provide them with armed forces. Conversely, and in addition, but in particular where it proves impossible to hold such organizations directly responsible for breaches of their own obligations of diligence (which they often do not yet bear), member States of such organizations are held responsible for their negligence when they failed to take all available reasonable measures in order to prevent and protect against the (risks of) harm caused by such organizations.

In fact, the institutional dimension of this renewed interest for due diligence in international law is also reflected in the sources through which these new obligations of diligent conduct or, at least, these new due diligence "policies" or "practices" develop, particularly as they relate to the behavior of international organizations and multinational corporations. Indeed, those sources are not primarily inter-State treaties, even if one may notice references to due diligence in some of the most recent treaties. Above all, they are the various norms adopted by institutions other than States, to the extent that such norms alone may aim to bind those institutions. These include the unilateral acts of international organizations such as the United Nations, the European Union or the World Bank, or even self-regulation by multinational corporations and the soft law relating to the so-called "human rights' due diligence" of these corporations.

The renaissance of the due diligence standard in contemporary international law, but also the weaknesses that characterize its recent practice, are a perfect illustration of the malaise surrounding the relationship between international law and the institutions that are ruled by it and that adopt it in return. It was therefore difficult to find a better introduction to the international law of institutions and to my new chair's research project.

1. See, S. Besson, *La* due diligence *en droit international*, Recueil des cours de l'Académie de droit international de La Haye, Tome 409 (pp. 153-398), Brill/Nijhoff: Leiden/Boston 2020 (245 p.). An English version, revised and completed, will be published as *Due Diligence in International Law*, Brill/Nijhoff: Leiden/Boston 2022 (forthcoming).
2. See, S. Besson, *Reconstruire l'ordre institutionnel international*, Leçons inaugurales du Collège de France, Collège de France/Fayard: Paris 2021 (75 p.) (forthcoming).

The increasing relevance of international non-State actors, whether regional organizations, NGOs or multinational corporations, could lead, at first glance, to a weakening of the role of public international law (whose traditional subjects are now part of the minority) in the effort to police behavior and give rise to a fairer world. For example, in recent years, legislators have turned to private law concepts (e.g., duty of care, "devoir de vigilance") in their attempts to make corporations accountable. Do you share this fear, or do you think, on the contrary, that this trend will be corrected by a correlative increase in the number of subjects governed by international law?

This is a broad question (which, in fact, combines two questions: the increase in the number of subjects of international law and, in this context, the increasing role of private subjects). The best way to respond, it seems to me, is not to address these issues in terms of "subjects", "participants" or "actors" anymore (and especially not by qualifying them further with adjectives such as "classic" or "traditional" which generally bring very little to the discussion), but instead to refer, when applicable, to "institutions" of international law, as I do in the context of my chair at the Collège de France.

It is indeed the representation of the same peoples (and ultimate subjects of international law) by these multiple institutions that will be the main focus of the chair's research and teaching program in the coming years. It will examine the way in which that relationship of representation should be reflected in the sources of international law and regimes of international responsibility applicable in case of breach of that law. If it has not yet been sufficiently the case, it is precisely because thinking of these issues in terms of equal "actors", "participants" or "subjects" juxtaposed on one another has tended to flatten everything (with the only criterion for distinction then amounting to the opposition between States, also deemed to be actors, on the one hand, and these "non-State" actors, on the other).[3]

Understanding how the peoples of this world are represented by various institutions of international law should in turn enable us to envisage a system of multiple representation built around the institutional continuity between States and international organizations (regional or universal), on the one hand, and between the latter and various other public institutions (such as cities) or private institutions (such as non-governmental organizations, or even multinational corporations), on the other.[4] International representation can and should indeed be conceived as both public and private, and public and private representation may be approached as complementary. Of course, their internal organization should be reformed so as to be democratic, and their relationship should be carefully articulated by ensuring the priority of public institutions.

Therefore, to answer your question more directly: ordered and systematized in this way, the multiplicity of international representative institutions does not imply a weakening of international law, but on the contrary a strengthening of the legitimacy of its law-making processes and, ultimately, of international law itself. This is what we have tried to explain in a forthcoming article, co-written with José Luis Martí, which addresses international democratic representation by so-called global cities. We argue that those cities could complement States as representatives of the same peoples in international law-making processes to the extent that they are able to compensate some of the latter's democratic deficits (and vice-versa, of course).[5]

It goes without saying, it will still be necessary to work our way around and, above all, to understand the institution that (for now) constitutes the centerpiece of this system of multiple representation: the State.[6] This will also require a better conception of the implications of the public/private divide in international law. Herein lies the preliminary answer to your second sub-question. Private self-regulation, soft law and even, in some cases, domestic private law have recently become some of the preferred sources of the various incarnations of the standard of due diligence in international law, albeit with mixed results. As I explained in answer to your first question, this is because international private law, and in particular a potential international corporate law, is not yet sufficiently developed. It is now up to us and our public international representatives, States and international organizations, to confront this issue.

You have just created, within the International Law Association (ILA), a study group focusing on the relationship between regional organizations and international law. What are the specific features of regional organizations, whose number is constantly increasing, that led you to believe that this interaction raises new issues that have not been sufficiently studied yet?

This newly created ILA study group (which I co-chair with Eva Kassoti of the Asser Institute in The Hague) focuses on the international law of regional international organizations (RIOs) and aims to clarify, through a comparative approach, the internal and external practices of international law specific to these international institutions.

The group brings together some twenty specialists of the law of international organizations, as well as of RIOs from all regions in the world. These are experts coming from both academia and practice. To my knowledge, and although political scientists and international relations experts have long been interested in regionalization, this is the first time that such a project pertaining to the compa-

3. See, S. Besson, *Reconstruire l'ordre institutionnel international*, *op. cit.*

4. See, S. Besson, "Du droit de civilisation européen au droit international des civilisations : vers une institutionnalisation internationale des régions", (2021) 3 *Swiss Review of International and European Law* (forthcoming).

5. See, S. Besson and J. L. Martí, "Cities as Democratic Representatives in International Law-Making", in H. Aust and J. Nijman (eds.), *Research Handbook on International Law and Cities*, Elgar: London 2021 (forthcoming). See, more generally, S. Besson and J. L. Martí, "The Legitimate Actors of International Law-Making – Towards a Theory of International Democratic Representation", (2018) 9:3 *Jurisprudence* 504-540.

6. See, S. Besson, *Reconstruire l'ordre institutionnel international*, *op. cit.*

rative international law of regional organizations and their practices of international law is undertaken, especially on such a global scale. The platform provided by the ILA is unique in this respect. Depending on our findings, our group's reports and recommendations may lead to the creation of a permanent ILA committee, which could articulate various guidelines and principles in the area. We will hold some of our meetings at the Collège de France, and various academic publications are already scheduled.

Such an exercise in the comparative international law of RIOs is necessary today, as the number of these organizations has increased all around the world. Some of these organizations even hold general powers and are active in all areas of international law. Unsurprisingly, therefore, these RIOs have gained in influence over their member States and even over the universal international organizations (UIOs) with which they interact (whether or not they are members thereof). As an example of the influence of these regional organizations on international law, one should mention the development of their internal (in fact, international) law and its influence on their member States and their respective practice of international law, on the one hand. On the other, many RIOs have launched their own practices of international law, both within their internal legal order (where they have one) and in their impact on the development of international law in certain regimes, or even on general international law. Indeed, some of these RIOs have grown an autonomous legal order and decide on the conditions of the status, rank and effects of international law within that order. Some of them have also developed their own practices in their relations with third States or other RIOs or UIOs, such as the United Nations, in the field of general international law, in particular with regard to sources (esp. treaties and custom), immunities and international responsibility.

Curiously, however, the influence of RIOs on international law and what it tells us about the possibilities and limits of contemporary international law remain under-researched, with the exception of the influence of the European Union and of a few other economic or security RIOs (to date, the regionalization of international law has generally been considered mainly from these two angles).

A possible reason for this relative lack of interest on the part of international lawyers (there are a few exceptions, of course, notably within French-speaking scholarship) is that RIOs are difficult to define. They are indeed extremely varied, not only with respect to their internal organization (whether they aim at political, or simply economic integration, or at mere cooperation without integration), but also with respect to their international relations. This may explain why they are usually defined in a purely negative manner as non-universal, and opposed to UIOs. Moreover, as pointed out by Catherine Brölmann,[7] RIOs elude, in particular because of their territorially delineated powers, the territory-function dichotomy model of public institutions still prevalent in international law, i.e., the idea that those institutions are either States with territorial jurisdiction, or (universal) international organizations with functionally delineated powers. Matters are further complicated by the fact that "regions", and their different institutional forms (organizations, groups, courts, codification committees, treaty systems, etc.), are melting pots of identities and solidarities of various natures that often go beyond a merely geographical or territorial bond, a dimension to which, therefore, they cannot and should not be reduced. Not to forget the more general difficulty of defining what an "international organization" is, being an institution whose characteristics are still widely disputed in international law.

The development of RIOs on a global scale (although there are still significant discrepancies in density from one region to another) and the growing influence of non-European (including non-democratic) RIOs in international law are all the more interesting for us Europeans. They allow us indeed to self-critically examine what has been our institutional advantage from the standpoint of international law in a different light, and should lead us to address anew the question of its legitimacy.

The roots of European regional organization and of the resulting European institutional advantage among RIOs are, of course, historical. In short, it goes back to the European origins of international law (*jus publicum europaeum*) and then to the legal and institutional place taken by the European region in the international legal and institutional order Europeans instituted during the late 19th and early 20th centuries. In fact, as soon as international law extended outside of European borders, first with a "civilizing" mission and later on for purposes of "development", one rapidly witnessed the emergence of competing claims by States in other regions of the world to assert their own regional (practice of) international law and create their own regional organizational structures. This was the case first in Latin America, then in Africa, in the Arab world and, finally, in Asia.

What this means is that RIOs may also be of great interest to those concerned by a better institutionalization of the equal representation of all peoples in the world and of their legal cultures. This is all the more important in this period characterized by the civilizational backlash against international law, together with the assertion of new forms of (universalizing) imperialism by certain "civilization-States" outside of Europe and, more generally, of the West. A better understanding of the potential of RIOs in this context and especially of their role in international law-making could therefore increase the legitimacy of international law and enable the emergence of a more truly common international law. It is time for all regions and legal cultures to contribute to this on an equal footing and within an institutional framework that guarantees the

7. See, C. Brölmann, "Review of L. Boisson de Chazournes (2017) Interactions between regional and universal organisations: a legal perspective", (2020) 114:2 *American Journal of International Law* 335-350.

equality of individuals and peoples from all these regions. This will require in particular a better articulation of the relations between RIOs and States, on the one hand, and between RIOs and UIOs, and in particular between RIOs within the United Nations, on the other.

The idea of a "world of regions" has, of course, a long pedigree in international relations, but it is an idea that is worth revisiting in the new multilateral context that characterizes the early 21st century. Instead of fearing the regionalization of international law on the grounds of a possible fragmentation of a body of law that pretends to be universal *per se*, as it used to be the case in the immediate post-war period, it would be more appropriate to think of the growing role of regional international institutions and law as a virtue and to work together, through inter-regional cooperation and comparisons, towards building an international law that could truly claim to be universal.

Your project within the International Law Association seems to rely on the idea that the EU should first and foremost be thought of as a regional organization. However, the structural originality of the EU could also lead one to believe that it is a federal State under construction, all the more so as the EU itself seems to claim, through its behavior, its specificity and its autonomy, more than any other international organization. To what extent, then, can it be said that the EU – as a model of integration – is an exception and remains a challenge to traditional concepts of international law?

The question of the *sui generis*, or third kind, nature of the European Union (EU) as an institution, according to which the EU is neither a State (including a federal one) nor an international organization (including a supranational one) (contrary to the institutional dichotomy prevalent in the contemporary international law of public institutions), has long fascinated European and international lawyers alike. The debate has been fueled by the case law of the Court of Justice of the EU (CJEU), to the extent that it regularly characterizes the EU legal order as an autonomous legal order, and even as a new legal order (of international law), even if it has since then rejected that order's classification as a State legal order.

Considering that the EU's institutional specificity is also reflected in the particularities of its so-called "external relations" and, therefore, in its relations to international law (especially with regard to sources or immunities, where its practice of general, and even special, international law, emulates that of States or, if one adopts the alternative perspective, is at the vanguard of that of supranational organizations, of which the EU is often the only example actually), the question of a third kind of public international institution is also, obviously, a key part of the mandate of our ILA study group on the international law of RIOs.

The specificities of the EU's practice of international law are striking in more than one respect. They result both from its internal organization and how it organizes its relations with its Member States, on the one hand, and from the way it articulates its external relations, on the other. Thus, the EU is one of the few, if not the only RIO that has grown a legal order that it considers to be "autonomous", the only one with individual subjects (its "citizens") and the only RIO with a full democratic organization (and esp. a real Parliament with legislative powers). In terms of its external relations, the EU is also one of the few RIOs to have received or acquired very extensive external powers, including normative ones and the power to enter into international legal instruments. This is obviously one of the consequences of the quasi-general nature of its internal powers. The EU Treaties themselves expressly refer to the respect of international law as a value and aim. They also repeatedly stress the importance of the relationship between the EU and other international organizations, including the United Nations. Not to forget, of course, the application, since the merging of the three EU pillars by the Treaty of Lisbon, of the EU institutional framework and law-making procedures to the approval of certain treaties and other external decisions, including the extension of the powers of the European Parliament in this area.

As a matter of fact, it is precisely our interest (as researchers and teachers) in the specificities of the EU's external relations and its unprecedented practice of international law that have led us, Eva Kassoti and myself, to propose the creation of an ILA study group on the international law of RIOs. The reasons we decided, however, to broaden the scope of our inquiry to other RIOs pertain to the universality of international law and to the benefits of comparison for the study of the external relations of both the EU and other RIOs. This comparison is actually already at work in practice, even if it mostly goes one way only, since the EU and its practice of international law are often taken as models when setting up or reforming RIOs elsewhere in the world. The same trend can be detected in legal scholarship, both among legal scholars and in other disciplines relating to international relations: the EU has long been treated as the example *par excellence* of successful international integration of States at a regional level. If you look closely at the mandate of our study group, however, you on notice that all references to the EU are intentionally being juxtaposed on the term "RIOs", rather than included in the latter's scope, therefore entertaining the possibility of a fundamental institutional distinction between the EU and RIOs.[8]

At the same time, and in any case, there are various signs in the recent external relations practice of the EU that clearly reveal its regional dimension. For instance, one could mention the increasing references to the EU's territory or its territorial "jurisdiction" in the recent case law of the CJEU. How else is one to understand what is meant by the "extraterritorial", albeit quite rare, extension of the scope of norms and duties under EU law (and I

8. See, the list of ILA study groups: ‹https://www.ila-hq.org/index.php/study-groups#›.

do not refer here to its mere global economic and political influence akin to the "Brussels Effect" described in Anu Bradford's book,[9] or its other types of unilateral external repercussions depicted in the recent book by Joanne Scott and Marise Cremona)?[10] This sense of political and legal boundaries of the EU is most welcome, as one should fear the alternative entertained by some and especially the related emergence of a form of European imperialism in international law. All the more so since, as you know, the adoption of EU and international law pertaining to the EU's external relations is not entirely subject to the democratic control of the European Parliament. On the contrary, parts of it, such as "restrictive measures", for instance, are still ruled by the early 1990s' second pillar's intergovernmental logic. This, by the way, is alarming in light of the growing disconnection one may observe between the European policy (both internal and external) conducted by the EU Member States' governments at the European Council or at the Council, on the one hand, and their national parliaments and, of course, their peoples, on the other.

Independently of the position of the EU and its Member States on the question of the EU's international autonomy (and their respective perspectives on this subject differ greatly, actually), what the recent proliferation of RIOs shows is that the EU's unique position in international law, especially in its relations with third States and UIOs, is at stake.

It needs revisiting in relation to other RIOs. And rightly so, in light of the historical advantage European States have enjoyed in international law thanks to their higher degree of regional organization. This may signal a day of reckoning after years of unreflected regional exceptionalism with respect to international law in Europe. In the future, it will be interesting to explore how the international representation of the other peoples of the world by one or more RIO can contribute to enhancing the democratic legitimacy of international law-making, but also that of UIOs, such as the United Nations, whose internal organization should accommodate those RIOs to a greater extent than it already does.

Part of the future of international law will be played out at the regional level. And the EU will certainly be vested with an even more critical role therein than what has been the case so far. Still, the EU will also have to learn how to play that role in a newly regionalized architecture of international law. Its institutional future itself could be at stake. It is therefore of utmost importance to prepare for it now, in particular by striving to strengthen the democratic legitimacy of the EU's external relations, including that of the EU institutions in charge thereof and of their practice of international law.

Interview by James Corne, Hugo Pascal and Vasile Rotaru

9. See, A. Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford University Press: Oxford 2020 (424 p.). See also, A. Bradford, "The European Union in a globalized world: The Brussels effect", this Journal, p. 75 *et seq.*

10. See, M. Cremona and J. Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, Oxford University Press: Oxford 2019 (264 p.).

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The Belt and Road Initiative: A New Landscape in Mapping the Changing Global Governance

The Belt and Road Initiative (BRI), which has been put forward since 2013, is often perceived as an ambition to export a "China Model" that promotes alternative global norms and standards to the currently prevailing Western ones.[1] The presumption might be corroborated by the press release of the fifth plenary session of the 19th Central Committee Chinese Communist Party, where "promot(ing) the joint implementation of the Belt and Road Initiative towards a high quality development" and "actively participat(ing) in the reform of global governance"[2] are put together as one of China's future leading open policies. The BRI, while often suspected due to its unique and distinctive features compared to the Western benchmark, is regarded by China as a path towards the progressive reform of the current global governance based on traditional Chinese wisdom. We argue that, rather than proposing a "China Model"[3] that would fill in the leadership vacuum left by the Western powers, China is experimenting a new approach to transnational cooperation, thus adding new elements to the changing landscape of the global governance.

1. China's Pragmatic Use of Legal Tools for Implementing the BRI

The name of the BRI is coined to manifest its singularity: the initiative is neither a project nor premised upon a multilateral international legal instrument. The implementation of the BRI aims at neither creating an international organization with specific mandates nor building a regional alliance. It is a process of cooperation. The undefined geographic scope and priorities of the BRI characterize the flexible and open nature of the initiative. While cynics observe the BRI through the lens of geo-political or geo-economic strategy, countries alongside or covered by the "belt and road" are invited to cooperate on a voluntary basis for the progressive implementation of the initiative. The totally voluntary nature of cooperation distinguishes BRI from any regional trade and investment agreement such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) that China has recently expressed its intention to join or the Regional Comprehensive Economic Partnership (RCEP) that China has officially signed on 15 November 2020.

Besides, the Chinese government has extensively concluded intergovernmental agreements with BRI countries and with some international organizations. Yet, most of them are not legally binding or are "of soft law nature".[4] Those agreements build the foundation for policy coordination and for continuously broadening the international consensus on the BRI's furtherance. At the same time, China has taken the approach of acclimatizing to the local context and managing its relations with the leadership on a bilateral basis. The flexibility in leading bilateral cooperation implies that "legal norms, *per se*, are not the primary basis for China to rely upon".[5] The BRI lacks a clear and systematic legal framework as a useful tool of communication to clarify itself to the world. Consequently, countries who would traditionally rely on such legal framework as "a founding treaty" of the BRI in order to understand the political and economic implications of BRI will be disappointed and thus second guess China's grand ambitions behind it.

Nevertheless, China's emphasis on foreign diplomacy in pushing forward the BRI should not be misunderstood as a complete rejection of the legal rules. The BRI prioritizes infrastructure connectivity, and the financing of infrastructure projects is highly technical and complex, therefore, sophisticated and detailed legal rules and arrangements are required to provide a secure, reliable and predictable basis of operation. The activities of the Asian Infrastructure Investment Bank (AIIB) provide an example of how the China-led multilateral development bank, which is expected to alter the current global financial governance through the input of 'Asian values',[6] has to be receptive to and abide by the established international legal rules. For example, for the purpose of main-

1. See, for example, D. Tobin, "How Xi Jinping's 'New Era' Should Have Ended US's Debate on Beijing's Ambition", Center for Strategic and International Studies (CSIS) (2020), available at <https://www.jstor.org/stable/resrep24771>, accessed on 27 November 2020. In a recent discussion on the issue of China and global governance to which this author participated, it is contended that the very premise of a liberal international order is increasingly contested both internally and externally, China, under a such context, supports but also challenges the established order and the global governance system in which it is embedded. See, M. Burnay, W. Muller, "China, Law and Global Governance: Power through Rules of Rule through Power?", *Hague Yearbook of International Law*, Volume 31, 2018, Brill Nijhoof, 2021, pp. 9-14.
2. The Press Release in Chinese is available at : <http://www.xinhuanet.com/politics/2020-10/29/c_1126674147.htm>.
3. See, for example, Q. Kong, M. Du, 'Is the 'Belt and Road' Initiative the Chinese Vision of Global Governance?", in G. Martinico, X. Wu (eds.), *A Legal Analysis of the Belt and Road Initiative, Towards a New Silk Road*, Palgrave McMillan, 2020, pp. 5-19.
4. See, G. Martinico, 'Comparative Law Reflections on the Use of Soft Law in the Belt and Road Initiative', in Giuseppe Martinico, Xueyan WU (eds), *op. cit.*
5. See, R. Nurgozhayeva, "Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective", *The Chinese Journal of Comparative Law*, (2020) Vol. 8 No. 1 pp. 250-278, p.262.
6. See, D. M. Ong, "The Asian Infrastructure Investment Bank: Bringing 'Asian Values' to Global Economic Governance", *JIEL*, 2017, 20, pp. 535-560.

taining credit ratings, AIIB has mapped out "guidelines for the assessment, monitoring and control of the risk of legal or regulatory sanctions, financial loss or loss to reputation AIIB may suffer as a result of our failure to comply with laws, regulations, international standards and codes of conduct applicable to our banking activities".[7] Moreover, Chinese infrastructure projects holders in need of blended financing have to abide by the established international legal rules, instead of making new rules based on the "China model". Chinese enterprises are furthermore encouraged to strengthen the blended financing cooperation with multilateral development institutions, because of the positive political influence of multilateral institutions that helps projects to mitigate risks and increase credibility.[8] The cooperation with multilateral development institution, motivated by the need for blended financing, requires Chinese enterprises to negotiate with multilateral institutions and to eventually take in those universally practiced financial legal rules.[9] In addition, leaders of the BRI counties have recently expressed their endorsement of the UN Sustainable Development Goals. For that purpose, the leaders are determined to sustain cooperation "in line with internationally agreed principles and obligations"; to "work together in line with our national legislation, regulatory frameworks, international obligations, applicable international norms and standards", and called for "more international cooperation in line with our applicable respective obligations under international conventions, such as UN Convention against Corruption (UNCAC) and relevant bilateral treaties".[10] The objective of building a green and sustainable Belt and Road, as it has been declared in the form of a coordination policy, will drive BRI countries including China to adjust their conduct to be in conformity with the international norms, thus generating a "BRI culture of compliance" in achieving the sustainable development goals (SDG).[11]

Insofar as legal security is concerned, China has felt the necessity of building an efficient and trustworthy dispute settlement mechanism for dealing with foreign-related trials, drawing particular attention on the specialties of the cases related to BRI countries. China's Supreme People's Court (SPC) released in 2015 and 2019 two guidelines on the judicial service and guarantee that China's court system should offer to the BRI. Those directives contain the SPC's direction on the tasks and activities undertaken by all levels of judicial organs for serving the BRI's furtherance. The main objective is to enhance the trustworthiness of China's judiciary in settling the legal disputes related to BRI countries.

According to the 2019 guidelines,[12] China's courts should faithfully apply the international treaties and conventions binding on China, and respect international customs and commercial usages; on the other hand, Chinese legal texts and cases should be translated into foreign languages and well published in BRI countries in order to improve the understanding of Chinese legal practices by foreign subjects; the "one-stop" legal dispute settlement with the diversified available remedies that coordinate judicial settlement, mediation and arbitration, offered by the recently established China International Commercial Court (CICC), will be further promoted and extended. The 2019 guidelines show SPC's support for the participation of Hongkong International Arbitration Center (HKIAC) to the one-stop legal dispute settlement as designed by CICC. Last but not least, foreign arbitration institutions may establish their branches and have their *arbitral situs* at Lingang area in Shanghai.[13]

The above guidelines show SPC's intention to improve the international trustworthiness and openness of the Chinese judiciary, in light of both the competition and cooperation among different international and domestic dispute settlement institutions.[14] Yet, on the other side, SPC seems to over-emphasize the importance of settling the legal disputes arising from BRI projects within Chinese territory: SPC's sense of security is to a certain degree closely connected with its capacity of influence and even control over those judicial and arbitral practices, as well as over mediation. It is thus hard to thoroughly reject the assumption that the SPC is skeptical towards genuinely internationalizing the dispute settlement. The latter's multiple centers of gravity scatter over the world.

The above examples on the use of legal tools for implementing the BRI illustrate that law is not perceived as the "foundation" of the BRI. BRI is designed as a pro-

7. 2019 AIIB Annual Report and Financials, p. 16.

8. See, *Greenovation Hub: Investment and Financing Models, Challenges and Recommendations of renewable Energy Projects by Chinese Companies in the Belt and Road Countries*, January 2020.

9. See, M. A. Carrai, "It Is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System", in J. Chaisse, J. Górski (eds.), *The Belt and Road Initiative, Law, Economic, and Politics*, Brill Nijhoff, 2018. The author argues that "the BRI related *International Developmental Financing Institutions* (IDFIS) are nested mostly in the current international legal system and can contribute to some of its objectives, such as environmental protection, security and social sustainable development", p. 111.

10. Belt and Road Cooperation: Shaping a Brighter Shared Future, Joint Communique of the Leaders' Roundtable of the 2nd Belt and Road Forum for International Cooperation, 27 April 2019, Beijing, China.

11. One of the venues for increasing the environmental sustainability of the Belt and Road Initiative is the Belt and Road Initiative International Green Development Coalition (BRIGC or The Coalition). Launched in 2019, the Coalition is an open, inclusive and voluntary international network which brings together the environmental expertise of all partners to ensure that the Belt and Road brings long-term green and sustainable development to all concerned countries in support of the 2030 Agenda for Sustainable Development. See, ‹https://www.unep.org/regions/asia-and-pacific/regional-initiatives/belt-and-road-initiative-international-green›.

12. Supreme People's Court, *Guidelines for courts to provide enhanced judicial services and guarantees for Belt and Road*, 9 December 2019.

13. It is argued that the BRI-related international arbitration practices will bring dynamics of change to the global framework for international arbitration. See, U. Liukkunen, "Chinese Context and Complexities – Comparative Law and Private International Law facing new Normativities in International Commercial Arbitration", *Ius Comparatum* 1(2020) 254-287 [International Academy of Comparative Law: aidc-iacl.org].

14. In terms of judicial cooperation, China has signed United Nations Convention on International Settlement Agreements resulting from Mediation («Singapore Mediation Convention») on 7 August 2019. China also participated in the adoption of the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. See: ‹http://cicc.court.gov.cn/html/1/219/208/209/1303.html›.

cess of cooperation, instead of an immense edifice, that needs driving dynamism rather than a solid foundation. Experts who contended that "every time a regional or global power takes investments into its area of influence, it seeks to create an international law that applies to the protection of such investments" conclude however with uncertainty over whether China will follow the "US-led hegemonic system of investment, which remains largely intact today".[15] The necessary but still marginal role of law characterizes China's "maximized flexibility"[16] in leading the BRI that contrasts itself with the Western benchmark of the Rule of law.

2. "China Model" vs. the Western Benchmark

China has taken an ambivalent position concerning the role of law as a tool of governance. It is clear that China is investing in its institutional capacity to develop norms, yet there is a "lingering lack of clarity about the legal dimensions of the Belt and Road initiative".[17] In pushing forward the BRI whose core aim is increasing connectivity, China pragmatically relies on the function of policy, while at the same time resorting to legal tools when it is necessary and useful. Antoine Garapon's insightful observation sheds light on China's pragmatism: China deploys its BRI through infrastructure investment rather than through the transplantation of a legal culture, the imposition of law, or through the empowerment or the transmission of a specific model of society. China believes that the society of consumption may become similarly attractive to other countries. However, the BRI contains within itself the risk of keeping China away from the universally accepted norms and legal regulation. The very reason of such scenario is that China is still not a State under the Rule of law.[18] In a broader perspective, China's conception and implementation of the rule of law "are significantly different from any existing legal system in the West or any paradigmatic 'Western rule of law ideal'."[19] In brief, China's statist socialist rule of law is the key institutional factor which leads to skepticism and criticism from the West.

The overstated "China model" accompanies the concern over the tension and rivalry that the development of BRI will instigate. It has been well argued that "[l]ack of transparency is perhaps the defining trait of the BRI and the projects carried out under its umbrella"; "[t]he fact that China's state-owned enterprises play a major role in the BRI leads to the argument that China's state capitalism and its one-party political system may sit uneasily in a liberal-democratic world order".[20] Garapon also concluded that the weak reliance on law and the lack of autonomy and independence of the law and the market in relation to the politics characterize China as a post-democracy that challenges and competes with the current democracies.[21] Some other influential opinions underscored China's engagement as a 'prolonged struggle' over the current international order. The current one advocated by the Americans as a "rule-based international order" appears in fact to be "an order in which Americans make the rules". The question of how much 'renegotiation' of that order China will demand, and what emerges afterward, is wide open.[22]

There are different strands of thinking on how to alleviate the tension between the "China model" and the Western ideology. The "conformity" view argues that China has to bring its trade and investment under the BRI "into one scheme and take into consideration both international rules and institutional arrangement", and when China seriously address multilateralism and international law issues, China "needs to ensure that rule making and decision-making for the BRI should be conducted not by China alone but by an independent process without the domination of any one State".[23] The suggestion essentially argues for putting China's approach to global governance, as those practices relating to the BRI, in conformity with the Western benchmarks embedded in the currently prevailing international rules and institutions. Such a simplistic solution may be contested based on the criticism that international law is not neutral, and it can favor the powerful, justify aggression and carry an imperialist agenda.[24] The consequence of the above compliance rhetoric would be maintaining the *status quo* of the current "universal" law's domination, while a new hegemony replaces the old one with the structure of global governance unchanged.

A reconciliatory argument focuses on the Chinese traditional legal culture where law and morality play different but complementary roles in governing the Chinese society; the latter "places a greater value on trustworthiness, and does not have the same belief that markets in themselves can be left to enforce ethical outcomes"; that the difference between China's tradition in dealing with law and that of the BRI countries warrants that the "continued convergence between legal systems is essential to the expansion of BRI activities"; and that the "[s]ustainability of the BR legal system will require that determining

15. See, M. Sornarajah, "Chinese Investment Treaties in the Belt and Road Initiative Area", *The Chinese Journal of Comparative Law*, (2020) Vol. 8 No. 1, pp. 56-57.
16. See, H. Wang, "China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability", *Journal of International Economic Law*, 2019, 22, pp. 29–55, p. 47.
17. See, W. Muller,"The Power of Discourse, Doctrinal Implications of China's Normative Aspirations", *Hague Yearbook of International Law*, Volume 31, 2018, Brill Nijhoof, 2021, p. 66.
18. See, A. Garapon, Les "Nouvelles Routes de la Soie" : la voie chinoise de la mondialisation, *IHEJ*, 23 novembre 2016.
19. See, R. Peerenboom, *China Modernizes, Threat to the West or Model for the Rest?*, Oxford University Press, 2007, p. 196.
20. See, M. Baltensperger, U. Dadush, "The Belt and Road Turns Five", *Bruegel Policy Contribution*, Issue n°1, January 2019.
21. See, A. Garapon, "Les Nouvelles Routes de la Soie : la voie chinoise de la mondialisation", *op. cit.*
22. See, S. Roggeveen, "China, America and the Thucydides Trap: An interview with Graham Allison": ‹https://www.lowyinstitute.org/the-interpreter/china-america-and-thucydides-interview-graham-allison› (last visit on 30 November 2020).
23. See, C. Jianfu, 'Tension and Rivalry: The "Belt and Road" Initiative, Global Governance, and International Law', *The Chinese Journal of Comparative Law*, (2020) Vol. 8 No. 1, pp.194, 195.
24. See, B. A. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century*, Oxford University Press, 2016.

what can be achieved through consensus and long-term sustainable relationships, in the manner of Confucian *Li*, is given precedence, and that resort to formal penalties and prohibitions, in the manner of Confucian *Fa*, is limited to those cases where li is genuinely impossible or ineffective".[25]

The above view following the comparative law approach is theoretically ideal. However, the legal pluralism that it advocates may find it politically difficult to reform the current international law, as the latter's "international" nature is deeply questioned.[26] That is, if the creation, interpretation and application of international legal rules are influenced by the domestic laws of those powerful States, it remains open whether a pluralist approach implies that new rising power(s) will resist, compete with and thus finally replace the old ones. In other words, the reconciliatory view that sympathizes with China's legal culture would support the argument that China as a rising power will fill in the gap of global governance created by the contemporary crises of the liberal international order.

That is, China will defend the emergence of a low-cost version of the international order which may not be fully deprived of its liberal dimension, "but clearly goes against the systematic promotion of the values of democracy, human rights and the rule of law at both the national and international levels".[27] The more sympathetic view contends that "the BRI has the potential for contributing the international rule of law if there is the political will', whereas it also admitted that the rule of law is a contested concept, and "even if there is a political will to improve on the rule of law conditions along the Belt and Road, it might not be a rule of law in a narrow sense".[28]

The pessimist view perceives rules-based global order as an illusion, contending that "[i]nternational law today is powerful against the powerless, and powerless against the powerful. As long as this is true, a rules-based global order will remain a fig leaf for the forcible pursuit of national interests".[29] It follows that China's rise as a new center of gravity of global affairs through the furtherance of BRI will "reform" the current international law, but such reform would not only take place in China's national interests,[30] but also "enhance and justify China's rise".[31] Likely, Jerome A. Cohen suggests that China "seems to be inching gradually toward a more innovative, broader approach that shapes international law in par with its growing political and economic power. [...] American endorsement of international law, in both theory and practice, will give the PRC an incentive to increasingly submit its own conduct to an evolving 'rules-based order'."[32]

It is true that power relations among States is a dynamism of change to international law. However, power relations among States is more complex in reality than in theory, therefore, the impact of the changing power relation on the evolution of international law has to be examined through more concrete and empirical studies. The pessimist view attaches too much importance to States while ignoring the limit of such a statist approach to international law, and in a broader perspective, to the global governance to which participate multiple actors at all levels. In fact, any inquiry on the impact of China's rise on the changes of international law, insofar as it implicitly equates power struggles among States with the essence of international law, is self-contained in the statist perspective: it overlooks the 'empire of private law' premised upon property, rather than sovereignty, that enables, structures, channels and opposes international power.[33]

In addition, the statist or sovereigntist cognitive framework turns to be outdated against the "new global form of sovereignty" which is "composed of a series of national and supranational organisms united under a single logic of rule",[34] i.e., a network of global powers beyond States. Furthermore, as Mireille Delmas-Marty envisages, the emergence of a constellation of public and private actors for preserving the global commons ("*biens communs*") calls for a new form of governance aggregating, in lieu of separating, the Knowledge (experts), the Will (citizens), and the Power (states, regional, and international organizations, etc.).[35] In other words, nation-States are losing the traditional dominant position in the process of governing the world without a global government. Focus must also be shifted to new actors and the dynamism brought by them to the global governance.

25. See, N. Morris, "Developing a Sustainable Legal System for the Belt and Road Initiative", in W. Shan et al. (eds.), *Normative Readings of the Belt and Road Initiative*, Springer International Publishing AG, 2018, pp.54, 55.

26. See, A. Roberts, *Is International Law International?*, Oxford University Press, 2017.

27. See, M. Burnay, "China and Global Governance: Towards a Low-Cost Global Legal Order?", *Hague Yearbook of International Law*, Volume 31, 2018, Brill Nijhoof, 2021, p. 42.

28. See, H. Andersen, "Rule of Law Gaps and the Chinese Belt and Road Initiative: Legal Certainty for International Businesses?", in. Martinico, X. Wu (eds.), *op. cit.*

29. See, B. Chellaney, "The Illusion of a Rules-Based Global Order", available at <https://www.project-syndicate.org/commentary/china-makes-mockery-of-international-law-by-brahma-chellaney-2019-12?barrier=accesspaylog#:~:text=International%20law%20today%20is%20powerful,forcible%20pursuit%20of%20national%20interests>.

30. See, C. Cai, "New Great Powers and International Law in the 21st Century", *The European Journal of International Law*, Vol. 24 no. 3, 2013. The author concluded that new great powers, including China, are positioned in a manner that is both different and similar to the positioning of old great powers, in shaping and reshaping international law, at 795.

31. See, C. Cai, *The Rise of China and International Law*, Oxford University Press, 2019, p.39. The author underscores that the current relationship between international law and the big powers differs from its past history in that international law "may impose more hurdles on China than it did to old great powers in history".

32. See, J. A. Cohen, "Law and Power in China's International Relations" (2019) 52 *NYU J Int'l L & Pol* 123, pp.164, 165.

33. See, M. Koskenniemi, "Expanding Histories of International Law" (2016) 56 *American Journal of Legal History* 104.

34. See, M. Hardt, A. Negri, *Empire*, Harvard University Press, 2000, p. 12.

35. See, M. Delmas-Marty, "Gouverner la mondialisation par le droit", *Revue européenne du droit*, September 2020, n°1, p. 9.

3. Non-State Actors in the BRI and a new Dynamism of Global Governance

BRI is State-driven, yet, there is a wide spectrum of actors implementing the BRI. Among others, state-owned enterprises (SOEs) play a critical role. SOEs' performance in the BRI and their political, economic and social impacts draw wide attention. The SOEs' contribution to the BRI leads however to the skepticism that "China's state capitalism and its one-party political system may sit uneasily in a liberal-democratic world order".[36] The reality is more complex. The relationship between the State and SOEs shall not be simply defined in light of agency. SOEs enjoy autonomy and remain independent from governments in the legal sense. Yet, governments can effectively influence SOEs and other actors' investment conducts in the BRI countries by framing policies and policy orientations. For example, since 2007, China has pushed SOEs to the forefront of setting the standards for corporate social responsibility (CSR) practices both domestically and in their operations abroad.[37] A recent research shed light on the actual relationship between the State and other actors: while BRI is depicted as a State-Mobilized globalization (SMG) strategy, the unique feature of the "mobilization state" lies in the fact that "when Chinese leadership urged 'globalization' in the top-down mobilization and promotion of a nationalist strategy, the domestic audience - different State and capital actors - can do many different things".[38] The fragmentation between State and non-State actors including local governments, business entities (state-owned or not), may have some connection with the pragmatic use of the legal tools in the implementation of the BRI as described above. The vacuum left by State law may be filled by private actors' initiatives. For example, a recent empirical study on the Southeast Asia's Cross-Border Special Economic Zones[39] have also shown that the State is transforming its role by relaxing the control over transnational business activities.

On the other side, "the conduct of Chinese state-owned enterprises and private firms investing along the OBOR are likely to be subject to ever-increasing scrutiny".[40] For example, in terms of CSR, the government and Chinese companies has been increasingly making use of the ISO 26000 standards. "Although the government will remain the key driver of CSR development, the role of the general public will continue to grow in importance".[41] Chinese companies are the key players to deliver infrastructure projects for the BRI, their awareness and capacity of promoting equitable and sustainable development "are building up with increasing domestic and oversea pressure and incentives".[42] To achieve the SDG in the BRI context, pooling together the efforts of China's and host States' policy guidance and regulation, the financial institutions' green credit policy, as well as Chinese companies' improvement in management and communication, becomes more than ever necessary. BRI thus provides a field of experimentation for the multi-stakeholder governance.

The statist view of BRI should be replaced by a new one that attaches importance to the actual contribution of non-State actors, mainly private actors. The bloc of actors implementing the BRI, as well as of their practices, form a new landscape for mapping the changing scenario of the global governance. More precise inquiries on the role of non-State actors can help to cure the myopia in observing the BRI's influence on the global governance. Hardt and Negri have warned that "in the context of globalization, we can see that a new imperial formation is emerging that can function only through the collaboration of a variety of national, supranational, and nonnational powers".[43] Non-State actors' activities would have significant, if not determinant, influence on the question whether an imperial governance without Empire would emerge in future globalization.

Conclusion

Nation-States remain important for global governance. Yet, human history has stepped out the age of empires,[44] and even the US as the biggest superpower has never been able to rule the world completely in its own will. China's rise is still far from amounting to a Chinese hegemony. On one side, "China's growing power is not as securely based as widely assumed, and China's views are influenced by its interaction with the United States and its perception of American international law practice".[45] On the other, China has suffered from the consequences of the parochialism of American cosmopolitanism.[46]

36. See, M. Baltensperger, U. Dadush, "The Belt and Road Turns Five, Bruegel Policy Contribution", Issue n°1 January 2019.
37. State-owned Asset Supervision and Administration Commission of the State Council, Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities, promulgated on and effective since 29 December 2007. See, also, Ministry of Ecology and Environment, Ministry of Foreign Affairs, National Development and Reform Commission, Ministry of Commerce, Guidance on Promoting Green Belt and Road, April 2017; Ministry of Ecology and Environment, *The Belt and Road Ecological and Environmental Cooperation Plan*, May 2017.
38. See, M. Ye, *The Belt Road and Beyond, Sate-Mobilized Globalization in China: 1998-2018*, Cambridge University Press, 2020, p. 13.
39. See, C. Thame, "State Transformation and Uneven Development Across Southeast Asia's Cross-Border Special Economic Zones", *Journal of Political Science Review* 6, no. 1 (2020): 29–67.
40. See, M. Zou, Labour Standards along "One Belt, One Road", in Lutz-Christian Wolff; Chao Xi; Jenny Chan (eds.), *Legal Dimensions of China's Belt and Road Initiative*, Wolters Kluwer, 2016, p.2.
41. See, G. Tu, S. Chen, "National Reports, China", in C. Kessedjian, H. Cantú Rivera (eds.), *Private International Law Aspects of Corporate Social Responsibility*, Springer, 2020, p.257.
42. See, J. Xiheng, "Green Belt and Road Initiative Environmental and Social Standards: Will Chinese Companies Conform?", in G. Sen, M. Leach, Jing Gu (eds.), *The Belt and Road Initiative and the SDGs: Towards Equitable, Sustainable Development*, IDS Bulletin, Vol.50, No.4, December 2019, p.61.
43. See, M. Hardt, A. Negri, *Commonwealth*, The Belknap Press of Harvard University Press, 2009, p. 233.
44. This author embraces the broad definition of empire as "a form of political and economic power potentially encompassing influence and legal authority as well as military control over foreign populations, subject to different degrees of negotiation". See, M. Koskenniemi, W. Rech, M. Jiménez Fonseca (eds.), *International Law and Empire, Historical Explanations*, Oxford University Press, 2017, pp. vii, viii.
45. See, J. A. Cohen, "Law and Power in China's International Relations", *op. cit.*
46. See, S. Moyn, "The Parochialism of American Cosmopolitanism": https://www.lawfareblog.com/parochialism-american-cosmopolitanism, 15 Sept 2017.

It is then justifiable to argue that a rising China should not repeat the parochial attitude in following the US footprints. Furthermore, the increasing interdependence among nations highlights the fundamental flaw in equating international law with the struggle for national interests. Neither the absolute sovereigntist perspective of international law fits the globalizing world any longer, nor the universalism has ever achieved total domination as expected by hegemonistic powers. BRI offers China a critical opportunity to forge its own account of and strategy for global governance. China is developing its own 'discourse power'. It is also true that China adopts a defensive attitude in criticizing the established norms yet with no clear alternative model emerging.[47] However, this author contends that China's "pragmatism" in law may become the component of a larger body of "law in movement" (*droit en mouvement*)[48] that governs the changing and uncertain world.

Global governance has no model to follow, nor a framework setting its limits or frontiers. Global governance is a fluid but not linear process. The multiple actors of global governance may share the same objectives of pursuing peace and prosperity, but compete among themselves with means of different wisdoms and plans.

Yet, there is still the pitfall of confounding objectives and means, including harsh confrontations that would potentially lead to the cycling of hegemony through lawfare, like the case of US-China trade war where law is weaponized to achieve protectionist purposes.

In that sense, building consensus for cooperation through law and policy is still crucial to prevent the "race to the bottom".[49]

Cynic opinions view BRI as China's geopolitical and geo-economic strategy in pursuit of exporting a "China model" that will replace the current international order in the long run. This article argues that China's BRI, with its distinctive features, may form a new pattern of governance (pragmatic use of law, crucial influence of government policies, variable roles of state-owned enterprises and private actors) that differs substantially from the Western one.

While at a time where the current 'liberal' model of global governance, if any, is more and more questioned on its efficiency and legitimacy, China's BRI can be perceived as an experimentation on the process of global governance: a process that has neither foundation nor centers.

The critical question is no longer how to contain competition among "models" in order to avoid the harsh confrontations and the consequential cycling of dominations or hegemonies. Rather, China's rise shall refresh the thinking on how to alter the cognitive framework to guide the coexistence, mutual reception, and complementarity as well. The alteration is now urged by the challenges of surging waves of disorder in the "ocean of globalization" ("*l'océan de la mondialisation*").[50]

47. See, W. Muller, "The Power of Discourse, Doctrinal Implications of China's Normative Aspirations", *Hague Yearbook of International Law*, Volume 31, 2018, Brill Nijhoof, 2021, p.77.

48. See, M. Delmas-Marty, "Gouverner la mondialisation par le droit", *op. cit.*

49. See, M. A. Carrai, "The Rise of Screening Mechanisms in the Global North: Weaponizing the Law against China's Weaponized Investment", *The Chinese Journal of Comparative Law*, Volume 8, Issue 2, September 2020, pp. 351–383.

50. See, M. Delmas-Marty, *Aux quatre vents du monde – Petit guide de navigation sur l'océan de la mondialiation*, Seuil, 2016.

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The European Union in a globalised world: the "Brussels effect"

There is a general feeling, at least outside of the EU, that the EU is becoming increasingly irrelevant from most points of view. On the other hand, in your latest book, you claim that the EU remains an influential superpower that shapes the world in its image: it is actually the only global regulatory superpower, due to what you term the "Brussels Effect". What is the Brussels Effect?

I do not deny that the EU has multiple weaknesses, but my book is an invitation to ask what power means today and what kind of influence is actually important. In this regard, my intuition is that we have underestimated one particular type of power; taking it into account shows that the EU really is a global hegemon.

By the *de facto* Brussels Effect, I refer to EU's unilateral ability to regulate global markets by setting the standards in competition policy, environmental protection, food safety, the protection of privacy, or the regulation of hate speech in social media. Interestingly, the EU doesn't need to impose its standards coercively on anyone – market forces alone are sufficient. In fact, the EU is one of the largest and wealthiest consumer markets, supported by strong regulatory institutions. There are few global companies that can afford not to trade in the EU, and the price for accessing the single market is adjusting their conduct and production to EU standards, which are often the most stringent standards globally. Importantly, often these firms choose to abide by the same rules across other markets too, so as to avoid the cost of complying with different regulatory regimes.

The *de facto* Brussels Effect is complemented by a *de jure* Brussels Effect, i.e., the adoption of EU-style regulations by foreign governments. This might be the result of lobbying by local companies that already comply with EU rules and standards, but there is a broader set of mechanisms that transmit EU rules to foreign jurisdictions. Indeed, the EU rules often appeal as a template, due to EU's overall political influence and bargaining power coupled with its experience, expertise, and willingness to extend technical assistance and engage in capacity building. More prosaically, the civil law tradition of the EU typically leads to precise and detailed rules, drafted in multiple languages, which are easier to emulate in developing countries that may have less-skilled administrative agencies and judiciaries. The Brussels Effect presents these countries with an opportunity to outsource their regulatory pursuits to a more resourceful and experienced agency.

You make the point that your observation is not only about the EU and Brussels, but that the "Brussels Effect" might emerge in other jurisdictions too. What are its necessary and sufficient conditions?

The book attempts to lay down a generic theory of what it takes for a jurisdiction to be a global regulatory power, although the EU is now the only one who meets these cumulative conditions.

The starting point is that the jurisdiction needs to have a large and sufficiently homogeneous consumer market, so as to become an unavoidable trading destination. The next condition is that the jurisdiction needs to have sufficient regulatory capacity; being a regulatory power is a conscious choice pursued by a state rather than something inherent to its market size. The state must commit to building institutions and vesting them with regulatory capacity to translate its market power into tangible regulatory influence. Next, there should be a political will to deploy this regulatory capacity towards designing stringent rules; unlike the US, for instance, the EU has just such a political will.

The last two conditions help identify the policy domains where this kind of power can exist. First, one can only regulate unilaterally inelastic targets. Unlike capital, which can move elsewhere if regulation becomes cumbersome, consumers are not mobile, and companies need to abide by the rules applicable in the relevant market. This explains the difference between the US, which predominantly targeted the more elastic financial sector in recent decades, and the EU, which focused on regulating consumer markets and the environment.

The last condition does the most analytical work in the theory, as it allows us to explain why some companies follow the same rules globally in some circumstances while others take advantage of different regulatory regimes in others. This is the non-divisibility of production: the Brussels Effect emerges where companies conclude that it is in their interest to pursue a uniform conduct or production pattern as opposed to taking advantage of lower regulations in other markets.

However, you also claim that there are companies for whom it would be feasible to divide their production patterns, but that choose not to do so, for reputational reasons.

Indeed, sometimes companies just want to retain a uniform global brand. Moreover, firms can send the markets

and consumers a valuable signal by associating themselves with high standards across many areas of regulation, be it by listing their company in a stock exchange that holds them to more stringent reporting requirements or by adhering to high environmental, human rights, or labor standards. In this way, firms can enhance their legitimacy, obtain reputational gains, and win over consumers whose values drive their customer behavior. Some firms cannot afford sending a signal to some consumers that their interests are less taken care of than those of European consumers.

In fact, there are many further reasons that push companies towards non-divisibility. For instance, legal non-divisibility refers to legal requirements and remedies as drivers of uniform standards. It typically manifests itself as a spillover effect that follows from the corporation's compliance with the laws of the most stringent jurisdiction. Global mergers provide an illustrative example in that they cannot be consummated on a jurisdiction-by-jurisdiction basis. Technical non-divisibility refers to the difficulty of separating the firm's production or services across multiple markets for technological reasons. It often applies to the regulation of data privacy, where the GDPR's "privacy by design" principle increasingly ensures that products are designed to a single standard, with the EU determining the default settings as the most stringent regulator of data protection. Finally, even where companies are able to identify a technological solution that allows them to produce different product varieties for different markets, the underlying economics, and in particular the importance of scale economies, can often make such divisions untenable.

We read your book as an interesting attempt to rethink power. You come up with a very broad theory of power. One can't but wonder, however, whether it is not overly reliant on economic factors. For instance, isn't EU's perceived legitimacy, as an organization promoting certain ideals, important in explaining its hegemony?

I think that the five conditions explain how markets expand EU's regulatory capacity. However, this is clearly not only a story about bureaucracy and regulatory capacity.

The idea of the EU being perceived as a legitimate regulator comes down to whether the values reflected in its regulations are embraced by governments, companies and consumers. Partially, the answer determines whether companies themselves would be willing to be seen as following certain rules and standards. This is clear in the tech industry, where companies now want to be seen as being associated with the values embodied in the EU rules. This is the reason why they do not adopt, for instance, the more stringent Chinese rules on free speech online. US techno-libertarianism is now widely held to be obsolete, while the Chinese digital authoritarianism is inacceptable; therefore, the best way to gain their consumers' trust might be to subscribe to EU rules and underlying values, which are generally well thought and produced through an appropriate legislative process.

EU's perceived legitimacy is also clearly important for the *de jure* Brussels Effect; indeed, foreign governments are only comfortable with emulating the EU because it is perceived by their own citizens as a good example to follow.

What about multilateral cooperation – is there any place left for it from the perspective of the global regulatory hegemon?

The book might be read as challenging the prevailing narrative that views the EU as a champion of multilateral cooperation and universal norms, painting a stark contrast with the United States' unilateralism in international affairs. Through the Brussels Effect, it is the EU, and not the United States, which best deploys the market forces to unleash its unilateral global regulatory power. What is distinctive about the unilateral Brussels Effect is that it is a peaceful and quiet power. The EU doesn't need to rely on coercion or cooperation. It doesn't need to get the governments to agree on those rules, as the market incentives push the companies towards complying. In contrast to traditional channels of international influence (e.g. economic sanctions), regulatory power is one of the few areas where unilateralism still works.

This doesn't mean that this is the only way through which the EU wants to exercise its regulatory power. The EU also wields norm-setting power through a number of different channels such as trade agreements and participation in international institutions and transnational government networks. Clearly, it has a substantial vested interest in the resilience and continuation of the liberal international order. The EU is very active in international organizations and attempts to enter into multiple multilateral agreements. However, here the EU is forced to secure a political agreement, which is hard to achieve even within the EU itself. Treaty-driven harmonization is particularly difficult if states do not agree on the benefits of global standards. Their enforcement is also tricky, as there is no guarantee that treaties will be implemented or enforced. The existing divisions that make multilateral cooperation challenging appear to only be growing.

This being said, the theory developed in the book does suggest that the EU is expected to rely on cooperative instruments in situations where the Brussels Effect fails to reach EU corporations' important export markets, as, in the absence of a level playing field, the EU's export-oriented firms face difficulties penetrating these markets. Similarly, the theory would suggest that the EU is more likely to pursue treaty-driven harmonization in areas where the EU has limited regulatory capacity and hence a diminished ability to generate regulations.

Does the European Court of Justice (ECJ) play any role in the Brussels Effect?

The ECJ has often been asked to rule on the extent of the regulatory powers of the EU and has been on balance pro-integration, enhancing the powers of the Commission and other EU institutions. Indeed, many central concepts

of EU law—including the supremacy of EU law and its direct effect—stem from ECJ rulings. In recent years, it has also been asked to directly rule on the extraterritorial effect of EU rules. The right to be forgotten is a good example: prior to its inclusion in the GDPR, it was promulgated by the ECJ. However, my feeling is that mostly the ECJ has an internal focus, any external effect being either an afterthought or an instance of the "Brussels Effect".

Beyond this interpretative role, the European courts have provided an institutional template for regional courts. Indeed, some studies show that there are multiple copies of the ECJ around the world. Moreover, foreign courts often cite the ECJ rulings in multiple areas. Foreign jurisdictions also tend to follow the EU's lead and engage in "copycat" litigation in cases where the effects of some conduct—such as anticompetitive practice extend across multiple markets, especially where EU investigations alert foreign governments and plaintiffs of the conduct that calls for enforcement action, or where relying on EU investigations lower the costs of enforcements for jurisdictions with fewer resources.

As you clearly point out, market power alone is not enough. For instance, the US has an important consumer market – indeed, it already had one before the EU was created. It also has the regulatory capacity, and a legal tradition close to the European one. However, it does not seem to enjoy the same kind of influence, mostly because it doesn't pursue the most stringent standards. What is special about the EU and its normative agenda?

The main reason for the European appetite for regulation is that it has been the primary tool of European integration. There has always been a dual motivation behind regulation: not only setting the substantive rules for a particular field (e.g. environmental regulation), but also building a single market that allows for a harmonized regulatory environment and thereby frictionless trade across the member states. This dual role has paved the way for compromise, as parties across the political spectrum, businesses and consumer organizations alike can fall behind regulation as a means to increase integration. In a way, regulation is the only means for the Commission to intervene in the economy, given its tight budgetary constraints restricting EC's ability to pursue direct-expenditure programs; when the Commission seeks to expand its competencies, it tends to do so via regulation.

The second reason is that Europeans trust the market less than Americans do, and have generally structured their economies so as to allocate more rights to the state as opposed to the individual. Furthermore, the EU does not share the US' reliance on private litigation and tort liability rules to deter firms from placing unsafe or otherwise harmful products on the market. Instead, the EU relies on the government to promulgate, and then enforce, ex ante regulations, such interventions being often perceived as legitimate and desirable.

As to the content of the rules, there are several reasons why EU regulation usually favors "harmonizing up" rather than "harmonizing down".

First, stringent standards were often adopted to reassure the European public that economic integration would not be pursued at the expense of consumer health and safety or environmental quality. Moreover, Europeans generally subscribe to a "precautionary risk culture". Indeed, the EU and the United States both share the administrative culture of analysing the costs and benefits of regulatory action before enacting a new regulation. However, the adoption of this "impact assessment" is more recent and hence less entrenched in the EU. When regulatory risks are uncertain and hard to accurately quantify, the EU is more comfortable intervening, even based on precaution.

Upward harmonization has also been politically more palatable among the states that already had the highest standards in certain regulatory areas. High growth rates and competitive economies in Northern Europe enhance these countries' ability to advocate for environmental regulations that do not compromise economic goals. They also have a strong incentive to Europeanize their standards so as to ensure that their domestic firms are not disadvantaged when competing in the European market.

When considering the views of the various key interest groups, harmonizing up as opposed to down also provides a fertile ground for compromise. Marrying each standard's economic purpose to its broader societal purpose helps build coalitions among different stakeholders. Even for businesses that would prefer laxer rules, upward harmonization remains preferable to discordant national standards, which inevitably increase costs and complexity.

What about protectionism? Might the Commission be engaged in protecting European companies from international competition?

Those skeptical of the EU's external regulatory influence often portray the EU as a protectionist actor, eager to impose costs on foreign firms in an effort to protect EU firms, especially regarding antitrust investigations of the tech sector. However, a closer look at the relevant cases suggests that European companies are hardly the main beneficiaries of the Commission's competition actions. In most instances, the winners are other US companies, including the ones who had filed complaints with the Commission as affected competitors in the first place.

We understand that, in a way, engaging in an extensive regulation is almost an existential concern for the EC. Does this mean that the Brussels Effect is consciously pursued?

For a long time, the resulting Brussels Effect was just an ancillary and largely unintended by-product of a regulatory agenda that was driven by internal motivations. However, the Brussels Effect itself proved to be useful for furthering European integration. For one, it helps the Commission le-

vel the international playing field, thus mitigating concerns from EU firms of their global competitiveness. This helps win broader support for further EU regulation. For another, due to the Brussels Effect, the EU increasingly becomes a global standard setter, which enhances the legitimacy and influence of its standards, both at home and abroad. The Brussels Effect also offers an important foreign policy instrument, compensating the Commission for the lack of power it otherwise has in external affairs.

The external dimension of the single market was only fully realized when the EU's trading partners, including the United States, expressed concerns that the single market might impose costs on third countries. Indeed, various statements from EU institutions point to a growing awareness of the external effects of the single market, and the realization that this dimension presents the EU with opportunities.

The economic goal of ensuring a level playing field for, and protecting the competitiveness of, European industry likely goes a long way in explaining the EU's willingness to externalize its regulatory agenda. However, the EU may also be motivated by a desire to obtain greater legitimacy for its rules through globalizing them. It may also attempt to replicate its own governance model and regulatory experience abroad. The EU's own successful experience in creating a common market has encouraged it to pursue a global order based on those same rules. The EU subscribes to a view that trade liberalization fails to achieve economic goals without a simultaneous harmonization of policies. Finally, being able to set norms globally allows the EU to prove to its critics that it remains relevant as a global economic power. Embracing the role of a regulatory hegemon reinforces the EU's identity and enhances the EU's global standing even in the times of crises where its effectiveness and relevance are constantly being questioned.

Whatever the motivation might be, you claim that the result is a certain convergence on stringent standards across the globe. How does your observations fit with the prevailing studies on regulatory competition, which usually point to a race to the bottom?

Thinking about the Brussels Effect detaches globalization from the idea of deregulation and the race to the bottom. It shows how the benefits of uniform production across the global marketplace incentivizes companies to adjust their regulatory standards upward rather than downward.

From this perspective, the Brussels Effect builds on the so-called "California Effect", expanding its dynamics from a US federal system to a global context. However, it also outlines the precise conditions that allow an upward regulatory convergence to emerge. The theory underpinning the California Effect recognizes the importance of market size and scale economies as a source of a jurisdiction's external regulatory clout. Yet it fails to acknowledge factors such as regulatory capacity and inelasticity as key components of the theory and overlooks factors other than scale economies that can prevent a company from producing different varieties for different markets.

Finally, the literature on regulatory competition generally focuses on the "*de jure* regulatory convergence", which fails to account for regulatory convergence that takes place in the absence of formal changes to legal rules. In fact, the *de facto* convergence can take place in the midst of a great-power disagreement. When the conditions for the Brussels Effect exist, rival standards between two equal powers fail to materialize. Instead, the outcome of the regulatory race is predetermined: the more stringent regulator prevails.

One cannot but think that the conditions you explain are specific to the institutional, economic and political features of the EU. Does it mean that a similar effect cannot be expected in Washington, or indeed in Beijing?

A similar effect might in fact emerge elsewhere, although the reasons for engaging on the stringent regulation path may differ. The US and China are not completely oblivious to regulatory competition. Indeed, we already see such competition for the regulation of technology, where every one of those jurisdictions attempts to assert its own philosophy. The US tries to enshrine its techno-libertarian approach, making sure that no regulation would compromise the free internet and incentives to innovate, while China makes significant incursions by asserting its authoritarian vision.

To be sure, the political economy behind the rise of the regulatory state might be different in other jurisdictions, but the endpoint could very well be the same. The US has not been willing to regulate from the beginning of the 1990s, but there seems to have been a change of heart in the past several years. While predictions are difficult, I expect that the EU will turn out to be on the right side of history, and that other jurisdictions will move towards accepting that significant dangers arise out of an unmitigated free market, prompting the need for regulation.

However, can it be expected that a similar effect would emerge in countries that do not follow the same approach to social regulation? China, for example, seems to use technical standards more than legal regulation; indeed, it seems that using the law as the main tool of social regulation is very much a European and US tradition. Couldn't there already be a "Beijing Effect", deployed through other means?

Thus far, Beijing has not chosen EU's path for becoming a regulatory hegemon. It chose to use infrastructure building as a way to export its standards; this is indeed a different logic, and the "Beijing Effect" might be something altogether new, rather than a variant of the Brussels Effect. However, if Beijing were to choose to enhance its influence by following the EU model, the five conditions for the emergence of the Brussels Effect might provide a clear roadmap, if China also truly opens its markets to foreign companies.

Nevertheless, I think that even in such circumstances the Beijing Effect would take a long while before emerging. The reason is that the regulatory capacity is tied to GDP per capita rather than GDP: the Chinese consumption per capita is not high enough, for the time being, for consumers to be concerned about stringent protective regulations as European consumers do.

In some areas, and most importantly the regulation of digital platforms, these jurisdictions seem to actually be drifting apart. Might the reason be that there is no common ground in this area, meaning that such convergence is indeed an important part of the Brussels Effect? European hateful speech may very well be US free speech, and both have an incentive to be the first ones to set the prevailing rules.

We might witness an increased balkanization of the Internet through the emergence of competing regulatory centers. This is inevitable to some extent – it has happened already, as attested by the fact that there are other dominant digital platforms in China or in Russia. Partially this is explained by the lack of agreement on fundamental principles in these areas.

This being said, a full balkanization is unlikely. Taking your example, some Silicon Valley companies do actually follow the EU more stringent rules, staying away from the full extent of the more permissive US doctrine of free speech. However, content moderation will be a great challenge going forward, for it is an area where values clash and decision making in concrete instances is difficult, especially considering the amount of relevant data.

Based on your research, we understand that international power might emerge from an interplay between legal and economic forces. Indeed, this kind of power allows the EU to set global standards protecting some values dear to European consumers and citizens. But how long can it be expected to last, in light of the expected evolution of its relative economic power? What if the global markets do get balkanized, perhaps under Chinese pressure?

It is indisputable that the EU will be a smaller market going forward; its relative share of the global GDP will go down, just as that of China's will increase. I expect, however, that EU's regulatory power will outlive its pure economic might.

One reason is that it takes a significant amount of time and energy to build a regulatory capacity similar to the one embedded in the "Brussels Effect". Moreover, the willingness of a jurisdiction to set stringent standards depends on the GDP per capita more than on relative economic power. It might be that by the time Chinese GDP per capita becomes sufficiently high, its economic growth will slow down to the point where the government would not be willing to take any risks of further slowing down growth by creating regulatory barriers. Finally, China heavily relies on export-driven growth, while it is the import markets that get to set the global standards.

In any case, to the extent that China is building its internal regulatory capacity, we actually observe that it is copying the EU model; here, its standards and values are therefore entrenched and institutionalized through the de jure "Brussels Effect"; in the end, the *de facto* market governed by EU-style rules and standards becomes larger that the European consumer market.

I do not expect the Brussels Effect to unravel due to the balkanization of global markets. For one thing, Europeans have in fact been quite skillful in engaging with China, at least where it is possible to do so without compromising its values. There might be some areas, including the regulation of digital economy, where the required consensus is lacking. In those instances, global markets may be balkanized and the EU will not be able to exert any regulatory influence over Chinese companies. But I am hopeful that increased transatlantic cooperation in technology regulation will allow the EU and the US to provide a normative counterweight to China, and hence limit its efforts to deploy and export its digital authoritarian model abroad. More generally, while the liberal international order might be on the verge of unraveling, the Brussels Effect challenges the view that globalization is necessarily in retreat. It shows that international norms may continue to emerge in many policy areas even in the absence of multilateral cooperation, for the Brussels Effect is a way to mitigate the demise of international cooperation and institutions in some policy areas.

This being said, there are indeed multiple existing and emerging threats and challenges that have the potential to undermine the conditions sustaining the Brussels Effect in the future. In particular, the EU's relative market size will diminish. The EU's relative regulatory capacity could weaken, whether as a result of Brexit, due to the threat posed by populist anti-EU parties or following China's relative increase in regulatory capacity. The EU's willingness to promulgate stringent rules could similarly be undermined, in particular if the populists' anti-EU agenda leads to attempts to repatriate powers back to the member states. The non-divisibility of production could become less common due to technological developments such as additive manufacturing or geo-blocking. Further, the weakening of the *de facto* Brussels Effect could be accompanied by the fading *de jure* Brussels Effect as the anti-globalization sentiment hinders treaty making and institutionalized cooperation.

These forces and challenges combined may, over time, corrode the most potent version of the Brussels Effect, squeezing the EU's regulatory hegemony from the outside as well as from within. However, it is unclear if any of these developments will challenge the Brussels Effect in the immediate future. It is also highly plausible that the EU's regulatory machinery will simply hum along, extending EU's regulatory hegemony into the foreseeable future.

Interview by Joachim-Nicolas Herrera and Vasile Rotaru

Stephen Breyer • Associate Justice of the Supreme Court of the United States

The Supreme Court of the United States: Power and Counter-Power

Some years ago, the Chief Justice of the Supreme Court of Ghana came to visit our Court[1]. She wanted to learn how the Court had advanced and protected civil rights in America. She seemed particularly interested in this question: Why does the American public do what the Supreme Court says? Implicitly she also wanted to know why, or how, the Court could act as a check upon others in Government, even Presidents, where there is serious disagreement. That question remains important.

Put abstractly, the Court's power, like that of any tribunal, must depend upon the public's willingness to respect its decisions, even those with which they disagree and even when they believe a decision seriously mistaken. The importance of this respect matters most when a decision of the Court strongly conflicts with the views of those in other Branches, most notably, the President.

This article will expand on the importance of public acceptance in safeguarding the role of the judiciary. The first part, to provide context, will set forth several examples illustrating the increase in the public's acceptance of the Court's decisions, and hence an increase in the Court's power. The second and third parts will discuss more directly the Court's related power to act as a check upon other parts of the government. I shall illustrate the kinds of checks that I have in mind. I shall also illustrate how the Court's power to check has grown over time. And I shall describe certain related, potential difficulties that may arise in the future. I will then propose a few steps the Court and public could take to help overcome these problems.

1. The Court's Power: In General

Why is it that some people will follow the suggestions, thoughts, even the orders of others? Long ago Cicero described an answer to this central question about power. He thought there were three possible ways to assure the obedience of those who live in a State: 1) the fear of punishment; 2) the hope of rewards or particular benefits; and 3) justice. This last way, justice, would convince people that those who govern deserve obedience. Whether Cicero's view does or does not apply in general to government, it does apply to the U.S. Supreme Court. The Court's power to punish or to provide rewards (or benefits) is limited. Its power to act justly, at least in my view, does play a major role in obtaining the public's respect and consequent obedience. The Court's history illustrates how that is so. A few examples will help support this point of view.

In considering those examples, it is important to keep in mind how the law provides the Court with, at least, legal power. That power finds its major source in the U.S. Constitution as well as in the views of those who wrote it. The Constitution is a brief document. It has seven articles and twenty-seven amendments. It creates a representative federal democracy, a separation of governmental powers both horizontally (legislative, executive, judicial) and vertically (state/federal), equal respect before the law, protection of fundamental rights, and a guarantee of the rule of law. The Constitution's Framers had every right to admire their creation. But, as Hamilton pointed out in *The Federalist No. 78*, one Branch of government must have authority to assure that the other Branches act within the limits set by the Constitution. Otherwise, the document will have little effect; the Framers might as well have hung it on the walls of a museum.

Which Branch will have the authority to determine what limits the Constitution sets forth and when other Branches exceed them? The Executive Branch, namely the President? Is there not a risk that the President would simply decide that whatever action he takes is consistent with the Constitution? What about Congress? Its members are elected; they likely understand popularity. But what will happen when say, a criminal defendant or others benefitting from constitutional protections, are not popular? The Constitution, indeed law in general, applies to those who are not popular just as it applies to those who are popular. Can Congress be trusted to protect the latter, unpopular, group?

The Third Branch, the Judiciary, remains. Perfect, Hamilton might have thought. The judges understand law. They are unlikely to become too powerful, for they lack the power of purse and of sword. Hence the Judicial Branch and the Supreme Court in particular should have the last word. The majority of the other Framers agreed with Hamilton. And his view was essentially that which John Marshall and the Supreme Court adopted in the famous case, *Marbury v. Madison*, 5 U.S. 137 (1803).

However, the letter of the Constitution and the intentions of the founders are only partly the source of the Supreme Court's power, only partly because neither Hamilton nor the others could answer the critical question posed

1. A revised version of this article will be published by Harvard University Press next fall.

by Hotspur in Shakespeare's *Henry IV*. Owen Glendower, a commander of Wales and a mystic, says: "I can call the demons from the depths of the sea. "I can call the demons from the depths of the sea," replies Hotspur, "and indeed anyone can, but do they come when you call them?"

1.A. Lack of Power

Indeed, on one of the first occasions when the Court and the President found themselves in conflict on an important matter, the President prevailed. Early in the history of the Republic a tribe of Indians, the Cherokees, lived in Northern Georgia on land that treaties guaranteed them. In 1829 gold was found on that land. The Georgians wanted the gold. And they took control of the Cherokees' land. The Cherokees and their supporters found an excellent lawyer, Willard Wirt. Wirt filed complaints in court. Eventually, the issue of territorial control found its way to the Supreme Court. And the Court decided the question.

The Court decided that the Cherokees had the legal right to control their territory and that Georgia lacked legal authority to do so. The State of Georgia, however, simply ignored the Court's decision. What did Andrew Jackson, the President of the United States, do? Nothing. He is supposed to have said, "John Marshall has made his decision; now let him enforce it." Jackson (and his successor) then sent federal troops to Georgia but not to enforce the Court's judgment. Rather, he sent troops to remove the Cherokees, forcing many of them to travel on the "trail of tears" to Oklahoma, where their descendants live to this day.

Will Presidents respect decisions of the Supreme Court when they strongly hold contrary views? The case was not a happy omen.

Supreme Court Justices long remained uncertain whether the Court could effectively enter a judgment that others strongly opposed. In 1903 Justice Oliver Wendell Holmes, Jr., summed up the problem in a decision that in effect refused to enforce the Fifteenth Amendment's guarantee that former slaves could vote. How could Holmes have done this? He wrote that the Court has "little practical power to deal with the people of the state in a body." He added, it is said that "the great mass of the white population intends to keep the blacks from voting." If that is so, a Court decision ordering the contrary would be "an empty form." The power to redress that evil must lie in the hands of the legislature and the Executive.

How far-reaching then is the power of the Supreme Court?

1.B. The Growth of the Court's Power

Let us now jump to 1954. In that year the Court held that racial segregation, practiced widely throughout the South, violated the Fourteenth Amendment's guaranty that the law must provide every "person . . . equal protection." Its decision, *Brown v. Board of Education*, sounds fine. But what actually happened next, in, say 1955? Virtually nothing. And in 1956? Almost nothing again. Congress did nothing. The President did little. And the South complied only minimally with the Court's ruling.

In 1957, however, a federal trial court judge in Little Rock, Arkansas, ordered the State to enroll nine black students at Central High, an all-white school. At the time of the school's September opening date a large hostile crowd surrounded the school. The Governor, Orval Faubus, announced his opposition to integration and sent state police to prevent the nine black students from entering the school. A standoff lasted several days. Journalists from across the world came to cover the event. The question on everyone's mind was: What would the President of the United States do?

James Byrnes, Governor of South Carolina, former Supreme Court Justice, wartime economic administrator, and a "moderate" on race, advised President Eisenhower, to do nothing. He told the President that if he sent troops to Arkansas, there could well be violence. He might have to occupy the South, and he would have a second Reconstruction on his hands. At best, the South would close all its schools. Herbert Brownell, the Attorney General, took the opposite position. He told the President he must send troops, at the least to protect the "rule of law." In the end, the President decided to send 1 000 parachutists, members of the 101st Airborne Division. At the time, nearly all Americans recognized that Division as heroes of World War II's invasion of Normandy and the Battle of the Bulge. The parachutists took nine brave black students by the hand, and they walked together into the white school. So, the Court won this confrontation, did it not? It did, but it won *with* the cooperation of the President of the United States.

Moreover, the story does not end here. The soldiers could not stay at the school forever. After several months they withdrew. Local authorities then tried to re-segregate the school. The Supreme Court in the case of *Cooper v. Aaron* rejected their attempt. It ordered immediate integration. But local authorities would not comply. To the contrary, they moved in the opposite direction. They closed Little Rock's high school. That year no student, neither white nor black, received an education.

The situation could not last. This was the time of Martin Luther King Jr., of bus boycotts, of freedom riders. The Nation had awakened to the injustice of racial segregation. And after quite a few years, racial segregation imposed by law ended in the South of the United States.

I once asked Vernon Jordan, a great civil rights leader, whether the Court had actually played a major role in ending segregation. After all, even in the Court's absence would there not have been enormous pressure to end that system, from civil rights leaders, from the rest of the country, indeed from the entire world? He answered that, of course, the Court had been critically important. Congress, after all, had done nothing. At the very least, the Court had provided a catalyst. With the help of others, it

had succeeded in dismantling a significant pillar of, if not racism, at least racism's legal face. The Court had played, not the only role, but an essential role in ending legal segregation. With the help of the President, civil rights leaders, and a great number of ordinary citizens, it had won a major victory for constitutional law, for equality, and above all for justice itself. Justice itself, the justice of the Court's integration decisions, helped to draw respect for, and increased the authority of, the Court. I cannot prove this statement. But I believe it.

1.C. Example: An Atmosphere of Respect

A further example to which I call attention is the Court's Year 2000 decision, *Bush v. Gore*, 531 U.S. 98 (2000). It is debatable whether that decision determined who would be President of the United States. But many thought that it did. At the least, the decision was a highly important one, potentially affecting vast numbers of Americans. The Court divided 5-4. I did not agree with the Majority. And, I wrote a dissenting opinion.

But Harry Reid (the Senate leader, a Democrat who likely also thought the decision wrong) later said that the most remarkable feature of the decision may have been a feature on which few had remarked. Despite its importance, despite the belief (held by half the country) that it was misguided, the Nation followed the decision without violent riots, without the throwing of stones in the streets. And the losing candidate, Al Gore, told his supporters, "Don't trash the Supreme Court".

These facts suggest that obedience to the Court's decisions, respecting those decisions even when they are wrong, has become close to habitual. Americans find it a normal attitude to take. Indeed, they find it normal to the point where they rarely realize that it is simply a custom, a habit. As the air around us, unnoticed, allows us to breathe, so this habit allows the rule of law itself to flourish.

Now that you have an overview of the power of the Court, let's move on to the Court's role as a counter-power.

2. The Court as a Check

By "counter-power," I mean the Court's relations with the other two political branches, Congress and the President. I would focus in particular on the President and his ministers. In order to better understand this subject and to realize the potential tensions between these three branches, one must remember the matters that are submitted to the Court.

2.A The Interpretation of Words in a Federal Statute

For one thing, most of the cases the Court decides concern the interpretation of words in a federal statute. Does the word "costs," for example, in a statute requiring a losing party to pay an education-related lawsuit's "costs," include the cost of experts that the winning party hired? Members of the Court sometimes disagree about the proper interpretation of these statutes. But normally those disagreements reflect differences in methods of interpretation that are not political in nature. Different jurisprudential views lead to differences in result.

Nearly all judges use the same basic interpretive tools. They will consider the statute's text, its history, relevant legal tradition, precedents, the statute's purposes (or the values that underlie it) and the relevant consequences. Different judges may tend to give different weight to one, or another, of these tools. Some judges, for example, place predominant weight upon text and precedent; others place greater weight on purposes and consequences. Judges may also differ about, for example, just what a statute's purpose is or just what consequences will likely flow from a particular interpretation.

These differences will only rarely have a major effect in the political realm or on the relation between Court and President. For, even if a President very much disagrees with the Court about the interpretation of a statute, he can ask Congress for a new law that will take his position. That fact often transfers disagreement from the judicial to the political arena.

I cannot say "always" because some statutes may be difficult, if not impossible, for the political branches to change (those forbidding discrimination, for example). But still, disagreements about the meaning of words in a statute *often* become (after the Court's decision) a political matter for the political branches (and not the Court) to resolve.

2.B. The Review of Regulations Promulgated by the Executive Branch

For another thing, many cases that involve the Executive Branch concern the meaning and legality of regulations that the Executive Branch has promulgated. Some of those cases may raise important questions about the President's power. But far more often they will require the Court to determine, for example, whether the Executive has followed proper administrative procedures, whether the Executive has properly taken account of the views of interested citizens, or whether the justifications the Executive has given for its course of action are sufficiently reasonable. A Court determination that a President's regulatory or administrative decision is unlawful will only rarely lead to serious conflict between the Court and the President, for normally the decision does not prevent the President from redoing the action, this time following proper procedures.

The Court, for example, recently found unlawful two Executive Branch decisions. One concerned the Executive's desire to place a question about citizenship on the decennial census form. The other revoked an earlier Executive Branch program that allowed certain young undocumented persons to remain in this country. The Executive lost both cases in the Supreme Court. It nonetheless remained open to the Executive once again to decide whether it should take these, or similar, administrative actions,

this time lawfully following requisite administrative procedures. Thus, serious disagreement between Court and President is muted.

2.C. The Constitutional decisions

A serious conflict between Court and President is more likely to occur when the Court makes a constitutional decision, for example, when it applies to presidential actions the constitutional limitations that accompany the Constitution' highly general words, such as "freedom of speech" or "freedom of the press," or simply "liberty."

When different Branches interpret these constitutional words differently, the Court will normally have the last word. Neither the President nor Congress can lawfully change the Court's constitutional interpretations. Two features of constitutional interpretation nonetheless reduce (though they certainly do not eliminate) the risk of overt conflict. The Constitution does not tell citizens what they can, or cannot, do. It mostly tells *governments* what they can or cannot do. It thereby sets limits confining government action. And most actions that citizens want governments to take (or not to take) fall within those limits. The Court, policing the limits, is a kind of "border patrol." Given the wide scope of decision-making that the Constitution leaves to democratic political processes, only a comparatively few (though important) decisions will have the kind of major public "ballot box" effect that leads elected officials to react strongly.

Despite the decision-related features that limit the risk of serious overt conflicts, major important conflicts between Court and President can and do arise. Take as an important example constitutional questions about the scope of protecting basic liberties in time of war.

Again, consider Cicero. He once said, "*inter arma enim silent leges*," "In times of war, the laws fall silent." President Franklin Roosevelt's Attorney General, Francis Biddle, brought this statement up to date during World War II. He said, "The Constitution has not greatly bothered any wartime President" (at least not at the time). These words imply serious limitations upon the Court's wartime protective power.

During World War II, for example, the Court considered the constitutionality of a Presidential order deporting 70,000 American citizens of Japanese origin from the West Coast to camps, rather like prison camps, in intermountain regions. The Court upheld the order by a vote of 6-3. Today most of us would believe that the majority was clearly wrong and committed a serious injustice. Why did it reach its decision? Justice Black apparently said to the others at their Conference, "Somebody must run this war. It is either Roosevelt or us. And we cannot."

Today, however, the Court's refusal to become involved in highly important war-related or security-related matters, has significantly declined. Several years after World War II ended, the United States was again at war, this time in Korea. President Truman, in order to assure the continued production of a wartime necessity, namely steel, tried to take over privately owned steel mills. The Court considered the matter, and it held that the President, in the circumstances, was acting unconstitutionally. The President accepted and followed the Court's decision.

One might downplay the significance of the case. President Truman was far less popular than President Roosevelt had been. The Korean War was not World War II. But one cannot deny the fact that the Court's action does not fit Cicero's description. The Court showed that it could impose a constitutional check upon the President, even in time of war.

The Court further abandoned Cicero in four cases arising out of prisoners of war held at Guantanamo Bay in Cuba. The plaintiffs, detained after their capture in Afghanistan, were not very popular in the United States. The defendants, such as the President and the Secretary of Defense, were considerably more popular and certainly far more powerful. Those circumstances did not prevent the Court from deciding each of the four cases in the plaintiffs' favor. They included a case in which the Court held unconstitutional a congressional statute denying the prisoners access to the courts. The Executive Branch, in each case, accepted the Court's decision. The President, George W. Bush, said, "We'll abide by the Court's decision. That doesn't mean I have to agree with it."

These, along with the earlier examples, help to illustrate an evolution in the views of Presidents, branches of government, judges, and public opinion. The public now expects Presidents to accept decisions of the Court, including those that are politically controversial. The Court has become able to impose a significant check - a legal check - upon the Executive's actions in cases where the Executive strongly believes it is right.

3. The "Check" and the Future

Suppose that I could stop my account here. Were that so, I would have described a history in which the American people gradually adopted customs and habits that led them to respect the rule of law even when the "law" included judicial decisions with which they strongly disagreed. The history would also be that of a Court that gradually expanded its authority to protect an individual's basic constitutional rights, even during times of war. I would certainly not claim that this history's theme has always been one of progress, for the United States, including its judicial system, has had many ups and downs, including slavery, a civil war, segregation (and Court decisions such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded* (1868)) to name only a few. Still, the public has accepted a rule of law. And, so far the public seems to have maintained its confidence in the Court. A Pew Research poll showed, for example, that in 2019 62% of Americans held a favorable opinion of the Court (about the same percentage as in 1985).

However much I might like to tell this story, I cannot, for matters are not that simple. Nor is the future ever certain. We cannot now know what future historians will write about the public's acceptance of the Court, let alone the rule of law.

Are there significant features of American society that threaten acceptance of a rule of law, at least in so far as judicial decisions embody, and explicate, that law? There are, at least, two, which to my mind provide cause for concern. For one thing, we see a growing public suspicion and distrust of all government institutions. The Pew Research Center reports that in 1958, 73% of all Americans trusted the federal government's decisions most of the time. By 2019 that percentage had fallen to just 19%.

At the same time, we have seen a gradual change in the way the press (along with other institutions that comment upon judicial work) understand the judicial institution. Their understanding is important, for it is only through their writing that the vast majority of Americans learns just what courts, including the Supreme Court, do. Several decades ago, for example, few if any of these commentators, when reporting a decision, would have mentioned the name or political party of the President who nominated a judge to office. Today the press does so as a matter of course. Going further, it systematically labels a judge as "conservative" or "liberal." And, Senate Senators, divided along party lines, describe a nominee as too "liberal" or too "conservative." What they say, reported by the press to their constituents, reinforces the view that politics, not legal merits, drives Supreme Court decisions.

These are more than straws in the wind. They reinforce the thought, likely already present in the reader's mind, that Supreme Court judges are primarily political officials or 'junior league' politicians themselves rather than jurists. The judges tend to believe that differences among judges mostly reflect not politics but jurisprudential differences. That is not what the public thinks.

And if the public believes to the contrary, we should not be surprised if political parties, too, see in the nomination of a judge an opportunity to extend their political influence. Nor should we be surprised if proposals for structural change of the Court become a topic of general public concern. If the public sees judges as "politicians in robes," its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court's power, including its power to act as a "check" on the other Branches.

If so, what can we do to stop the attrition? Let me sketch a few thoughts about what judges themselves might do inside the Court as well as what I believe others might do outside it, in our broader society.

3.A. Internally

What can we do, we judges of the Supreme Court, to help maintain the confidence and respect (of both others in government and the public in general) that the Court has gradually obtained over the course of time?

As Hamilton pointed out, we have neither purse nor sword. We cannot easily reward nor frighten our fellow citizens. To obtain their respect we must rely upon decisions that reflect both practical wisdom and justice. I would emphasize five features of our work that reflect this aspiration and which judges normally try to keep in mind.

1. Do your job. I would add that, in doing so, do not look for or expect popularity. The job of constitutional judges like ourselves is to interpret or to apply the legal phrases that we find either in a statute or in the Constitution itself. Because the cases that we hear normally concern instances in which different lower court judges have decided a legal question differently, the scope of the words, their ordinary meaning and their application, is normally uncertain.

As I have said, judges have several tools available to help them with this interpretive work: the ordinary sense of words, history, tradition, precedents, purposes (or values that underlie a constitutional provision), and related consequences related to those objectives. Judges vary in the emphasis they give some of these tools compared with others, but virtually every judge will use each of these tools on one or another occasion.

An appellate judge's work then consists of: reading briefs (and other papers); listening to oral arguments; attentively following the discussion between judges and lawyers; discussing a case with colleagues; writing a draft opinion; submitting that opinion to colleagues for views and criticisms; and releasing the opinion to the public along with any concurring or dissenting views of other colleagues. The decision-making process does not, and should not, consider popularity, support, criticism, or the future opinions of trade groups, labor groups, or media. The most these groups can do to influence the result of a case is to present their arguments directly to the Court, usually in the form of *amicus curiae briefs*. Thus their views are relevant insofar as they translate into legal arguments. My experience of more than thirty years as a judge has shown me that, once men and women take the judicial oath, they take the oath to heart. They are loyal to the rule of law, not to the political party that helped to secure their appointment.

2. Clarity. For a Supreme Court Justice, more than good manners is at issue. Clarity in writing is a professional necessity. It shows a clarity of thought. Clarity helps convince the reader that the judge has decided the case according to reason and the law, not according to politics or caprice.

At the same time we must keep in mind the nature of the audience that will take particular interest in a decision. A bankruptcy decision, for example, will have a more technical readership than an opinion about freedom of expression. An opinion that will have a broad public audience requires writing that is simpler and more direct than does an opinion about bankruptcy.

3. Deliberation. Deliberation, as others have said, is not conversation (which does not seek to produce a decision), gossip, praise, or indignation. For a group of judges, such as our Court's Justices, "deliberation" has a goal. It involves weighing the arguments for and against different possible interpretations (or applications) of a phrase with the goal of arriving at a decision.

It is tempting to believe that there is a difference in the kind of deliberation undertaken by political officials (or by the people) and that of judges. The first concerns an action to be undertaken; the second concerns the justice of an action that already has been undertaken. A judge, Aristotle thought, "evaluates the justice of past actions."

This distinction often helps to characterize the work of appellate judges. Judicial opinions typically place importance upon characteristics of actions that took place in the past. But, it is less helpful as applied to the Supreme Court, particularly to its decisions that help determine the confidence that the public has, or will maintain, in the judicial institution itself. Decisions about the lawfulness of abortions or of a homosexual's right to work without discrimination rest upon analysis of prior fact and law, but they nonetheless have more to do with the future than with the past. Reconsider the problems of implementing integration along with the legal need to make the phrase "equal protection of the laws" meaningful. How could the Court have done the latter without taking account of the consequences of its decisions, along with the importance of successful implementation? Yet this kind of problem, infrequent though it may be, helps explain the legal need to consider consequences; and the resulting fact that, because the Court must in part look to the future, opponents of its decision may argue that it is acting like a legislature, not a court.

When deciding this kind of question, as is true of other legal decisions, judges draw upon their own jurisprudential views of proper interpretation and perhaps of the nature of law or of the Court itself. Different basic views can lead to differences of opinion among judges as to proper outcome. But the future is nonetheless at issue.

How does deliberation work in this kind of case? The oral arguments can help a Justice make up his or her mind. Moreover, the questions a Justice asks at oral argument will sometimes help other Justices understand his or her approach to the case as well as the problems he or she may have with particular proposed solutions. Ordinarily, however, deliberation among the Justices begins at Conference, held once or twice each week. There, the Justices will discuss the cases more formally, and they will try to arrive at preliminary conclusions.

The Conferences are confidential. Only the Justices participate. Each Justice, in turn, presents his or her point of view; and then there may be responses and more general discussion. The discussion is rarely completely open or far-ranging. Normally a Justice's point of view rests upon use of the tools I previously mentioned (text, history, tradition, precedents, purposes or values, and consequences). Normally, each judge arrives at the Conference with a point of view while remaining open to the possibility that it will change.

Perhaps the most difficult part of a deliberation for a Justice is not formulating a point of view as much as it is demonstrating a capacity to change that point of view when faced with the views of others. The success of a deliberation may depend upon a cliché: "Listen to others." When I worked in the Senate, on Senator Kennedy's staff, I learned one method, often successful, that helps bring together those who deliberate. When someone sets forth a point of view, you can ask him to explain it in more detail. When he does so, often he will say a few things, perhaps only details, with which you agree. You can then suggest that you work with that agreement and see if it will provide a basis for greater agreement. And often it does. (The Senator used to add, in speaking to his staff: "Do not worry about who gets the credit. Credit is a weapon. If you reach agreement, there will be enough credit to go around; and, if you fail, who wants the credit?") Certainly, the Court is not the Senate; nor is it a political institution. Nonetheless, this advice remains relevant.

4. Compromise. Because a judge's decision rests upon principle, it is often difficult for a judge to compromise. In many foreign courts, the court issues a single opinion in a case, without published dissent; compromise, being necessary, may, through force of habit, become easier to reach. But the American system finds its origins in that of England, where each judge would present his own opinion, giving his own reasons for reaching a particular result. We have taken something of a middle course.

I doubt that an unanimity requirement would work well in this country. At least it would not tend to make the public believe that the Court was always unanimous. Rather, many would think that disagreements remain but are hidden. And that attitude would decrease trust in the Court. Regardless, our system allows published dissents. And a draft dissent will sometimes (but not often) lead a tentative majority to change its mind and change the outcome. More often, a dissent leads a judge writing a majority opinion to improve that opinion in light of the criticisms that a draft dissenting opinion makes.

Although members of our Court can write dissenting and concurring opinions, they still must try to find at least five judges who will join a single opinion. There must be one opinion "for the Court," to guide the public. And that fact often means that compromise is necessary. There are different ways to reach a compromise.

The first one consists of deciding a case on narrow grounds (when broader grounds were available), deciding a case with less emphasis upon the basic jurisprudential principles that underlie it. Imagine a hypothetical example in which a Department issues a decree, and the decree is challenged on the basis that it is constitutionally

prohibited. If the decree is also inconsistent with ordinary law, one way to compromise would be to decide on that basis, instead of deciding the big constitutional question, where there may be major divisions. We should ask the question: decide the narrower issue but where there is more agreement, instead of the larger issue where there will be great divisions.

A narrow decision is not the only form of compromise. A Justice can "swallow" a dissenting view. He or she might decide, for example, to join a Majority opinion with which he disagrees (occasionally noting that he is doing so only to create a majority opinion needed for guidance in the particular case). He can write a dissenting opinion or memorandum and not publish it. He can decide not to have a view about granting a certiorari petition revealed to the public. He can refrain from writing a concurring opinion that would otherwise set out just where and how he agrees or disagrees with the majority's view. In most of these instances, the decision not to dissent gives a public impression of greater unanimity than actually exists.

When should a judge prove willing to compromise? Each judge must turn to his or to her own conscience to find an answer to that question. But, in doing so, a judge must take two general factors into consideration. For one thing, the judge should ask who is the primary audience for the decision: other judges, lawyers, the general public? Is that audience more likely to need to know the position of the Court, or is it interested in the personal opinion of different judges?

Moreover, there is only one Constitution of the United States. There is not a "Constitution according to Justice Scalia," or a "Constitution according to Justice O'Connor" or according to any other individual judge. It is what the Court decides, not what individual Justices think, that typically has the greater importance. Too many dissenting opinions risk diminishing the public's confidence in Court decisions. Many European courts do not issue dissenting opinions, primarily for that reason.

There is no treatise that tells a judge when, or how much, to compromise. Too little compromise risks substitution of an individual judge's views for the views of (and law made by) a court. On the other hand where there never (or only rarely) a dissenting opinion, the public (or at least the informed public), aware of the jurisprudential differences among different judges, would begin to doubt the sincerity of decisions that do not reflect that judicial diversity.

In either circumstance, the public's confidence in the Court itself, as a legitimate interpreter of laws, is threatened. Where do we find the happy medium? That is a conscience-based decision that each judge has to make. But I can say that I believe the more different are the jurisprudential views among a single court's judges, the more important compromise among them becomes.

5. Broader Perspective. Consider the minority of cases that concern important and deeply held social or political beliefs, such as abortion or freedom of religion. These cases often concern far more than technical legal issues. They also touch upon widely held beliefs, customs, habits, and practices. Thus, a large part of the general American public takes a greater than ordinary interest in what the Court decides. How should the Court decide that kind of case?

Justices in such a case begin with the gathering of raw material - textual analysis, history, tradition, precedents, and so forth - and they transform those raw materials into a judgment. That judgment is only to a minor extent a judgment about what has happened in the past. Rather, it is more an instruction (in respect to law and judicial action) aimed at the future. And, more than much of the Justices' work, it does not simply concern the actions or means for bringing about an agreed-upon ultimate end. It often brings into question the nature of the ultimate end that the judge or Justice must seek.

Where are Justices and judges to find those "ends," those ultimate objectives, which must guide them as they transform that raw material? They find them in the Constitution itself. In particular, they find them in the values that underlie that document and its provisions. That is what those who speak of the Constitution's "spirit" normally mean. The racial integration that the Court demanded in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955), for example, is not simply a logical conclusion drawn from the constitutional provision that insists upon "equal protection of the laws." It is also an affirmation of the value that underlies that provision; it is an affirmation of justice itself.

We can take other examples of the way in which underlying constitutional purposes can inform ultimate interpretive ends. Unlike some nations, the United States does not maintain an absolute commitment to secularism. Rather two provisions of the Constitution govern the relation of religion and public life. One of them forbids prohibition of "the free exercise" of religion. The other prohibits the enactment of laws "respecting the establishment of religion." These provisions, for example, allow Congress to open its sessions with a prayer, but they forbid government from subsidizing religious training. It is far from obvious how they apply to religious monuments placed on public property, say the government's placing the Tablets of the Law (i.e., the Ten Commandments) on the grounds of the Texas State Capitol or on the walls of a Kentucky state court. The Court had to decide this last mentioned question. And, in my view, doing so required the Court to look to the primary objectives of the Religious Clauses.

Take another example, one related to the constitutional guarantee of free speech. That guarantee is necessary in a representative democracy, for it allows the public to develop and to transmit to those whom they elect different thoughts, ideas, criticisms, and points of view. It guarantees "a marketplace of ideas" and a "transmission belt" that

carries expression from a person to his or her community and, eventually, to her elected representatives. Reference to both these basic purposes can help resolve difficult legal questions. Why, for example, does the Court interpret the constitutional term "free speech" more strictly 1) when a government rule or regulation limits the scope of the "market place of ideas" or the "transmission belt" than 2) when a government rule or regulation limits the scope of speech as part of, say ordinary economic or commercial regulation? In the first instance, "free speech" protects necessary elements of a workable democracy; in the second, it considers the rule or regulation that democratic processes have helped to bring about. That is a good reason for interpreting the First Amendment as applying more strictly to the first kind of restriction than to the second.

I could say more about the examples. They are controversial in their details. But I use them only to suggest that reference to basic underlying constitutional purposes can help answer difficult interpretive questions. Because the Constitution itself seeks to establish a workable democracy and to protect basic human rights, reference to those purposes also moves Court decisions in the direction of Justice (with a capital "J"). In this way, not in seeking popularity with one group or another, the Court can preserve, perhaps augment, public confidence in its authority.

3.B. Outside the Court

What can people outside the Court do to help maintain the public's confidence in the Court's and the law's authority? As I said in response to the Ghanaian Chief Justice's questions, a nation's willingness to follow the law and to respect the courts is a matter of custom and habit. Those habits include a willingness to follow judicial decisions with which you disagree, that may affect you adversely, and which may be wrong (after all, in a 5 to 4 decision, some judges must be wrong).

Every month I see illustrated Americans' willingness to respect the Court's authority and how that willingness helps keep our nation together. I keep in mind the fact that we are a nation of nearly 330 million people of every race, every religion, many different national origins, and holding virtually every possible point of view. I regularly see from the Bench these highly diverse groups of people trying to work out their differences through law, rather than in more brutal ways. I then understand the Founders' hope that the Constitution would last and become a national treasure.

What can we do to maintain this habit, this custom, this treasure? Judges and lawyers alone cannot succeed. Rather, the 329 million Americans who are not lawyers or judges must understand the need to maintain that habit, and they must accept it. We need to explain it to our children and to our grandchildren, hoping that they too will understand its importance.

When I describe to students what I believe we can do, I emphasize three general directions our efforts might take.

The first, and most obvious, concerns *education*. Those future generations must understand how our government works. They need to know that they are, and will be, part of that Government. They need to know what the rule of law is and how (from the time of King John and the Magna Charta) the rule of law offers protection against government action that is arbitrary, capricious, autocratic, or tyrannical.

The second concerns *participation* in the public life of a Nation with a highly diverse population and that rests upon a rule of law. There are many different ways to participate in public life. One can serve on a school board, a library committee, an arts council. One can participate in a neighborhood improvement project, help teach children to read, work for the improvement of parks and playgrounds. One can vote, campaign, run for office. The possibilities are endless.

The third concerns *practice*. The Constitution creates methods for resolving differences through participation, through argument and debate, through free speech, through a free press, and through compromise. Students and adults alike, however, must practice the skills of cooperation and compromise to learn them and to keep them.

Education, participation, practice in cooperation and compromise aim to build public trust in the working of our democratic institutions. Albert Camus in The Plague helps us understand why that trust, as well as why a rule of law, is so important.

At the end of that book the narrator explains why he has recounted the history of the plague that ravaged Oran (perhaps an allegory of the Nazis in France). Because, he says, I want readers to know how the people of Oran reacted, for better or for worse, to that plague. Because I want them to know what a doctor is, a person who, without discussion or theorizing, directly and simply brings help to those who need it. Above all, because the plague germ never dies. It goes into remission, lurking in the attics, the file cabinets, the closets, only to re-emerge and again send its rats, for the learning or the misfortune, of man, into a once-happy city.

The rule of law is an important weapon, though not the only weapon in our continuous efforts to fight that plague germ.

I am an optimist. I believe we can rebuild trust in institutions. The rule of law is sturdy. I hope and believe that the Court will retain its authority. But to maintain that trust, authority and the rule that supports the use of law itself, requires work. As I hope my stories have shown, it requires that judges, lawyers, teachers, citizens, alike work long and hard on that project, and that they work together.

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A new architecture for globalization

The Covid crisis has acted as a revelation of the intensity of our interdependencies on a global scale. However, such *de facto* interdependence has not been accompanied by an increase in solidarity. The systemic vulnerabilities revealed by the crisis should encourage us to think about a better organization of globalization, in which interdependence and solidarity are equivalent[1]. Many intellectuals, artists and activists like to dream of the "world-to-be". It is quite legitimate to try to draw the contours of a desirable future, so much so that the present moment is not. It is quite natural to try to project one's own hopes into this desirable future. However, one must be careful of illusions and cognitive biases. I do not believe that this crisis will give birth to a new world.

If the extraordinary (in the original meaning) moment that we are going through is a crisis, it is not because we have a choice between several possible worlds. There will be no post-pandemic world-to-be because there is no other world available than the one we already live in. We stopped believing in the beyond-worlds and in the theology of salvation a long time ago. The only salvation that needs to be worked on is *public salvation*, the salvation of this world – the only one we have in store.

If there is no other world, the question that remains open, however, is the following: can the *world-to-be* be something other than the world *before*, only "*a little worse*" – to use the expression of the French writer Michel Houellebecq, known for his pessimism?

The answer to this question is certainly undecided, since it will depend profoundly on our collective choices. Even if we are still in the eye of the storm and the unprecedented crisis that we are experiencing is likely to last for a long time to come, it still seems to me necessary and useful to quickly have some benchmarks and good analytical frameworks to understand the moment we are in and what we can hope for once the worst is over.

The vulnerability of integrated and complex systems

At first glance, there is no common thread between the subprime crisis of 2008 and the current pandemic. Except that historians who will study our era in two or three hundred years will probably see these as the two most important dates of the beginning of the 21st century. More so since there is a common factor to these events: they are each in their own way a crisis of globalization, in that they follow the same pattern and manifest the same "topology":

- (i) an incident occurs at a given moment at a precise point (let us call it the epicenter) and yet causes a systemic-global crisis by propagating in concentric circles, in the manner of seismic vibrations. The epicenter of the 2008 financial crisis was the US housing market. The epicenter of the health crisis of 2020 was the Chinese province of Hubei;

- (ii) the epicenter of the incident is always a nodal point. It is no coincidence that the financial crisis originated in the United States and the health crisis in China: these countries are two essential hubs of globalization;

- (iii) the peripheral regions always end up paying more than the epicenters the price of a crisis they did not cause: the sovereign debt[2] crisis resulting from the financial crisis has particularly damaged Southern Europe even though the latter had nothing to do with the US housing market; the health crisis is once again affecting, in a cruel irony, Southern Europe, starting with Spain and Italy, which now have more deaths than China.

Such is the paradox of globalization that emerges with these two crises: the fact that we are so integrated and interconnected makes us both stronger and more vulnerable. Stronger, because global economic and technological integration has, as I pointed out in *Slow Démocratie*[3], provided new opportunities for the American and European economies, which were running out of steam after the end of the Glorious Thirties, but it has also brought entire segments of the population of emerging countries out of extreme poverty, especially in South Asia (the African continent, alas, has not reaped the benefits of this globalization).

But it has also made us more vulnerable, and this is not contradictory to the above, since a local shock applied to a nodal point has incalculable cascading consequences, which was not the case in a less open world. The so-called "Spanish" flu, which actually originated in the United States, took two years to reach the European continent. The Black Death of the 14th century took about ten years to reach Europe.

1. For a first analysis, see the text published by the author at the beginning of the health crisis: D. Djaïz, "Coronavirus: la mondialisation malade de ses crises", *Le Grand continent*, 23 mars 2020 : <https://legrandcontinent.eu/fr/2020/03/23/coronavirus-mondialisation-david-djaiz/>.

2. See on this issue: H. de Vauplane, "Covid-19 : que faire des dettes souveraines?", *Le Grand continen*t, 30 June 2020: <https://legrandcontinent.eu/fr/2020/06/30/covid-19-que-faire-des-dettes-souveraines/>.

3. D. Djaïz, *Slow Démocratie*, Allary Editions, 2019.

A new "archipellisation of the world"

This force, which can turn against itself and become a vulnerability, can be explained quite simply by the spatial organization of our globalization. Take economic value chains. These are not linear but starred: there are large metropolitan hubs where principals are concentrated, which themselves are linked to regional hubs where second-order subcontractors are located, which themselves are linked to third-order hubs, and so on, by successive interweaving. Far from having become "flat", as Thomas Friedman's[4] successful essay proclaimed, the world has never been so rough and dented: on the one hand an archipelago of closely connected hubs; on the other, a vast hinterland more or less well irrigated, depending on the level of solidarity defined within each national system, *since the redistribution from the centers to the peripheries is performed almost exclusively on a national basis*.

In Europe we suffer *a priori* less than elsewhere from such "archipellisation of the world", even if this is not always the feeling of people living in territories in difficulty. Surely high value-added activities and highly skilled jobs are increasingly concentrated in metropolises, as in the rest of the Western world: since the 2008 crisis, most net job creation has taken place in a few metropolitan areas. But we do have a powerful system of inter-territorial cohesion[5] that ensures redistribution between productive and less productive areas through public and private channels: social spending, public jobs and administrations, retirement pensions... but also residential and tourist mobility that irrigate regions lacking a productive base.

In an economically and technologically hyper-connected world, it is therefore sufficient for one of these nodal points to be affected by an incident for the entire system to jam (according to the following diagram: first the *hubs*, then the peripheries), whatever the triggering event. Such event can be either involuntary (an epidemic, a financial panic) or deliberate (a terrorist attack). In 2008, the collapse of the subprime mortgage market, which was not particularly visible on the global mapping of financial risks, caused a freeze on wholesale funding for American banks, which then spread to the European financial system, then to the real economy, and finally had a very severe impact on the public finances of European states, which were forced to bail out their banks and their critical industries in great urgency. As Adam Tooze[6] showed in his masterful account of the 2008 crisis, there is a deep continuity between these events - forming a chain of dominoes. The right model for understanding and measuring the 2008 crisis is therefore not that of state-by-state national accounting, but that of the "nested matrix" of corporate balance sheets, the depth of which is staggering. Just one example of these strange interweaving of balance sheets: Rana, Hemnes, Hattfjelldal and Narvik, four small municipalities in northern Norway, collectively lost 350 million Norwegian kroner (43 million euros) after investing 451 million kroner (55.6 million euros) in asset-backed bonds, which were themselves composed of subprime mortgages from the US housing market.

A "context" for the pandemic

In 2019, a bad pangolin soup eaten in a market in Wuhan may have caused the worst pandemic we have seen since the Spanish flu of 1918-1920. It first spread in the Hubei region and then spread to the rest of the world because of the strength of cross-border human mobility. Think about it: every second before the crisis, some 130 passengers were flying somewhere on the planet. 1.4 billion international tourists flew in 2018, equivalent to 44 arrivals per second at an airport. These figures suggest how quickly a virus can spread in an open system where people move intensively from one country to another.

To be clear, the idea here is not to incriminate globalization as an efficient cause of the pandemic, but rather to show that our globalization constitutes a "spatio-temporal context" (or a "*milieu*" to speak an *ecological* language...) favorable to the propagation of systemic crises, where the alignment of the planets is indeed total [7]. Regarding pandemics:

(i) Pathogens *jump the species barrier from animal to human* in hotspots at the frontier of the most urbanized human activity and a natural environment, where there is still an abundance of wildlife, especially when natural environments are disrupted by practices such as intensive monoculture or wildlife smuggling (a lucrative business worth $19 billion a year in China);

(ii) *they spread from human to human* in highly urbanized areas (the city of Wuhan is a perfect candidate);

(iii) they become *global pandemics* in contexts of great human circulation, whether for war or economic reasons: already in the 14th century, the Great Plague that appeared in the Far East spread to the Western world because of the development of the Eurasian trade routes (the well-known "Silk Roads"). Today, one can easily superimpose the map of intercontinental air flights and the map of the spread of the coronavirus out of China in the first weeks.

Loss of biodiversity, poor "diplomacy" between humans and animals, unbridled urbanization and intense cross-border mobility: these are the primary characteristics of *our* globalization - or what Michel Lussault has called in his vocabulary "the advent of the World"[8]. This poor linkage of course helps to transform a local epidemic into a global pandemic in just a few weeks, whereas it

4. T. Friedman, *The World Is Flat: A Brief History of the Twenty-First Century, Farrar*, Straus and Giroux, 2005.
5. L. Davezies, *La République et ses territoires : La circulation invisible des richesses*, Seuil, coll. «La République des idées», 2008.
6. A. Tooze, *Crashed*, Les Belles Lettres (French translation), 2018.
7. P. Daszak, "Anatomy of a Pandemic", *The Lancet*, vol. 380, Dec. 1, 2012.
8. M. Lussault, *L'avènement du Monde : Essai sur l'habitation humaine de la terre*, Seuil, 2013.

took two years for the Spanish flu to reach Europe, and nearly fifteen years for the Great Plague.

Our interdependencies revealed

But we need to go further. It is not just that our globalization provides this pandemic with a "context" or "environment" that is conducive to its development. Conversely, this crisis of unprecedented proportions is acting as a powerful reminder of several social and environmental phenomena specific to globalization that we had not fully grasped. This crisis thus reveals the intensity of our ties. In a very beautiful text spotted by his distant successor Professor Philippe Sansonetti, Charles Nicolle (1866-1936) who was professor at the Collège de France and director of the Pasteur Institute of Tunis wrote: "*Knowledge of infectious diseases teaches people that they are brothers and in solidarity. We are brothers because the same danger threatens us, and we are in solidarity because the contagion most often comes from our fellow men*."[9]

The speed at which a virus spreads reflects the intensity of the ties that bind us together. It's no coincidence that metropolitan areas are hotbeds of proliferation: every day, we are in active or passive contact with hundreds of people, in addition to our family and friends, the people we take public transit with, those we pass on the street, office colleagues, diners at the restaurant. The regional mapping of the spread of the virus at this stage, recently proposed by the *Groupe d'Etudes Géopolitiques*, is particularly interesting[10]: not surprisingly, among the most affected areas are the megacities, but also the border areas, theaters of high commuting mobility. The famous "European backbone", the cradle of European capitalism since it corresponds to the ancient trade routes and trade fairs, is the most affected area to date. One never becomes more aware of the density of the social infrastructure than when a grain of sand jams a very complex machinery that operates silently the rest of the time. It is only when we experience a water outage due to a broken pipe or a power outage due to a short circuit on a high-voltage line that we become aware of the complexity of the physical infrastructure that distributes water and electricity, which we "naturally" consume the rest of the time.

The same is true of the "social infrastructure" in general. It only becomes apparent to us in its complexity when it jams: it is only when the Trevi Fountain or St. Mark's Square are empty of visitors and of their selfie sticks that we realize how millions of tourists pour into these places every year, which have become "hyper-places" under the effect of international tourism[11]; it is only when Chinese production lines are at a standstill that American industrialists realize the complexity of their productive assemblies and worry about the depth of a chain of subcontractors they did not even know existed[12]; it is only when we are confined to the solitude or to the closed confines of family life that we become aware of the density of our daily social life and the topology it involves -to what extent our daily life is interwoven, woven by interactions of all kinds, including mere "proximity" with perfect strangers. The health crisis we are going through is the ultimate and brutal revelation of our level of interdependence.

Moreover, the crisis reveals the deep intertwining between international sociability, limited to a minority of individuals (business clientele and tourists from the world's middle class) and sub-national sociabilities. The speed at which the epidemic is spreading in northern Italy can be explained by the telescoping of these two sociabilities: Lombardy is an industrial and tourist hub where hundreds of thousands of visitors arrive every year from China, visitors who imported the virus, but this region is also the scene of another temporality, that of very intense daily mobility between the hinterland formed by towns and medium-sized cities such as Bergamo and Brescia, where young, precarious workers live, and the Milan conurbation where they work. The virus probably spread in these medium-sized cities because of this spatial configuration: young workers, forced to live with their parents and grandparents for both economic reasons (precariousness and unemployment) and cultural reasons (solidarity with the elderly), contracted the virus in the conurbations and transmitted it within their family unit. Spain seems to be following the same trajectory. It is heartbreaking to think that it is probably the less individualistic societies, where intergenerational solidarity remains the most alive, that will pay the heaviest human toll to the pandemic.

Interdependence without solidarity

Unfortunately, the level of de *facto* interdependence that we have acquired in globalization far exceeds the level of *de jure* solidarity that should have been built to minimize such risks. The acceleration of flows and the increased interconnection reinforce systemic risks, as we have sufficiently shown. After the 2008 crisis, the risks specific to the financial system were better identified and mapped in the financial system, and one of the reasons why the financial system is not currently collapsing despite the seriousness of the full-scale test to which it is subjected is undoubtedly due to the standardization effort that has been made during the 2010s in terms of prudential supervision and capital ratios. But finance is not the only highly integrated area presenting systemic risks. In addition to the health sector, such risks also exist in the energy, nuclear, food and technology sectors (non-exhaustive list).

Our interdependencies are *global*, but our solidarities remain irreversibly *local and national*. During lockdown, we are rediscovering the strength of "local" family and friendly solidarities; we are also rediscovering the strength

9. C. Nicolle, *Destin des maladies infectieuses*, 1933.

10. See: https://legrandcontinent.eu/fr/observatoire-coronavirus/

11. M. Lussault, *Hyper-lieux : les nouvelles géographies de la mondialisation*, Seuil, 2017.

12. P. Guarraia, "Corporate supply chains vulnerable to coronavirus shocks", *Financial Times*, March 8 2020 : <https://www.ft.com/content/be05b46a-5fa9-11ea-b0ab-339c2307bcd4>.

of national solidarities. States, even at the heart of the Schengen area, are brutally closing their borders, often in a hasty and disorderly manner. This should not be seen, however, merely as nationalism of doubtful merit, but rather as the manifestation of a collective instinct for survival in moments of acute crisis, clinging to the most tangible organized social reality - the nation. This should not prevent us from passing a harsh judgment on the insufficient European coordination and the institutional labyrinth that prevents the protection of citizens and the production of adequate public goods in these particularly difficult times. Let us hope that this instinctive national solidarity does not prevent us from feeling similar all over the world. With hundreds of millions of people confined to their homes in the four corners of the world, never before have we fraternized so much in the same common experience.

It is perhaps a historic opportunity, in our segmented and archipelagic[13] societies, that we can rediscover a common experience, the cement of which is certainly a negative feeling: fear. Faced with this gigantic global benchmark of public policies that this crisis constitutes (since we only need to open a news line to compare the quality of the response provided by the different States), there is moreover a specific challenge for the European nations, which can be described as "social market democracies": to show that the model of the social and democratic State does not demerit in the management of the crisis, compared to the Chinese Party State or the American liberal State...

The inevitable return of public power

Among the lessons to be learned from this crisis, the return of public authority is now a given, after thirty years of "automatic pilot" and "the end of History". The three major crises of globalization (September 11, subprime and coronavirus) have each time shaken the primary purpose of public power - which is to guarantee public peace. Indeed, public peace has three components: *safety*, understood as the absence of war or aggression; *security*, understood as the absence of crises or accidents; and health, understood as the absence of disease. With the Covid-19, the loop is thus closed. Civil peace has been tested three times in twenty years, on each of its essential dimensions: terrorism has shaken physical safety, the financial crisis has shaken *economic and social security*, the coronavirus is undermining *human health*.

To fully understand what is at stake, we need to return to the fundamentals, i.e. Hobbes' *Leviathan*. The frontispiece of the first edition of *Leviathan* (1651) is striking. The sovereign who has just been erected to put an end to disorder and perpetual warfare stands almost suspended over the City - a Leviathan levitating. The City is empty, as if everyone is confined to their homes, except for a few individuals walking around in the open air. A closer look, with a magnifying glass, reveals two types of individuals in the deserted Main Square: gendarmes in charge of public safety, recognizable by their muskets; and doctors, recognizable by their long beaked masks supposed to protect them from the plague. When the danger is there, the public space is only occupied by those who take care of civil peace, starting with the gendarmes in charge of security and the medics in charge of health. For Hobbes, strongly influenced by Thucydides' passage on the great plague of Athens[14], moments of epidemic crisis are those that reveal the relationship between the people and sovereignty: a mass of sick people who must be taken care of, even if it means simply excluding them from the public space "*for their own good*". The difference between Hobbes' thinking and the crisis we are living through is that in the crisis we are living through, this state of exclusion from the public space is temporary, linked to exceptional circumstances, whereas in Hobbes' case it is virtually permanent. It must be said that between Hobbes and us, democracy has been grafted onto *Res Publica* - and the democratic nation onto the State.

The crises of 2001, 2008, and 2020 have each in their own way inflicted a stinging denial on the advocates of the end of History who, after 1989, argued that globalization should be put on "automatic pilot", i.e. that the progressive integration of markets would bring in its wake liberal democracy, economic prosperity, and human health -a state of perpetual peace with "zero risk-zero death". Of course, the number of deaths from Covid-19 is likely to be immeasurably lower than the death toll from the Spanish flu a century ago, which claimed several million lives. But it is already in the thousands, tomorrow it will be in the tens of thousands and perhaps in the hundreds of thousands. In the most affected regions such as Northern Italy or the province of Hubei, everyone knows a coronavirus victim in his or her close circle. We thought we had eradicated mass death after the Second World War, and even more so since 1989; we thought that death was now only a natural thing, which could arise accidentally from time to time, but according to the law of individuals and not the law of series, and now it is striking again *en masse*, as shown by these coffins lined up in Italian churches that mourning families can no longer even cry since even gatherings are forbidden.

Nation-states, floodgates of globalization

Like the light at the end of the tunnel, the afterwards seems far away. It is a new architecture of globalization that we will have to invent, nothing less. Faced with the disruptions caused by these systemic crises, the function

13. J. Fourquet, *L'archipel français*, Seuil, 2019.

14. "The disease also triggered other more serious disorders in the city. Everyone indulged in the pursuit of pleasure with a daring that he had previously hidden. At the sight of these sudden changes, of the rich suddenly dying and the poor suddenly becoming rich from the riches of the dead, people sought quick profits and pleasures, since life and wealth were also ephemeral. No one showed any eagerness to reach an honest goal with any difficulty; for one did not know whether one would live long enough to reach it. Pleasure and all the means to reach it were considered beautiful and useful. No one was held back either by the fear of the gods or by human laws; piety was not esteemed any more than impiety, since one saw everyone perish indiscriminately; moreover, one did not think he would live long enough to have to account for his faults. What was more important was that the judgment had already been given and was threatening; before undergoing it, it was better to derive some enjoyment from life".

of public power as a "floodgate" is more necessary than ever. Nation-states must once again become the floodgates of globalization. When human, economic or financial flows are likely to have a negative health, social or environmental impact, the national government (or the European power, if one decides to build a Europe-power capable of producing public goods, rather than a Europe of rules...) can decide to put in place certain limits, temporary or otherwise. It is not a question of shutting ourselves behind ramparts but, on the contrary, of organizing a regulation of the flows of globalization, just as floodgates organize the circulation of boats on a canal. *Floodgates are safety valves that prevent the rapid and exponential spread of incidents in complex systems.*

In addition to these restored margins of action, it will be necessary to consider building a true *global rule of law without a global state*, as the great jurist Mireille Delmas-Marty states.[15] It cannot be a question of overarching Law or regulations issued by undemocratic administrative authorities, disconnected from any political legitimacy. As effectiveness and legitimacy remain largely on the side of democratic nation-states, the error of globalism since the 1980s has been to think that supranational institutions, such as the WTO in trade matters, could simply replace states as the economy became globalized. This led to negative integration, with states abandoning pieces of sovereignty in favor of multilateral treaties, without such abandonments translating into gains in sovereignty or solidarity on a supranational scale - this is what is called negative integration, which has mainly taken the form of a generalized disarmament of public power (the famous "race to the bottom").

Instead of these abandonments of sovereignty, it is crucial to return to a more reasonable approach: ensuring that national laws henceforth incorporate universal provisions, particularly those relating to global public goods (environment, air quality, health, financial stability, etc.). This was, for example, the purpose of the *Global Pact for the Environment*.[16] Proposed by France in 2017, the Pact proposed that nation-states incorporate into their domestic law the fundamental principles of environmental law, including the right of every person to live in a healthy environment; the obligation to assess the environmental impact of any project; the precautionary principle; and the polluter-pays principle. This project failed because of the opposition of the United States, China, Russia and Brazil (the usual suspects...) in Nairobi in the spring of 2019, due to a lack of sufficiently firm commitment from Europe. The same could be done in the area of labor law and, of course, in the area of health.

Such an approach, relying on the responsibility of nation-states, is undoubtedly more promising than the "globalist" approach and the abandonment of sovereignty that has too often led to an outright downward revision. The philosophical equivalent of this legal doctrine must be sought in the "reiterative universalism" promoted by Michael Walzer[17].

What new international order?

This new international order could rely quite heavily on existing institutions, provided that some of their operating rules evolve. In the 1980s and 1990s, the advocates of liberal globalization wanted to ensure that the expansion of economic flows would take precedence over any other collective consideration, be it social, environmental, health or other. A simple and common-sense rule could be that democratic nations (or Europe if, once again, it decides to become a "power") have the right to define their own rules, institutions and even their own belief systems. If European citizens don't want beef fed with growth hormones from the United States or Canada on their plates because they don't want to eat it, they should have the right to take measures to suspend imports without having to prove, with scientific studies, that this meat is carcinogenic. Their democratic deliberation deciding that they do not want this hormone-treated beef because it does not correspond to the healthy and ecological food to which they aspire should suffice. One can only regret the inability of economic science to take into account these vital long-term issues, which are called: *safety*, *security* and of course *health*.

With this new architecture of globalization, public authorities will regain their function as a "signaling station", capable of discriminating between what is intended to be placed on the world market and what is not; capable of imposing selective deceleration by regaining control of non-market public goods, starting with the fight against climate change and the erosion of biodiversity; capable of relocating certain strategic assets, such as the production of plant proteins or the active ingredients of medicines, in order to regain control of the supply chains that are essential for human life: health, food, energy and technology supply chains.

A circular and local economy could thus blossom other than in the form of stumps, "out of globalization" but energized by the incomes of competitive sectors which, for their part, live well from globalization. The buildings are renovated with quality materials produced locally, for example wood from the local forests. Renewable energy (wind, solar, biomass...) forms a larger part of the local energy mix. Waste is fully recycled thanks to the progress of the circular economy. An increasing proportion of the seasonal fruit and vegetables consumed are produced within a radius of a few hundred kilometers, as already proposed by the AMAP (*Association pour le maintien d'une agriculture paysanne*), which brings producers and

15. M. Delmas-Marty, "Gouverner la mondialisation par le droit", *Revue européenne du droit*, Sept. 2020 : < https://legrandcontinent.eu/fr/2020/03/18/coronavirus-mondialisation-droit-delmas-marty/>.

16. On the Global Pact for the Environment, see in this issue Y. Aguila and M.C. de Bellis, "A Martian at the United Nations or Naive Thoughts on Global Environmental Governance", *Revue européenne du droit*, March 2021.

17. M. Walzer, "Les deux universalismes", *Esprit*, n° 187, December 1992, pp. 114-133.

inhabitants of the same region closer together by forming new short circuits. Today such initiatives exist, but they are extremely limited and scattered. A transition to scale encouraged by the public authorities must be organized, because in all these areas there are enormous deposits of sedentary jobs that would allow the frustration of the millions of inhabitants living in these areas broken by globalization and deindustrialization to be overcome. Local authorities can encourage their local producers by labeling their products, making serviced land or farmland available to them in exchange for a low rent, providing them with legal support to form a producers' cooperative, developing a local currency that can only be spent on local products, providing tax incentives for city-center trade and local crafts, making apprenticeships and vocational training courses of excellence again, which means stopping indexing everything to the university degree. *Little by little, at a low cost, it is thus possible to remove local areas of economic production and social life from the frantic pace of globalization and its scattered value chains*.

This is obviously not "de-globalization" – that would make no sense. It's not about barricading ourselves and returning to Asterix's village, any more than it's about rewinding the film at the touch of a button to take us back to the sepia France before the Glorious Thirty. These solutions are illusory. The international division of labor is there with its specialization effects, and it has brought certain benefits, not the least of which is to have lifted hundreds of millions of people out of poverty. It is rather a question of being able to discriminate democratically between what can and must be placed on the world market, with its inevitable demand for competitiveness and speed, and what can on the contrary be sheltered, preserved, encouraged in short, sedentary, circular, slowed down circuits -sheltered from global economic integration and its levelling force.

One might object that such a program risks the emergence of a territory with multiple lanes: on the one hand those that host competitive companies, project themselves onto world markets and pay high salaries to their executives and on the other hand, local and circular activities. Except that the multi-lane territory is already there, between the activities *turned towards the global economy*, often concentrated in international metropolises, and the *sedentary* activities with low added value scattered throughout the territory. And such disconnect is aggravated by the stories that are told, by territorial myths about globalized metropolises and run-down peripheries. On the contrary, it is necessary to counter such fragmentations, encouraged by the uncontrolled dynamics of globalization. It is urgent to invent a new territorial narrative where solidarity between nomadic and sedentary sectors is restored and where territorial fractures are replaced by cooperation and complementarities.

If we don't, two political offers will compete for the votes of the distraught and disempowered middle classes. An ultra-nationalist offer, already a winner on every continent, which will propose "take back in hand" kits as simple as they are illusory, based on race, the sorting of identities, border closures as effective as doors slamming in the wind. An offer still in gestation but whose weak signals are emerging: ultra-localism, disillusioned by the death of ideologies and the general loss of reference points of our time, considering that the only salvation to be opposed to the chaos of the world lies in the autarky of territories, following the collapsological fashion.

When the first lights of globalization appeared, as early as the 1960s, the most serious economists warned us: the distributive effects will be significant in societies; there will be big winners and big losers. Nothing could be more normal, since processes such as trade opening, financial integration and the fragmentation of value chains amounted to modifying the relative remuneration of labor and capital in all sectors of the economy. This simple observation should have alerted us to the fact that strong public intervention was needed to correct or compensate for the negative effects of greater interdependence. It would have required a new age of public power. This has not been the case, since, on the contrary, the weakening of public power has been promoted as globalization has deepened. Neoliberalism is exactly that, in my opinion: the promotion of globalization *at the same time as* the retreat of public power, in its discretionary and interventionist aspects, in favor of global rules that put democracies on automatic pilot. Thirty years ago, it would have been possible to conceive of a completely different kind of globalization based on interdependence and solidarity, but this would have meant arming public power in a completely different way. Instead, we had interdependence *without* solidarity. Today we see how vulnerable this has made us.

Public authorities must now regain a sense of the long term. States must not repeat the 2009 mistake of signing blank checks to companies in difficulty. The recovery plan must not just be about rushing money out the door, but about sorting out three categories: what *we want to keep*, what *we want to see disappear*, and what *we want to create*. In other words, it must have a strong ethical and political content.

Conclusion

As you will have understood, this new society will have to be organized around the terroirs and living areas, which are, along with the nations, the other essential element of the social fabric. Within these regions: revalorization of jobs aiming to connect people; synergies between public authorities, civil society and economic operators; consumers who, out of civic-mindedness, direct their purchases towards short-distance production or towards *Made in Europe*; a greater share of the added value produced on the territory; a reinvented local democracy.

Of course, this new model of society cannot be proclaimed by decree. It will also be important to deeply revitalize democracy. The institutional balance to be found

for Western democracies is incredibly subtle: in a world of dangers and risks, it is necessary to maintain efficiency, reactivity, a sense of time, all of which are proper to the State and to a strong executive, and at the same time it is time to open the locks, the doors and windows to civil society and to allow citizens and different social forces to participate in writing this new narrative. It will therefore be necessary to invent hybrid regimes where efficiency and long-term sustainability are preserved, but where democratic life is enhanced by an authentic form of continuing democracy.

We cannot rewind History. At the very most, we can only hope that humanity will not reproduce the attitude mocked by Jean de La Fontaine in his famous fable "*Les animaux malades de la peste*": that which consists, at the heart of the epidemic, under the influence of fear, in designating scapegoats rather than fraternally building solutions for a controlled and slowed down globalization.

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Avoiding a Requiem for the WTO

Although the WTO has been relatively effective in overseeing the implementation of the multilateral agreements concluded during the Uruguay Round, with some notable exceptions, including the Agreement on Trade Facilitation and the Information Technology Agreement, WTO members have not managed to conclude new agreements to liberalize trade in goods and services. This has had serious repercussions. For one, it shifted the focus of many members to bilateral and regional trade cooperation. For another, it has meant that the WTO has not played a significant role in defusing and addressing the trade conflict between the US and China.

The WTO was largely 'missing in action' during the first stages of the global COVID-19 pandemic – many members resorted to unilateral imposition of export restrictions for medical supplies and personal protective equipment. Suggestions to react fell on deaf ears: cooperation on trade in vaccines;[1] support global value chains producing critical supplies;[2] agreement to govern restrictions during a global public health crisis.[3] Some WTO members have made proposals in this vein, but to date no new agreements on such matters have been considered.[4] Absent progress on restoring the role of the WTO as a forum for cooperation on trade there is little prospect that the organization can play a significant role in helping to address major trade tensions between the large trading powers and move forward in guiding the use of trade and trade policy in addressing global market failures (climate change) and helping member governments to identify and implement good regulatory practices to support sustainable development objectives.

Although many WTO members tend to view matters through a 'US' or a 'China lens', it is important to recognize that the need for international cooperation spans a range of issues areas that are salient to a broad cross-section of the WTO membership. Whether the political will exists to reengage multilaterally and pursue WTO reform is an open question. We discuss five areas of WTO reform:[5] (1) revisiting the working practices of the organization; (2) monitoring and evaluation; (3) preparing negotiation of new agreements; (4) reforming the WTO dispute settlement system; and, last but not least (5) addressing what Wu has termed the 'China Inc.'[6] problem.[7]

1. Working Practices

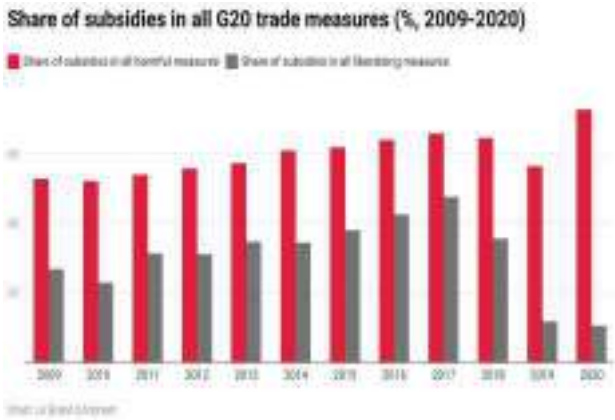
The consensus decision-making, and a "member-driven" governance model have reduced the effectiveness of the WTO.[8] While appropriate for adoption of results of substantive negotiations, WTO working practices have been abused by members to impede the functioning of WTO bodies. We should differentiate between day-to-day activities of WTO bodies and negotiation and adoption of substantive disciplines. Consensus legitimizes conclusions on substantive matters, but it should not enable countries to block agreements that bind only signatories. Nor should consensus apply to matters such as setting the agenda of WTO committee meetings.[9] Increasing interaction with stakeholders and opening the WTO to greater participation by nongovernmental entities are important areas for reform.

2. From Notification & Review to Monitoring & Evaluation

As things stand, monitoring is entrusted to members, who supply information through notifications, complemented by WTO Secretariat preparation of periodic Trade Policy Reviews (TPRs) for all members. Cross-notifications of Chinese subsidies by the United States, for example, make clear that the notification process results in a (very)

1. See, T. Bollyky and C. Bown, "The Tragedy of Vaccine Nationalism: Only Cooperation Can End the Pandemic," *Foreign Affairs*, 2020 <https://www.foreignaffairs.com/articles/united-states/2020-07-27/vaccine-nationalism-pandemic>.
2. See, M. Fiorini, B. M. Hoekman and A. Yildirim, "COVID-19: Expanding access to essential supplies in a value chain world," *in* R. Baldwin and S. Evenett (eds.), *COVID-19 and Trade Policy: Why Turning Inward Won't Work*, London: CEPR Press, 2020.
3. See, S. Evenett and L. A. Winters, Preparing for a Second Wave of COVID-19: A Trade Bargain to Secure Supplies of Medical Goods, 2020: <https://www.globaltradealert.org/reports/52>.
4. See e.g., Canada. 2018. Strengthening and modernizing the WTO. JOB/GC/201, 24 September; Canada. 2018b. Strengthening the deliberative function of the WTO. JOB/GC/211, 14 December; China. 2019. China's Proposal on WTO Reform. WT/GC/W/773, 13 May; China. 2019. China's Proposal on WTO Reform. WT/GC/W/773, 13 Ma; European Union. 2018. Concept Paper on WTO Modernization, at <https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf>.
5. See, <https://globalgovernanceprogramme.eui.eu/research-project/revitalizing-multilateral-governance-at-the-wto-2-0/>.
6. See M. Wu, "The 'China, Inc.' Challenge to Global Trade Governance," *Harvard International Law Journal*, 2016, 57: 1001-63.
7. See, M. Bronckers, "Trade Conflicts: Whither the WTO?" *Legal Issues of Economic Integration*, 47(3): 221–244; S. Charnovitz "Solving the Challenges to World Trade" 2020: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736069>; O. Fitzgerald, (ed.), *Modernizing the World Trade Organization*, Waterloo: CIGI, 2020. See also, bringing together a compilation of suggestions for a post-COVID-19 work program, S. Evenett and R. Baldwin (eds.), Revitalising Multilateralism: Pragmatic ideas for the new WTO Director-General, London: CEPR Press, 2020.
8. See, B. M. Hoekman. 2019. "Urgent and Important: Improving WTO Performance by Revisiting Working Practices," *Journal of World Trade*, 53(3): 373-94.
9. The 2007 Warwick Commission report, The Multilateral Trade Regime: Which Way Forward? proposes greater recourse to critical mass-based deliberation and proposes that WTO members be called upon to explain their reasons for objecting to proposed agenda items. See <https://warwick.ac.uk/research/warwickcommission/worldtrade/report>.

incomplete picture in some areas of trade policy.[10] Independent monitoring by the Global Trade Alert initiative reveals many more subsidies. Although many subsidies are removed each year, more harmful measures are introduced each year than are removed, and the gap has been increasing (Figure 1). The WTO Secretariat should be mandated to compile publicly available information on national policies.[11] The need goes beyond subsidies, and includes policies affecting investment and trade in services and cross-border data flows. On services, for example, the WTO only reports data for a subset of the membership.[12]



Note: 2020 data are for the period up to December 7.

Source : Global Trade Alert. https://www.globaltradealert.org/.

The WTO cannot outsource this core function but would benefit from cooperating with other organizations in this effort (IMF, World Bank, UNCTAD, ITC and OECD). A focal point for such collaboration could be the G20 Trade and Investment Working Group, in which all these organizations participate.

3. Negotiating Anew

In 2020, the Ottawa Group requested analysis of adopted COVID-19 measures.[13] The WTO Secretariat is prohibited from expressing a view whether policies are consistent with WTO rules, and is not tasked with assessing the ex-post impacts of WTO agreements or the cross-border spillover effects. Fiorini et al. found that evaluation – as distinct from monitoring – was ranked last as a priority for the next DG.[14] Creating more space for the Secretariat to analyze the global economic effects of policies affecting competitive conditions on markets, by cooperating with other institutions, would help determine whether policies cause spillovers that are systemic in nature.[15] Greater use of 'thematic sessions' of WTO bodies – in which external actors are invited to participate and the agenda includes matters that are not (yet) subject to multilateral rules – and overcoming silo problems by establishing dedicated working parties spanning all WTO bodies that deal with different dimensions of a policy area are pragmatic ways of fostering deliberation. Greater direct involvement in the operation of the WTO by the business community can help keep the WTO relevant by providing officials with up-to-date information from the core constituency they represent.[16]

In late 2017 many WTO members launched plurilateral initiatives to define good practices and new rules in four areas: e-commerce, investment facilitation, services domestic regulation and supporting micro, small and medium-sized enterprises to exploit trade opportunities. Dubbed Joint Statement Initiatives (JSIs), these plurilateral initiatives are a positive development.[17] Plurilateral domain-specific cooperation that focuses on policies underlying current trade tensions offers a means for WTO members to engage meaningfully with like-minded trade partners on subjects of common interest. The MFN constraint may of course block plurilateral cooperation because of free riding concerns. Creating a legal basis in the WTO to incorporate and govern discriminatory agreements is an important area for reform.[18] Open plurilateral agreements (OPAs) that are applied on an MFN basis, as argued by Hoekman and Sabel, will help assure non-signatories of their compatibility with the WTO.[19]

Special and differential treatment (SDT) of developing countries means that developing nations may offer less than full reciprocity in trade negotiations and claim greater freedom to use certain trade policies than high-income countries. Outside the group of UN-defined LDCs, there are no criteria that define what constitutes a developing country. SDT has been used, abused, and created problems. The Trade Facilitation Agreement (TFA) allows scheduling of commitments by developing countries and links implementation to technical assistance. Low et al. go further and argue for a new bargain on what differentiation means, designing SDT in terms of specific individual

10. See, R. Wolfe, "Is World Trade Organization Information Good Enough? How a Systematic Reflection by Members on Transparency Could Promote Institutional Learning", *Queen's University - School of Policy Studies*, 2018: <https://ssrn.com/abstract=3299015>.
11. This has begun to be done – see e.g., WTO, Overview of developments in the international trading environment, WT/TPR/OV/23, Geneva: WTO, 2020.
12. See, B. M. Hoekman and B. Shepherd, "Services Trade Policies and Economic Integration: New Evidence for Developing Countries," *World Trade Review*, 2020; R. Wolfe. 2021. "Yours Is Bigger Than Mine! Could an Index Like the PSE Help in Understanding the Comparative Incidence of Industrial Subsidies?", *The World Economy*, forthcoming.
13. See, Ottawa Group. 2020. "COVID-19 and Beyond: Trade and Health," Communication from Australia, Brazil, Canada, Chile, the European Union, Japan, Kenya, Republic of Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, WT/GC/223, November 24 2020.
14. See, M. Fiorini, B. M. Hoekman, P.C. Mavroidis, D. Nelson and R. Wolfe, "Stakeholder Preferences and Priorities for the Next WTO Director General", Global Policy, 2021. Note that on February 15, 2021, the General Council agreed by consensus to select Ngozi Okonjo-Iweala of Nigeria as the organization's seventh Director-General.
15. See, B. M. Hoekman and D. Nelson, "Rethinking International Subsidy Rules," *The World Economy*, 43(12): 3104-32, 2020.
16. See, E. Alben and L. Brown, "Is the WTO in Sync with the Business Community?", *Global Policy*, 2021. For specific proposals on mechanisms to do this see C. Findlay and B. Hoekman, "Value chain approaches to reducing policy spillovers on international business," *Journal of International Business Policy*, 2020.
17. Note however that the legality of JSIs has recently been challenged in a communication signed by India and South Africa, see WTO Doc. WT/GC/W/819 dated Feb. 19, 2021.
18. See, B.M. Hoekman and P. C. Mavroidis, "Embracing Diversity: Plurilateral Agreements and the Trading System," *World Trade Review*, 2015, 14(1): 101-16. See also, M. Bronckers. 2020. "Trade Conflicts: Whither the WTO?", *Legal Issues of Economic Integration*, 2015, 47(3): 221–244.
19. See, B. M. Hoekman and C. Sabel, "Plurilateral Cooperation as an Alternative to Trade Agreements: Innovating One Domain at a Time", Global Policy, 2021.

country needs at the sectoral or activity level.[20]

4. Dispute Settlement

The WTO includes independent, third-party adjudication of trade disputes reflected in the principle of de-politicized conflict resolution.[21] If the prospects of effective enforcement decline, there will serious negative consequences for future rule-making efforts in the WTO. Action to address the weaknesses of the Dispute Settlement Understanding (DSU) is therefore a priority area of WTO reform. Since its establishment in 1995, some 600 bilateral trade disputes (598 as of end December 2020) have been adjudicated. The International Court of Justice (ICJ), a state-to-state court that adjudicates disputes in all areas of international law, has only addressed 178 disputes since 1947.[22] Some members, notably the US, have been critical of the system, alleging that the Appellate Body (AB) has too frequently overstepped its mandate. The antidumping zeroing case law, the core US concern, AB rulings on the use of safeguard actions, and as discussed by Ahn,[23] the case law on "public body" all contributed to the doubts about the quality of outcomes. The objective function of courts is to make law predictable. There is often, no predictability generated by AB rulings in this area. The AB ceased operations in December 2019 because of US refusal to agree to appoint new AB members and/or re-appoint incumbents. Resolution of the crisis requires reform of how the system works. As of October 2020, fourteen appeals were pending before the dysfunctional AB,[24] raising the question what the status is of the associated panel reports.[25]

WTO members most concerned with effective dispute settlement need to launch negotiations on specific procedural dispute settlement reforms. These can build on the 'Walker principles'[26] that address core US concerns, e.g., that adjudicators do not exceed their mandate and engage in rulemaking. Reform efforts should include a focus on the first stage panel process and the role of the WTO bodies and the Secretariat in helping to defuse and resolve disputes. Wauters,[27] echoing previous analysts,[28] characterizes the Secretariat as the "invisible experts" who influence the preparation of reports. This must change. The key need in any reform process is to maintain the de-politicized nature of WTO dispute adjudication. This need not require an appeals board,[29] even though most WTO members prefer to maintain the two-stage process.[30] And there is scope for constructive engagement under WTO auspices, which could be emulated elsewhere: 'specific trade concerns' (STCs) in committee deliberations[31] provides an illustration.[32]

5. China Inc.

As Mavroidis and Sapir note,[33] China's accession, hailed initially as a milestone for the multilateral trading system, became a source of acrimony.[34] The US especially has raised a series of complaints before the WTO, mostly dealing with the role of the state in the workings of the economy - what Wu[35] has termed the China Inc. problem. The behavior of state-owned enterprises (SOEs) and measures requiring transfer of technology have been central to US concerns. Furthermore, China has not changed its policies because of US measures, or the announced EU White Paper on subsidies.[36] If the major trade powers do not (cannot) negotiate new, specific disciplines for subsidies, SOEs and transfer of technology, the various reform areas discussed above will have much less salience.

Conclusion

The question looking forward is whether rulemaking, which increasingly has shifted to deep regional trade agreements37 can occur under WTO auspices. For the WTO to open its door to deeper forms of cooperation the membership must accept variable geometry. The new DG has an important role to play in this regard.

20. See, P. Low, H. Mamdouh and E. Rogerson, Balancing Rights and Obligations in the WTO–Shared Responsibility, Stockholm: Government of Sweden, 2018.
21. See, B. M. Hoekman and P. C. Mavroidis. 2020. "To AB or Not to AB? Dispute Settlement in WTO Reform", *Journal of International Economic Law*, 2020, 23(3): 703-22.
22. International Court of Justice: ‹https://www.icj-cij.org/en/cases›.
23. See, D. Ahn, "Why Reform is Needed: WTO 'Public Body' Jurisprudence", *Global Policy*, 2021.
24. See, B. M. Hoekman and P. C. Mavroidis, "Preventing the Bad from Getting Worse: Is it the End of the World (Trade Organization) As We Know it?" *European Journal of International Law*, forthcoming.
25. In response to the demise of the AB the EU developed the MPIA (Multi-Party Interim Appeal Arbitration Arrangement). This commits signatories that are complainants or respondents in panels to either accept a panel report or to use the MPIA to appeal findings through a process that closely mirrors what the AB would do. Participation is open to any WTO member. At the time of writing only 23 WTO members had joined the MPIA, including the EU and China.
26. D. Walker, Informal Process on Matters Related to the Functioning of the Appellate Body – Report by the Facilitator, H.E. Dr. David Walker (New Zealand), OMC, 2019.
27. See, J. Wauters. "The Role of the WTO Secretariat in Dispute Adjudication", *Global Policy*, 2021.
28. See, H. Nordström, "The WTO Secretariat in a Changing World", *Journal of World Trade*, 2005, 39: 819-853. See, also J. Pauwelyn and K. Pelc., "Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement", 2019: ‹https://ssrn.com/abstract=3458872›.
29. See, B. M. Hoekman and P. C. Mavroidis, "To AB or Not to AB? Dispute Settlement in WTO Reform," *Journal of International Economic Law*, 2020, 23(3): 703-22.
30. This is a clear finding emerging from the survey of practitioner views on the DSU and the AB crisis by M. Fiorini, B. Hoekman, P. C. Mavroidis, M. Saluste and R. Wolfe, "WTO dispute settlement and the Appellate Body: Insider perceptions and Members' revealed preferences," *Journal of World Trade*, 2020, 54(5): 667-98. Compare R. Howse, "Appointment with Destiny: Selecting WTO Judges in the Future", *Global Policy*, 2021.
31. See, M. Karttunen, T*ransparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown*, Cambridge: Cambridge University Press, 2020.
32. A corollary of the STC process is that members have a greater incentive to notify new measures coming under the purview of the TBT- and SPS committees. The notification track record in these areas is good as is reflected in the databases that are maintained by the Secretariat on new TBT and SPS measures M. Karttunen, "Transparency in the WTO SPS and TBT Agreements: The Real Jewel in the Crown", Cambridge University Press, 2020; R. Wolfe, "Reforming WTO Conflict Management: Why and How to Improve the Use of Specific Trade Concerns," *Journal of International Economic Law*, forthcoming.
33. See, P.C. Mavroidis and A. Sapir, "All the Tea in China: Solving the 'China Problem' at the WTO", *Global Policy*, 2021.
34. Since 2011, under President Xi, there has been a shift towards increasing the role of the state in the economy.
35. See, M. Wu, "The 'China, Inc.' Challenge to Global Trade Governance," *Harvard International Law Journal*, 2016, 57: 1001-63.
36. See, European Commission, White Paper on levelling the playing field as regards foreign subsidies, Brussels, June 17 2020 COM(2020) 253 final: ‹https://ec.europa.eu/competition/international/overview/foreign_subsidies_white_paper.pdf›.
37. See e.g., A. Mattoo, N. Rocha and M. Ruta (Eds.), *Handbook of Deep Trade Agreements*, Washington, DC: World Bank, 2020.

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For Democratic Global Governance

Coronavirus is a global problem. Migration flows are a global problem. Global warming is a global problem. Social inequalities are a global problem. Tax evasion is a global problem. Gender equality is a global problem. Freedom of the press is a global problem. These "problems" do not involve the existence of a person, a State or a continent. They involve the existence of all people, all States, all continents, at the same time. It would therefore be illusory to think, or to suggest, that each person, each State, each continent can settle these matters "in its own way", "according to its own free decision". We must abandon the principle of sovereignty, a principle that has become useless and dangerous. We must abandon the national-state framework and propose the principle of solidarity to (re) found the coming world political order.

In 1941, Ernesto Rossi and Alterio Spinelli, anti-fascist activists imprisoned on the island of Ventotene, wrote a manifesto that is even more topical at the beginning of the 21st century: "*The ideology of national sovereignty has been a powerful lever of progress; it has made it possible to overcome many divergences based on parochialism with a view to greater solidarity against the oppression of foreign rulers. However, it carried within itself the seeds of capitalist imperialism. The absolute sovereignty of nation States has led to the will to dominate each nation-State, as each feels threatened by the power of others and considers as its 'living space' ever-larger territories to allow it to move freely and secure its livelihood without depending on anyone else. As a result, the State has been transformed from a guarantor of citizens' freedom to a patron of subjects who are at its service. The problem that must be solved first of all - under the risk of rendering vain any further progress - is the definitive abolition of the division of Europe into sovereign national States*".

This conclusion in the form of an invitation was not heard at the end of the Second World War. It must be heard today, in 2021, in order to emerge from the polycrisis. Just as the Renaissance gave rise to the principle of sovereignty and the State, globalization imposes another principle of political organization: the principle of solidarity between people to manage their common goods by setting up global institutions.

Objectively, all economies, all music, all ideas, all emotions are connected. Objectively, all people form a multicultural global human community. Objectively, humans share the same situations, experience the same conditions and live the same events that constitute them in a world historical Being. This has been the case for a long time, if we are to believe Montaigne, who stated that "each man bears the entire form of the human condition". But, subjectively, this human condition, this world historical Being, this community of existence was not felt by the people. Because all knowledge led each person to live as an irreducible singularity. Because the spontaneous reaction, even today, is to object that cultural, demographic, religious, economic and political differences accross the Globe make it impossible to establish the existence of a world historical Being.

But, as such, it would quickly become impossible to speak of a French historical Being in view of the social practices that sometimes vary greatly from one end of the hexagon to the other. Unless we define society as a meeting of clones, diversity and even differences do not prevent us from becoming a society; on the contrary, it is its underlying condition, since to become a society is always to associate with someone other than oneself by finding the interests, principles, and values that can form a bond (with this other person). The World Historical Being is not the expression of a Hegelian becoming of the European or Western historical Being. It is today built and continues to build itself by the ability of people to reason with one another about their similarities, their differences, their correspondences.

Today, the subjective meets the objective. Through the multiplication of crises - social, environmental, sanitary, etc - people become aware of "their community of fates" in the words of Edgar Morin, feel in their beings what the artists were singing in 1985: "we are the world". With the coronavirus, each person experiences the necessary worldwide coordination of scientists - who are not all in the same country! - to find the right treatment; experiences the hitherto abstract and distant formula "health is a global common good"; experiences the economic systems that bind them together and force them to think together about ways to get out of the crisis.

This sensitive experience must not be lost; it must be experimented in accordance with the process described by John Dewey. That is to say, the manifestation through acts and institutions of the consciousness that people have of their relational experiences. If health is now seen as a global common good and not as a concept, it becomes possible to disconnect this good from nation-State institutions and entrust it to a global institution. And this is

the case with the issue of climate, biodiversity, migratory flows, tax evasion, etc.

That this historical moment prompts us to reflect about governance that is not only global but also democratic leads us to question the legal document through which the democratic principle is expressed: the constitution. "Global", "international", "postnational" constitutionalism has, recently, become a theme of reflection for jurists, both internists and internationalists. And, with a few exceptions, the authors highlight the contradictory, illogical and aberrant nature of this notion. And they are right. It is contradictory to think of a post-national constitution when the constitution is "the genius of the people" and there is no such thing as a post-national people. It is illogical to conceive of a world constitution imposed on States when the international democratic order is based on respect for the principle of sovereignty of each State. It is absurd to imagine that a world constitution could express the living-together of peoples with different histories, traditions and cultures. They are right … if and only if the reflection remains within the conceptual framework inherited from the 18th and 19th centuries, that is to say, a framework that thinks in terms of constitution, State, nation and sovereignty. This framework, which in its time "revolutionized" the understanding and perception of the order of things, must today be rethought in light of a global society. All conceptual frameworks move under the effect of globalization; so does the one legal one.

Until recently, and perhaps even today, the relationship between international law and constitutional law was represented under the double opposite figures of monism and dualism.

For advocates of dualism such as the German Heinrich Triepel or the Italian Dionisio Anzilotti, domestic law and in particular constitutional law and international law constitute two equal legal systems, two disciplines that are foreign to each other, independent and isolated from each other. The validity of internal norms is independent from their conformity to international law. This separation of the two disciplines is based, according to the dualists, on the difference of sources, legal instruments and addressees. Constitutional law expresses the will of a State, international law by the agreement of several States; constitutional law is embodied by the constitution, which is a unilateral act, international law by a treaty, which is a contractual act; constitutional law is addressed to citizens, international law to States. The two orders being separate, there can be no normative conflicts between them and the norms of one order have no force in and for the other order.

For the supporters of the monist thesis, international law and internal law constitute one and the same order within which the two types of norms, international and internal, are subordinate to each other. For some, in the Bonn School represented by Erich Kaufmann and Max Wenzel (1920), monism gives precedence to domestic law, since it is the constitution of the state that provides the basis for the State's international competences and the place of international treaties. For others, such as "the Austrian Normative School" represented by Kelsen and Verdross and defended in France by Duguit and Scelle, monism gives primacy to international law because the latter conditions domestic law and is "at the top of the universal legal edifice" according to Verdross's formula.

The choice would therefore be between indifference or submission. The indifference between international law and constitutional law (the dualist school) would not allow us to think about the internationalization of constitutional law. Or the submission of international law to constitutional law or of constitutional law to international law (the monist school). Kelsen is certainly the one who most strongly theorized this submission through his metaphor of the pyramid of norms: "there can only be one type of relation between two normative orders," he writes, "that of partial and subordinate orders in the superior unity of a total order".

However, these representations are no longer able today to account for the relationship between constitutional law and international law. The present moment of social internationalization makes it necessary to rethink the structure of the legal order (1) and the legitimacy of this new structure (2).

1. The affirmation of a new representation of democratic global governance

1.A. The representation of governance in networks

The inadequacy of the Kelsenian representation - monism with precedence for international law - is not only due to globalization. It has to do, first of all, with the logical structure of the Kelsenian theory. Indeed, its pyramidal conception clashes with its own conception of the interpretation of norms since, according to Kelsen, judges are not in a situation of subordination to norms; in order to apply them, they must determine their meaning, *i.e.*, they must move them from the quality of legal statements to that of legal norms, and consequently the internal judge is the master of the international norm. On the other hand, according to Kelsen himself, the pyramid stands only due to the hypothetico-logical norm, the famous grundnorm; whereas the constitution should derive from the fundamental norm, it is the constitution, an inferior norm, that is supposed to give rise to the hypothesis of a norm that is superior to it so that it appears inferior to it!

Evidently, internationalization, that is, the emergence of a common global space for the application of rights, has brought to light the logical contradictions of the pyramidal representation by showing a non-hierarchical tangle of rights. The 19th century was the one in which each State brought order to chaos by producing a constitution; the 20th century was the one in which the States built relations between internal orders, the so-called time of system rela-

tions; the 21st century is the one in which law is no longer thought of in terms of "internal/external" but in terms of global order. On the semantic level, it may be interesting to observe that European law is increasingly being stated in constitutional terms: the ECHR says that the Convention is "the constitutional instrument of the European legal order" and the Court of Luxembourg qualifies the treaties establishing the European Union as a "constitutional charter". The same applies to the texts establishing the UN, the ILO, the WHO, etc.

This semantic shift opens up the space for alternative theories to that of the hierarchy of rights systems. Some try to save the Kelsenian vision and propose the model of a plurality of normative pyramids. Others, such as Ingolf Pernice, reject the pyramidal model in favor of that of "multilevel constitutionalism". Others such as François Ost and Mireille Delmas-Marty, propose a radical paradigm shift by thinking of rights no longer in terms of pyramids but in terms of networks. Internationalization manifests itself through processes of interaction between constitutional systems that implement legal communicability. In this network system, no element of the network is privileged over another, no element is merely subordinate to one or another. Constitutional rights are connected to each other, interact with each other, thus breaking both the classical conception of an incommunicable national constitutional law and the conception of an international law separate from constitutional rights.

The global legal order can be thought of through the model of a star. It is built by and with constitutional identities. In other words, it is not a pyramid but a star whose branches are the constitutional identities, a star that draws its vital energy from its branches and gives its branches their radiance and luminosity. The world legal order is not the only level of normative production, nor is it an autonomous level. It draws its general principles from the constitutional traditions of the member States, it takes its reasoning from constitutional jurisprudence, it leaves States a margin of appreciation in the implementation of fundamental rights. In a word, it supports and builds from several levels of normative production, local, regional, national and international, without one of these levels being, once and for all of overhanging. All of them compete and participate in the production of the world constitutional star. And this sense meets the movement of de-State internationalization of contemporary constitutionalism.

If law can be thought of now as a network or a star, then it is possible to think of the emergence of a new discipline, a new knowledge, a new regime of intelligibility of the legal order: global or international constitutional law.

1.B. The affirmation of a global constitutionalism

The first condition for the possibility of an international constitutional law is a theory of a global or comprehensive constitution. It is built from global constitutional standards. A standard designates "a generally shared and recognized principle"; hence global constitutional law must define the modalities of the discovery of this shared generality. One of the possible venues is that opened up by the recent work of a young generation of historians who are redrawing a "connected history" that tends to understand history from points of view that are more diverse than those of Europeans or Westerners, as illustrated in particular by the work of Romain Bertrand, *Histoire à part égales*[1] (History as equals). These works are perhaps a path to be followed by jurists to discover the world constitutional standards under the aegis of "connected law", that is, a law that would have the advantage of focusing on situations of contact and the circulation of concepts. The standards would not be sought through the juxtaposition of legal systems presented as perennial, nor in a "model", presented as universal and therefore supposed to apply to the entire world constitutional system. They would be constructed by connecting the constitutional networks that would constitute the global constitutional space.

In the classical paradigm of constitutional law and international law, as a whole structured around the principles of State and Sovereignty, it is often argued that this space is unthinkable. Wrongly so. For, without needing to change the paradigm, by remaining within the classical regime of constitutional and international intelligibility, it is permissible to hypothesize a global constitutional space. The three elements usually retained by jurists to identify a legal order are, in fact, present: a territory (the planet), a people (humanity) and a legitimate power over this territory with respect to this humanity (the UN and its institutions, including the International Court of Justice). In this global constitutional space, global constitutional standards can thus emerge from the connection of constitutional networks in which multiple actors, public, associative and private, participate.

The second condition for the possibility of a comprehensive constitutional law is to rethink the traditional analytical framework of the links between constitution, state and people. Two objections can, in fact, be immediately raised: a constitution has as its object the State, and since there is no world State there can be no world constitution and therefore no global constitutional law. Since a constitution is "the genius of a people", the world people do not exist and there can be no global constitution either.

However, it is necessary to re-read article 16 of the Declaration of 1789: "*a society* in which the guarantee of rights is not assured, nor the separation of powers determined, has no constitution". In other words, the object of a constitution is not only the State but the society to which it gives form. It is not only the State, since all the activities of individuals seized by the law can be related to the constitution. This, in legal language, is translated by the expressions "constitutionalization" of civil law, labor law, social law, commercial law, administrative law, crimi-

1. R. Bertrand, *L'Histoire à parts égales. Récits d'une rencontre Orient-Occident (XVIe-XVIIe siècles)*, Seuil, 2011.

nal law, and similar. That is, by the idea that all branches of law, and not only political law, find their principles in the constitution. Moreover, the fact that the constitution is the act that informs – in the philosophical sense of the term – society is only a break with regard to the habit of thinking of the constitution as an act that organizes public powers. When Montesquieu imagines the ideal constitution, he starts from an analysis of society, from an analysis of the "social powers" – nobility, bourgeoisie, etc. – that are the basis of the constitution. When Rousseau writes his draft constitution for Corsica, he explicitly takes as the basis and objective of his work the structuring of the Corsican social body. This conception of the constitution-expression of society faded away when the idea was imposed, throughout the 19th century, that it was only the particular status of the rulers; it reappears logically today with the emergence and development of the idea of constitution-guarantee of rights which contributes to include all social activities in the scope of the constitution.

Nor is the existence of a world people the precondition for a world constitution. "*One is not born a woman, one becomes one*," wrote Simone de Beauvoir; one is not born a citizen of the world, one becomes a citizen through the constituent act. The force of law, recognized by Pierre Bourdieu, is to institute, that is to say, to make what it enunciates exist, to give life to what it names. Thus it will be with the world constitution which, by naming the citizens of the world, will make them exist "in reality". It is the magical force, often ignored, of the language of law and in particular of the words of the constitution to make things with words.

Recognizing in Siéyès the father of the theory of the people subject to constituent power, Carl Schmitt, in his *Constitutional Theory*, re-actualizes and reinforces the abbot's ideas by considering that if the people are the subject of constituent power and if the constitution is the act of the people capable of acting politically, "it is necessary that the people preexists and is presupposed as a political unit". The notion of "people" is undoubtedly not the same in Siéyès and Schmitt; it refers to an origin and ethnic homogeneity in the latter, to natural law in the former. But both discourses express the same idea of the people, whatever its identity, above and before the constitution. It must be agreed that this scholarly representation of the relationship between the people and the constitution has the immense merit of "making it true" by spontaneously echoing the ordinary language that generally presents the people as the author of the constitution. The effectiveness of the two discourses, scholarly and ordinary, thus produces a truth of evidence, of common sense, a "well-founded illusion" according to Durkheim's formula, which reinforces the system and which it obviously seems absurd to discuss.

And yet, it is not forbidden to deconstruct this representation and to argue that the "genius of the constitution is the people" or, more exactly, that "the genius of the constituent process is the people". The citizen of the world, in fact, is neither an immediate fact of consciousness nor a natural fact; it is the result of a continuous and often conflicting process of integration of individuals, groups, communities that are initially foreign to each other and which, through the action of the law and the institutions that the constitution establishes, will find themselves bound by common questions to be debated and resolved, by common values, by common services that, in turn, will develop a sense of solidarity that constitutes the world historical Being. A world constitution will be this moment of crystallization of the process of formation of the world historical Being, offering the citizens of the world the instrument to see themselves as such. The world historical Being exists, but it will only through the emerge constituent gesture that will give it life.

2. The affirmation of a new representation of the democratic legitimacy of global governance

2.A. The principle of global commonality

The political inadequacy of the principle of sovereignty. Domestic constitutions were founded on and implemented the principle of sovereignty to express the legitimacy of the national people to determine for itself the rules of its living-together. It cannot be the principle that establishes and implements the political legitimacy of action of the world historical Being. All the more so since this principle has become empty and dangerous.

Empty first of all because, in the words of Sandana Shiva, "globalization has genetically modified the State; it no longer represents the interests of citizens but those of multinational corporations". The history of the right of peoples to self-determination is implacable: in its name, a people claims and endows itself with a State, and then that State disposes of its people and seeks to dispose of other people as well. What is at issue, then, is the principle of sovereignty. It was invented in 1576 by Jean Bodin as an ideological weapon at the service of the King who, at the time, was looking for an argument that would allow him, at the top, to challenge the power of the Pope and, at the bottom, to subdue the lords of his kingdom. No doubt useful at that time in history, it is no longer useful today. It has become an empty principle. National sovereignty no longer means anything when large international contracts involve technology transfers and products are no longer manufactured by and in one country but from components from all continents. National sovereignty is meaningless when trade barriers are abolished between States as they once were between the provinces of the Kingdom. National sovereignty no longer means anything when communications tend to universalize consciences.

Dangerous, second all, because the principle of sovereignty leads the State, that refers to the desire to secure its means of living, to promote its freedom of existence and in doing so, to impose its domination over weaker States. To take an example: Catalonia wants to become the

State of the Catalan people, while it lives in the Kingdom of Spain, whose constitution recognizes the existence of the peoples of Spain, including the Catalan people who, like the Basque people or the Andalusian people, enjoy political autonomy! In other words, Catalonia no longer wants to live with other peoples within a State; it wants to become a nation-State, the State of the people. In this way, it will finally be sovereign, free to organize itself as it wishes.

This is a dangerous sovereignist illusion, whose Catalan enacment is easy to imagine, since it has produced the same results everywhere and always. Assuming that Catalonia becomes a sovereign State, at the beginning the sun will shine: the sun of the Republic, the sun of the flag, the sun of the language, the sun of the way of life, the sun of the happiness of finally being alone with its peers. Then, quickly, the clouds will pile up. Inside, Tarragona and Lleida will ask to be able to administer themselves freely. But above all, outside, Catalonia will have to promote its existence, to be concerned about its own development without worrying too much about the consequences for its neighbors. Born to free itself from the Spanish "yoke", Catalonia will become a nation-State imposing its "yoke" both internally and externally.

The emergence of the principle of global commons. Just as the Renaissance gave rise to the principle of sovereignty and the State, globalization imposes another principle of political organization: the law of multinationals. As Vandana Shiva writes, this will not be countered by nation-States but by a "global awakening of citizens". With globalization, a new world is beginning, made up of a pluralism of conceptions of life, of post-national spaces for deliberation, of income detached from the labor force, of global institutions for decision-making in matters of health, the environment, climate, food, etc. This world that is beginning needs a new spirit-principle to guide it: the world that ends had sovereignty as its principle; the world that comes has as its principle loyal cooperation between peoples, the principle of the *en-common*, to take up Monique Chemille-Gendreau's proposal, the principle of common goods that peoples share and that they must manage by equipping themselves with post-State institutions. And this principle must inspire the writing of the next world constitution.

The idea is far from being accepted, and some, like Finkielkraut, grumble, vituperate and anathematize against the disappearance of the principle of sovereignty. They are wrong. The anguished posture in the present always leads to a nostalgia for the past which ends up fuelling the desire for a return to what is presented not as the ancient order of things but as the true, natural and authentic order of human reality. The past is transformed into myth, the work of meaning is halted and things are immobilized at a point in their history. The fact that a world ends does not mean that the world is finished. In the last lines of his *Memoires d'Outre-Tombe*, Chateaubriand writes: "it seems that the old world ends and the new one begins".

In his book *Politics*, Aristotle defines the *polis* as a community of the good life for families and lineages for a fulfilled and self-sufficient life. This definition refers to three functions of the *polis*: an economic function – ensuring the satisfaction of the needs of the community – a security function – ensuring defence against enemies – and a moral function – enabling people to live well together. And for Aristotle, it was this last function that allowed the *polis* to be characterized in relation to simple conventions of common utility. Simple conventions of common utility, this is what the World has been, globally, until now a constitutional *polis*, this is the World that a world constitution will institute. It is not, in fact, the same World that is instituted according to whether it is instituted by the categories of international law or by the categories of constitutional law.

With the category titled Treaty, the Germans, Italians and Spaniards see themselves as foreigners belonging to different States that mark their identity and make agreements among themselves; with the category Constitution, they see themselves as members of the same family with different histories but united under the same law. With the category Treaty, a world public opinion can manifest itself, at best, which will exercise a more or less effective power of influence; with the category Constitution, world public opinion is transformed into a community of world citizens and the power of influence into a power of political decision. With the category Treaty, individuals are taken as persons and consumers; with the category Constitution, they acquire the quality of citizens, that is, political actors. If the constitutional "moment" makes a break with the treaty "moment", the passage from one to the other is not necessarily brutal; it is made, prepared, worked on under the treaties.

2.B. The principle of a global *jus-commune*

Judges are the main actors in this transnational constitutionalism. Indeed, internationalization is manifested by a judicial globalization brought about by the almost simultaneous appearance before different national and/or regional jurisdictions of identical legal questions, most often in the field of human rights and criminal law, but also in economic or business law. Judges are thus called upon to make decisions whose scope extends far beyond the boundaries of the domestic legal order in which they operate and which concern matters involving aspects of international or foreign law or matters that judges know to have already been dealt with by a foreign court. All of these circumstances encourage judges to consider solutions adopted outside their domestic legal order and to establish relationships with the foreign courts.

This phenomenon leads national judges to work on a transnational basis, to engage in dialogue and to borrow from each other, to seek information from their colleagues, to meet and share their case-law. Judges are not subject to international influence; they are the actors of this legal transnationalism, of this global jurisdictional di-

plomacy in which a global constitutional community is built. This dialogue is manifold, between national judges and between national and regional judges. It can be tense or difficult, as shown by the relations between the ECHR and the ECJ, between the ECHR or the ECJ and national constitutional courts. But, all in all, a global constitutional case-law emerges through the participation of the constitutional courts in jurisdictional networks.

Hence the inevitable questions stand: is it legitimate for a national judge to consult foreign case-law in order to decide a domestic case and is it legitimate that this construction of international constitutional standards is the work of judges and not of the people or their elected representatives? These legitimate questions open up a reconsideration of the contemporary democratic requirement that does not or no longer boils down to the power of suffrage. The guarantee of rights has become a code of access to the democratic quality of governance, and judges are its vectors.

Moreover, the authority of foreign case law solicited by a national judge is only an authority of persuasion in that it can offer more convincing insight or reasoning on identical or similar issues. Secondly, this construction by judges of a transnational constitutionalism is based on constitutional standards derived from the main international treaties and covenants on human rights ratified by States.

Finally, and as a consequence of the above, the legitimacy of this jurisdictional work rests on the principle of good faith insofar as it obliges States to respect the international conventions, covenants and treaties they have signed and from which the international constitutional standards are derived.

Judges crystallize and give effect to the world constitutional heritage. They thus participate in making world governance democratic since it is no longer only in the hands of the States, but also in those of the citizens through access to judges who impose on the States the respect of fundamental rights.

Concluding remarks

The stakes are therefore high and the moment to dare to choose the constituent pathway can no longer be put off. The current situation is unsatisfactory: States have transferred many of their competences but have retained democratic legitimacy; regional and international organizations have received competences but have no democratic legitimacy. Therefore, no matter how one turns things around, either one must put the competences where the legitimacy is, or one must put the legitimacy where the competences are. Each of the two answers has its own logic and coherence; it is time to assume a clear and radical choice without getting lost in a consensual "good little mix" of the two positions. And, if the second one is chosen – which is my case – we should now open the process of a world constitution organizing democratic world governance.

"*The day will come*," writes Victor Hugo, "*when all of you, nations of the European continent, without losing your distinct qualities, will be closely united in a superior unity and will constitute the European fraternity, and the day will also come when, even more transfigured, it will be called Humanity*." "*The day will come*." The sooner, the better, to avoid the coming of the dark night!

Bernard Stirn • Honorary president of section at Conseil d'Etat, membre of the Institut de France

Participating in the Governance of Globalization through Law: New Horizons for National Supreme Courts

By their very nature, supreme courts intervene within the perimeter of a State. It is their responsibility to ensure the unity of the law in a country and to ensure the development of case law that national law needs. Thus, they could have seemed weakened by the growing internationalization of the law, which is manifested by the strengthened authority of international treaties and the increased role of international jurisdictions. The phenomenon is particularly marked in Europe, where the law of the European Union and the law of the European Convention on Human Rights are combined. Europe is also the place where, through the dynamism of their jurisprudence, the two European courts, the Court of Justice of the Union, based in Luxembourg, and the European Court of Human Rights, based in Strasbourg, give full scope to these two interactive and often intermingled branches of European law.

However, the globalization of law has also opened up new horizons for national supreme courts. With demands for independence and impartiality expressed at the international level, these courts have seen their own guarantees strengthened and they are called upon to play a greater role in ensuring that the courts under their authority comply with these requirements. They contribute to the construction of a law beyond borders and fulfill an eminent mission in the dialogue of judges that is established to define its contours. The decisions they render often meet with a reach that goes far beyond their own country. Thus, far from being victims of the globalization of law, they are rather committed actors and beneficiary partners. In other words, globalization strengthens them institutionally and broadens their jurisprudential office.

1. The globalization of law strengthens the supreme courts at the institutional level

From an institutional point of view, globalization has been accompanied by an increase in the number of supreme courts and a strengthening of their authority.

1.A. An increased number

Some supreme courts are the heirs of a long history. Such is the case in France of the *Conseil d'État*, whose evolution has accompanied that of political institutions since the *Ancien Régime* and to which the Consulate's constitution gave its modern form in the year VIII. The same can be said of the Court of Cassation, which is a descendant of the Paris Parliament during the monarchy and then of the *Tribunal de cassation*, instituted in 1790. Nevertheless, the family of supreme courts has grown in recent years and the globalization of law has played a large part in this. It has played a decisive role in the multiplication of constitutional courts and in the appearance of new supreme courts.

Born in the United States with the 1803 Supreme Court decision *Marbury v. Madison*, the constitutionality review of laws took a long time to cross the Atlantic. In the aftermath of the First World War, it appeared, under the influence of Kelsen and in the context of the disappearance of the Austro-Hungarian Empire, in the Austrian constitution of 1920, which created a constitutional court. But the Austrian case remained an exception in Europe, and it was not until the ideals asserted after the victory over Nazism that the constitutional courts became more widely established there. All over the world, their institution is linked to the restoration of democracy and the will to consolidate it. A constitutional court was created in Japan in 1947, in Italy in 1948, and the German Basic Law of 1949 established the Karlsruhe court. With the return of Portugal and Spain to democracy, the link between constitutionality review and democracy became stronger: a constitutional court is provided for in both the Portuguese constitution of 1976 and the Spanish constitution of 1978. After the fall of the Berlin Wall and the break-up of the Soviet Union, a similar movement can be observed in Eastern Europe, including Russia, where the Constitutional Court was established in 1991.

Although major democracies such as the United Kingdom, Denmark, the Netherlands, Norway, Sweden and Switzerland continue to ignore constitutional justice, there is an international dimension to the spread of constitutional courts. With nuances between countries, a European model of constitutional court, distinct from judicial and administrative supreme courts, is taking shape and differing from the American model of a single supreme court. In the many countries where they now exist, constitutional courts are joining the classical supreme courts, which adjudicate cases as final instance. If, from one country to another, the articulations between the traditional supreme courts and the new constitutional courts vary, a new component is enriching the generic category of national supreme courts, along with the constitutional courts.

The supreme courts themselves are becoming more numerous. In Germany, five federal courts specialize in civil and criminal, administrative, financial, social and la-

bor law. They each have the status of the supreme court of their respective jurisdiction, although the Constitutional Court of Karlsruhe can be appealed if their decisions do not comply with the principles of the fundamental law.

Particularly characteristic of the development of supreme courts is the recent creation of the Supreme Court of the United Kingdom. Traditionally, the role of supreme court was vested in the Judicial Committee of the House of Lords, composed of twelve Law Lords. Chosen from the country's most eminent jurists, they sat both as Members of Parliament in the House of Lords and as judges of last resort on the Judicial Committee. This organization, inherited from the past but very unique in terms of the separation of powers, came to an end with the Constitutional Reform Act of 2005, passed under Tony Blair's government. Effectively established on October 1st, 2009, the new Supreme Court brought British institutions closer to international standards and immediately took its place among the great courts whose jurisprudence has an echo beyond national borders. Its international dimension is all the more affirmed since it has also inherited the powers of the Privy Council with respect to Commonwealth countries that continue to accept its jurisdiction of last resort.

Being more numerous and diversified, the supreme courts have also strengthened their authority.

1.B. A strengthened authority

In the United States, where the Supreme Court has traditionally played a decisive role in deciding major social issues, the end of racial segregation,[1] the death penalty,[2] acceptance of voluntary interruption of pregnancy,[3] affirmation of the right to recourse for Guantanamo detainees,[4] recognition of marriage for all,[5] the intervention of supreme courts in legal and political debates is increasingly widely recognized.

The example of the French Constitutional Council is significant in this respect. Initially conceived as an institution responsible for guaranteeing the prerogatives of the government vis-à-vis Parliament, Professor Rivero calls it a "watchdog of rationalized parliamentarism." It has gradually asserted itself as a true constitutional court. Through its jurisprudence, it has incorporated into its control the conformity of laws with the principles of the Preamble from its decision of 16 July 1971 on freedom of association. The opening of its referral to sixty deputies or sixty senators in 1974 and the introduction in 2008 of the priority issue of constitutionality ("*question prioritaire de constitutionnalité*"), which makes it accessible to citizens, completed the evolution. A similar rise in power can be seen in Belgium, where the court of arbitration, created in 1980, took the name of constitutional court in 2007.

1. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
2. Atkins v. Virginia, 536 U.S. 304 (2002) and Roper v. Simmons, 543 U.S. 551 (2005).
3. Roe v. Wade, 410 U.S. 113 (1973).
4. Rasul v. Bush, 542 U.S. 466 (2004).
5. United States v. Windsor, 570 U.S. 744 (2013) and Obergefell v. Hodges, 576 U.S (2015).

For its part, the new Supreme Court of the United Kingdom recognized its jurisdiction to decide far-reaching constitutional questions when it ruled that Brexit could not, in view of its implications for the rights and freedoms of British citizens, be decided without a vote of the Westminster Parliament. Nonetheless, the consent of the local assemblies of Scotland, Wales and Northern Ireland was not required.[6] Then it did not hesitate to censor the decision of the government of Boris Johnson to suspend the work of Parliament for five weeks in order to have freer hands in the negotiation of the withdrawal agreement with the European Union.[7]

Faced with the imperatives of the fight against terrorism as well as with the measures necessary to combat the Covid-19 epidemic, the reconciliation between a state of emergency and the rule of law has been ensured by the jurisprudence of the supreme courts, which, seized with similar questions, have provided comparable answers. In France, the law of June 30, 2000 has enabled the judge in charge of summary proceedings at the *Conseil d'État* to intervene within a very short period of time and to provide a legal framework for both the state of emergency from 2015 to 2017 and the state of health emergency in 2020. The concern to ensure that the measures taken were strictly proportional to the requirements of the situation led, during the state of emergency, to the imposition of house arrest[8] and administrative searches.[9] During the state of health emergency, the same concern has arisen particularly in the decisions regarding freedom of demonstration,[10] registration of asylum applications,[11] surveillance by drones,[12] opening of places of worship,[13] and the need for the presence of the accused before the court.[14]

The authority of the supreme courts is also increasing through the strengthening of the guarantees they have and the role that is increasingly entrusted to them to ensure the independence of their court system. In France, the constitutional amendment of July 23, 2008 thus shifted the presidency of the Supreme Council of the Judiciary from the President of the Republic to the first president of the Court of Cassation. It also shifted this function to the public prosecutor before this court, depending on whether it is a question of debating the issues that are of interest to judges or to prosecutors. The Vice-President of the Conseil d'État also chairs the High Council of Administrative Courts and Administrative Courts of Appeal. These developments are not unrelated to the decision by which the Conseil d'État ruled that although a decree had been

6. UK Supreme Court, *Miller*, 24 January 2017.
7. UK Supreme Court, 24 September 2019.
8. CE, 11 December 2015, *Cédric Domenjoud et autres*.
9. CE, 6 July 2016, *Napol and Thomas*.
10. CE, 13 June 2020, *Ligue des droits de l'homme et autres*.
11. CE, 30 April 2020, *Ministre de l'Intérieur*.
12. CE, 18 May 2020, *Association la Quadrature du net*.
13. CE, 18 May 2020, *Fraternité sacerdotale Saint-Pierre et autres*; 29 November 2020, *Association civitas et Confédération des évêques de France*.
14. CE, 27 Novembre 2020, *Association des avocats pénalistes*.

able to give the General Inspectorate of Justice the power to examine the administrative and financial management of the judicial courts, without of course interfering in the assessment of the decisions handed down, it had, on the other hand, illegally included the Court of Cassation in the scope of its control. Special guarantees, which had not been provided for, were needed for the judiciary, given its mission at the top of the judiciary and the role assigned by the constitution to its first president and its attorney general at the head of the Superior Council of the Judiciary.[15]

Strengthened from an institutional point of view, the national supreme courts also exercise, in the globalized legal world, an enlarged jurisprudential power.

2. Globalization of law expands the jurisprudential office of supreme courts

The globalization of law extends the jurisprudential office of the supreme courts in two ways. Firstly, it confers on them powers that underline the specificities of their intervention. Secondly, it leads them, despite the difficulties, uncertainties and tensions that appear in certain countries and with regard to certain decisions, to hand down judgments that go beyond the framework of their own state to contribute, through exchanges across borders, to the emergence of shared principles and thus to contribute to laying together the foundations of a global law. Organized as a network, the supreme courts judge beyond borders.

2.A. The network of supreme courts

In the globalized world, supreme courts are exercising a renewed office. In addition to their role as judges of last resort, at the top of a court system, they are also particularly qualified representatives of the justice system of their State in the globalized world where judges from different countries have to exchange views in order to coordinate their jurisprudence.

European law particularly highlights the specific place of supreme courts.

As early as the Treaty of Rome of 1957, a distinction appeared between the supreme courts and the other courts. While the latter may, in the event of serious difficulty over the interpretation of Union law or the validity of a norm of secondary legislation, refer a question to the Court of Justice for a preliminary ruling, the supreme courts are obliged to do so. The particularity of the supreme courts is even more marked in the procedure introduced by Protocol No. 16 to the European Convention on Human Rights, which entered into force in 2018. This protocol reserves the possibility for the supreme courts of countries that have ratified it to request an advisory opinion from the European Court of Human Rights on a question of principle relating to the interpretation or application of the Convention. Finally, the national supreme courts participate in the choice of European judges. Article 255 of the Treaty on the Functioning of the European Union thus created a committee, composed of former judges or advocates-general of the Court of Justice and members of national supreme courts, which assesses the suitability of candidates proposed by the States to serve as judges at the Court of Justice and the General Court of the European Union and as advocates-general at the court. Inspired by this precedent, the Committee of Ministers of the Council of Europe decided that a "panel", similarly bringing together former judges of the European Court of Human Rights and members of national supreme courts, would give an opinion on the qualification of candidates for the post of judge at the European Court of Human Rights.

The association of national supreme courts with the appointment of European judges is in line with the perspective that makes these courts the main actors in the dialogue of judges. They take part in the major associations which, on a worldwide scale as well as in the European framework, facilitate exchanges through meetings, networks for the dissemination of case law and Internet forums. They maintain between them often very close bilateral links. In Europe they are the natural participants in the regular dialogue with the two European courts. Thus the European Court of Human Rights brings together every year, for a working seminar, the Presidents of the Constitutional Courts and Supreme Courts of the forty-seven member States of the Council of Europe.

Through the network of judges, by attentive listening and by a crossing of jurisprudence, many delicate questions are solved thanks to conciliatory logics. For example, one can think of the one which allows to articulate the supremacy of the constitution in the internal order and the primacy of international and European law. In his speech at the opening of the European Court of Human Rights in 2014, Andreas Vosskuhle, then president of the Karlsruhe court, explained that law in Europe was no longer described in terms of the Kelsen pyramid, but was more like a Calder mobile, whose elements, constantly in motion, find their balance in their permanent and reciprocal interaction. This movement is driven by the supreme courts and their role beyond borders.

2.B. Judging Beyond Borders

Listened by their counterparts as well as by international courts, the decisions of constitutional courts and supreme courts have, by the same token, an audience that goes beyond the national framework. Even more so, the solutions they adopt have consequences on major debates and often find strong echoes far beyond their borders.

The role played by the German court in Karlsruhe is particularly characteristic in this respect. A vigilant guardian of fundamental rights and democratic balances guaranteed by the German constitution, it is at the same time committed to the construction of Europe. The balance it draws between national constitutional requirements and the progress of the European edifice gives its jurispru-

15. CE, 23 March 2018, *Syndicat Force ouvrière magistrats et autres*, CE, 11 December 2015, *Cédric Domenjoud et autres.*

dence a primordial importance for the Union as a whole. In a decision of June 30, 1989, the Karlsruhe court ruled that the ratification of the Lisbon Treaty did not require a revision of the German constitution, but that the federal law should recall the imperatives of democracy, the responsibilities of Parliament and the requirements of respect for fundamental rights. It authorizes the creation of the European Financial Stability Fund[16] as well as the ratification of the Treaty on Stability, Coordination and Governance in Europe,[17] while stressing that the Bundestag must retain control over budgetary policy.

When the Karlsruhe court was seized with the question of the repurchase of sovereign debts on the secondary market by the European Central Bank, it asked, for the first time, a preliminary question to the Court of Justice of the European Union.[18] Enlightened by the Court's answer,[19] it judged the mechanism to be in conformity with the German constitutional requirements.[20] However, it goes on to specify that the European Central Bank must justify, through an understandable and precise analysis, the conformity of public debt repurchases with its mandate and the proportionality of its interventions.[21] On the occasion of these various decisions, the Karlsruhe court partially ruled in its courtroom on the future of European construction. Beyond German constitutional law, the decisions it handed down have had an echo and significance throughout Europe, which have enabled it to take steps and overcome crises, without neglecting the constitutional characteristics of one of its principal member States.

Shared principles emerge from the combined jurisprudence of constitutional and supreme courts. The two European courts provide a form of synthesis, to which other international jurisdictions contribute, notably the International Court of Justice and the International Criminal Court. Procedural standards are defined to ensure an effective remedy before an independent and impartial judge and to ensure a fair trial. Common concepts are affirmed: proportionality, legal certainty, legitimate confidence, subsidiarity. In addition, values such as non-discrimination, human dignity, the rule of law and the requirements of democracy are being reaffirmed.

Difficulties and tensions are inevitably present. Within the European Union, judicial reforms in Poland and Hungary have raised concerns about the independence of the judiciary.

Some decisions are carrying with them threats to liberties, such as the ruling of 22 October 2020 by which the Polish Constitutional Court reduced the right to voluntary interruption of pregnancy to almost nothing.

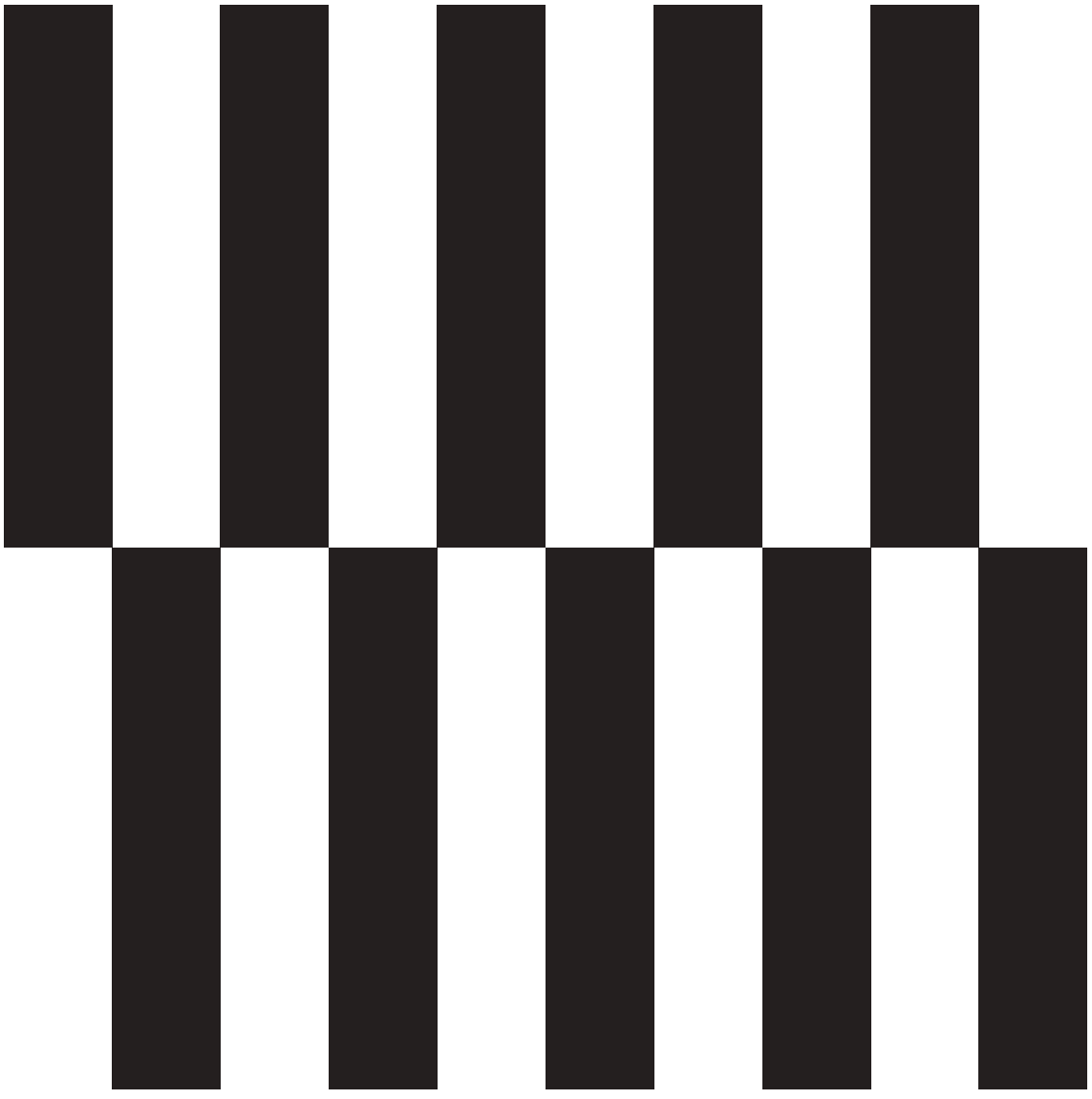
Within the Council of Europe, Turkey's development after the failed coup d'état in the summer of 2016 undermines essential freedoms, with arbitrary arrests and a deliberate disregard for the independence of judges. The questioning by illiberal regimes of the very legitimacy of judges' interventions, like the attempts to regain control of constitutional courts and supreme courts, are also, as a tribute of vice to virtue, a reflection of the power of judges in the globalized world. Excesses are fortunately tempered by the interventions of the Court of Justice with regard to the member states of the Union and of the European Court of Human Rights with regard to the countries of the Council of Europe. For example, the Polish government reviewed the reform of its Supreme Court after the Court of Justice, accepting an infringement action brought by the Commission, found that it violated the fundamental rights guaranteed by the Union.[22]

Beyond these difficulties, a common fund is constituted from the decisions of constitutional courts and national supreme courts. For the international courts and, in particular, in Europe, for the two courts of Luxembourg and Strasbourg, it constitutes a base from which they build a jurisprudence that synthesizes the elements brought by each national law. The Court of Justice of the European Union thus derives general principles from the constitutional traditions common to the member states. The European Court of Human Rights, for its part, seeks to determine whether a consensus has been reached among the different States of the Council of Europe, to which it recognizes a margin of appreciation that is all the wider the weaker the consensus is.

Through the exchanges between them, through the common construction of a corpus of jurisprudence whose scope transcends state borders, the national supreme courts intervene on the whole in a broader horizon and with broader perspectives. They have become essential actors in a wider legal universe and contribute to giving the global law necessary for its regulation its full foundation. Far from reducing their role, the globalization of law gives them new missions, reinforces their independence, increases their authority and strengthens their vitality.

16. Court of Karlsruhe, 7 September 2011.
17. Court of Karlsruhe, 12 September 2012.
18. Court of Karlsruhe, 14 January 2014.
19. CJEU, 16 June 2015, *Gauleiter*.
20. Court of Karlsruhe, 21 June 2016.
21. Court of Karlsruhe, 5 May 2020.
22. CJEU, 17 December 2018.

Challenges



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A Martian at the United Nations or Naive Thoughts on Global Environmental Governance

"The higher you go, the further you can see" says a Chinese proverb. So let us imagine, that a Martian comes to observe the Earth and its inhabitants. What would he think, from his flying saucer, of the habits and customs of this weird species in full expansion: human beings? How would he judge the state of the planet and the effectiveness of global environmental governance?

Let us tell the story of a Martian, but a Martian who was a lawyer – and who loved the Earth.[1] He had first come here 50 years ago, on the occasion of the 1972 United Nations Conference on the Environment in Stockholm, and had been coming back regularly since this date.

The Martian had observed the Earth for a long time, bewildered by the extraordinary degradation of the state of the environment. All the indicators were getting worse: the increase in air pollution, the spread of plastic in the oceans, the irremediable decline in biodiversity, climate change, melting ice, and the increase in extreme meteorological events. The Martian was also disturbed by the place occupied by human beings on this planet and by their capacity to colonize all ecosystems. In 1950, the world population was reckoned at nearly 2.6 billion people. Fifty years later, in 2000, it had more than doubled to just over 6 billion. By 2020, it had grown to 7.8 billion. The impact of the existence of the human species on the planet was such that humans themselves had identified a new era in the geological history of the Earth, in which humans had become the main force of planetary change: the Anthropocene.

The Martian had thought he could be reassured, for a short time, in 1992, during the Rio Earth Summit. Finally, he thought, the time had come for awareness! The Brundtland report had just drawn up in 1987 a dark, but fair picture of the situation. There was no longer any room for doubt: Humankind was now aware of his enormous capacity to modify the natural balance of his planet and to lead his environment towards a state endangering his living conditions on Earth, and even his own survival. In Rio, the United Nations had therefore adopted two major international conventions, the Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity (CBD).

Nevertheless, in 2015, the Martian had returned to Paris, the place where the "COP 21", the 21st conference of the parties of the climate convention, took place. Since 1992, global greenhouse gas emissions, far from being reduced, had continued their inexorable rise, increasing by 60%. Worried, the Martian wondered then how these small human beings, who had so much deteriorated their environment, were going to organize to react. From his spaceship, he observed… So, what were the humans doing in these days of December 2015? They were sitting around a table and talking… Among 193 states, they were talking and talking, day and night. Like at the Copenhagen Summit in 2009, like at every COP, for two interminable weeks, the states were discussing. Negotiations continued until the last day, and even the last night. Like in a movie, until the end, the suspense remained at its height: were we finally going to get an agreement? Finally, after the conference had been extended until the next day, in the early morning of December 12, 2015, the president of the conference, his eyes surrounded by circles, raised his hammer and struck, to the applause of the enthusiastic audience: "We have an agreement!"

Was such a decision-making process rational? Was it serious? Was it worth the stakes? Was there not a huge gap between the seriousness of the ecological crisis on the one hand and the inefficiency of governance methods on the other?

These were the thoughts that ran through the mind of our Martian friend. Then, he undertook to meet with the Secretary-General of the United Nations to try to better understand. His objective was to draw up a small report aimed at explaining to the Martian authorities the situation on Earth, in three points:[2] first, an inventory of the difficulties of global environmental governance; second, a diagnosis, to identify some of the causes of these difficulties; finally, some naive lines of thought to try to help set up a more efficient and fairer system of global governance.

1. Observation: the dual failure of global environmental governance

The Martian then went to the United Nations headquarters in New York. The Secretary-General of the United Nations warmly welcomed him in his office and indicated that he was ready to answer his questions. He immediately shared with him his 2018 report that was specifically devoted to "Gaps in International Environmental Law". In it, the Martian could find a complete diagnosis of the

1. This article is reminiscent of a famous article by Professor Jean Rivero, to which the authors pay tribute (Jean Rivero, "Le Huron au Palais-Royal ou réflexions naïves sur le recours pour excès de pouvoir", *Dalloz*, 1962, Chronique VI, p. 37-40).

2. The academic rules on the planet Mars favoured indeed the three-part plan.

situation: absence of shared and binding principles, fragmentation of international environmental law characterized by a general lack of coherence and synergy between sectoral regulatory frameworks, fragmentation of international institutions, difficulties of implementation, difficulties for courts and tribunals to enforce existing law, etc.[3]

Although global environmental governance had produced some major successes such as the Paris Agreement, it seems in fact to be marked by the inevitability of a double failure: on the one hand, in relation to the development of ambitious new standards (A); on the other hand, with regard to the application of existing standards (B).

1.A. The tragic inability to adopt ambitious new standards

The Secretary-General of the United Nations first noted some positive aspects: since the Stockholm conference in 1972, many international texts in relation with environmental issues had been adopted.

However, the Martian noted that it seemed that these texts fell into two categories: either ambitious texts but falling under soft law, not really binding (the Aichi Biodiversity Targets in terms of biodiversity, the Paris Agreement on climate change); or binding agreements but limited to very technical and sectoral fields (waste, hazardous materials, pollution from ships). The states seemed unable to agree on texts that were both ambitious and mandatory.

Yet several ambitious projects had emerged during this period that could have led to salutary outcomes in favor of the global environmental governance. Three initiatives vividly illustrated the inexorable failure of ambition.

1/ The project for a World Environment Organization

Firstly, the creation of a World Environment Organization was suggested in the early 2000s. The aim was to give new impetus and unity to global environmental governance, which is fragmented among nearly 20 different institutions and more than 500 multilateral treaties. The idea was to give the environmental field a dynamic similar to that initiated by the creation of the WHO in the area of health or the WTO in international trade. The project was presented at the Johannesburg Earth Summit in 2002 and was strongly supported by several heads of state. Everyone remembers the words of French President Jacques Chirac at this Summit to underscore the need for action: "Our house is burning and we are looking elsewhere". Discussed throughout the decade, put back on the negotiating table several times, the project was finally abandoned in 2012, at the so-called "Rio + 20" conference, in favor of a simple strengthening of the United Nations Environment Programme (UNEP).

2/ The International Environmental Court project

Secondly, the proposal for an International Environmental Court has been supported by several initiatives, such as the International Court of the Environment Foundation, founded in 1992 by the Italian Professor Amedeo Postiglione, and the International Court of the Environment Coalition, created in 2009. In three decades and despite several proposals, no project has ever been completed. However, there was no lack of good will, and the proposal seemed relevant. As Sir Robert Jennings, Judge and then President of the International Court of Justice, put it, the environment being a particularly specialized and eminently international field, a control structure at the international level seems the most relevant solution.[4] Yet, the political will has not been there: states seem to seek avoidance of a mechanism that could make international environmental law punishable and coercive.

3/ The project of a Global Pact for the Environment

Thirdly and finally, the project of a Global Pact for the Environment has also faced reluctance. The initiative aimed to enshrine in a general text the fundamental principles of international environmental law. The idea is not new: it was already in the Brundtland Report of 1987. It was taken up by the IUCN, which in 1995 drew up a Draft International Covenant on Environment and Development. In turn, the *Club des juristes* proposed the adoption of a Global Pact for the Environment in 2015. The initiative initially met with some success: in 2017, President Emmanuel Macron took it to the UN, on the basis of a preliminary draft drawn up by an international network of lawyers chaired by Laurent Fabius, President of the French Constitutional Council and former President of COP 21. On May 10, 2018, the UN General Assembly adopted a resolution opening the negotiations, "Towards a Global Pact for the Environment", voted by 143 states for and - only - 5 against. However, discussions then stalled during the State Working Group sessions at UNEP in Nairobi. Although these negotiations are still underway, they have given way to a project with much less ambition, since the states have chosen to move towards a simple "Political Declaration" with no legal value, far from the initial project of an environmental quasi-constitution.

4/ A history full of failures

The Martian had to face a truth: this ambitious triptych of governance (world organization, court of justice, constitution) had come up against the fears of the states.

There were many examples of failures, such as President Rafael Correa's intelligent and innovative project,

3. Report of the Secretary-General, "Gaps in international environmental law and environment-related instruments: towards a global pact for the environment", December 13, 2018, report A/73/419. The same observations were made in 2015 in the report of a French think-tank, the *Club des juristes*, on the need to strengthen the effectiveness of international environmental law (report of the Environment Committee of the Club des juristes: *Increasing the effectiveness of international environmental law: Duties of States, rights of individuals*, November 2015: ‹https://www.leclubdesjuristes.com/le-club-dans-les-medias/communique-de-presse/publication-du-rapport-du-club-des-juristes-renforcer-lefficacite-du-droit-international-de-lenvironnement-devoirs-des-etats-droits-des-individus/›).

4. P. Sands, *Principles of International Environmental Law*, 2nd Edition, Cambridge University Press, p. 187: "It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international ; and that the main structure of control can therefore be no other than that of international law".

in which he proposed that his country, Ecuador, renounce oil exploitation in part of the Amazon forest in exchange for international aid. This idea unfortunately did not have the expected success with the rich countries. Likewise, the history of climate negotiations is full of setbacks, from the announcement in 2001 by the President of the United States of his country's refusal to ratify the Kyoto Protocol, to the failure in 2009 of the COP 15 in Copenhagen, which was supposed to adopt a new international climate agreement to succeed that Protocol. It was not until 2015 that such an agreement was adopted in Paris at the COP 21 … until the announcement in 2016 by the President of the United States of his country's withdrawal from the Paris Agreement…

There is a tragic dimension in the global governance of the environment, thought the Martian. As early as 1992, in Rio, everything had been said. The urgency to act had been established, a set of principles guiding global action had been recognized, and solutions had been discussed. However, as soon as an ambitious project was proposed, it seemed to come up against an invisible wall. The Secretary-General of the United Nations himself had to admit: the current situation was becoming desperate. What is the point of committing oneself if the outcome is known in advance?

Thus, concluded the Martian, something is wrong in the kingdom of human beings.

1.B. The difficulty of applying existing norms

Our Martian friend, wishing to introduce a touch of optimism, observed that, in spite of everything, many texts had been adopted. He then inquired about the way in which the states were applying the existing agreements. The afflicted Secretary-General, gave him a disappointing answer: international environmental law was suffering from a recurrent lack of implementation. In many cases, standards were simply not mandatory. In others, they were mandatory, but their violation was not punished.

1/ A collection of soft law standards

First, many standards are only soft law: they are merely non-binding objectives. This is the case for the "Aichi Biodiversity Targets", set within the framework of the Convention on Biological Diversity. Adopted by the Conference of the Parties of this convention in October 2010, in the city of Aichi, Japan, they were to constitute the new "Strategic Plan for Biological Diversity 2011-2020" for the planet. Finally, thought the Martian, human beings had taken ambitious measures! "Have these objectives been respected?" he asked. The United Nations Secretary-General then put another report on the table: the 5th report on the Global Biodiversity Outlook, produced in 2020 by the Secretariat of the Convention on Biological Diversity[5]. Published ten years after the adoption of the Aichi Targets, on the eve of the adoption of the new global framework for biodiversity at the COP 15 in Kunming (China) in May 2021, this report should serve as the basis for the next Strategic Plan for the post-2020 period. The conclusion is indisputable: almost no objective has been achieved. Out of the 60 criteria for the success of the objectives, only 7 can be considered fulfilled.

2/ Mandatory standards often deprived of effective systems of sanctions

Second, even where international standards are mandatory, there is often a lack of effective sanctions. A prominent example is the 1997 Kyoto Protocol, adopted under the Framework Convention on Climate Change. Canada's failure to meet its commitments to reduce greenhouse gas emissions (it was the largest supplier of crude oil to the United States) took the risk of sanctions under the Proto-col. In 2006, at the 12th United Nations Climate Conference in Nairobi, Canada had wanted to revise the Protocol, considering the targets imposed "unrealistic and unattainable". Finally, in 2011, after the election of Conservative federal representatives, Canada announced that it preferred to withdraw from the Kyoto Protocol. To avoid sanctions, Canada chose a more economical and practical option: mere withdrawal.

The Martian did not understand: when two individuals sign a contract, they are bound by their promise, they cannot withdraw. In the event of a breach, one can go to court, can't he? Why do states, which commit themselves to an international convention, have the right to withdraw? Why would it not be possible to take them to court if they do not respect their commitments? This difficulty, the Secretary-General of the United Nations replied, stems from the very nature of international law, which is based on the consent of states. The Martian then wanted to know more about the very basis of international law.

2. Diagnosis: the theory of auto-limitation of states and the Buffet Syndrome

The foundation of international law, in the traditional conception, is based on the theory of auto-limitation of states (A). In practice, however, this doctrine results in the primacy of the national selfish interests of states over the common good, which can be referred to as the Buffet Syndrome (B).

2.A. The theory of auto-limitation of states

On Earth, explained the Secretary-General of the United Nations to his Martian visitor, the state has gradually become the preferred form of political organization of societies. This is true internally, to organize social relations within a people. It is also true internationally: states are at the heart of global environmental governance.

1/ The paradox of sovereignty subject to law

In the traditional conception, international law is made by states and for states. This view is often referred to as

5. 5th Global Biodiversity Outlook Report (GBO-5), available online on the website of the Convention on Biological Diversity: <https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf>.

the "Westphalian system", named after the 1648 Treaties of Westphalia that ended the Thirty Years' War in Europe. Since then, the organization of international society has been based exclusively on relations between equal and sovereign states. Historically, continued the Secretary-General, this system was a step forward: it has made possible to introduce a little bit of order into international relations that were, and still are, too often marked by anarchy or war. It is based on a major principle: the sovereignty of states.

"But," the Martian asked, "if each state is sovereign, if it does not recognize any authority superior to it, how can it be subject to law?". "It is indeed a delicate question", the Secretary-General acknowledged: "how can the sovereignty of states be reconciled with the binding nature of international law? Our jurists have settled it through the 'auto-limitation theory'. It is true that a sovereign state cannot submit to an external and superior will. On the other hand, it can freely decide, by its own will, to respect the international legal order. The cornerstone of international law, the basis of its binding character, is thus auto-limitation of states. International norms are binding only because states consent to auto-limitation".

This theory commands both the elaboration of international law and its application.

2/ International norms under permanent negotiation

As far as its elaboration is concerned, this theory controls the sources of international law and, therefore, the decision-making process. International law is essentially a conventional law, a law of contract. Among the various legal instruments, international conventions are favored: because they systematically collect the consent of the states parties, they correspond best to the theory of auto-limitation. Even acts of secondary legislation, i.e., the large family of resolutions and other decisions adopted by the organs of international institutions, are characterized by this conception: although legally, they are unilateral acts, in practice they are acts negotiated between States. They are sometimes wrongfully identified as 'agreements' : this is the case, for example, in the area of climate change, with the decision of COP 7 in 2001, known as the "Marrakech Agreement".[6] It is also true, in the area of health, with the International Health Regulations of 2005, which is sometimes referred to as an "agreement signed by 196 countries"[7] or a "treaty"[8] when in reality it is a unilateral act adopted by a WHO body, the World Health Assembly.

Thus, in global environmental governance, the decision-making process requires the agreement of the 193 member states of the United Nations. The whole process is based on the permanent search for a balance, between consensus and compromise. Diplomats are often facing a dilemma: they must either aim for an ambitious agreement but, in this case, one that brings together only a limited number of countries, or a universal agreement (bringing together many countries), but not very ambitious (states only aligning themselves to the lowest common denominator).

3/ International justice as an option

With regard to the implementation of international law, the theory of auto-limitation extends to the sanction mechanisms: in international law, justice is often only an option. The control mechanisms provided for in most international environmental agreements are more a matter of conciliation than of real sanction. Their applications are not supervised by courts but by administrative monitoring committees, the "compliance committees", whose powers are reduced. Sanctions, when they are provided for, are often limited to purely declarative acts ("name and shame"). Referral to these committees is generally limited to states and the administration responsible for monitoring the convention: it is rarely open to non-state actors.

This situation leads to important restrictions in the application of existing international law: sanctions in the event of non-compliance with commitments are rare. The convention bodies in charge of monitoring exercise their mission by integrating, consciously or not, the possibility for states to withdraw at any time from the agreement concluded in the event of a major conflict. This is, moreover, as the Secretary-General put it, "the difficulty of my own mission and, more generally, of that of the United Nations". Faced with states that sovereignly decide whether to comply with the rules of the game, it is all a matter of conviction and diplomacy.

2.B. Pitfalls of the auto-limitation theory: The Buffet Syndrome

The limits of the auto-limitations theory can be illustrated by the Buffet metaphor. They are the reasons for the difficulties in setting up a system of disinterested management of common goods.

1/ States before the Buffet of Natural Resources

In the sharing of global space and common resources, states are like guests at a cocktail party, placed in front of a buffet of food. *Ab initio*, conscious of the limited nature of resources, everyone willingly accepts the rule imposed by reason and equity, that of equal sharing. In both cases, the mechanism is based on auto-limitation: each person commits to limit their own consumption in order to guarantee access to food for all.

Yet, the theory of auto-limitation clashes with reality. One has to simply look at the actual behavior of the guests at the buffet to be convinced of this: the temptation is great, the food is close at hand... and everyone rushes to the buffet to pile up quantities of food on their plates

6. See the website of the Framework Convention on Climate Change: ‹https://unfccc.int/lulucf-developments-at-past-cop-and-sb-sessions›.

7. See the website of a Canadian think-tank: ‹https://www.ottawahealthlaw.ca/research›.

8. See the Wikipedia page "International Health Regulations".

without worrying about the others. The worst is the justification for this voracious behavior: everyone anticipates that their neighbors will not respect the rule anyway, so it is better to be ahead of them so as not to become a victim.

How can we not think of the buffet when observing the behavior of states in the face of the planet's limited resources? National appetites are such that the idea of auto-limitations quickly encounters its limits. Frenzied consumption ends up being nothing more than a means to avoid being overtaken by a competing state. If everyone lived as an inhabitant of the United States, 5 planets would be needed.[9]

In reality, the states find themselves dragged into a form of "Red Queen's Race". In an episode of Alice in Wonderland,[10] Alice and the Red Queen start a frantic race and yet they don't make any progress. Indeed, explains the Queen, in this country, everything is constantly changing and so "you have to run as fast as you can to stay in one place". In biology, the "Red Queen hypothesis" explains the necessity of the evolution of species as a result of a race to adapt.[11] Used in economics to describe competition between companies or in international relations (e.g. in connection with the weapons race between states), this metaphor explains that, in a competitive environment, one need to adapt to survive: he who does not advance steps backwards.

Likewise, in the race for natural resources, states consider their consumption necessary to maintain their ability to compete with other states. Therefore, they are forced to run simply to stay in the same place. The buffet of natural resources thus remains overexploited by states, comforted by the magical thought that the limits mentioned by scientists are only an illusion and that the world is like a double-bottomed box that in reality hides an infinite quantity of available resources. Many eat as if the buffet was unlimited. Thus, when some states turn aware of the resources limits, they seem to eat even more by fear to give advantage to their neighbors. The rule of auto-limitation is not adapted to such a context: it is regarded as an evolutionary disadvantage for those who would apply it.

2/ The absence of a disinterested management system for common goods

Some goods are useful to all mankind: tropical forests, oceans, large rivers, air or even the polar ice caps. However, our system of inter-state governance is failing to put in place a disinterested management of these common goods.

The recent forest fires in the Amazon and in Australia have brought to the forefront the need for action. The Martian visitor himself had heard about them: the damages caused by these fires were visible from his own planet. He therefore wondered about the measures that had been put in place to preserve the tropical forests, reservoirs of carbon and therefore true "green lungs" of the Earth.

Once again, the response of the Secretary-General of the United Nations was disappointing. Admittedly, there was a lot of scientific work on the need for collective governance of these assets. But the "tragedy of the commons", conceptualized by Garrett Hardin in 1968 in his article in *Science*, seemed inevitable. Declining the prisoner's dilemma[12] to the question of goods owned by everyone, this theory explained that individuals adopt strategies that seem rational at the individual level, but that lead to irrational results at the collective scale. For this particular category of goods that benefit everyone, the immediate maximization of individuals' interest paradoxically leads to a deterioration of the situation on the collective level and a degradation of the good. Overexploitation leads to the destruction of collective property.

Yet projects initiated in this area have failed so far. Even when certain actors play the game of auto-limitation, they are hardly supported by their neighbors.

In 2007, for example, Rafael Correa, President of Ecuador, made an innovative proposal to manage a national portion of the Amazon rainforest that includes an oil field. His failure shows that such a system of auto-limitation cannot work without the solidarity of rich countries with developing countries.

Ecuador had discovered large oil field in the Yasuni Park[13], classified as a UNESCO World Heritage Site and listed as having one of the greatest biodiversity per square kilometer in the world. This raised the question of balancing environmental conservation against national economic interests, especially the needs of a developing country.

President Correa then proposed an original mechanism: Ecuador agreed to give up oil exploitation in the park in exchange for international aid: 3.6 billion dollars over 12 years, or half of the revenue that would be yielded by the exploitation of Yasuni's oil. This contribution made it possible to safeguard a part of the Amazon, avoid greenhouse gas emissions and help the country in its energy transition, without penalizing its economic development.

This initiative, which was to "inaugurate a new economic logic for the 21st century" in the words of Rafael Correa when he presented his proposal to the United Nations in 2007, quickly received $100 million in pledges, to the applause of states and environmental protection associations. But of the $3.6 billion requested in total, only $13.3 million

9. Source: *Global Footprint Network*.

10. This moment is taken more precisely from "Alice Through the Looking Glass", the second part of Lewis Carroll's famous novel.

11. The Red Queen hypothesis is proposed by Leigh Van Valen, a 20th century American biologist. In a constantly changing environment, the behavior of one species influences that of others: therefore, to avoid extinction, a species must adapt to the evolution of other species.

12. The prisoner's dilemma was proposed in 1950 by Albert W. Tucker, an American mathematician, in the context of game theory. It illustrates the situation in which players would actually have an interest in cooperating, but where, being ill informed in the absence of communication between the players, each one chooses to betray the other.

13. More than 920 million barrels of oil, or 20% of Ecuador's reserves, had been discovered there.

was provided - only 0.37% of the total. Without the promised financial counterpart, the country decided to start exploiting the deposits located under the Yasuni Park.

The Martian visitor was taught that auto-limitation is nothing without solidarity. More than ever, according to the formula of Mireille Delmas-Marty, it was necessary to pass from solitary sovereignty to solidarity sovereignty,[14] that is to say, a sovereignty in which the states do not limit themselves to the defense of their national interests, but are also concerned about common goods.

3. Food for thoughts

Logically, once the observation and the diagnosis had been made, the Martian and the Secretary-General of the United Nations kept speaking by imagining, with a certain naivety, a few possible solutions. These seemed to them to be structured by two main ideas: the return to values (A) and the recognition of a global public interest (B).

3.A. The return to values

International environmental law is too often limited to a technical approach. "Perhaps we have forgotten that law is a vector of values?" thought the Secretary-General.

1/ The technical approach of international environmental law

When we look at the state of international environmental law, there is a striking discrepancy between, on the one hand, the failure of the ambitious projects mentioned above (World Environment Organization, International Court of the Environment, Global Pact for the Environment) and, on the other hand, the proliferation of technical and sectoral texts (on waste, chemicals, etc.). This could be seen as a cause-and-effect link: in the absence of agreement on major issues, it is preferable to discuss specific and technical subjects. This is, moreover, a departure from environmental law in general, including at the internal level: aimed at governing a set of industrial economic activities, and based on a scientific background, it quickly tends to become a technical matter, made up of annexes, numerical tables, classifications, statistics and chemical formulas. In international matters, this tendency seems to be exacerbated by the heavy procedures and bureaucracy of international organizations.

This pragmatic vision has certain advantages. Some advocate a "tailor-made" approach to international environmental governance: each specific problem must be addressed by a specific sectoral agreement. This approach allows to avoid overly abstract debates on values and to focus on fixing concrete issues. It also sometimes makes it possible to build majorities with *ad hoc* coalition depending on the issues, with some countries wishing to make progress on one subject but being more reluctant on other.

We can draw a parallel with the European Union construction: this was initially based on a very concrete and given project, the creation of a single market for coal and steel.

This method can be effective in the short term. It can work within the narrow scope of the problem under consideration. However, it has its pitfalls.

First, it has an institutional consequence: the fragmentation of global environmental governance. While a specific convention addresses a specific problem, it should not be forgotten that each convention is linked to an administration. Indeed, many conventions have their own monitoring bodies: a Conference of the Parties (COP), an executive secretariat, bureau, committees of experts, etc. A convention is not only a text, it is also often an administration. For example, alongside the UNEP administration in Nairobi, there is the secretariat of the United Nations Framework Convention on Climate Change in Bonn, or the secretariat of the Convention on Biological Diversity in Montreal. Some of these administrations have several hundred employees. The result is a multiplication of costs and cumbersome procedures. Each of these conventions has also its own COP, regularly bringing together all the states Parties. It is a bit like, in domestic order, creating a specific government for each law to follow up on it.

Above all, as the history of the European Union has shown it, sooner or later there will be a need to establish common values.

2/ A need for common values

By sticking to technical rules, the overall vision, the coherence of the system and, even worse, the final objective of these rules are lost.

Lawyers are well aware of the usefulness of general principles in a legal system. It is not simply a matter of writing beautiful statements of law. Principles are the foundations and cement of the system, they keep the building upright. When the rules become difficult to apply, when the people they are meant to serve find it difficult to meet them, they will have to remember the underlying reasons why they consented to, otherwise the temptation to leave will be great. Let us recall Canada's withdrawal from the Kyoto Protocol. Or, in the case of the European Union, the departure of the United Kingdom, which may related to an initial misunderstanding about the true nature of the European project. It is a bit like being in a couple: when difficulties arise, we need to recharge our batteries in shared values.

The law is a vector of values and these values are translated into legal principles[15]. This is why in a state, the legal

14. See "From solitary sovereignty to solidarity-based sovereignty", Mireille Delmas-Marty, presentation to the *Collegium International*, June, 25, 2014 (http://www.collegium-international.org/en/) or more recently in this journal M. Delmas-Marty, "Gouverner la mondialisation par le droit", *Revue européenne du droit*, September 2020.

15. Principles fulfil various functions in a legal system: an "interpretative function" (they can inspire the interpretation of certain provisions), a "conciliatory function" (in case of contradiction between norms, principles offer a conceptual matrix that helps to reconcile conflicting requirements) or a "suppletive function" (by providing a legal basis for reasoning, even in the absence of precise rules).

order is based on a set of principles, often enshrined in a constitution. The consecration of these principles in a text of a constitutional nature has the particular advantage of anchoring them over a long period, thus they are sacralized and protected from changes of majority.

International law is no exception to this requirement.

Moreover, the Secretary-General recalled, the founding fathers of the United Nations were not mistaken. In 1945, they had started from the beginning: values. This was reflected in the first words of the United Nations Charter: "We the peoples of the United Nations…". What audacity, carried by the hope of a new world! How can we not make the connection with the first words of the American Constitution "We, the people of the United States…". And how can we not feel sorry, by comparison, for the current lack of ambition of global environmental governance and its purely technical approach?

In reality, if we judge a tree by its fruits, we must face the facts: after decades of technical sectoral treaties, this approach has failed to contain the decline of biodiversity and global warming.

Does not the worsening of the ecological crisis over the last 50 years demonstrate the failure of the small steps policy? By wanting to evolve only gradually, we end up going backwards. The measures taken remain far below the necessary scale to implement real change. They are limited to marginal corrections and unimplemented objectives, kept within the flexible and minimal framework of global environmental governance as it was created several decades ago. The world is aware of the scale and severity of the ecological crisis, yet actions are not commensurate with the enormity of the looming catastrophe.

Despite all the good will of diplomats and officials of international environmental organizations, despite the tremendous energy they devote to multilateral environmental agreements, they are not succeeding in curbing the crisis. The reason lies in the very conception of global environmental governance. In the absence of common principles, it is today a building without basement. Like a building that would have been built starting directly from the 2nd floor. As a country that would have a set of national technical laws but no constitution.

This is the goal of the Global Pact project: to create a constitutional moment, enshrining the fundamental principles of global environmental governance.[16]

The Martian listened attentively to the Secretary-General. Then his eyes lit up: "I understood" he said, "the principles are like the stars: you can't touch them, but they show the direction".

3/ The principle of Common But Differentiated Responsibilities (CBDR): the tool of a contextualized universalism

It is true that each culture produces its own system of representation, so it is difficult to identify a set of values that could be valid everywhere and at all times. This is why, notes Monique Chemillier-Gendreau, "many obstacles still stand in the way of common values that would make the realization of a truly international law possible".[17]

However, from this point of view, the ecological crisis could be the chance of international law.

First of all, environment proposes a value on which the peoples of the whole world, whatever their history, culture or religion, should be able to agree: the need to preserve the planet, their common home. Even if there are differences in approach depending on the country, the awareness of an interdependence between Man and nature is gradually spreading worldwide.

Secondly, environmental law offers an interesting matrix principle in the search for a balance between universalism and pluralism: the principle of common but differentiated responsibilities.

First enshrined in 1992 in the Rio Declaration on Development and Environment, this principle aims to take into account "the different contributions to global environmental degradation" (Principle 7 of the Declaration). It expressly affirms the double face of the responsibility of states: certainly, it is common, so that each state must assume a share of the burden; but it is differentiated, leading to heavier obligations on rich countries, given their historical share in the pollution of the planet.

It is mainly in the area of climate that this principle has been enshrined. Taken up in the Paris Agreement, the principle was already included in the 1992 Framework Convention on Climate Change, which stated in its preamble that "the global nature of climate change requires countries to cooperate to the maximum extent possible" while specifying "in accordance with their common but differentiated responsibilities, respective capabilities and economic and social conditions."

This demand for differentiation according to the diversity of concrete situations is reminiscent of the idea of distributive justice: according to Aristotle, true justice consists in taking into account de facto inequalities, in order to proceed with a distribution of goods proportionate to the talents and capacities of each person.

The principle of common but differentiated responsibilities makes it possible, on the one hand, to grant the general objective of protecting the environment and, on the other hand, to take into account particular situations. In this respect, it could prefigure a more global method for the law of globalization, in that it makes it possible to reconcile unity and diversity: on the one hand, the will to unite around common universal principles; on the other, anchoring in reality and respect for the diversity of situations.

16. See the Pact's website: <https://globalpactenvironment.org/en/>.

17. "A la recherche de valeurs communes", in *Humanités et souveraineté, Essai sur la fonction du droit international*, chaptre 14, M. Chemillier-Gendreau, La Découverte, 1995, p. 330.

3.B. Recognition of a global public interest

The Secretary-General of the United Nations reminded the Martian that sovereign states were, until now, the only decision-makers of international norms. It followed that the international normative system was almost exclusively based on the representation of the national interests of states. Unfortunately, lamented the head of UN diplomacy, in such a system, no one had an interest in changing the situation. The few states that wanted to carry out ambitious environmental reform faced a convergence of opposition from countries in the North and the South. The developed countries were threatened of being held responsible for the historical pollution and destruction from which they had benefited and did not want to have to make an economic contribution commensurate with these benefits. Many developing countries were betting on their still unexploited natural resources to accelerate their development and allow their people to access the comfort that the populations of developed countries took for granted. As in a kind of political and economic *pax nuclearis*, no one wanted to create a source of liability that could be immediately alleged by another state.

The alien visitor was astonished by this exclusivity granted to states. He was well placed to know that there could be external and superior interests to those of the states.

1/ The existence of a global public interest, distinct from the particular interests of states

It has become clear that the multiplication of cross-border crises calls for a global response. The ecological crisis was not enclosed within national borders. A state alone, however powerful it may be, cannot fight global warming or the sixth mass extinction of species. The same is true for dealing with the economic crisis, the risk of terrorism or the Covid-19 pandemic.

However, it seems less easy to draw the consequence from this observation: there is indeed a global public interest, which is not to be confused with the sum of the particular interests of states.

This global public interest is the underlying concept for the consecration of a status for "global public goods" or the debates around the notion of "common heritage of humanity": all these concepts could be founding elements in the reconstruction of a global environmental governance that is consistent with reality.

Admittedly, this common interest is multifaceted. Its content remains undetermined. Depending on the conceptions, it may cover the interest of present generations alone (the community of current inhabitants of the planet) or also include the interest of future generations (humanity) or, more broadly, extend to the interest of the planet as a whole (the planetary community of life).

But, less than the content, what matters at this stage is the strength of the assertion of this legal category: there is a global public interest that is distinct from the collective interest of states, which is merely a juxtaposition of national interests. The *collective* interest should not be confused with the *public* interest.

Above all, if this interest is global, we must exhaust the logic and affirm its features: the global public interest is *superior* and *external* to the interest of states. Ultimately, such an assertion carries with it a reinterpretation of the notion of sovereignty. It is not about questioning it: sovereignty is critical for states just as freedom is essential for individuals. Yet, it must be seen for what it is: it cannot be absolute. It is relative and has a limit: respect for the global public interest. Moreover, this assertion could provide a basis for the intrinsic force of international law: the binding nature of international norms would not come from the auto-limitation of states, but would derive from the requirements of the global public interest.

A question then arises: who can represent the global public interest?

2/ The difficult representation of the global public interest by states

Given the current state of decision-making in global governance, with states as the main actors, we can first consider entrusting states with the task of carrying this global public interest. This is reflected in Mireille Delmas-Marty's concept of sovereignty based on solidarity: The underlying idea is that states are certainly sovereign to defend their national interests but also to defend the common interest of humanity.[18]

This consideration of the global interest by the states themselves is both possible and eminently desirable. It can be done in particular by national jurisdictions. In this respect, the French *Conseil Constitutionnel* rendered a remarkable decision on January 31, 2020.[19] At issue was the ban on the export of certain pesticides to third world countries – a measure passed to protect them. Based on the concept of "common heritage of human beings" enshrined in the preamble of the French *Charte de l'Environnement*, the *Conseil Constitutionnel* ruled that environmental protection implies taking into account the extraterritorial effects of activities carried out on national territory.

This solution is pragmatic: in the short term, in the absence of a powerful world authority representing the common interest, it is necessary to ensure that it is taken into account by the national authorities. This mission assigned to the concept of authority is not without recalling the relationship between justice and force in Pascal's *Thoughts*.[20]

18. M. Delmas-Marty, "From solitary sovereignty to solidarity based sovereignty", *supra.*

19. Cons. const., decision n° 2019-823 QPC January, 31 2020, *Union des industries de la protection des plantes.*

20. B. Pascal, *Thoughts*, 1670: "Justice without force is powerless; force without justice is tyrannical (…). Thus, not being able to do strong what is just, what is strong was made to be just."

Above all, one might note that, far from being opposed, the two interests converge: the well-understood interest of the states is largely in line with the common interest. In this respect, if by a kind of blindness to their own interest, some states sometimes favor the short term, by abusively exploiting their own natural resources, they cannot ignore their future interest: the destruction of the environment generates increasing costs that will weigh on all, whether through climate change, the collapse of biodiversity, the droughts of arable land or the depletion of resources. The global productivity loss due to climate change has already been estimated at $2 trillion per year by 2030, according to a recent UN report.[21]

However, experience shows that states are unfortunately not always eager to defend the global public interest. In times of tension, they usually put their own national interest first.

This difficulty is reflected in the U.S. Supreme Court's cases. In *Kiobel* in 2013, cited by Mireille Delmas-Marty in the above-mentioned article, a dissenting opinion had suggested that the notion of American interest could be broadened to include the global interest. This opinion, supported by Judge Breyer, was based on the concept of the "enemy of the human race", established by a 1789 text, the Alien Tort Act, in order to find an extension of the jurisdiction of American courts, at the time to pirates and today to human rights violations committed abroad. But the Supreme Court did not follow this reasoning: according to it, "US Law does not rule the world".[22]

Similarly, the decision-making process at the United Nations illustrates the difficulties for states to take into account a common interest. In international forums, the prevailing mode of decision-making is consensus. Theoretically, well understood, this method is in line with this perspective: a state that could be reserved on a proposal chooses to silence its opposition and abstain, to the benefit of the common interest. Abstention is privileged over opposition, allowing states that wish to do so to move forward. However, experience shows the limits of the consensus method. This is the case with the discussions on the Global Pact project: while the UN General Assembly resolution opening the negotiations was adopted by an overwhelming majority (143 votes in favor, 5 against), the first round of negotiations in Nairobi in 2019 ended in a stalemate due to the opposition of certain states: the latter, minority but powerful (including the United States and Russia), strongly required that the consensus method be applied.

In another example, Brazil alone managed to block the decision-making process on the 2021 budget of the Convention on Biological Diversity for several weeks - thus jeopardizing the 15th Conference of the Parties on Biodiversity (COP 15). This budget must be voted on before December 31 of each year, otherwise the COP Secretariat will be unable to work from the first day of the following year. The process is subject to a tacit agreement procedure in which the silence of the states is tantamount to consent. By breaking the traditional silence, Brazil has unilaterally hindered the decision-making process for the 196 States Parties.

This example shows the risk that the consensus requirement could be diverted from its purpose: initially intended to facilitate the emergence of a common interest, it can be interpreted as a requirement of near unanimity and ultimately lead to a tyranny of the minority.

This method is particularly paralyzing in an international society of nearly 200 States. Admittedly, it is sometimes possible for a group of states to decide to act together without waiting for the other states. But in the field of the environment, inter-state negotiations often have to include all the parties. It is hard to imagine, for example, in the area of climate change, that large countries would not be subject to the collective effort. Thus, the withdrawal of the Paris Agreement from the United States, the world's largest emitter of greenhouse gases, was a very bad sign for the success of this treaty.

All in all, it is difficult to count on states to put the global public interest ahead of their national interests.

3/ Other ways of representing the global public interest

Although states play a necessary role, it is not sound for them to be the exclusive custodians of the global interest. In the tradition of checks and balances, counterbalances must be put in place to avoid the risks of abuse in the exercise of sovereignty.

The first solution aims at strengthening the role of non-state actors on the international ground.

On this subject, there is a gap between practice and law. In practice, we observe a rise in the power of non-state actors, local authorities, NGOs, scientists, economic actors: all of them are present in international environmental forums. In law, however, they have no real existence in the decision-making process, which does not officially recognize any institution other than states and certain international organizations in the enactment of international standards. Non-state actors are not subjects of international law.

Yet these entities play an important role in the very application of international law. This is evidenced by the tremendous mobilization of American cities and businesses when the United States announced its withdrawal from the Paris Agreement. The United States Climate Alliance was thus created in June 2017, bringing together 24 states and 2 U.S. territories committed to meet U.S. commitments to reduce greenhouse gas emissions. For the first time, non-state actors went so far as to substitute

21. "Climate change and labour: impacts of heat in the work place climate change, workplace environmental conditions, occupational health risks, and productivity –an emerging global challenge to decent work, sustainable development and social equity", *UNDP*, 2016.

22. See S. Breyer, *The Court and the World: American Law and the New Global Realities*, First Vintage Books editions, 2015.

themselves for a defaulting state in order to comply with a treaty that it had signed.

Some of these sub-state actors, even if they are not States, have a strong legitimacy since they represent population groups. This is obviously the case of local authorities, which represent the inhabitants of a given territory. This is also often the case of economic or social associative organizations, which represent intermediary bodies. These can be seen as true institutions, in the broadest sense of the term. By considering these entities as mere individuals, and by excluding them from the international institutional system, global governance ignores their real influence and power of representation. The legal fiction of an international arena populated solely by States is no longer adapted to the reality of the world.

A second solution is to strengthen the role of international organizations. Strictly speaking, they are the ones with a natural vocation to carry the global public interest. However, their role in the normative process is not always clearly affirmed.

First, we can think of giving them more direct powers in the preparation of treaties. In this field, their mission is often limited to technical work, the animation of working groups or the elaboration of action plans: we can mention for example the Montevideo Environmental Law Programme which is managed by UNEP. To go further, why not give the Secretary-General of the United Nations a real power of proposal in terms of treaties? In the current procedure, only the states have such a prerogative. More broadly, why not give the executive secretariats of the various multilateral environmental conventions enhanced prerogatives in the process of developing standards? By analogy with the European Union, one can imagine a plurality of institutions involved in the "manufacture of standards", each of them representing different interests: the European Council represents the states, and the European Commission, guardian of the Union's interest, has a power of proposal.

The normative power of international organizations can also be strengthened more directly. Among the various sources of international law, it would be a matter of giving a more important place to acts of secondary legislation, that is, acts directly enacted by international organizations. The deliberative organs of international organizations may indeed adopt these acts by the rule of majority, sometimes qualified majority. Unlike treaties, they do not necessarily require the agreement of all the concerned states. One example is the original mechanism provided for in the WHO "Constitution" (its constituent treaty) for the adoption of the International Health Regulations, an international instrument of a binding nature.

On the one hand, it is adopted by the deliberative organ of the WHO, the World Health Assembly, by a two-thirds majority (Article 19); on the other hand, it enters into force for all Member states, except those that have expressed their refusal within a certain period of time. This subtle procedure, mixing majority rule and consent requirement, is a model and prefigures the type of evolution that global environmental governance could undergo in order to be more effective.

Conclusion

As he was leaving, the Martian noticed a gap. Although he had identified some possible solutions, he had not considered the most difficult question: the art of reform. How could such far-reaching changes be accepted and implemented by the states? Unfortunately, the history of the Earth's people showed that it often took the occurrence of disasters to provoke deep-seated questioning. It took the shock of the First World War to bring about the creation of the League of Nations. It took the horrors of the Second World War and the Shoah to lead to the adoption of the United Nations Charter and, a few years later, the Universal Declaration of Human Rights. How many extinct species, how many hurricanes, how many climate refugees, how many cities wiped off the map by rising waters would it take the Earthlings to decide to act?

The Martian visitor got up, walked to the door and left the office of the Head of the United Nations. Then, he turned to the Secretary-General and said, as to deliver a final message: "Your planet is beautiful. Seen from the sky, it has no borders".

The reflections of our Martian friend were undoubtedly too naive. Where reason and a sense of proportion have so far failed to reform global environmental governance, how could a visitor from another planet succeed? Yet, moved by optimism, we sometimes find ourselves believing that such changes will eventually impose themselves, unless by necessity. One begins to hope that one day we will be able to break down this invisible wall against which ambitious policies to protect nature come up.

Some may argue that the present time is not the right time for such a revolution and that the future must be trusted. They may realistically believe that the dream of a world with strong rules of governance is out of reach in the short term. However, it is to be feared that if we wait for a better time to change the model, the Martian will have little to observe next time he passes over the Earth.

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Addressing Climate Change from the Bottom-Up in a Kaleidoscopic World

We live in the new geological epoch of the Anthropocene, in which humans are the dominant force in nature. The problems we now face inherently affect the well-being of future generations. Climate change is the archetypal such problem.[1] Preventing disastrous climate change requires managing a global public good - the stability of the Earth's climate system - in the interest of ourselves and of future generations. We must address climate change in the context of a kaleidoscopic world, which is characterized by rapid change in our environment, in technology, in power structure, and in players. Issues emerge quickly, and interests and constituencies change quickly.[2]

Many actors beyond States are now critical players in this more fluid and chaotic world. These other actors include subnational units of governments, cities, private sector businesses, nongovernmental organizations, *ad hoc* coalitions, informal movements, and even individuals. While international agreements and national legislation remain essential, they are insufficient. Nonbinding legal instruments and individualized, voluntary commitments at all levels are significant and growing in number. The world is at the same time becoming more localized and globalized. Engagement in climate action is both bottom-up and top-down.

The kaleidoscopic world reflects the revolution in information and communications technologies, which enable people to communicate, network, and collaborate across the world. Facebook, Tumblr, YouTube, Twitter and their analogs in various countries have emerged on an unprecedented scale. In spring 2019, Twitter reported 330 million monthly users, with governments, heads of States or foreign ministers of 187 States having 951 Twitter accounts. Mobile phone technology has spread more rapidly than any other technology in history. More than 5.1 billion people are using mobile phones in 2019, letting them communicate instantaneously across many geographical scales. These technologies enable participation in discourse from the bottom-up by organizations, informal coalitions, movements and individuals, at all scales, whether local, regional, national, or international.

1. The Urgency in Addressing Climate Change

In the Paris Agreement, States express the goal to limit the Earth's temperature rise to 1.5° C and the necessity not to exceed 2°C over pre-industrial levels. Already evidence indicates that the Earth's temperature is on a path to increase well beyond this. Studies released during the 2019 United Nations (U.N.) Climate Action Summit show that emissions associated with States' current nationally determined contributions ("NDCs") will lead to an increase in temperature of between 2.9 to 3.4 °C by 2100.[3]

Scientists fear that rising greenhouse gas ("GHG") concentrations and resulting temperature increases will cross important thresholds and disrupt the stability of our planet Earth's systems, with disastrous consequences. Scenarios once viewed as "worst case" are becoming increasingly plausible. The IPCC's 2019 Special Report on the Ocean and Cryosphere found that rising carbon dioxide absorption has made oceans more acidic and less productive. Rising temperatures melt glaciers and ice sheets, contributing to an alarming rate of sea-level rise.[4] Extreme weather is on the rise around the world, as evidenced by unprecedented fires, mega-storms, and floods. Data through early October 2019 indicate this year is the fifth year in a row in which the U.S. experienced at least ten disaster events costing over $1 billion each. July 2019 was the hottest month ever recorded for the world as whole. Recent studies reveal that permafrost is thawing, raising concerns of substantial releases of methane. Pulses of this potent gas could lead to crossing certain thresholds, with irreversible and catastrophic impacts.

2. The Need for Bottom-up Approaches

Maintaining a stable climate is a global public good, in which all actors must be engaged. National governments have yet to meet the challenge. Fortunately, subnational governments, cities, the private sector, and individuals are taking measures to reduce emissions, promote low-carbon solutions, and/or pressure governments at all levels to take action. Some are also filing lawsuits against governments and fossil fuel companies. All of these efforts may be viewed as bottom-up initiatives.

Subnational governmental actions in countries with federal systems can be especially useful because authorities at these levels in countries such as the U.S. are responsible

1. The authors thank Katherine McCormick and Olivia Le Menestrel for research assistance. This article was first published in Y. Aguila (ed.), "Le droit à l'épreuve de la crise écologique", *Revue des Juristes de Sciences Po*, January 2020.
2. E. Brown Weiss, *Establishing Norms in a Kaleidoscopic World*, 396 Recueil des cours (2018).
3. P. Kabat et al., United in Science: High-Level Synthesis Report of Latest Climate Science Information 5, (Sept. 2019).
4. Intergovernmental Panel on Climate Change, Special Report on the Ocean and Cyrosphere in a Changing Climate (25 Sept. 2019).

for planning, regulating, and funding in key sectors, such as electric utility regulation, transportation planning, land use, building codes, and more. Commitments at these levels can bolster political will, both locally and nationally. Successful mitigation efforts demonstrate proof of concept and can lead to replication in other jurisdictions and catalyze more ambitious and affordable national and international commitments. This is especially important given recent federal rollbacks in climate regulation, both in the U.S. and abroad.

Our major focus is on the U.S., since the combined populations and economies of some of its states are on a par with some large countries, and since some U.S. states have been leading the charge on climate for decades. The U.S. has a federal system of government, with fifty states, each with its own jurisdiction to address issues related climate change. The Constitution provides that "*all powers not delegated to the United States under the United States Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people.*" In the absence of federal leadership now on climate change, subnational efforts are especially important and show some progress in tackling GHG emissions.

This article describes some of the major state programs, transnational initiatives by states, and programs by cities and local communities, as well as engagement by the private sector, youth movements and others.

3. State/Provincial Level Measures

Significant action at the state and local levels began two decades ago after the U.S. withdrew its signature to the Kyoto Protocol. These developments include California's leadership in launching an economy-wide cap-and-trade program and in regulating GHG emissions from vehicles and fuels; the bipartisan Regional Greenhouse Gas Initiative ("RGGI") in the Northeast; Colorado's Clean Air Clean Jobs Act; and scores of other relevant state policies. These initiatives have shown that action against climate change is not only possible, but that it also brings great benefits through economic opportunity and growth. A majority of U.S. states have adopted bipartisan renewable portfolio standards ("RPS"), which have been widely popular and successful as they promote renewable sources of energy and help bring costs down. Similarly, deployment of electric vehicles has been catalyzed and supported through state incentives, including rebates and policies such as allowing clean fuels and vehicles to drive in lanes generally reserved for high-occupancy vehicles.[5]

When the Donald Trump announced in June 2017 his intent to withdraw from the Paris Agreement,[6] the Governors of Washington, New York and California took immediate action by forming the U.S. Climate Alliance ("USCA"), with the intent to honor within their jurisdictions the U.S. commitments under the Paris Agreement. As of September 2019, 24 Governors and Puerto Rico had joined the USCA. This bipartisan coalition represents over 55% of the U.S. population and $11.7 trillion of the U.S. $19.3 trillion gross domestic product ("GDP"). If the Alliance were a country, it would be the third largest economy in the world. When the USCA released its annual report in September 2018, it declared that, "[b]ased on climate and clean energy policies already in place across Alliance states, we are projected to have a combined 18-25% reduction in GHG emissions below 2005 levels by 2025."[7]

Just days after the President's 2017 announcement regarding the Paris Agreement, a broader coalition of businesses, investors, cities, states, universities and other organizations formed the "*We Are Still In*" ("WASI") coalition, pledging a shared commitment to help meet the Paris Agreement goals. WASI now boasts over 2,800 signatories, including 2,203 business leaders and investors, 287 cities and counties, 351 colleges and universities, and 10 states. These leaders represent over 155 million people across all 50 states, totaling almost $10 trillion in GDP.[8]

In addition to launching and expanding coalitions to demonstrate leadership in their own jurisdictions, U.S. states are working together on a bipartisan basis to push back on the current Administration's rollbacks of clean energy and motor vehicle standards.

Some states have formed regional collaborations to limit emissions. In 2009, RGGI became the first multi-state U.S. cap-and-trade program to reduce carbon dioxide emissions from the power sector. In 2017, the participating states (including many led by Republican governors) agreed on a draft strategy to extend the program through 2030, including a 30% tightening of the emissions cap from 2020 to 2030, which would reduce the region's power-sector emissions by 65% below 2009 levels.[9]

Regional collaboration is also beginning in the transportation sector. The Transportation and Climate Initiative (TCI), is a collaboration of states from the mid-Atlantic to New England working with the Georgetown Climate Center to design a cap-and-invest program for the transportation sector similar to RGGI. A proposed Memorandum of Understanding is scheduled to be released by the end of 2019.[10]

4. Transnational Initiatives

Another significant development is the emergence of programs that are developed jointly between U.S. states and entities in other countries. These cooperative arran-

5. See V. Arroyo, "From Pittsburgh to Paris", 31 *Georgetown Environtmental Law Review*, 433 (2019), for additional examples of state and local leadership.

6. The President Donald Trump sent his official notice of withdrawal on 4 November 2019; withdrawal takes effect a year later.

7. U.S. Climate All., Fighting for our future: Growing our economies and protecting our communities though climate leadership (2018)

8. *Home*, We are still in: ‹https://www.wearestillin.com/› (last visited 2 Oct. 2019).

9. *Regional States Announce Proposed Program Changes: Additional 30 percent Emissions Cap Decline by 2030*, RGGI, INC (23 AUG. 2017), ‹https://www.rggi.org/sites/default/files/Uploads/Program-Review/8-23-2017/Announcement_Proposed_Program_Changes.pdf›.

10. *TCI's Regional Policy Design Process 2019*, Transportation & Climate initiative (1 Oct. 2019): ‹https://www.transportationandclimate.org/›.

gements involve carbon sequestration (California and Brazil), cap-and-trade programs (California and Quebec), electric vehicle development and deployment (California and China; Vermont and Quebec), and the "Pacific Coast Collaborative" (among states in the United States and western Canadian provinces). These programs are not treaties or other formal international agreements between countries. Rather, they often take the form of voluntary commitments, in which participants agree to cooperate. The bilateral agreements to address acid rain and other pollution problems between the states in the U.S. and Canadian provinces are precedents for this approach. The legal instruments often take the form of a Memorandum of Understanding ("MoU"). These MoUs help determine the flow of information, ideas, and support for mutual low-carbon policy implementation. Under these memoranda, institutions can initiate GHG reduction programs and approaches, which can be replicated or extended to additional jurisdictions. Their approaches might ultimately be adopted nationally or in formal international agreements between the countries.

Many multilateral transnational programs informally link U.S. states and cities and their counterparts from around the world. For example, 94 cities, representing over 700 million citizens and one fourth of the world's economy, participate in the C40, which creates a collaborative network for cities to share knowledge "and drive meaningful, measurable and sustainable action on climate change."[11]

A similar transnational program, the Under2 Coalition, connects governments working towards keeping temperature rises "well below" 1.5 ° C.[12] It includes more than 220 governments, and represents 1.3 billion people and 43% of the world's economy. Ten states and regions within the group have committed their jurisdictions to reaching net-zero emissions by at least 2050. Members sign the Under2 MoU, committing their state, city, or country to reducing emissions by 80-95% related to 1990 levels, or to two annual metric tons of carbon per capita by 2050.

Multilateral initiatives in the energy sector also exist. For example, the Powering Past Coal Alliance is an active coalition of national governments, subnational governments and private sector bodies, whose goal is to replace coal with clean energy programs. As of September 2019, the Alliance had 91 members, spanning 32 national governments, 25 subnational governments, and 34 businesses and organizations.[13]

These transnational initiatives are elements of the kaleidoscopic world, allowing actors to come together in creative partnerships to implement agreed-upon goals. Their membership may change, as may their programs in response to changes in projected climate scenarios and effects. The initiatives reflect a basic international norm of cooperation in which actors seek to avoid harm by working together and to achieve benefits they could not get on their own.

5. Individual State Programs

21. In the U.S., programs in the individual states offer insights into the breadth of concern with climate change and innovative measures for combatting it. At least eight states, the District of Columbia and Puerto Rico have passed legislation requiring 100% clean or renewable energy. We focus on California, New Jersey, and New York because they have large populations and large economies, and because they are among the current leaders on climate and clean energy.

5.A. California

California has been a leader in climate action for decades, under both Democratic and Republican administrations. It has acted on various fronts to reduce GHG emissions, to promote energy efficiency, and to spur investments in clean energy. Some highlights of California's multi-faceted programs are described below.

California has a cap-and-trade program covering GHG emissions, which was recently extended to 2030. In 2018, then-Governor Jerry Brown also committed the state to 100% clean electric power by 2045. California policy has spurred huge private and public investments in clean energy. In 2018, the state led the country in solar jobs, with over 76,000 employees,[14] and has tripled its wind-energy capacity in recent years by creating 12 new wind manufacturing facilities–producing $12.6 billion in investments through 2017.

One of the most significant developments is California's collaboration with other leading states and automakers to reduce vehicle GHG emissions beyond federal standards. In September 2019, however, the Trump Administration released a rule revoking California's authority to apply stricter vehicle GHG limits which other states might follow. In response, California and other states are suing the federal government to contest its authority to prevent California from adopting stricter standards. California is also partnering with major automakers - Ford, Honda, VW, and BMW - in an agreement stating that they will continue gradually to increase their fuel efficiency standards. Those signing onto the voluntary agreement have until 2026 to produce cars with a minimum 50 mpg. The agreement covers 30% of all new cars and SUVs sold in the United States. Other companies, including GM, Fiat Chrysler, and Toyota, have subsequently released statements supporting the federal government.

In addition to regulating vehicles, California also requires as of September 2018 that fuel producers cut the intensity of their fuels 20% by 2030 as part of their Low

11. See, C40 Cities, <https://www.c40.org/> (last visited 21 Oct. 2019).

12. See *About the Under2 Coalition, UNDER2,* <https://www.under2coalition.org> (last visited 21 Oct. 2019).

13. See, *Powering Past Coal All.*: <https://poweringpastcoal.org/> (last visited 31 Oct. 2019).

14. *Appendix A: Solar Jobs by State*, THE SOLAR FUND (2018): <http://www.thesolarfoundation.org/wp-contents/uploads/2019/02/Appendix-A.pdf>.

Carbon Fuel Standard. In June 2019, California signed a MOU with Canada to cooperate on measures limiting GHG emissions. The partnership strives to increase the speed by which zero-emissions vehicles will be adopted and promises a transfer of knowledge relating to technical information and best practices.[15]

5.B. New Jersey

In October 2018, New Jersey Governor Philip Murphy released a roadmap to get 100% of its energy from renewable sources by 2050, and 50% by 2030.[16] In July 2019, he signed the Updated Global Warming Response Act into law, which set new carbon emissions mandates – 80% below 2006 levels by 2050 - and requires specific measures to reach this goal. New Jersey is also working on increasing renewable energy, especially wind. Executive Orders require that the state develop 3,500 megawatts of offshore wind power by 2030, direct the Board of Public Utilities and the Department of Environmental Protection to develop an Offshore Wind Strategic Plan, and create the Wind Innovation and New Development Institute to serve as a regional hub for the state's wind industry. State legislation also sets a RPS that requires power companies to generate 35% of their power from renewable energy by 2025 and 50% by 2030. In October 2019 an Executive Order established a statewide climate change resiliency strategy to plan for climate change impacts.[17]

5.C. New York

In March 2019, New York Governor Andrew Cuomo signed into law a $175 billion budget, which provides for congestion pricing - the first of its kind within the U.S.- requiring drivers in parts of New York City to pay a toll, the proceeds from which will be used to improve the subway and address other transportation needs.[18] New York also passed the Climate Leadership and Community Protection Act, which became law in July 2019.[19] The Act sets an ambitious statewide objective of achieving "net zero" carbon emissions by 2050, in addition to setting the binding and enforceable goals of reaching 85% reduction of emissions by 2050, with a midterm goal of 40% by 2030. By 2040, the state's goal is to achieve 100 percent clean electricity.[20] Also notable is a focus on environmental justice concerns, with a 22-member climate action council which will craft a scoping plan on these issues.

Recognizing the need for investments in environmental justice communities, the Governor committed the state to providing free community solar energy to 10,000 low-income residents.

In March 2018, the Governor committed $1.4 billion to 26 renewable projects, which include 22 solar farms, three wind farms, and one hydroelectric project. The state will invest $200 million in energy storage. New York is also focusing on increasing energy efficiency and has announced that it would increase its current 2025 energy efficiency goal by 50% and provide $36 million in incentives for localities, homebuilders, residents and business to make investments in increasing energy efficiency.

The actions in these three states are all focused on expanding renewable energy, addressing energy supply as well as demand, and incorporating considerations of environmental justice. Their actions offer a detailed glimpse into what bottom-up actions at the subnational level can entail and their important role in addressing climate change.

6. Municipal Initiatives

Cities have also become major actors in addressing climate change. Cites such as New York, Los Angeles, and Chicago have been leaders through organizations such as C40 and Climate Mayors. In June 2017, the U.S. Conference of Mayors, which represents thousands of cities with populations exceeding 300,000, adopted several resolutions, including one that explicitly recognized the importance of the Paris Agreement, the Clean Power Plan, and federal action to support clean transportation alternatives and the need to provide cities with the tools to combat climate change and prepare for its impacts on communities. The Conference also adopted resolutions encouraging utilities, the federal government, and others to help accelerate the electrification of the transportation sector and encouraging cities to pursue a transition to 100% clean, renewable energy by 2035. These are important steps, but they must be implemented.

Individual cities are making commitments to promote clean energy. To cite but two examples, Orlando, Florida is transitioning its municipal fleet to 100% advanced fuel vehicles with a target date of 2030, and Disneyworld (located there) is bringing a 50 MW solar project online to power two of its four theme parks. San Francisco, California became the first major U.S. city aiming to run fully on renewable energy, with a goal of doing so by 2030.

Cities in other countries are also taking important measures to address climate change. At the 2018 U.N. Climate Action Summit, C40 announced that 27 of its member cities had peaked in their carbon emissions, and since that time, emissions have declined. In October 2017, twelve cities—including London, Los Angeles, Mexico City, and Paris—pledged to procure only zero-emission buses for

15. *Canada and California Sign Agreement to Work Together on Cleaner Transportation*, CAL. AIR RESOURCES BOARD (26 June 2019): ‹https://ww2.arb.ca.gov/news/canada-and-california-sign-agreement-work-together-cleaner-transportation›.

16. *The State of Innovation: Building a Stronger and Fairer Economy in New Jersey*, THE ST. OF N. J. (Oct. 2018): ‹https://www.njeda.com/pdfs/StrongerAndFairerNewJerseyEconomyReport.aspx›.

17. *Governor Murphy Signs Executive Order to Establish Statewide Climate Change Resilience Strategy,* INSIDER NJ (Oct. 29, 2019) ‹https://www.insidernj.com/press-release/governor-murphy-signs-executive-order-establish-statewide-climate-change-resilience-strategy/›.

18. *FY 2020 Enacted Budget Financial Plan, N. Y. ST. of Opportunity* (Mar. 2019): ‹https://www.budget.ny.gov/pubs/archive/fy20/enac/fy20fp-en.pdf›.

19. New York Climate Leadership and Community Protection Act, S. 6599, 2019 Leg. Reg. Sess. (N. Y. 2019)

20. *Governor Cuomo Announces Formal Request for New York Exclusion from Federal Offshore Drilling Program*, N. Y. ST. (9 Mar. 2018): ‹https://www.governor.ny.gov/news/governor-cuomo-announces-formal-request-new-york-exclusion-federal-offshore-drilling-program›.

municipal transit fleets beginning in 2025.[21]

While these initiatives and commitments are important, they alone are not sufficient. Other jurisdictions across the U.S., the federal government, and the world as a whole must do more to avoid reaching tipping points that trigger catastrophic climate change impacts. Recent studies have shown that while 68 countries have stated their intention to enhance ambition in their Paris Agreement NDCs, this only represents 8% of emissions worldwide.[22] More action needs to be taken at every level – federal, state, community, and individual – to ensure that we do not surpass Earth's critical thresholds. The next sections discuss other important players in our kaleidoscopic world – the private sector and individuals.

7. Private Sector Commitments

Some actors in the private sector are making important commitments to address climate change. Companies and business coalitions have been moving forward with pledges to reduce emissions and invest in climate solutions. They are driven by compelling scientific reports, consumer and employee demands, shareholder resolutions, divestment campaigns, reputational and litigation risks, and more. The Business Roundtable, whose members are exclusively chief executive officers in charge of major U.S. companies, issued a statement in which they committed to lead their companies "for the benefit of all stakeholders – customers, employees, suppliers, communities, and shareholders." This includes protecting the environment by embracing sustainable business practices.

The involvement of the private sector is global. Climate Week at the U.N. in September 2019 yielded dozens of new commitments from companies and organizations around the world. For example, 130 banks from 49 countries within the United Nations Environment Programme's finance initiative – representing over $47 trillion in assets – released the Principles for Responsible Banking to accelerate "the banking industry's contribution to achieving society's goals as expressed in the Sustainable Development Goals and the Paris Climate Agreement."[23] Amazon announced its "Climate Pledge," committing to honor the objectives of the Paris Agreement with its own twist – meeting the goals laid out in 2040, rather than the Agreement's 2050 target and calling on other companies to do the same. Former New York Mayor Michael Bloomberg started America's Pledge, which will track efforts by U.S. states, cities, and businesses to reduce GHGs.

8. Youth Movements and Civil Society Initiatives

Youth have led the way in catalyzing social movements to convince governments and others to combat climate change. Youth climate movements began to appear after the Rio Conference on Environment and Development in 1992 and were largely organized along geographical lines. Since 2005, most have been under the larger umbrella organization of the International Youth Climate Movement (IYCM) with regional membership from all around the world. These movements or networks may combine smaller scale local movements under a national or regional umbrella. Umbrella organizations of NGOs beyond youth also exist, such as the Climate Action Network International with over 1,100 nongovernmental organizations in 120 countries.

In the last few years, youth have created many more movements to combat climate change, which are not geographically linked. Such movements include the Sunrise Movement, Fridays For Future, Extinction Rebellion, Earth Uprising, and Youth Climate Leaders. Some, such as the Sunrise Movement in the U.S., are focused on national actions. Others, such as Youth Climate Leaders, aim to be global organizations. Some are highly global and highly decentralized and do not require an individual to engage with an institution before taking action in the name of the movement. Such movements include Fridays For Future. There is also some overlap between these movements. For example, ambassadors of Earth Uprising are also avid protesters within the Fridays For Future movement. The movements may also support each other, as illustrated by Greta Thunberg's social media posts supporting Extinction Rebellion actions.

Since this article focuses on subnational actions in the U.S., we consider first the Sunrise Movement, which began in 2017 and has substantial national momentum. Sunrise tries to stimulate political engagement to get authorities to act and to convince the U.S. Congress to adopt the Green New Deal, calling for a rapid transition to 100% renewable energy. The Green New Deal integrates consideration of racial and socio-economic inequities with demands for increased measures to fight climate change and for community and workforce investment. The movement has seen some success in that the Green New Deal resolution has been introduced in Congress, and some candidates for national political office are embracing its principles, though more detail would be required to enact it into policy.

Next we consider two international youth movements that depend upon local individual actions. Greta Thunberg, a Swede, began her movement in August 2018 when she protested outside the Swedish Parliament for three weeks. She continued these protests on Fridays after school started, sharing her protests on Instagram and Twitter, which led to the hashtags *#FridaysForFuture* and *#Climatestrike*. Using social media, she gained momentum with other youth around the world. In September 2019, Thunberg addressed the U.N. Climate Action Summit to great applause. Following her speech, she gained millions of new followers on both Twitter and Instagram. The movement has its costs, though, for it has generated backlash on social media against children and teenage girls.

21. *C40 Cities Clean Bus Declaration of Intent*, C40 CITIES (2017): <https://www.c40.org/networks/zero-emission-vehicles>.

22. 2020 NDC Tracker, Climate Watch: <https://www.climatewatchdata.org> (last visited 1 Nov. 2019).

23. Principles for Responsible Banking, UNEP Fin. Initiative: <https://www.unepfi.org/banking/bankingprinciples/> (last visited Nov. 5, 2019).

Extinction Rebellion, a movement that began in the United Kingdom in October 2018, describes itself as an "international movement that uses non-violent civil disobedience in an attempt to halt mass extinction and minimize the risk of social collapse." Its approach contrasts with traditional tools like petitions or efforts to reach out to political representatives. The movement, using social media of Instagram and Twitter, advocates decentralized action, claiming that anyone who follows its core principles and values can act in its name.

While these movements are similar in trying to effect political change, they differ in significant ways, including in their rhetoric. Most of the earlier movements self-identified geographically, used little social media (mostly nonexistent then) and were rather centralized, with sometimes layers of institutional organization. Recent movements use social media to reach people, advocate individual decentralized actions, and may use strident rhetoric. This strategy enables them to gain global momentum quickly, to reach far more people, and to stimulate wider action.

9. Actions in Courts and UN complaint bodies

Civil society is increasingly bringing complaints before judicial or semi-judicial bodies to press for action on climate change. Some efforts target international tribunals or complaint bodies. Greta Thunberg and fifteen other youth have petitioned the U.N. Committee on the Rights of the Child under the Third Optional Protocol (Article 5) to protest governmental failures to address the climate crisis. The petition alleges that the lack of action by Argentina, Brazil, France, Germany and Turkey will cause youth to suffer consequences in violation of the provisions of the Convention on the Rights of the Child (Articles 3, 6, 24, 30). The petition provides many details of expected harm and also considers applicable principles of international law, including the precautionary principle and the principle of intergenerational equity. While the issue of standing to bring the petition must be addressed, the initiative is important because it presages potentially further petitions to international bodies.

Youth and others are also increasingly turning to national courts to try to force governments to do more to combat climate change or to target fossil fuel companies as sources of the climate problem. In the United States, 21 young people brought suit against the U.S. Government in *Juliana v. United States* alleging that the Government is knowingly neglecting to prevent future catastrophic effects from climate change in violation of the plaintiffs' constitutional due process rights in life, liberty and property. They have invoked the public trust doctrine and extended it to the atmosphere. The District Court and the Federal Appeals Courts have refused to dismiss the case, but due to procedural challenges the case has yet to proceed to trial. Similar lawsuits have been launched in other U.S. states.

Cases are also being pursued in other countries. In the Netherlands, the *Urgenda Foundation* sued the Dutch Government for failing to take adequate measures to reduce GHG emissions. The District Court in The Hague ordered the Government to reduce annual GHG emissions by at least 25% at the end of 2020 compared with the 1990 emissions level in order to reduce the risk of dangerous climate change. The Court concluded that the principle of fairness required the State to ensure that the costs of climate change are distributed reasonably between present and future generations. On 20 December 2019, the Netherlands Supreme Court upheld the decision. In Pakistan, in *Leghari v. Federation of Pakistan*, the Lahore High Court Green Bench agreed that the failure of the Government to address climate change violated plaintiff's constitutional rights to life and dignity. It created a Climate Change Commission to monitor progress in implementing the country's National Climate Change Policy. The case is especially important for recognizing fundamental rights as a basis to challenge national government inaction on climate change and invoking the intergenerational equity and precautionary principles.

While these cases are perhaps among the most well-known, youth and others have brought climate change cases in at least 28 countries, covering North and South America, Europe, Asia and the Pacific Region.[24] In January 2019 the municipality of Grande-Synthe in France filed a suit before the Conseil d'État against the French government for failing to take appropriate measures to combat climate change and requested that it be ordered to take appropriate actions to reduce GHG emissions. *Notre Affaire à Tous* and three other non-profits filed a similar suit in March 2019 before the Administrative Court of Paris. These cases reflect a growing trend to use the courts as a way to get governments to address climate change.

Public prosecutors, nongovernmental organizations, and individuals are also turning to the courts to try to hold fossil fuel companies responsible for their failure to acknowledge publicly and address the dangers of fossil fuels in contributing to climate change. In New York, the Attorney General sought to prosecute Exxon Mobil under New York's Martin Act against shareholder fraud, alleging that the company misled investors and shareholders about the actual costs and risks of climate change and hence the assessment of the company's attractiveness as an investment. On 10 December 2019, the New York Supreme Court rejected the claim on the basis that the Attorney General had failed to establish a violation by a preponderance of evidence. Massachusetts has filed a civil suit against Exxon Mobil alleging misrepresentation and failure to disclose climate change risks to the business and seeking injunctive relief and punitive damages. Several Exxon Mobil shareholders in Texas and New Jersey have initiated suits in federal court against directors of the

24. J. Setzer & Rebecca Byrnes, *Climate Chance Litigation: 2019 Snapchot* (July 2019), ‹http://www.lse.ac.uk/›. See Climate Change Litigation Database, for a list of cases initiated by youth, ‹http://climatecasechart.com› (last visited Nov. 5, 2019).

corporation, alleging violation of federal securities law, breach of fiduciary duty, waste of corporate assets, and unjust enrichment. In Maryland, the Mayor of Baltimore and the Baltimore City Council have filed a complaint in state court against 26 oil and gas companies alleging that they contributed to climate change by producing and selling fossil fuels and by deceiving the public about the products' danger in violation of several state laws.

Lawsuits against companies for contributing to climate change are being litigated in other countries as well, as for example the suit by a Peruvian farmer against a German electricity company for contributing to climate change leading to glacial melting and floods.

The use of court litigation to hold government and companies accountable for climate change is increasing. This trend reflects a sense of urgency in using all available levers and approaches to address climate change. The key question is what difference all the initiatives described above will make in limiting GHG emissions sufficiently to keep the global temperature from rapidly rising and risking the stability of our climate system. The answer is still unclear. Monitoring and assessing these efforts and their effects will be essential.

10. Reflections on Bottom-up Initiatives in the Kaleidoscopic World

The mitigation of climate change is a global public good. Climate change has profound implications for people today and for future generations. It is inherently long-term and intergenerational. Our actions to address climate change take place in the context of the new kaleidoscopic world, with rapid change, many actors (both public and private), and different kinds of legal instruments. The problems of climate change must be addressed locally, regionally, and internationally. Individuals must become involved. While all the actors must be accountable for their actions (or inactions), the complexity of the kaleidoscopic world makes accountability more challenging.

In the new kaleidoscopic world, national governments must act to reduce GHG emissions. However, top-down measures by themselves are unlikely to be sufficient even if States meet their current national determined contributions.

Bottom-up approaches that engage other actors beyond governments are essential. They enable national governments to meet their commitments and provide avenues to go beyond them.

In this more fluid context, legal instruments must go beyond formal international agreements and national legislation. Arrangements between subnational entities, nonbinding legal instruments, and individualized voluntary commitments by all actors, public and private, are essential and likely to become increasingly common.

As we develop top-down and bottom-up measures to address climate change, equity issues arise. Climate change will have disparate and unequal effects on low-income and minority communities and individuals, who frequently live in vulnerable areas and have far fewer resources to adapt. Moreover, they have contributed least to emissions of greenhouse gases. This means we must address such intragenerational inequalities with fair and robust policies.

Climate change intrinsically raises issues of intergenerational equity. Our actions today will profoundly influence the robustness and habitability of our planet for future generations and the costs they must bear to protect their inheritance. Youth know this. The problem is that future generations are not at the table for the decisions we take today. The kaleidoscopic world complicates efforts to give them a voice, because these decisions happen on multiple levels, with multiple actors, and on multiple issues. We need to devise ways to ensure that the interests of future generations are considered in these decisions.[25]

Accountability is critical to ensuring that those who act, whether top-down or bottom-up, are answerable for the results of their action or inaction. Individuals must also be accountable. Accountability can be complicated. Who is accountable to whom, for what, when, and how? The lawsuits related to climate change and the youth and other movements working through direct engagement with policy makers are efforts to hold leaders accountable. These actions are vital in capturing attention and in catalyzing action at all levels of society.

25. E. Brown Weiss, "Intergenerational Equity in a Kaleidoscopic World", 49 *ENVTL. L. & POL'Y* 3 (2019); U.N. Secretary-General, *Intergenerational Solidarity and the Needs of Future Generations*: Report of the Secretary-General, UN Doc. A/68/322 (15 Aug. 2013).

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Global governance through the market and sustainable development

The concept of the market economy represents a system where decisions to produce, exchange and allocate scarce goods and services are mostly determined using information resulting from the confrontation of supply and demand as established by the free play of price competition.[1] According to liberal theory, this mechanism is the engine of economic growth, leading to a free and self-regulating market, in a globalized economy, depoliticized and free from any exogenous constraint, particularly economic, social and environmental.[2]

However, it appeared, from the 19th century, first in the United States and then in Europe, that the protection of free competition, a central principle of the market economy,[3] required the intervention of States to correct the market imperfections linked to the behavior of firms, when they hinder its proper functioning, whether these obstacles result from anti-competitive practices (cartels, abuse of dominant positions) or from excessive concentration. These State interventions are carried out within the framework of competition policy.[4]

In the mid-20th century, this liberal doctrine was supplemented by an analysis of market failures, at the origin of the theory of externalities, the theory according to which, through their activity, competing firms produce effects that provide to others, without monetary compensation, a utility or an advantage or, on the contrary, a nuisance or damage. Escaping from market logic, these externalities, especially when they are negative, require State intervention through regulatory policies.[5]

Supported by all the international organizations with an economic vocation,[6] a regulated market theory has thus gradually established itself on a global scale establishing a link between competition, competition policy and macroeconomic results, such as productivity, growth, innovation, employment and inequalities.[7] Assured of the validity of this model, these organizations encouraged States to adopt competition policies implemented by competition authorities and/or courts, in principle independent, in compliance with fundamental procedural guarantees, according to standardized regulations[8] regarded as essential for their participation in international trade.[9] Thus competition law, standardized and globally integrated by cooperation agreements,[10] has been established as a principle of global governance by the market.[11] Having supplanted collectivist or interventionist systems,[12] this model is now universal[13]. In a global market, capital, goods, services and labor are in a situation of global competition.

From the end of the 1970s, however, it appeared that, if this economic model allowed undeniable progress, it followed directions that the planet and its inhabitants could not sustain any longer in terms of development and environment. A World Commission on Environment and Development, set up in 1983 by the United Nations General Assembly, thus noted a double failure: both in

1. R. Guesnerie, *L'Économie de marché*, Le Pommier, 2006.
2. M. Friedman, *Capitalisme et liberté*, Flammarion, Champs Essais, 2016.
3. Neoclassical market economics is based on the paradigm of pure and perfect competition; B. Guerrien, "Qu'est-ce que la concurrence parfaite ?", July 2017, accessible here: ‹http://bernardguerrien.com/wp-content/uploads/2017/07/concurrence-parfaite.pdf›.
4. E. Combe, *Economie et politique de la concurrence*, 2nd éd. Dalloz, 2020.
5. F. Aggeri, *Marchés et développement durable. L'activité marchande sans le marché*, Presses des Mines, pp.231-245, 2010 ; R. Coase, "The problem of social cost", *Journal of Law and Economics*, 1960, 3, 1-44 ; E. Meade, "External Economies and Diseconomies in a Competitive Situation", *The Economic Journal*, 1952, Vol. 62, No. 245 p. 54-67 ; R. Cornes et T. Sandler, *The theory of externalities, public goods and club goods*, Cambridge University Press, 1986 ; C Gollier, Le climat après la fin du mois, PUF, 2019.
6. Research carried out by the International Competition Network (ICN) and other international organizations, for example the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD), initiatives taken by non-governmental organizations such as the Consumer Unity and Trust Society (CUTS) and, above all, by the most influential national competition authorities aim to promote understanding of the objectives, content and effects of competition policy on a global scale. For a reflection on this question, see: H. M. Hollman et W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role", *Minnesota Journal of International Law*, vol. 20, 2011, pp. 274-323.
7. P. Aghion, N. Bloom, R. Blundell, R. Griffith, & P. Howitt, "Competition and Innovation: an Inverted-U Relationship", *The Quarterly Journal of Economics*, 120(2), 2005, pp. 701-728; P. Aghion, C. Antonin, S. Bunel, *Le pouvoir de la destruction créatrice*, Odile Jacob, 2020.
8. UNCTAD Model Law on Competition (2010).
9. See the negotiations within the World Trade Organization (WTO) on the interaction of trade and competition policy and the opposition between developed and developing countries; OECD, Global Forum on Competition: Competition Policy, Trade and the Global Economy: Elements contained in existing WTO agreements, commitments contained in regional trade agreements, current challenges and areas for reflection - Memo by R. D. Anderson, W. E. Kovacic, A. C. Müller and N. Sporysheva - 5 December 2019 : ‹http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf›.
10. M. Rioux, Globalisation économique et concurrence (Memo). Études internationales, 33 (1), 2002, pp. 109–136 : ‹https://doi.org/10.7202/704384ar›.
11. The meaning of the neologism "global governance" is inspired by the report on Global Governance of the French Economic Analysis Council, Documentation française 2002: ‹https://www.cae-eco.fr/staticfiles/pdf/037.pdf› (in French).
12. According to WTO criteria, even China was recognized as a market economy in 2016. However, it is denied this status by Europe and the United States.
13. The market economy, however, has variations depending on the contexts and institutions that support it. Alongside the market economy practiced in Anglo-Saxon countries, a "social market economy" has developed in Europe, inspired by ordoliberalism, while China describes itself as a "socialist market economy"; see R. Guénerie, above.

development and in management of the environment.

According to the report of this Commission published in 1987[14] and widely documented by four years of work, with regard to development: "in terms of absolute numbers there are more hungry people in the world than ever before, and their numbers are increasing. So are the numbers who cannot read or write, the numbers without safe water or safe and sound homes, and the numbers short of woodfuel with which to cook and warm themselves. The gap between rich and poor nations is widening - not shrinking - and there is little prospect, given present trends and institutional arrangements, that this process will be reversed." While "There are also environmental trends that threaten to radically alter the planet, that threaten the lives of many species upon it. including the human species." In order to remedy this situation of planetary peril, this Commission proposed the adoption of so-called "sustainable development" policies allowing to meet "the needs of the present without compromising the ability of future generations to meet their own needs".

As conceived by this report and the founding texts that followed it, sustainable development is based on integrated economic, environmental and social solutions that are the basis of economic models serving people and the environment, of environmental policies that contribute to progress; and of social approaches that promote economic dynamism and protect environmental heritage, while strengthening human rights, equality and sustainability.[15] While in its formulation, this concept may seem broad and vague, over time it has nevertheless become much more precise in its three-fold dimension, economic, social and environmental, as well as in the integration mechanisms that bind them together. Thus, the 2030 Agenda organizes around five pillars (planet, population, prosperity, peace and partnerships) 17 sustainable development goals[16] which are now sufficiently precise to guide and assess the policies of the signatory States.[17]

According to the market economy doctrine, environmental and social issues included in sustainability fall under externalities.[18] So that, in principle, the market and sustainable development follow different logics: the free play of competition for one, state intervention in various forms, mainly regulatory and fiscal, for the other. The question, then, is whether these regulatory policies are sufficient to offset the negative climatic, environmental and social consequences of the market economy.[19] The observation is unfortunately that of increasing inequalities, worsening poverty,[20] increasing hunger,[21] environmental degradation and accelerating global warming.[22] The questioning of our development model takes on a new dimension with the economic and social consequences of the global coronavirus pandemic.[23]

The dual approach, free competition and state regulation, is also a source of tension, insofar as the market economy and sustainable development are antagonistic: the private interest pursued by firms is opposed to the public interest of sustainability; the present time of immediate transactions on existing goods is opposed to the potential of future projects; ad hoc and anonymous exchanges on the market are opposed to transmission of knowledge and solidarity between peoples and towards the future generations; finally, the economic effects for private firms are opposed to the consequences on the common goods.[24]

According to the dominant opinion, the survival of the liberal economy requires, in fact, that these existential contradictions be resolved in order to avoid social explosion and climate catastrophe.[25] To this end, at the global level, various organizations, affirming in principle the compatibility of the market economy with the imperatives of sustainable development (1), are looking for techniques to take these imperatives into account in the application of competition law (2).

14. Our Common Future. Report of the World Commission on Environment and Development presided by Gro Harlem Brundtland ("Brundtland report"), April 1987.

15. T. Strange, A. Bayley, OECD Insights Sustainable Development Linking Economy, Society (2008). For a summary in French, see: ‹https://www.oecd.org/fr/lesessentiels/41903232.pdf›.

16. Poverty eradication; fight against hunger; good health and well-being; access to quality education; gender equality; access to drinking water and sanitation; affordable, reliable, sustainable and modern energy; access to decent work; build resilient infrastructure, promote sustainable industrialization, and foster innovation; reduction of inequalities; sustainable cities and communities; sustainable consumption and production patterns; combat climate change; conserve and sustainably use the oceans and seas for sustainable development; sustainable use of terrestrial ecosystems; access to justice and accountable institutions; global partnerships for attainment of these goals: ‹https://www.un.org/en/exhibits/page/sdgs-17-goals-transform-world›.

17. For France, see the Report on the objectives of sustainable development presented on the occasion of the voluntary national review of France at the High-Level Political Forum on Sustainable Development (July 2016, New York): ‹https://sustainabledevelopment.un.org/content/documents/10726Report%20SDGs%20France.pdf›.

18. W. J. Baumol, W.E. Oates, *The Theory of Environmental Policy*, Cambridge University Press, 1988.

19. F. Aggeri, *op. cit.*; OECD Global Forum on Competition Discusses Competition Under Fire: ‹http://www.oecd.org/competition/globalforum/competition-under-fire.htm›.

20. World Bank studies show that while extreme poverty has been significantly reduced in emerging countries over the past fifty years, the conjunction of the Covid-19 pandemic, conflicts and climate change is likely to push again in extreme poverty a large number of people in precarious situations. According to preliminary estimates for 2020 that take into account the effects of the pandemic, between 88 and 115 million additional people would be affected, bringing the total number of people living in extreme poverty to 703-729 million ‹https://www.banquemondiale.org/fr/topic/poverty/overview›.

21. The latest data from the joint FAO, WHO, WFP, Unicef, IFAD report (SOFI Report) published on July 13, 2020 shows that hunger continues to increase, while the planet globally produces sufficient food: according to 2019 data , even before the Covid-19 pandemic worsened the situation, 690 million people, or 8.9% of the world's population, were underfed: ‹http://www.fao.org/3/ca9692fr/online/ca9692fr.html›.

22. F. Aggeri, *op. cit.*

23. L. Idot, "Covid-19 et droit de la concurrence", *Revue Europe*, No. 4, April 2020, p. 6 ; OECD, Les réponses de la politique de la concurrence de l'OCDE face au COVID-19, April 2020 : ‹http://www.oecd.org/coronavirus/policy-responses/les-reponses-de-la-politique-de-la-concurrence-de-l-ocde-face-au-covid-19›.

24. F. Aggeri, *op. cit.*

25. F. Aggeri, *op. cit.* ; F. Aggeri and O. Godard, "Les entreprises et le développement durable", *Entreprises et Histoire*, December 2006.

1. Affirmation of a principle of compatibility between market economy and sustainable development

In the political positions of these various State or inter-State organizations, the coexistence between the market economy and the objectives of sustainable development is based on the ambition of a new market doctrine[26] (A), mobilizing various fundamental conventional or constitutional principles (B) and by a new conception of consumer welfare as an essential objective of competition policies (C). As indicated by "The Green Deal for Europe",[27] it is ultimately about giving ourselves the means to make the market economy sustainable[28] (D).

1.A. The ambition of a new market doctrine

From the 1990s on, the rise of social and environmental concerns pushed international organizations, the European Union, States and the institutions responsible for implementing competition policies to reduce these tensions, both in the field of antitrust and merger control and in that of State aids. The central idea is that a well-conducted and effectively implemented competition policy, depending on the economic, social and environmental situation of a country, should complement other government policies to support sustainable and inclusive growth and development. In particular, it is argued that competitive markets encourage companies to produce more cheaply, invest efficiently, innovate and adopt more energy efficient technologies, that this competitive pressure is a powerful incentive to use the limited resources of the planet efficiently and as a result that it complements the policies and rules for the protection of social and environmental equilibria.[29] The doxa is that competition policy contributes, by itself, to the effectiveness of green policies, or more generally, of sustainable development.[30] These are the ambitions taken up in various forms, by the United Nations with the Sustainable Development Goals (SDG agenda 2030),[31] by the OECD,[32] through its studies and recommendations on sustainable development and competition policies, but also by the UNCTAD,[33] the IMF,[34] the World Bank[35] the WTO[36] and the ISO.[37] This is also the ambition of the European Union's "green deal" action plan.[38] The same ambition is affirmed by certain States, including France, which is mobilizing to achieve the sustainable development goals of the Agenda 2030,[39] which constitutionalized its environmental protection policies,[40] has assembled a citizens' convention to accelerate the fight against climate change[41] and has adopted a legislative framework to take into account the social responsibility of companies.[42] In this perspective, the national independent public and administrative authorities have published a working document on their role and their tools in the face of climate issues.[43] For its part, the French Competition Authority announced, when publishing its guidelines for the year 2020, that, through its decisions, it intended to take into account the requirements of sustainable development and in particular the environment.[44] In summary, competition policies have a role to play in supporting sustainability and in particular in protecting the environment. Ultimately it would be about achieving "inclusive competition."

26. M. Lafitte, "Développement durable et économie de marché", *Revue Banque*, February 2007.
27. https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_fr.
28. Margrethe Vestager uses the expression "greening competition policy" in her interview "Green Deal and competition policy" ; L. Peeperkorn, "Competition and Sustainability: What Can Competition Policy Do?", Concurrences No. 4-2020.
29. UNCTAD The role of competition policy in promoting sustainable and inclusive growth, July 2015.
30. Margrethe Vestager, *op. cit*. This dogma is, however, discussed by environmental economists both in principle and in practice, see: F. D. Vivien, "Un panorama des propositions économiques en matière de soutenabilité", O. Boiral, "Environnement et économie : une relation équivoque", *VertigO*, November 2004.
31. ‹https://www.un.org/sustainabledevelopment/›.
32. OECD 2008, "Réglementation environnementale et concurrence", *Revue de l'OCDE sur le droit et la politique de la concurrence*, vol 9/2 ; Forums mondiaux de la concurrence, https://www.oecd.org/fr/concurrence/forum-mondial/ : Le genre et la concurrence (2018), la concurrence dans le marché du travail (2019), la concurrence et la démocratie sont-elles symbiotiques ? (2017), La promotion de la concurrence et la protection de droit de l'homme (2016), Les liens et les facteurs d'entraînement entre concurrence et emploi (2015), La Lutte contre la corruption (2014), La concurrence et la réduction de la pauvreté (2013).
33. UNCTAD, *The role of competition policy in promoting sustainable and inclusive growth*, July 2015.
34. IMF, Policies for Faster Growth and Poverty Reduction in Sub-Saharan Africa and the Role of the IMF, December 2000.
35. The World Bank, Boosting Competition in African Markets Can Enhance Growth and Lift at least Half a Million People out of Poverty, 27 July 2016.
36. WTO, Working Group on the Interaction between Trade and Competition Policy, Note by the Secretariat, The Fundamental WTO Principles Of National Treatment, Most-Favoured-Nation Treatment and Transparency (WT/WGTCP/W/127 of 7 June 1999; https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm).
37. ISO, Guidelines Competition Law for Participants in the ISI Standards Development Process: ‹https://www.iso.org/files/live/sites/isoorg/files/developing_standards/docs/en/competition_law_guideline.df›.
38. A European Green Deal. Striving to be the first climate-neutral continent: ‹ https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en›.
39. France's roadmap for the 2030 Agenda: ‹https://www.agenda-2030.fr/sites/default/files/2019-09/4%20Page%20Livret_Sommet%20ODD%20-%20V2impression%20-%20ENGLISH.pdf›.
40. Constitutional law No. 2005-205 of March 1, 2005 relating to the Environmental Charter, Preamble: "the future and the very existence of humanity are inseparable from its natural environment … the environment is the common heritage of human beings… the preservation of the environment must be sought in the same way as the other fundamental interests of the Nation… in order to ensure sustainable development, the choices intended to meet the needs of the present must not compromise the capacity of future generations and other peoples to meet their own needs". The French Constitutional Council deduces from this that the protection of the environment, common heritage of human beings, constitutes an objective of constitutional value (Decision No. 2019-823 QPC of 31 January 2020 *Union des industries de la protection des plantes* [Prohibition of production, storage and circulation of certain plant protection products]).
41. The Citizens' Convention on Climate: ‹https://www.conventioncitoyennepourleclimat.fr/en/›.
42. Art. 1833 of the Civil Code, amended by statute No. 2019-486 of 22 May 2019; Art. L. 225-102-1 of the Commercial Code. For an inventory of texts relating to CSR see (in French): La responsabilité sociétale des entreprises: ‹https://www.ecologie.gouv.fr/responsabilite-societale-des-entreprises›.
43. Independent public and administrative authorities published a working document on their role and tools in the face of climate issues, 5 May 2020 (in French); Paris agreement and climate emergency: regulatory issues, Autorité de la concurrence, AMF, Arcep, ART, CNIL, CRE, CSA, HADOPI.
44. The Autorité de la concurrence announces its priorities for 2020: ‹https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-announces-its-priorities-2020›.

The realization of this new market doctrine is, however, subordinated to the relationship between competition law and the legal principles relating to sustainable development. Such a convergence can follow different logics: prevalence, reconciliation, balance, integration, articulation, consistency, consideration, cooperation or complementarity, support, etc., which determine different orientations in the relationship between the market and sustainability.

1.B. The mobilization of fundamental principles

In Europe, reorienting competition policy in consideration of the objectives of sustainable development consists first of all in examining the way in which sustainability, on the one hand, and competition, on the other hand, appear in the founding texts of the Union.

The framework of this relationship is given in the Preamble of the Treaty on European Union (TEU) "Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields."

The provisions of the treaties follow. On the one hand, environmental law is guaranteed by Article 37 of the Charter of Fundamental Rights of the EU, according to Article 3 of the TEU sustainable development is one of the objectives of the Union "based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment"; the social values of sustainable development are also affirmed by the same Article 3 of the TEU and specified in Articles 8 and 10 while Article 11 stipulates that the requirements of environmental protection must be integrated in the definition and the implementation of the policies and the activities of the Union, thus, in particular, in those aimed at promoting sustainable development. On the other hand, competition is one of the policies of the Union, the rules of which are laid down by Articles 101 et seq. of the Treaty on the Functioning of the European Union (TFEU), while its Article 7 prescribes the alignment of the fundamental principles, the objectives of the EU and the goals of its policies, including those on which sustainable development in the content of competition policy is based.

The articulation of these texts is a determining factor in the methods by which competition authorities and courts take into account the imperatives of sustainability. In terms of the hierarchy of norms, the normative power of the fundamental right to protect the environment and of the objectives of sustainable development as formulated by the treaties should prevail in the determination of the purposes of competition policy; which invites us to verify whether, as it stands, the Court of Justice has drawn all the consequences of this requirement for consistency between EU competition law and policies.

For France, the same approach would consist in checking the constitutionality of the rules relating to competition law contained in Articles L. 410-1 et seq. of the Commercial Code in light of the provisions of the Constitution relating to the protection of the environment and to the guarantee of social rights; an issue on which the Constitutional Council hardly expressed itself.[45] However, such an adjustment must not lead to the nullification of the EU competition rules.

1.C. The evolution of the goal of consumer welfare

In EU law as in national law, the essential instrument for aligning competition policy with the objectives of sustainable development is the search for consumer well-being. Although it is not cited either in the provisions of the TFEU relating to competition rules or in Titles II and III of Book IV of the Commercial Code, it is underlying the competition policy of which it is the essential, if not the exclusive, goal. A textual reference could however be found in Article 3 of the TEU which makes the "well-being of its peoples" one of the goals of the Union. Moving from the individual "consumer" to the collective "people" is moreover indicative of the current debate on the notion of consumer well-being.[46]

Based on perceptible signs of evolution of the notion of consumer welfare in the decisions of the Commission[47] and the case law of the CJEU as in those of the authorities and courts of the Member States,[48] a political debate has emerged as much on the nature of the well-being as on its beneficiaries.[49] Should it be exclusive or supplemented by the public interest? Reduced to the economic dimension of "consumer surplus" focused on prices or broadened to a qualitative vision open to social and environmental considerations?[50] Should it be appreciated individually or collectively? Be extended to all people, and in particular workers, whose situation is impacted by the functioning

45. However, see decision No. 2019-823 QPC of 31 January 2020, cited above, by which the Constitutional Council requires the legislature to ensure the reconciliation of the objectives of constitutional value of environmental protection and health protection with the exercise freedom of entrepreneurship.

46. S. Holmes, "Consumer welfare, sustainability and competition law goals", *Concurrences*, mai 2020, p. 1.

47. See for example the decision of the EU Commission of 24 January 1999 (case IV.F.1 / 36.718 - CECED) b) in which the Commission examines the collective environmental benefits of an agreement (points 55 à 57).

48. S. Holmes, *op. cit.*

49. F. Marty, "Le critère du bien-être du consommateur comme objectif exclusif de la politique de concurrence. Une mise en perspective sur la base de l'histoire de l'antitrust américain", *Revue internationale de droit économique*, vol. t. xxviii, no. 4, 2014, pp. 471-497 ; Senate, Information report No. 603 (2019-2020) by MM. A. Chatillon and O. Henno, made on behalf of the Committee on European Affairs and the Committee on Economic Affairs, filed on 8 July 2020 - Recommendation No. 3: "Systematically clarify the components of the criterion of" well-being of the consumer"against which the European Commission analyzes mergers and anti-competitive practices. See for example decisions 94/986/CE of 21 December 1994, Philips/Osram and 2000/475/CE of 24 January 1999, CECED: "The Commission should also initiate work relating to the integration of new components in this criterion, such as competitiveness, maintaining jobs, protecting the environment, protecting personal data or digital sovereignty".

50. E. Le Noan, C. Bertin, "Faut-il sauver le bien-être du consommateur ?", *Concurrences*, Feb. 2019, pp. 2-5.

of the market? Should it still be appreciated in the short term or in the long term, statically or dynamically?

The stakes are high, the dimension given to consumer well-being requires the ability of competition authorities and courts to integrate environmental protection and social balances into competitive reasoning. It would therefore be a logic of "integration" that would be at work. In this regard, various studies conducted under the aegis of the OECD devoted to the relationship between competition and the social dimension of sustainability and in particular social justice, the promotion of gender equality, poverty reduction, employment policies, the labor market or the protection of human rights, stress the need to broaden the notion of consumer welfare.[51]

1.D. Position of the EU Commission

What then of the position of the European Commission on the compatibility of competition policy with sustainable development? Regarding the climate and environmental dimension of sustainability, it is very clearly expressed in the definition of the framework of its call for proposals competition policy supporting the "Green Deal for Europe".[52] After recalling the goal of this pact and summarizing how competition policy itself contributes to the effectiveness of green policies, the document defines the framework within which this contribution could be improved into a synthetic formula which includes five proposals. The logic of this compatibility is therefore clearly that of a "contribution".[53]

The first two proposals are a restatement of the theory of externalities: "Competition policy is not in the lead when it comes to fighting climate change and protecting the environment." and "There are better, much more effective ways, such as regulation and taxation." The third suggests, however, an evolution of this theory: "Competition policy, however, can complement regulation and the question is how it could do that most effectively". The relation would therefore be one of complementarity. The fourth proposal recalls the competence conferred on the Commission by the Treaties for this purpose: "The Commission is responsible for the enforcement of competition rules based on its competences under the Treaty and existing EU secondary legislation, under the close supervision of the EU Courts." And it deduces, without affecting existing legislation, the limits of the contribution of competition policy to the Green Deal: "This means that, short of any changes in the existing legal framework, competition policy's contribution to the Green Deal can only take place within these clearly-defined boundaries". The remainder of the document indicates very logically that these limits are the techniques for implementing competition law which it is proposed to improve by possible modifications of the rules in force.

51. See reports and recommendations from global competition forums since 2014, *op. cit.*

52. Margret Vestager, The Green Deal and competition policy, Renew Webinar, 22 September 2020 ; EU Commission, Competition Policy supporting the Green Deal. Call for contributions.

53. The French translation of the document uses the term "*appui*".

2. Techniques for taking sustainable development goals into account in competition policy

The current state of regulation thus requires examining the ability of traditional competition law enforcement techniques to serve sustainable development, both in the field of State aids and in that of antitrust and merger control.[54] Another approach to be considered is to "internalize externalities" in the competitive game by creating markets for environmental goods.

2.A. State aids

It is accepted that the control of State aids is carried out by means of a test balancing the negative effects of aid on trade and competition in the single market and its positive effects in terms of contribution to achievement of an objective of well-defined common interest.[55] The Commission indicates that the application of these rules aims in particular to encourage investments which make it possible to support the environmental and climate axes of sustainable development.[56] It adds that new guidelines are open to consideration which will serve as a basis for the establishment of a framework allowing Member States to contribute to the objectives of the transition to a green economy, while using as effectively as possible limited public funds.[57]

2.B. Antitrust rules

The law relating to cartels and abuse of a dominant position is naturally conducive to the confrontation of competition policy with policies of sustainable development in business strategy. So that the search for consistency between one and the others mobilizes all the techniques of antitrust law: exclusion from the application of competition law, exceptions and exemptions from this application. In this regard, certain peculiarities of abusive practices deserve special consideration.

54. In environmental law the question is not new. For the last twenty years, the relationship between environmental law and competition law has been the subject of abundant case law and has given rise to numerous studies. See in particular: DGCCRF, Droit de l'environnement et droit de la concurrence, atelier de la concurrence du 6 juillet 2005 (ed. J.-M. Cot and L. Idot), *Rev. Conc. cons.*, No. 147, July-Sept. 2006, accessible here (in French) ; L. Idot, "Droit de la concurrence et protection de l'environnement, La relation doit-elle évoluer ?", *Concurrences*, Sept. 2012.

55. P. Thieffry, *Droit de l'environnement et droit de l'Union européenne et du climat*, Bruylant, 4e ed. 2020 ; CJUE, 22 sept. 2020, Hinkley Point, aff. 594/18 P, Autriche/Commission.

56. See Guidelines on State aids for environmental protection of 3 Apr. 2008; C. Giolito, chron. "Aides d'État", *Concurrences*, May 2008, p. 137; L. Idot, Droit de la concurrence et protection de l'environnement, *op. cit.*; These guidelines were replaced in 2014, Guidelines on State aids for environmental protection and energy for the period 2014-2020, OJ C 200, 28.6.2014, p. 1–55. They were to expire in 2020, but they have been extended until the end of 2021 (Communication from the Commission concerning the prolongation and the amendments of the Guidelines on Regional State Aid for 2014-2020. OJ C 224, 8.7.2020, p. 2–4) ; Adde, O. Peiffert, *L'application du droit des aides d'Etat aux mesures de protection de l'environnement*, Bruylant, coll. Droit de l'Union européenne, 2015. On the case law of the Court of Justice, see: CJCE, 20 November 2003, Gemo, aff. C-126/01, Rec. CJCE, p. I-13769, Europe, January 2004, comm. L. Idot, no 22. CJCE, 8 November 2001, aff. C-143/99, Rec. CJCE, p. I-8365, Europe, January 2002, comm. L. Idot, no 28; CJCE, 13 March 2001, Preussen Elektra AG, aff. C-379/98, Rec. CJCE, p. I-2099, Europe, May 2001, comm. M. Pietri No. 163 and L. Idot, No. 182. CJCE, 13 January 2005, Streekgewest Westelijk, aff. C-174/02, n.e.p.; 13 January 2005, F.J. Pape aff. C-175/02, n.e.p., Europe, March 2005, comm. No. 92.

57. EU Commission, Competition Policy supporting the Green Deal, *op. cit.*

1 - The exclusions

For a practice to be relevant to the relationship between competition policy and the objectives of sustainable development, it is obviously necessary that it falls within the scope of competition law. The question is classic: it is considered that an organization whose activity is exclusively dedicated to the protection of the environment, therefore of a non-economic nature, and which therefore is not a firm, escapes the application of competition law.[58] This is also the case for an organization whose purely social activities, meeting the requirements of national solidarity, are devoid of any profit-making purpose.[59]

2 – The exceptions

In the case of a firm, the agreements it enters into or the practices it implements may be exempt from the prohibitions and sanctions of Article 101, §1 of the TFEU, if they have neither the purpose nor the effect of reducing competition, if they are of minor importance, which could only very rarely be the case, or if they are totally imposed by State regulations, in particular of a social nature or for protection of the environment, which is less hypothetical.[60]

3 – The exemptions

Finally, although they are restrictive of competition, agreements and business practices can benefit from the exemptions provided for by Article 101, § 3 of the TFEU, if the social and environmental goals they pursue contribute, without absolute restriction of the competition, "to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". It is according to these criteria that, in consideration of their ability to direct technical or economic progress in the service of the objectives of sustainable development, so-called "environmental" or "sustainability" agreements, environmental labels and competitive compliance of markets resulting from environmental policies, in particular those of the selective treatment of waste or negotiable pollution permits,[61] are judged.

4 – Specificities of the abuse of a dominant position

In terms of abuse of a dominant position, the conditions under which public authorities may, in order to achieve an environmental goal, establish monopolies, grant exclusive rights[62] or create services of general interest[63] have been specified.

2.C. Merger control

In terms of concentration, the European regulation seems, on the other hand, less conducive to taking sustainability factors into account[64] and the guidelines specifying its application make no explicit reference to it,[65] no more than those of the French Competition Authority, which were however modified in 2020.[66] Although the Commission considers that the taking into account of extra-competitive factors is outside its competence,[67] it suggests, in the assessment of the efficiency gains projected by the concentration, a certain openness as to the indirect impact of expected climate and sustainability gains when they aim to foster investment and innovation.[68]

2.D. Internalization of external market effects

The internalization process aims to create a set of interconnected self-regulating markets where consumers, endowed with perfect information, would be able to make the most respectful choices vis-à-vis long-term objectives of sustainable development, such as global warming or environmental protection. The technique consists of defining homogeneous categories of goods that can be the subject of market transactions, guaranteeing the transparency of information on these goods and ensuring healthy and fair competition between market players. Such an extension of the market sphere concerns different areas: creation of natural resource markets and greenhouse gas emissions certificates, extension of the financial market through the introduction of information on the extra-financial performance of companies or invention of markets for "green" goods and services (eco-organizations) backed by information systems (eco-labels). The ability of these new markets to serve the goals of sustainable development is much debated. These initiatives also require public intervention to guarantee the goods traded as well as the value of the information provided to consumers, thereby creating a significant bureaucracy.[69] These new markets obviously do not escape the control of the competition authorities.[70]

58. CJCE, 18 May 1997, Diego Cali, aff. C-343/95, Rec. CJCE, I, p. 1547.

59. CJCE, 17 February 1993, Poucet and Pistre, case No. C-159/91 and C-160/91, rec. p. I-637; L. Idot, « La notion d'entreprise en droit de la concurrence, révélateur de l'ordre concurrentiel », *Concurrences*, May 2006.

60. J. Nowag, A. Toerell, "Beyond Balancing: Sustainability and Competition", *Concurrences*, November 2020.

61. L. Idot, "Droit de la concurrence et protection de l'environnement, La relation doit-elle évoluer ?", *op. cit*., which does a thorough analysis of the relevant case law. See in particular the guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements, OJ C 11/1 of 14.1.2011 (Guidelines on horizontal cooperation), p. 280 to 283 and p. 293 and Commission Regulation (EC) No 330/2010 of 20 April 2010 on the application of Article 101 (3) of the TFEU to categories of vertical agreements and concerted practices.

62. CJCE, 23 May 2000, FFAD, case C-209/98, Rec. CJCE, I, p. 3743.

63. L. Idot, "Droit de la concurrence et protection de l'environnement, La relation doit-elle évoluer ?", *op. cit.*

64. J.-M. Cot, "Concurrence et environnement : approche en droit des pratiques anticoncurrentielles et des concentrations", Atelier de la concurrence, prec., sp. No. 41 et s.

65. Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07).

66. The Autorité de la concurrence publishes its new guidelines regarding merger control: <https://www.autoritedelaconcurrence.fr/sites/default/files/Lignes_directrices_concentrations_2020_EN_adlc.pdf>.

67. EU Commission, Art. 8, §2 R.139/2004 of 21 March 2018, Bayer/Monsanto, M.8084.

68. EU Commission, *Competition Policy supporting the Green Deal*, *op. cit.*, Part 3, merger control.

69. For an analysis of these internalization techniques see F. Aggeri, *op. cit.*

70. L. Idot, "Droit de la concurrence et protection de l'environnement, La relation doit-elle évoluer ?", *op. cit.*

2.E. Two pre-concluding observations

First observation: according to the techniques described the permissive application of competition law in consideration of the sustainable development goals pursued by firms is obviously complemented, in return, by a strict application when agreements, practices and concentrations tend, conversely, to obstruct social or environmental regulations such as, for example, restrictions on the development or deployment of clean technologies or restrictions on access to essential infrastructures controlling access to renewable energy sources.[71]

Second observation: in practice, the effectiveness of these new guidelines is measured by the decisions handed down by the Commission and by the case law of the Court of Justice. It is to improve its application that, on 13 October 2020, the European Commission published a call for contributions to a debate on how competition law could contribute to achieving of the goals of the Green Deal for Europe.[72] Such support depends just as much on the decisions and court judgments of the Member States, since, as in France, in many of these States the articulation of the legal principles of sustainable development with competition rules follows the same logic.[73]

In general, legal scholars and economists defending the market economy believe that, while competition law instruments are potentially sufficient to meet such a challenge, their application must, to this end, be significantly strengthened. Legal certainty would require, in particular, on the one hand, that the guidelines of European and national authorities clearly indicate the impact of sustainability on competitive reasoning, on the other hand, that new methods of regulating the market be harmonized, in order to allow companies, as they are now strongly encouraged,[74] to place their strategies at the service of a social and solidarity economy, without exposing themselves to the legal risk of sanctions or suffering a loss of competitiveness. In this perspective, the positions of the OECD are aimed, on the one hand, at a global development of competition policies and their adaptation to emerging countries. Its annual thematic world forums lead, on the other hand, to recommendations on the conditions under which these policies should be oriented towards the objectives of sustainable development by reducing inequalities, fighting against poverty, for economic equality of the sexes, for social justice, for a better functioning of the labor market, etc.[75]

71. *Ibid.*

72. EU Commission, Competition Policy supporting the Green Deal, *op. cit.*

73. L. Idot, "Droit de la concurrence et protection de l'environnement, La relation doit-elle évoluer ?", *op. cit.*

74. J. Nowag, A. Toerell, "Beyond Balancing: Sustainability and Competition", *op. cit.* ; F. Aggeri and O. Godard, "Les entreprises et le développement durable", *Entreprises et Histoire*, Dec. 2006, pp. 6-19.

75. OECD Global Forum on Competition, *op.cit.*

Conclusions

It remains to be seen whether such an adaptation of competition policies is up to the existential threats of a social, environmental and now sanitary nature which the world is facing. If this were not the case, one solution would be to return to the theory of externalities in order to integrate social and environmental issues into competitive reasoning.[76] In this perspective, the competition authorities would have to carry out a synthesis between the free functioning of the market and regulatory policies, which would require new analysis models based on indicators measuring the social and environmental consequences of economic activity.[77] Either they succeed, or these competition authorities are themselves part of the problem.[78] Another option would be to abandon the dogma of economic development as the engine of the market economy[79] or, at the very least, to reconsider its instrument of measurement by gross domestic product.[80] Finally, certain currents of thought believe that sustainable development leads to a questioning of capitalism.[81]

This is the challenge that liberalism faces today in the face of increasingly active environmental and/or social groups[82] who are convinced - and militate in this direction - that vital issues for the planet, such as global warming, the explosive increase in social inequalities and the aggravation of poverty, condemn the foundations of the market economy.[83] They are encouraged to do so by the "fundamentalization" of legal principles for the protection of social and environmental rights to which economic activity would ultimately be subordinated. It would then be the objectives of sustainable development that would be the foundations of global governance.[84]

76. The Burndtland report (*op.cit.*, pt. 26) calls for the incorporation of sustainable development goals into all economic policies: "Sustainable development objectives should be incorporated in the terms of reference of those cabinet and legislative committees dealing with national economic policy and planning as well as those dealing with key sectoral and international policies. As an extension of this, the major central economic and sectoral agencies of governments should now be made directly responsible and fully accountable for ensuring that their policies, programmes, and budgets support development that is ecologically as well as economically sustainable."

77. See, for example, in Environment and economic perspectives 2012/4, the dossier: "Environnement et développement économique, Reflets et perspectives de la vie économique", 2012/4 (Tome LI), pp. 5-8.

78. Intervention of A. Tyrie, Chairman of the UK Competition and Markets Authority at the OECD Global Competition Forum on Social Justice: "How can competition contribute to fairer societies?".

79. J.E. Stiglitz, A.K. Sen, J.-P. Fitoussi, Report by the Commission on the Measurement of Economic Performance and Social Progress, 2009; G. Kallis, C. Kerschner, J. Martinez-Alier, "The economics of degrowth", *Ecological Economics*, 2012; E. Laurent, *Sortir de la croissance, Les liens qui libèrent*, 2019 ; S. Latouche, *La décroissance*, Que sais-je ?, 2019.

80. J.E. Stiglitz, A.K. Sen, J.-P. Fitoussi, *op. cit.* ; A. Pottier, "Les nouveaux indicateurs de richesse modifieront-ils la croissance ?", *Le Débat*, (2), 2018, pp. 147-156 ; OECD, Competition and macroeconomic outcomes factsheet, 2014.

81. C. Beaurain, M. Maillefert and O. Petit, "Capitalisme raisonnable et développement durable : quels apports possibles à partir de l'institutionnalisme de J. R. Commons ?", *Revue Interventions économiques, 210* ; B. Zuindeau, "Le développement durable est-il soluble dans le capitalisme ?", *Revue de géographie et aménagement*, 2006.

82. ATTAC, *Contre la dictature des marchés*, La Dispute-Syllepse-VO Éditions, 1999.

83. OECD, Global Forum on Competition Discusses Competition Under Fire, *op. cit.*

84. W.-H. Joke, "La gouvernance au service du développement durable dans le contexte de la mondialisation", Reflets et perspectives de la vie économique, 2002/1, pp. 19-33.

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Data Protection and Global Data Governance

Anda Bologa (AB)[1] : We look forward to hearing your views – those of a former U.S. diplomat and vice-president of the U.S Chamber of Commerce for Europe – on privacy, data protection, the GDPR and the European Court of Justice rulings on Privacy Shield, as well as the broader issue of global data governance. The basic assumption underlying European views of privacy seems to be the need to protect human dignity, a concept going back to the right of individuals to preclude unauthorized publications of private information, also known as the "right to one's own image". Do you agree that privacy is a culture-specific concept? If so, does a different cultural background lead to a different approach to data protection frameworks?

I am convinced that human beings everywhere treasure keeping some part of their personal space private regardless of the culture they come from. In this sense, the need for privacy is not dependent on culture *per se*. However, there are historical and cultural aspects that affect the specifics of how the broader society in a country may view privacy. For instance, in the US most people think of privacy first as freedom from governmental intrusion. In this sense, most Americans find it difficult to understand that European countries all require citizens to register their residence at the local police station; to most Americans, that's none of the government's business. Nonetheless, many citizens in Europe share the desire to limit governmental invasion of their personal space, especially those that have been subject to such intrusions in recent history.

However, there is an important distinction between privacy and data protection, although in the EU these notions are often conflated, as they are even in your question. Specifically, the focus of the EU General Data Protection Regulation (GDPR) of 2016 is essentially to protect the personal data of individuals from unscrupulous corporate advertising ("monetization of their personal data"); it does not address privacy in the sense of protecting people against the government, which is more my notion of privacy. Indeed, the GDPR and its predecessor, the Data Protection Directive of 1995, explicitly carve law enforcement and national security out of scope.

AB: The debate on privacy issues in Europe was stirred in the last decade both by the Snowden revelations and the overall development of internet platforms leading to what is called a "surveillance society". What are the main threats contemplated in relation to the (mis)use of data in the EU?

Mr. Snowden's 2013 revelations that the U.S. government was able to access personal information held by American companies is one of the reasons these issues of privacy (generally, against the government) and data protection are so often mixed up in Europe. When most Europeans think of personal data, they think of large social media and technological platforms that scoop up their data and then use it to sell targeted advertisements or other targeted messages. To me, the issue does not lie with the companies gathering and processing data as such, but more specifically with the purpose of the data processing. I am not convinced that the best way to solve the issue of companies monetizing our data is by a general restriction on everyone's ability to process data. That is to say, perhaps we should be going after the targeted advertisement (and messaging) model rather than data processing *per se*. That would go closer to the problem that people perceive.

The connection with Mr. Snowden is the ability of U.S. law enforcement and national security agencies to access the data held by internet companies. That of course is a valid and important concern about privacy. But the issue is not if the data is available or can be made available to those agencies, as they have multiple ways to get information on individuals; instead, the concern should be about what limitations are placed on those agencies and their ability to collect and use personal information. In the United States, this always requires the authorization of a judge via a warrant or subpoena, even if some in Europe feel that the U.S. Foreign Intelligence Surveillance Act (FISA) courts were too lenient. (They were, before Snowden; they have demonstrably tightened up since.) Going back to the divide in perception between the US and the EU, the ability French law enforcement has to access a citizen's data (which again is not governed by the GDPR) is far broader and less restricted that in the United States, and indeed would be unimaginable by American standards.

AB: Since its adoption in 2016 the GDPR has been in the spotlight receiving its fair share of praise and criticism. Do you think it represents a good model of global data governance?

To me, your question is first one of good regulatory practice. That is to say, if a government is going to adopt

1. An interview conducted by Anda Bologa, Affiliated Expert on cybersecurity and data privacy, Europuls think tank.

a law or regulation, it needs to know what societal problem it seeks to address. That is, there should be a theory of harm. In the area of protecting personal data, a clear example is medical data. This information is clearly very private and should be protected by law. So, it is certainly appropriate to regulate protection of some personal data, if the abuse of that data can lead to harm.

To me, the GDPR is written so broadly that it is difficult to find a theory of harm behind it. The GDPR begins with the concept of *personally identifiable information*, that is, any information that can be attached to an individual. Your name, address, whatever. This is a huge range of information, and the GDPR wants to regulate any and all "processing" of it. If the GDPR sought only to regulate the "harm" caused by using your data to create a "profile" of you and then use that to send you an advertisement or a political message, that would be understandable. However, that would not be regulating all processing of all *personally identifiable information*, which is what GDPR does.

So, we can think of a good public policy that would involve the protection of a certain amount of personal information, but this is not protecting everything that is done with all personally identifiable information. The extent of regulation should depend on how the data is used, as much as on other things.

Second, when the scope of a regulation like GDPR is so extensive, it is almost by definition impossible to enforce. And if a law is impossible to enforce, this encourages people to start disregarding the law, which is the opposite of good public policy.

The one area where the logic of the GDPR truly breaks down is where it has absolutes. Although the scope of the GDPR is to my mind far too large, the Regulation has much more flexibility than a lot of EU officials will admit. That is, it is more risk-based and thus not as constraining as some people believe. GDPR, for instance, explicitly allows for direct marketing, when according to the logic some privacy advocates have, it should not allow for it. However, GDPR becomes extremely rigorous when it comes to third countries, as it *prohibits* the transfer of any personal information to third countries that do not meet certain standards.

To be truly meaningful, the GDPR, like any law, must be enforceable and enforced. The EU, however, often creates what we call "unfunded mandates" – it makes great laws but then leaves it to the Member States to enforce them. This approach creates vulnerability for EU law in the scarcity of budget and limited capacity of the enforcement agencies in the Member States.

In this sense, the GDPR is only now beginning to be tested. The data protection authorities have the right to levy fines, but companies against whom those fines have been levied have then the right to go to court. As we will go through those legal processes it will be interesting to see how the GDPR will be enforced.

AB: In its July 2020 *Schrems II* judgment, the European Court of Justice declared invalid the European Commission's decision that personal data of Europeans could be transferred to companies in the United States that adhered to the EU-US Privacy Shield arrangement, because of invasive US surveillance programs, thereby making transfers of personal data on the basis of the Privacy Shield illegal. What is your assessment of this decision, and what does it mean for transatlantic data flows?

The ECJ findings in this case, as well as in the first Schrems case of October 2015, are deeply problematic because they state that personal data can only be transferred to non-EU countries where they enjoy the protections from government intrusion guaranteed by the European Charter of Fundamental Rights. That is, although the Data Protection Directive and the GDPR both explicitly carve a European government's law enforcement and national security actions out of scope, the ECJ has brought them back in for foreign countries. The ECJ reasons that European countries subject to the GDPR are also subject to the Charter, and therefore the Commission can only determine if a foreign country provides "adequate" protection for Europeans' data if the government of that country acts as though it were also subject to the Charter.

This has a certain appeal, as the protection of personal data is meant to be a "fundamental right." But it runs quickly into real practical problems, when, as the ECJ says in Schrems I, the transfer of any personally identifiable information to a country that is not adequate "must be prohibited." To me, this takes the GDPR to its illogical extreme.

Indeed, I cannot understand how under the two *Schrems* rulings it is possible to send any personal data at all to Russia, China, Turkey or even Israel, which benefits from a pre-Schrems adequacy decision. In all these cases, the governments are even "better" at reading private communications that include personally identifiable information than America's NSA – there are no restrictions on their access to that information at all. If indeed European data authorities decide to prohibit transfers of personal data (that is, even the sending of an email which of course has your name) to countries unwilling to subject their domestic security procedures to European evaluation, this will create serious problems for the European economy and society.

Specifically on the Privacy Shield: you have to remember that the EU-US Privacy Shield Arrangement was developed after the ECJ declared the predecessor arrangement, the "Safe Harbor," invalid in Schrems I. After that happened, and the ECJ brought into these adequacy decisions the question of constraints on a government's access to information held by private firms, the Obama Administration undertook numerous commitments to ensure that US law enforcement and national security agencies can only access Europeans' personal data held by companies on the basis of certain judicial procedures. In the Schrems

II decision, the ECJ finds that these commitments are not good enough, and indeed that even such mechanisms as the "standard contract clauses" are not good enough in the case of the United States.

This is a problem. I seriously doubt that the US government will make any significant changes to the commitments it undertook when agreeing to the Privacy Shield. Those commitments already go far beyond what most member state governments would accept on the behavior of their own law enforcement and national security agencies. Washington may accept some improvement in the "ombudsman" procedure by which European residents can dispute U.S. government use of their data, but that's about it. So, if a new agreement is found, that agreement will not look very different from Privacy Shield. The Commission will argue that the alternative of prohibiting all transfers of all personal data to the US would be disproportionate - and it will be right.

Only another decision of the ECJ can rectify this, by stating that a full prohibition on the transfer of any data is not what the GDPR, the Charter or even the ECJ meant. Rather, it will find that restrictions must be done in a proportionate, risk-based, manner, which is what the Commission currently argues - against the EU's data protection agencies, which are much stricter. It is possible that an ECJ ruling on the Commission's new adequacy decision on the UK can give us an answer, but it's certainly not going to be easy.

AB: In light of the *Schrems* II judgment, could it be expected that an improvement in transatlantic data flows might come from developments in federal privacy legislation in the US? Do you see a window of opportunity for the EU-US cooperation in matters of data privacy?

The US has extensive privacy and data protection legislation, but not a single GDPR that covers all processing of any personal information. For instance, the US has criminal provisions for divulging health and financial data. There is, however, a growing consensus among Senators and Congressmen, both Republicans and Democrats, against the way in which personal data is being used to generate profiles and sell targeted advertising, especially by big tech companies. I think we will have a law in the US protecting personal data from that sort of "abuse." I think it will be more tailored than the GDPR and most probably will not have provisions regarding transfers to third countries.

In terms of cooperation, I can see a window now. There is no doubt that many things about the GDPR have had a positive impact on the debate in the US. In addition to the benefit to the EU of being the first mover, there is also a cost, which is that people will look at what the first mover has done and will want to do it better. So maybe in three years' time you'll see Europeans saying that the US version of the GDPR is better than the one the EU has.

AB: As we speak, 76% of countries across the globe have in place or are developing data protection legislation. To what extent is the trend of adopting data protection legislation stirred by the GDPR? Do all jurisdictions that adopt privacy legislation similar to the GDPR do it for the same motives?

Indeed, the European notion that individuals should have the power to control the use of their data has had a global influence. Many countries have copied the GDPR, and its echoes are being felt increasingly in the other regulatory camps of the United States and China - what Anu Bradford called the "Brussels effect."

And if governments actually understand that people can and should have private spaces and that those should be protected, this is a positive trend. However, precisely because the GDPR does not protect the citizens against abusive authoritarian governments, it does not do what is necessary in many places to protect people's privacy.

More significant, perhaps, is that the most important aspect lies not just with the law, but with its enforcement.

The EU has a systemic need to regulate as it seeks to remove government-imposed barriers to the free movement of people, goods, services and capital among the member states. Regulation is the only instrument of public policy the EU has, given its relatively small financial capability. However, as mentioned earlier, if the law is not properly enforced and this stops citizens believing in it, that's a problem. Hence, the translation of the GDPR in many different countries might appear to create a public good, but it will do so in the end only if those countries properly enforce it.

AB: Global data governance is an integral part of internet governance. It is generally understood as the governing of cross-border data flows through norms, principles and rules applied to various types of data. Is the EU on its path to set data governance standards at the global level?

The perceived success of the GDPR feeds the EU desire to set the global norms for a human-centric internet, an ethical AI, common data spaces, and similar notions. Currently the EU aims to create universal governance structures for all data, not just personal data. When people in Brussels discuss data governance, they envisage legislative frameworks for all data that can be gathered and measured, even if it does not relate directly to a person. In my view, creating rules for all data we can record is not a wise approach.

When we talk about data governance and global data governance, we have to be very careful not to make the mistake of GDPR by trying to decide in a single instrument how all data is governed. What we should do is to come up with internationally-accepted regulations for specific sectors where we can define a societal harm that needs to be addressed.

AB: Do you think that we are moving towards a further Balkanization of the internet, or can international cooperation be achieved through multilateral institutions?

This is a different issue from internet governance. The Balkanization of the internet already exists, as China has already cut itself from the internet. The filters in China are so deep that the experience of the internet in China is very different from the one we have here in Europe. I am afraid that a lot of other governments will want to use something similar to the many technologies that China has created for the *great firewall*. They too would prefer to be able to censor the internet to stop distribution of information that is critical of those governments. That to me is a serious concern because it goes directly to what democracy is about - the relation between the individual and the government, and the capacity of the individual to question and even change the government. A lot of people in public administration in different countries do not like the public questioning the way the government works. In that sense, I'm afraid there will be a Balkanization of the internet, but it's not going to be a Balkanization that's caused by differences in data protection rules, as much as one driven by governments that want to be able to prevent or censor criticism of them.

This to me goes to the heart of the issue of internet governance, because you have a real difference going on in the International Telecommunications Union and other places about whether or not governments should be able to censor some or even all of the content that is available on the internet. Against that you have the theory that the internet offers access to information to anyone, anywhere.

I like the idea that I am able to use the Internet to read newspapers from India, Brazil and other parts of the world, without a government that would control that.

AB: While there are several multi-stakeholder international institutions which coordinate the process of internet governance, the struggle today is largely geopolitical. What is the EU's role in internet governance and how do you see the interrelation between its normative power in setting data protection standards and its leadership in internet governance?

The EU is constantly trying to build coalitions of countries that support the open internet and the applicability of international law to cyberspace. Generally, this is a good approach, and the EU is on a good path.

However, because of the effect of the GDPR on data transfers, I think the EU will face a major issue in building coalitions on internet governance with other countries. In particular, the Schrems II case has unveiled the tension between the EU's general good sense of what internet governance is and should be, and the very restrictive application of the GDPR. You cannot say a country is "inadequate" to receive EU personal data on the one hand, because it does not adhere to the EU Charter standards, and on the other hand ask that same country to support your approach to the governance of the internet.

This tension has to be addressed by the EU, and in order to do so the EU has to be willing to bring more proportionality to the application of the GDPR and the Charter to international data transfers. In this way, by escaping the most absolute parts of it, the GDPR can become a better law and a better model for global internet governance.

Laurent Cohen-Tanugi • International lawyer and political writer

Law is more than ever the necessary language of globalization

In *Le droit sans l'Etat* you were contemplating governance through law independently from the State. Does this "liberal" analysis enable an understanding of globalization as the creation of a legal space without real political convergence? Is the liberal model still a point of convergence within globalization?

Le droit sans l'Etat, which was published in 1985, was not about globalization. The book title aimed at contrasting the governance models of the United States and France. In that book I analyzed the importance of law and lawyers in the United States as a sort of counterpart to the administrative State and senior civil servants in France. For my generation, the book contributed to a more elaborate understanding of American democracy, but it also brought about a powerful reevaluation of law and a revival of political liberalism in France.

From there, I moved on to an analysis of European unification, characterized by the gap between a very sophisticated and integrated legal system and the absence of a State, and even of a European political unity, that is, another illustration of "law without the State". It is only thereafter, when globalization became the central phenomenon starting from the nineties, that in the absence of a world State or government, governance through law was seen as the natural instrument to regulate globalization. The phrase "global governance" came to designate this legal and institutional regulation of globalization.

What changed at the turn of the 21st century, which I described in my book *The Shape of the World to Come* published in the US in 2008, is the realization that globalization, then understood as a driver of global harmonization and pacification - remember *The World is Flat*, Tom Friedman's best-selling book - was also producing fragmentation and conflict, as a result of the rise of China and other emerging powers, as well as the identity-based reactions triggered by globalization around the world. The return of geopolitics, which the September 11, 2001 attacks symbolically inaugurated, marked a paradigm change from the liberal moment of the 80s and 90s, but the discourse about the legal governance of globalization was late in acknowledging it.

Your books of the nineties are grounded on notions, the objectivity of which is being challenged today. Are the concepts used to describe the world at that time still relevant? In particular, can one still use terms such as "democracy", "human rights" or "freedoms" while alternative models have emerged that negate the meaning that is given to them in the West? Does the language of law promote values that are universal enough to serve as the *lingua franca* of globalization?

You seem to be mixing two things that must be distinguished. The first one is the assault launched in the past several years against the liberal model of the rule of law within Western democracies as well as in the emerging world. Within Western democracies, populist movements are targeting the rule of law, that is the limitation of the popular will or majority rule by fundamental principles. The rule of law is what distinguishes liberal democracies from the "illiberal democracy" - a contradiction in terms - promoted by Victor Orban in Hungary and the current Polish leaders. This attack against liberal democracy took on a new dimension with the rise of emerging countries, which counter it with their own autocratic governance model with increasing assertiveness. I am, of course, referring here to China, Russia or Turkey. On this issue, the answer to your question is clear: we must defend our democratic model and our values, which are universal because they are anchored in humanism. We must defend them first at home, where they are undermined from within and from the outside, and we must also defend them as much as possible beyond the Western world, whenever fundamental human rights are violated, or worse even. Respect for national sovereignties and cultural relativism has its limits.

However, in this clash of governance models and values - that is the second aspect of your question - law remains more than ever the necessary language of globalization in order to prevent and resolve differences. Finding agreement on shared norms becomes more challenging in this environment, but as state actors generally behave rationally, everyone has an interest in reaching agreement, failing which it is war.

Do the "liberal" values promoted by the globalized rule of law clash with traditional values in the West and beyond?

I distrust overly general phrases such as "liberal values" or "traditional values". What is clear is that globalization in all its economic, technological, human and cultural dimensions, triggered within Western and non-Western societies a number of identity-based and nationalistic reactions, and a return to religion and what you call "traditional values". However, one must realize that

this recoiling and the rise of religious fundamentalism in the Arabo-Muslim world as well as in the West constitute a huge regression compared to the openness of the decades following World War Two. One must also keep in mind that these "traditionalist" reactions have been almost always instrumentalized, if not orchestrated, by autocrats and other demagogues, be it Poutine's Russia with the instrumentalization of the orthodox religion, Erdogan's Turkey with "moderate" Islamism, Modi's India with anti-muslim hinduism, Poland's "Law and Justice" and Trump's America. "Traditional values", along with induced nostalgia for a long-gone greatness, are thus one of the instruments of the populist and reactionary attacks on liberal democracy and the rule of law, science and progress, and the Enlightenment. This has produced Brexit, the Trump presidency, and the catastrophic outcome of the pandemic in countries governed by populists such as the UK, the US, and Brazil.

Does the use of law as a tool of globalization require a separation of politics and economics in international relations?

The separation of politics and economics within international relations coincided with the first decades of the current wave of globalization, which were characterized by Western economic, political and cultural dominance. During the 90s, marked by the illusion of the "end of history", of the global triumph of democracy and the market economy, and by technological harmonization, economic relations were somehow depoliticized. Since the paradigm change that I mentioned earlier, that is the return of geopolitics at the forefront of international relations, the separation between economics and politics exists less and less, and we are witnessing the opposite phenomenon, which is the excessive geopoliticization of economic relations, as illustrated by Donald Trump aggressivity mirrored by Xi Jinping's policies.

Paradoxically, as I was just discussing, this geopoliticization of international economic relations makes regulation through law even more necessary. Let me clarify, however, what I mean by "regulation through law", as law itself can be instrumentalized to serve geopolitical ends. I am not referring here to the frequent complaints against the extraterritorial application of American law in areas where an international consensus exists, such as the fight against corruption, money-laundering or tax fraud. In a globalized economy, it is quite natural that national or regional legislations have an extraterritorial reach, and that is indeed the case with several bodies of European law. What I find worrying, however, is the arbitrary enforcement of laws for geopolitical ends or as retaliation, and that is this type of instrumentalization of the rule of law that a legal regulation of an increasingly conflictual globalization must prevent through consensual institutions and substantive as well as procedural rules. "Lawfare" represents an emerging threat for globalization.

Can Europe be a global normative power?

I believe so, provided "norm" is understood as "rule" rather than as industrial standards. Since its birth at Maastricht at the beginning of the 90s, the European Union has identified itself as a "global normative power," and it has indeed become one in a number of key areas such as the regulation of personal data. Yet, this ambition has been hindered by the lack of European political unification, to the extent that global normative influence requires a law unified by EU regulations and enforced by integrated institutions. Thus, Europe's influence is the strongest in federalized areas, such as international trade, competition law, and monetary policy. Another limitation to Europe's normative influence is the lack of an enforcement arm, such as the European Commission in respect of competition law or the US Department of justice in respect of economic crime. The European prosecutor's office is a first step, insufficient still, in that direction.

However, in the conflictual globalization of the 21st century, Europe cannot satisfy itself with being a normative power, even a global one. As early as 2008, on the eve of the global financial crisis, I argued in favor of an ambitious European strategy for globalization in my report on the future of the "Lisbon strategy" - a fiasco - pursuant to a mission entrusted to me by Christine Lagarde and Xavier Bertrand for the French presidency of the EU. Several of our proposals, such as the need for a review of strategic investments at the EU level and a more robust trade policy, are being considered today by the Von der Leyen Commission and echoed by Internal Market Commissioner Thierry Breton. Europe must also become a political and strategic power and strengthen its technological and military capabilities in the years to come.

Let's return to America, to your praise of American democracy in the 80s and to your latest work *Résistances*. What is your assessment of the American democratic resistance to the Trump presidency?

I had the opportunity to denounce a regression of the rule of law in the United States following the September 11, 2001 attacks in a postface to a new edition of *Le droit sans l'Etat* twenty years later. However, the Trump presidency's relentless assault against democracy and the rule of law was of a wholly different nature, which is why its defeat was critical for the United States, for the world, and for liberal democracy.

"Democracy prevailed" as heralded by Joe Biden, in the sense that the popular vote and the electoral system were respected and the antidemocratic candidate, defeated. But it was a close call, and the Trump presidency revealed serious and surprising weaknesses of the rule of law and the balance of powers in United States, in a context, to be sure, where Congress was dominated by a party now only Republican by name, and whose moral bankruptcy is largely responsible for making American democracy look like a banana republic. I have been

particularly amazed by the number of breaches of law, ethics and democratic norms that a US president could commit without sanction during his mandate, and by the powerlessness of the rule of law vis-à-vis politics, whenever the majority party in Congress turns away from the spirit of the laws and the values of American democracy to serve only its own short-term interests.

Short of being able to reform the impeachment procedure and the electoral system, the new Democratic majority in Congress will have to work to better regulate and sanction presidential powers, strengthen the independence of the Justice Department, and otherwise prevent in the future a Donald Trump's countless violations of ethics and democratic norms.

That said, despite the faulty abdication of the Republican Congress and the resulting weakening of its "checks and balances," American democracy has demonstrated its unique resistance capability, thanks to the traditional media, the federal courts, the States and other local governments, civil society, and the "deep state" denounced by Trump, including the military leadership. I am not sure European democracies would have done better faced with a danger thats threatens them as well. We must draw all the lessons from the American experience, including January 6, 2021 and its aftermath.

Interview by Joachim-Nicolas Herrera and Vasile Rotaru

Martin Collet • Professor at the Paris II Panthéon-Assas University

Taxation of the digital economy: global challenge, local responses?

The taxation of the digital economy[1] provides an excellent area for observing the attempt to govern globalization by way of legal tools[2] as well as the difficulties in making such a perspective concrete.

On one hand, the incomprehension caused by the low level of taxation of large companies in the digital economy in jurisdictions where they generate important revenues, has contributed powerfully to the emergence of a previously unknown cooperation. During the last decade, almost 140 countries have been working, under the aegis of the OECD, on ways to adapt their corporate taxation rules to a number of new phenomena, closely related to the digitalisation of the economy, that challenge the traditional premises on which international tax law has relied for a century. This movement has already led to significant changes in rules and practices worldwide, particularly in the fight against tax evasion and tax avoidance.

On the other hand, when the attention is focused on the more specific question of the taxation of the profits of large companies in the digital economy, the difficulty of getting governments to converge towards a common legal framework remains evident, even though the business models privileged by these companies raise identical problems all over the world. Thus, despite an almost global consensus on the limits of the current tax system, initiatives that are purely national - and highly political - are multiplying in the greatest disorder, giving rise to outcries and threats of reprisals from States that consider themselves victims of discriminatory practices. The prospect of a uniform legal response to a clearly global issue thus remains, for the time being, very hypothetical.

Before analysing the fiscal challenges raised by the digitalisation of the economy and the way in which States are trying to respond to them, it is useful to briefly recall the origins of the current international tax system to understand its current inadequacy.

A global tax system designed in the 1920s

The way in which States share the right to tax the income of multinational companies is still based on a model conceived by the League of Nations in 1928.

Paradoxically, if taxation has always constituted an obvious attribute of sovereignty, it appears to be one of the oldest areas for the development of a form of legal globalization. Since the 1920s, the League of Nations has embarked on an ambitious programme of reflection on how States could coordinate their fiscal jurisdictions in order to avoid certain "frictions" detrimental to international commerce. Mostly, the League of Nations wanted to avoid cases of "double taxation", linked to situations in which two States may, on the basis of their respective domestic rules, claim the same right to tax the same profit or the same estate. For example, in the case of amounts earned abroad by an individual or a company, the "source" State can legitimately wish to tax this income generated on its territory, while the "residence" State usually counts on taxing all the income of taxpayers domiciled on its territory, including foreign revenues.

To reduce these risks, the League of Nations published in 1928 a first model convention whose provisions still guide, in substance, bilateral tax treaties that most countries in the world sign with their economic partners. These conventions aim at allocating the various sources of revenue, or even different estates, between the signatory States for the purpose of avoiding situations of double taxation. Thus, for example, the signatories generally agree that the source State should have the right to tax so-called "passive" income (income from the estate in particular) generated on its territory - including if perceived by residents of the other signatory State - while, conversely, the State of residence is alone to tax earnings, including where the economic activities are carried out in the other State (unless the company has a "permanent establishment" there, *i.e.* a fixed and permanent establishment with its own activity).

New ways of creating value

Recent evolutions in the models of value creation favoured by many companies tend to challenge this traditional model of repartition of taxable income between source States and seat States. To put it briefly, these

1. As the Collin-Colin Report pointed out, in 2013, the digital economy refers to companies immediately associated with this notion (companies in the advertising, information or entertainment sectors whose activity is essentially based on the use of digital technologies, and software publishing companies), but also to companies of all sizes and of all sectors that are increasingly using digital technologies and, in particular, are making ever more intensive use of the data resulting from their users' activities. Economists nowadays prefer to speak of the «digitalisation of the economy» rather than of the digital economy, since this phenomenon encompasses most of the activities involved in the production of goods and services, including the most traditional ones (P. Collin, N. Colin, *Mission d'expertise sur la fiscalité de l'économie numérique, Rapport au Ministre de l'économie et des finances, au Ministre du redressement productif, au Ministre délégué chargé du budget et à la Ministre délégué chargé des petites et moyennes entreprises, de l'innovation et de l'économie numérique*, 2013, pp. 5 *et seq.*).

2. See in particular: A. Garapon, "Une Cour peut réguler la mondialisation", *La Revue européenne du droit*, September 2020, no. 1, pp. 89 *et seq.*

models are making it more difficult every day to identify the place or places of value creation of an activity and, consequently, the distribution of the rights to tax this value between the relevant States.

In this respect, large multinational companies certainly offer the most striking examples of such struggles - which explains why they have become for many the symbol of practices, even abuses, which are not really their own. We are thinking here of companies such as Facebook or Google, which generate significant revenues from services provided to users and customers residing on the territory of States where the companies might have no physical presence. However, the 4,500 bilateral conventions which, today, are all inspired to a greater or lesser extent by an OECD model (which took over from the League of Nations in this matter), grant in principle to the country where the company is domiciled - or at least, has a fixed place of business (branch, office, factory...) - the right to tax the relevant profits. Thus, for example, only Ireland is entitled to tax the profits generated by Google in France when its lucrative advertising space placement activities are carried out by employees residing at group's European subsidiary in Dublin. This disconnection between, on the one hand, the territory in which a large part of value is generated - or at least yielded - and, on the other hand, its place of taxation appears today, to many governments to be incomprehensible for the public opinion.

But this is not the only difficulty faced by States. Indeed, most of the value produced by the activity of many companies, including in "traditional" sectors (hotels and restaurants, for example) now relies on so-called intangible assets - an algorithm for Google and, more often, a trademark, patents, know-how, etc. - which may themselves be located almost anywhere, lodged with dedicated subsidiaries. The Starbucks case, which arose in the UK in 2012, brought this problem to light. Despite a turnover exceeding £2 billion generated in the UK, the company managed to pay no income tax there, by relocating all its profits via a subsidiary located in the Netherlands and in charge of controlling the group's intangible assets for the whole Europe - assets whose for which the right of use was charged at a high price to local subsidiaries, particularly the ones in the UK.[3] At the same time, all of the large American companies in the digital economy were benefiting from sophisticated schemes that made it possible - in all legality - to minimise their overall tax rate by locating the bulk of their profits with subsidiaries established in accommodating jurisdictions (Cayman, Bermuda...), after having wiring them through various tunnel jurisdictions whose legislation and bilateral conventions authorised this type of practice.[4]

Finally, there is an even more serious difficulty: that of identifying the value generated by certain services - a value that must be understood in order to be located and then taxed. For example, while it is clear that Google or Facebook's advertising revenues are linked to the information collected from users (through their search history, in particular), is it necessary to and, if appropriate, how should this user participation - this "free labour", as the Collin-Colin Report[5] described it - be valued in the creation of the overall value of the service sold by Google or Facebook to its customers? And, beyond that, how can the "fair value" of certain intangible assets - Google's algorithm or Starbucks' Frappuccino recipe, for example - be assessed, in order to determine the acceptable level of remuneration? This question of the amount of "transfer prices", i.e., the prices at which companies in the same group charge each other (and therefore "off-market") for goods or services, is obviously crucial for governments: the rate of taxation depends directly on the amount of profits, which in turn depends on the amount of charges deducted by the company as a result of the transfer prices charged by its subsidiaries and parent company.

The BEPS project facing the "challenges of the digital economy"

States reacted rather late to these new facts. They initially preferred to focus their attention on the most obviously questionable behaviours when, in the aftermath of the 2007-2008 crisis, the need to regain budgetary leeway became apparent and, at the same time, the press revealed massive tax evasion practices sheltered by a few "tax heavens" (Liechtenstein, in particular)[6]. Annoyed at having had to provide huge financial aid to save banks which, at the same time (at least for some of them) facilitated tax evasion that reduced public revenues, governments quickly implemented various vigorous measures, both at the national level (as with the FATCA law in the United States in 2010)[7] and internationally (through initiatives targeting bank secrecy and aiming at the development of information exchange between tax administrations led by the OECD at the invitation of the G20).[8]

It was only in a second phase that attention focused on the different processes by which many large transnational corporations reduce their tax rates in a way that is legal but problematic from the point of view of public finances and, in many respects, of fairness. Thus, in 2012, the OECD convinced the G20[9] to support it in a project

3. For a presentation of this scheme, see in particular: T. Bergin, "How Starbucks avoids UK taxes", *Reuters*, October 15 2012.

4. See in particular, P. Collin, N. Colin, *ibid.*, 2013, p. 21.

5. *Ibid*, pp. 52 *et seq*.

6. See in particular: E. Vincent "Lichtenstein, la vallée des milliards cachés", *Le Monde*, February 19 2008.

7. The provisions of the Foreign Account Tax Compliance Act (FATCA) require banks around the world to report all accounts held by US citizens to the US tax authorities. For more information, see: ‹https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca›.

8. In 2020, the OECD welcomes both the dramatic increase in the number of exchanges of information since the launch of its "Global Forum on Transparency and Exchange of Information for Tax Purposes" in 2009, and the significant reduction (by almost 25% between 2008 and 2019) in the volume of bank deposits in international financial centres (Singapore, Hong Kong, etc.) by non-residents.

9. In a micro-formula lost in the middle of the 14 pages of the final declaration of the G20 meeting in Los Cabos (Mexico) in June 2012: "We reiterate the need to prevent base erosion and profit shifting and we will follow with attention the ongoing work of the OECD in this area".

called "BEPS" (Base erosion and profit shifting) which, as its name suggests, aimed to uncover some potentially questionable tax optimisation practices and, ideally, to propose ways to overcome them.

From the very beginning, companies of the digital economy - at the forefront of which are the "GAFAs" (Google, Amazon, Facebook, Apple) - were clearly in the scope of OECD's efforts. The first of the fifteen "BEPS actions" thus aimed to "address the challenges raised by the digital economy".[10] Not that these companies were then accused of adopting especially "aggressive" tax behaviour compared to other multinationals. However, in light of several features of their economic models and their location policies - those mentioned above - they raise, in the view of governments, risks of "erosion of the tax base" of a particular severity.[11]

However, during the publication in 2015 of the different BEPS Reports and in the following years, the issue of the digital economy was relegated to the background. The OECD preferred to concentrate on more fertile grounds, so as to develop consensual solutions: the creation of "anti-abuse" standards (in order to annihilate the advantage of resorting to certain purely artificial tax arrangements), the development of cooperation mechanisms between tax administrations, the multiplication of "reporting" obligations by companies, the drafting of an innovative "multilateral instrument" allowing interested States to simultaneously modify their bilateral tax treaties in order to integrate the new anti-fraud provisions proposed by the OECD, etc.[12]

Similarly, at the European level, several guidelines inspired by the OECD required national legislation to incorporate an arsenal of anti-fraud and anti-evasion provisions.[13] Some States that have long been accused of facilitating tax optimisation or even tax evasion (Luxembourg and the Netherlands, in particular) have thus amended their legislation and are trying to adopt best practices in terms of transparency and the fight against abusive corporate behaviour[14]. These trends reflect the emergence of legal standards that are likely to be imposed on a global scale as the subject of tax fraud has become so sensitive: the label of "tax haven" is becoming very difficult to bear, including by certain small States long associated with this expression.[15]

Towards new principles for taxing the profits of multinational companies?

Concerning the challenges raised specifically by the digitalisation of the economy, the observations put forth in the Collin-Colin Report and largely taken up by the BEPS Action 1 Report have never been denied. However, States have so far been unable to agree on their implications.

At the global level, the OECD has made significant efforts to try to overcome the relative failure of Action 1, which, due to a lack of consensus - notably due to the Obama Administration's reluctance to proposals that could affect some large US companies - had not resulted in anything tangible. Contrary to all expectations, the election of Donald Trump changed the situation. Most of the concerns raised by the practices of large digital companies overlapped with those taken into account, more generally, by the tax reform initiated by the Republicans in 2017 and aimed in particular at encouraging the relocation of American company profits to the United States while introducing a mechanism for minimum taxation of their profits made abroad.[16]

New "BEPS 2.0" negotiations, led by the United States, began in January 2019 in an "inclusive framework" bringing together 140 countries. A work plan was then adopted by the G20 summit in Fukuoka on 8 and 9 June 2019. These discussions led to two sets of proposals endorsed by the members of the inclusive framework in January 2020.[17]

Firstly, a "Pillar 1" aims to take better into consideration the point of sale of various goods and services (even beyond the case of digital companies) in locating the profits generated by these sales. Concretely, the idea is to propose a profit allocation formula that takes into account not only the country where the company is headquartered but also the consumer States, in order to allocate to the latter a fraction of the profits made on their territory by companies not located there. Secondly, a "Pillar 2" intends to introduce a minimum effective tax rate for multinationals, allowing States to tax their international groups for profits made abroad and little or no tax thanks to bilateral conventions. The aim is to discourage the relocation of profits for purely tax purposes and thus limit tax competition between States.

However, due in particular to the United States' volteface, which at the end of 2020 distanced itself from the

10. OECD, Meeting the Fiscal Challenges of the Digital Economy, Action 1 - Final Report 2015.

11. However, the statistical data appear to be as incomplete as they are contradictory. The European Commission estimated in 2018 that, on average, digital businesses were seemingly taxed at an effective average rate of 9.5% compared with 23.2% for traditional business models (see the European Commission's services' impact study on the two proposals for directives: SWD (2018) 81 final/2). For its part, the US Department of Commerce notes in its investigation report on the "GAFA tax" adopted by France that several studies consider, on the contrary, that the tax rates of these different categories of companies remain globally equivalent (Office of the United States Trade Representative, Report on France's Digital Services Tax prepared in the investigation under Section 301 of the Trade Act of 1974, December 2 2019, p. 5.).

12. For an overview, see: ‹https://www.oecd.org/fr/fiscalite/beps/actions-beps.htm›.

13. See the ATAD (Anti-Tax Avoidance Directive) of July 12 2016 (Dir. 2016/1164) and "DAC 6" of May 25 2018 (Dir. 2018/822).

14. See in particular: X. Paluszkiewicz, F. Dumas, "*L'espace fiscal européen*", Information report submitted by the Committee on European Affairs, Registered with the Presidency of the National Assembly on 9 July 2020, p. 34.

15. More than the prospect of being ostracised by the international community, the fear of scaring off foreign investment - with companies themselves becoming very worried about their image - probably explains this phenomenon.

16. For a presentation of the 2017 US tax reform, see e.g., S. Humbert, "*Les frontières des impôts de production*", CPO, Special Report No. 2, 2020, pp. 55 *et seq.*

17. See in particular, Statement by the OECD/G20 inclusive framework on BEPS on the two-pillar approach to address the tax challenges arising from the digitalisation of the economy, as approved by the OECD/G20 inclusive framework on BEPS on 29/30 January 2020.

negotiations,[18] the OECD proposals remain for the time being in the boxes. Indeed, there is no indication that other States that have actively participated in the discussions could not be disillusioned when examining in more detail the practical consequences that the practical implementation of the two pillars might imply. In particular, there is nothing to affirm that France would be a winner if "Pillar 1" were applied: for a few billion taxes potentially collected on the profits of Google and Facebook, how many would have to be waived on the profits made abroad by LVMH or Sanofi?

Pending a comprehensive response, the European Commission's proposals

For its part, in March 2018,[19] the European Commission presented several proposals which, pending a hypothetical global solution from the OECD, could limit the risks of erosion of the tax base and, at the very least, respond to the "sense of injustice"[20] arising, according to the Commission, from the current arrangements for taxing digital companies. The Commission thus assumes the political as well as the legal character of its approach: it is indeed a question of proving Europe's capacity to take action on a global subject without waiting for the approval of the United States. These proposals also enable it to suggest, very subtly, that there is indeed a homogeneous European public opinion (sharing in this case a feeling of injustice) whose aspirations could be effectively supported by the European institutions.

According to the Commission, a first proposal would be to establish new rules of taxation for companies with a "significant digital presence" on the territory of a State: the latter would gain the right to tax part of the profits linked to this "virtual" presence, even in the absence of a physical establishment. This is a proposal that is as bold as it is difficult to implement: it involves revising each of the bilateral tax treaties signed by each Member State, since all of them currently determine the place of taxation of company profits on the basis of the universally accepted notion of "permanent establishment", which itself is based on criteria of an essentially physical nature. A second proposal would be a common system of tax on the turnover generated by companies from providing certain digital services.

The latter proposal received a more than mixed reception. Only ten out of twenty-seven States considered it relevant[21] and several expressed an open hostility. This was the case, first of all, of Ireland. Even though such a tax would cause only a very limited loss of revenue for Ireland, its government argued that it was essential to keep these discussions at the OECD level in order to find solutions on a global scale.[22] While sharing this sentiment, Sweden is opposed to the very principle of a turnover tax, believing that "it would hamper innovation, investment and growth in the Union and harm its competitiveness against other regions".[23] Denmark and Luxembourg broadly share these points of view.[24]

National tax initiatives on digital services

In light of the halting of Commission's proposal and of a yet-to-come global solution, several European States introduced -or at least announced their intention to do so -a taxation scheme specifically targeting certain digital services. For their promoters, these measures have the advantage of maintaining pressure on international organisations and, even more so, on their more cautious members: the prospect of a multiplication of these taxes may indeed lead them to the conclusion that a global response would ultimately be the "lesser harm".

Thus, in France, a law of 2019[25] introduced a 3% tax on revenues from marketplace services (Amazon, Blablacar, Airbnb, etc.) and on revenues from the placement of advertising messages targeted according to user data. Only companies with a worldwide turnover of more than 750 million euros and 25 million euros for services provided in France are in the scope.

Several similar measures have been enacted or are in the process of being enacted, by several other European countries: Austria, the Czech Republic, Hungary, Italy, Spain and the United Kingdom.[26] Likewise, beyond European borders, several large countries - Brazil, India, Indonesia and Turkey - have already implemented (or are considering implementing) a "digital services tax" comparable to the French "GAFA tax", as recently underlined by the US Department of Commerce.[27]

Legally relevant answers?

The French tax (like the equivalent foreign schemes) is subject to several criticisms. First, it misses its objective in two ways: first by taxing turnover without taking into account profits (and in particular profits supposedly relocated by some of the companies subject to the new tax), and second because this consumption tax can easily be passed on to customers. Thus, at the end, rather than reducing the profits of foreign companies (Google and others), the economic burden of the tax falls essentially or even exclusively on their French customers.

Second, these unilaterally implemented taxes raise particularly heavy risks of retaliation compared to their

18. The US then expressed its «strong reluctance» to the project (CPO, Adapting Corporate Taxation to a Digitised Global Economy, 2020, p. 129).
19. See in particular: documents COM (2018) 147 final and COM (2018) 148 final.
20. Proposal for a Council Directive on the common system of taxation on digital services applicable to products derived from the supply of certain digital services, COM (2018) 148 final, p. 3.
21. See in particular: X. Paluszkiewicz, F. Dumas, Rapp. *Ibid.*, p. 50.
22. *Idem.* p. 51.
23. *Idem.*
24. *Idem.*
25. French law n° 2019-759 of July 24 2019 creating a tax on digital services and modifying the trajectory of the reduction in corporate income tax.
26. The characteristics of the different taxes are presented by: X. Paluszkiewicz, F. Dumas, *Ibid.* p. 53.
27. See in particular: Office of the US Trade Representative, Docket Number USTR-2019-009, 7 January 2021.

rather modest budgetary yield (of the order of 350 million per year).[28] The American authorities thus announced in 2019 that the French tax was, in their view, a discriminatory practice on the part of a trading partner that justified countermeasures, in application of section 301 of the 1974 Trade Act.[29] A list of 63 French products that in 2018 amounted to approximately 2.4 billion euros of imports was thus drawn up, with the intention of subsequently applying to them customs duties of up to 100%.[30] While the US Trade Representative decided in January 2021 to suspend the application of these duties, it has only done so in view of the ongoing investigation into other "digital services tax" initiatives launched by several countries (Austria, Brazil, the Czech Republic, the European Union, India, Indonesia, Italy, Spain, Turkey and the United Kingdom).[31] The case is therefore far from being closed.

However, supporters of these domestic taxes can legitimately argue that without their threat, the negotiations conducted by the OECD since 2019 would probably never have gotten off the ground. As for the structural deficiencies of these taxes, they can be explained first and foremost by the fact that any other form of tax, and in particular a tax based on the profits of foreign companies, would inevitably run up against the provisions of the bilateral conventions signed by the relevant States.

In other words, pending amendments to the latter – if necessary, to incorporate the OECD proposals – those States most token on acting to reflect their domestic public opinion have little choice of means of action.

Moreover, the pressure exerted by some governments to move forward with international negotiations has undoubtedly had a significant impact on the very practices of many companies, which are worried about their public image. Google's decision to sign a transaction with the French tax authorities in 2019 and a judicial public interest agreement (*Convention Judiciaire d'Intérêt Public*)[32] undoubtedly illustrates this concern: the US company preferred to give up one billion euros to the French State to put a definitive end to its disputes with the tax authorities rather than wait for their jurisdictional solution, even though the first and second instance courts had ruled in its favour.[33]

On the other hand, on the legal side, evolutions are still hypothetical. While not completely satisfied with the current system, many States are mainly concerned about the still unclear OECD proposals and the risks of legal certainty they would create by demanding a complete overhaul of the principles that have underpinned international taxation for the past century. In the end, the only certitude that emerges at the beginning of 2021 is that in digital taxation, as in other areas, it is indeed the international balance of powers and, in particular, the willingness of the United States to push in one direction rather than the other that will lead – or not – to the evolution of the law, in order for the latter, perhaps one day, to govern globalization.

28. According to the finance bill for 2021, this tax should bring in 358 million euros in 2021, after bringing in 405 million euros in 2020 (PLF 2021, t. 1, p. 33).

29. See the presentation of the latest actions taken on this basis – against China (intellectual property rights), the European Union (subsidies to Airbus) and France (tax on digital services) – on the website of the US Secretary of Commerce: ‹https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/june/section-301-investigation-fact-sheet›.

30. Office of the US Trade Representative, Notice of Determination and Request for Comments Concerning Action Pursuant to Section 301: France's Digital Services Tax, Federal register/vol. 84, n° 235, December 6 2019, p. 66957.

31. Office of the US Trade Representative, Docket Number USTR-2019-009, Jan. 7 2021.

32. The agreement is available on: ‹https://www.agence-francaise-anticorruption.gouv.fr/files/files/190903_CJIP.pdf›.

33. See in particular at last: CAA Paris, April 25 2019, min. c/ Google Ireland Ltd, *Dr. fisc.* 2019, n° 25, comm. 305, concl. A. Mielnik-Meddah, note F. Deboissy and G. Wicker.

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Governance of common goods as a political lever

"1. And the whole earth was of one language, and of one kind of words. 2. And it came to pass, as they journeyed toward the east, that they found a plain in the land of Shinar, and they dwelt there. 3. And they said to one another, Go to, let us make bricks, and burn them thoroughly. And thus the brick served them for stone, and slime served them for mortar. 4. And they said 'Go to, let us build ourselves a city, and a tower, the top of which may reach unto heaven; and let us make ourselves a name, lest we be scattered abroad upon the face of the whole earth'. 5. And the Lord came down to see the city and the tower, which the children of man were building. 6. And the Lord said, Behold, it is one people, and they have all one language, and this is the first thing they undertake to do; and now shall they not be restrained in all which they have imagined to do? 7. Go to, let us go down, and confound there their language, that they may not understand one another's speech. 8. So the Lord scattered them abroad from there over the face of all the earth; and they left off to build the city. 9. Therefore is the name of it called Babel, because the Lord did there confound the language of all the earth; and from there did the Lord scatter them abroad over the face of all the earth".

Verses 1 to 9, Chapter XI, Genesis, Hebrew Bible

The Genesis describes a mankind that would have achieved, in short, the utopian goal of globalization with global governance. In this account, naturally symbolic, we see that the pre-Babel humanity constituted a kind of political unit. A well-organized, well-structured political unit, where people made decisions and were able to carry them out. People understood one another, so there was a common culture. Why does God intervene to confuse people, to confuse mankind and to stop them from understanding each other any longer? It is because this construction of the Tower of Babel, which ascends to heaven and penetrates into the sky, means that men take themselves to be God-like: the dispersion of men on Earth is the consequence of the original sin, the sin of pride that pushes man to take himself for more than he is and humanity to take itself for more than it is, in short, man claiming to accomplish by himself the earthly Paradise.

This dispersion following the destruction of the Tower of Babel can be interpreted in contemporary geopolitical terms: all these dispersed peoples, speaking different languages, developing different cultures and not understanding one another. They come to develop different ideologies that lead them to fight, to confront each other in war. In the world of the Tower of Babel, there were no geopolitical problems. Geopolitics is the ideology relating to the territories and the nations that occupy them, it is a situation that arises from the lack of understanding of men in the absence of a common political unit that would ensure legitimate world governance in the eyes of humanity as a whole.

Defining globalization[1]

Real globalization is the result of a phenomenon of increased intertwining, where the dispersion of peoples and cultures has given way to a new melting pot, without, however, people being able to understand one another. This mixture has accelerated considerably over the last sixty years with an ever-increasing interdependence. To grasp this phenomenon, we must first provide a definition: globalization can be defined as the tendency for all active units to reason strategically on a planetary scale.

An active unit is a human group that is structured by an identified Common Culture (ability to understand each other) and by an Organization that takes decisions concerning the group both for internal and external affairs. An active unit becomes a political unit when it does not recognize an authority superior to its own. This is, of course, the case of States, which remain the main category of political unit and whose legal definition has been refined, but it is also the case of a growing number of heterogeneous groupings which consider themselves to be sovereign, i.e., do not recognize any authority superior to their own. This is by extension the case of international organizations of all kinds. They can be deemed to be, to a certain extent, political units, first and foremost the United Nations, which remains the basis of international law as it stands today. Terrorist organizations such as Daesh or Al Qaeda also meet this definition of political unit insofar as they consider themselves to be sovereign, i.e., they do not recognize any authority superior to their own, although naturally this is not how they are regarded from the point of view of international law.

So why is there a tendency for all active units on the planet to think strategically on a global scale? The globalization we have been experiencing for half a century is a phenomenon without precedent in the history

1. Several of the concepts used in what follows are taken from Thierry de Montbrial, *L'Action et le système du monde*, 4th edition, « Quadrige » collection, PUF, 2011.

of humanity. It is first and foremost a phenomenon of constantly accelerating technological transformation, a consequence of the revolution in information and communication technologies. For more than 60 years now, not only have we not seen a slowing down of the transformation, but we see before our eyes today that this transformation is accelerating, despite its upheavals. At the same time, the fall of the USSR, as a consequence of its fundamental inability to reform itself due to the intertwining of its economic and political structures, has contributed to tearing down certain levees and to the rekindling of problems frozen since the end of the Second World War. Large-scale migration phenomena have occurred, including within Europe with the extremely rapid enlargement of the European Union.

Designing and establishing regulatory mechanisms in an increasingly complex international system?

This general openness, this increased quantitatively and qualitatively transformed interdependence, implies a form of regulation. In highly interdependent physical systems, regulatory mechanisms are required since systems that are not regulated explode, i.e., evolve towards chaos. One thinks of major economic crises such as the one in 2007 and the misfortunes of the Middle East since 2011, which are relatively comparable situations. The recent economic crises, the multiplication of conflicts in the Middle East and the Covid-19 pandemic have in common that they are the result of events that were originally insignificant but evolved into gigantic problems.

If the world were already constituted or constituted again - in relation to the metaphorical account of the Tower of Babel - as a single political unit, the problem would be relatively simple. But this is not the case, and the issue of global governance is frighteningly complex. The word complexity comes from the Latin "*complexus*". It corresponds to the idea of the impossibility of unfolding, the impossibility of laying it out flat. In a complex system, it is impossible to fully describe the parts that interact and the nature of these interactions. This is now a common feature of hard sciences and human sciences: many phenomena, such as climate or geopolitics, cannot be described as systems, in the precise sense of the term, so as to explain all the interactions.

We cannot, however, renounce partial representations. If we want to have a somewhat precise idea of what is wrongly called "the international system", we have to start from a sort of first approximation, that of the interstate system, that is to say the relations between states. This is indeed a system whose structure remains at the heart of the "international system", despite the multiplication of other influential active units. Consequently, the problem of global governance still lies *at the root* of the problem of cooperation between States in order to achieve coordination that will enable the "international system" to evolve not only in a direction that is not chaotic, but even in the direction of a certain progression, that of the co-management of common goods.

Thinking about common goods

I call a "good" everything that can be destroyed or transformed by men. It is not only material goods, but also education, values and health on an individual or collective level, which are also fragile.

"Common good" is a general term that concerns a community as a whole. But to what extent can we speak of a common good for a human group that is not structured by a common culture and organization, such as a government in the case of a State? It may be that there are common goods at the intersection of all cultures. But there is necessarily a certain relativism. For someone like me, and perhaps for many of the readers of this text, what is called Western culture is a common good to «us», but not necessarily to "others". Does this matter deep down in Outer Mongolia? I am not sure. We can try to define the notion of common good more precisely. In economic theory, we oppose "private goods" and "public goods". A private good is a good that only one person can consume. The public good or collective good was defined by Samuelson as a good that is non-rivalrous and non-exclusive, on the scale of a society, whether political or not.

But beyond this definition, the climate issue suffices to show that in the absence of a global political unit with legitimate governance, the definition of common goods and a fortiori the modes of cooperation to implement public policies on a planetary scale, is not obvious. The example of public health can also be given, such as vaccination in the event of a pandemic. What is still needed are effective organizations responsible for coordinating inter-state cooperation in association with other active units, within a framework that is perceived as legitimate by the citizens of the world. At the same time, we can see that if we are not able to build these cooperation structures and implement these levers quickly enough, the risk of leading to disasters and chaotic world developments is very high. All of this, of course, must begin with awareness.

Is it possible to build an international order compatible with the levers of governance for the common good in the absence of a hegemonic power? It is clear that we are evolving rather towards strategic competition between the United States and China, which aspires to dominate the world in thirty years' time. Why thirty years? Because 2049 will be the hundredth anniversary of Mao's victory in China, and the Chinese have the open goal of being the world's leading power by then.

The construction of Europe must guide us here, without dogmatism or over-simplistic ideology. What we have achieved more or less well with the European Union is a completely original political adventure in the history of

mankind. We are seeking to build a new type of political unit that is not an imperial construction, which have always been doomed. A co-construction, a free association, in a democratic spirit. We have already achieved with the European Union types of interdependence which mean that some of the things that seem extraordinarily difficult – if not impossible – in the framework of classic inter-state cooperation can be done at European level by means of mechanisms of solidarity, cultural and naturally legal rapprochement.

If we continue, by improving, correcting, strengthening, preserving at the same time the cultures of the different States, if we manage to build a new type of political unit which in some respects goes beyond the Nation State, perhaps we will be able to better evolve in the direction of a true co-management of these famous common goods and modes of governance with their different levers that will make it possible not only to maintain a viable world but perhaps even to make this world progress in some respects.

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Geopolitics of the Energy Transformation

1. The internationalisation of energy transactions

The history of energy can be written from myriad perspectives, depending on the object emphasised in each account[1]. A household, a river, an activity, an event, a specific resource, a given technology, a country, a region, a global process or combinations thereof are some of the objects around which an energy narrative has been built.[2] As a result, the periodisation used, and the inflexion points selected as milestones are naturally not the same, nor is their relevance for other disciplines. From the standpoint of the social practice and discipline we call international law, three broad inflexion points are particularly noteworthy.

The first is the slow and multifaceted process known as the Industrial Revolution, which unfolded from the late 18th century onwards in England and then elsewere.[3] The Industrial Revolution is of critical importance for the study of the international law of energy first and foremost because it marked the transition from a mainly 'organic' (human-, animal-, wood- or charcoal-based) to a mainly 'mineral fuel' coal-based economy.[4] Even though the search for 'stocks' of mineral energy resources in foreign lands for use in the metropolis remained limited, the Industrial Revolution added a measure of internationalisation in energy transactions both directly and indirectly.

Directly, the turn to coal and, starting in the second half of the XIXth century, the increasing use of oil meant that energy resources had to be extracted where their deposits were found. As long as that location fell within a territory controlled by a State, including colonial possessions, that measure of legal internationalisation remained limited. However, energy transactions were also internationalised in an indirect manner, through the possibilities coal offered for long distance transportation (for market access, resource extraction and military expeditions) and the heavy reliance on slaves as part of the human energy supporting the 'triangular trade' mechanism that enabled and sustained the Industrial Revolution in England.

In an influential book,[5] economic historian K. Pomeranz asks why the Industrial Revolution happened in England rather than the Yangzi Delta, despite propitious conditions in both regions. His answer rests on two main factors, namely the fortuitous availability of large coal reserves in England[6] and, no less importantly, the triangular trade between England (exporting manufactures to its American colonies and former colonies), West Africa (from which slaves were sent to the Americas) and the Americas (which relied on cheap slave labour to produce the raw materials acquired by Britain in exchange for manufactures). These two factors, the abundance of coal in England and the 'natural bounty' imported from abroad enabled a capital and manufacture intensive path, with a growing population fed by natural resources from overseas grown/extracted by slaves. Thus, slavery as a form of traded human energy served as a catalyst for the transition to the fossil fuel energy matrix.

The second inflexion point relevant for an international law perspective also unfolded over several decades, but mainly in the aftermath of the Second World War. The post-war reconstruction effort required growing amounts of energy resources, mainly coal and oil, which could not be satisfied only by domestic inland deposits. The assertion of sovereign powers over the resources of the continental shelf, triggered by US President Truman's proclamation of 1945,[7] and the internal allocation of

1. This article relies on and is in many ways a preview of my book *The International Law of Energy* (Cambridge University Press, forthcoming 2021), mainly chapters 1 and 8.
2. Selected examples of this varying focus include: P. Warde, 'The Hornmoldt Metabolism : Energy, Capital, and Time in an Early Modern German Household' (2019) 24 *Environmental History* 472; R. White, *The Organic Machine: The Remaking of the Columbia River* (New York: Hill and Wang, 1995); C. F. Jones, *Routes of Power: Energy and Modern America* (Cambridge: Harvard University Press, 2014); M. I. Santiago, *The Ecology of Oil: Environment, Labor, and the Mexican Revolution, 1900–1938* (Cambridge University Press, 2006); D. Yergin, *The Prize: The Epic Quest for Oil, Money, and Power* (New York: Free Press, 2009); G. Hecht, *The Radiance of France: Nuclear Power and National Identity after World War II* (Cambridge: MIT Press, 1998); E. A. Wrigley, *The Path to Sustained Growth: England's Transition from an Organic Economy to an Industrial Revolution* (Cambridge University Press, 2016); A. Kander, P. Malanima, P. Warde, *Power to the People: Energy in Europe over the Last Five Centuries* (Princeton: Princeton University Press, 2013) ; J. R. McNeill, P. Engelke, *The Great Acceleration: An Environmental History of the Anthropocene since 1945* (Cambridge: Belknap Press, 2016) or V. Smil, *Energy Transitions: History, Requirements, Prospects* (Santa Barbara: Praeger, 2010).
3. On this major – and highly debated – subject of historiographical research see: R. C. Allen, *The British Industrial Revolution in a Global Perspective* (Oxford University Press, 2014) ; E. A. Wrigley, *Energy and the English Industrial Revolution* (Cambridge University Press, 2010).
4. E. A. Wrigley, *The Path to Sustained Growth*, at 2-3.
5. K. Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton: Princeton University Press, 2000).
6. This is a classic line of argument epitomised by the work of W. S. Jevons, *The Coal Question* (London: Macmillan, 1865).
7. Proclamation 2667 of September 28, 1945: 'Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf', 10 Fed. Reg. 12305 (1945). See D. C. Watt, 'First steps in the enclosure of the oceans: The origins of Truman's proclamation on the resources of the continental shelf, 28 September 1945' (1979) 3 *Marine Policy* 211.

powers over oil in submerged lands between the federal government and the States of the Union,[8] both illustrate an increasingly acute understanding of this imperative. More generally, the exploitation of fossil fuel resources in foreign lands was an extremely profitable activity, and it was essentially under the control of international oil companies from either the US or colonial powers.[9]

In a post-1945 decolonisation context characterised by the emergence of numerous newly independent States eager to use their own resources for their national development, this configuration led to a further degree of internationalisation of energy transactions. Two main questions arose, which have driven the legal aspects of oil and gas geopolitics ever since. One was the question of entitlements over energy and, more generally, the determination of the rules conferring such entitlements and allocating powers in case of competing claims. The other was the organisation of the energy transaction based on such entitlements. The geographical mismatch between the countries where energy deposits were mainly located and those where they were mainly consumed required indeed substantial amounts of foreign investment by the latter in the former in order to exploit the relevant deposits. It also rested on the assumption that the movement of capitals, equipment and the energy resources (or the refined product) thus produced would be enabled and protected.

At present, a third inflexion point is unfolding before our very eyes as a result of much more profound and long neglected implication of the 'mineral fuel' economy, namely its environmental implications, of which climate change is the most salient manifestation.[10] This multifaceted process of transition from carbon-intensive to low-carbon forms of energy and processes, often called the low-carbon transition, has very important implications for the international law of energy.

2. The energy transition

The financial and technological manifestations of the transition are complex. Total final energy consumption has followed a medium- and long-term upward trajectory, interrupted in 2020 by the measures to manage the COVID-19 pandemic, but likely to continue. The increase in energy consumption has led to an increase in the overall consumption of fossil fuels, nuclear and traditional biomass (again, with the important caveat of the pandemic, which has massively affected transportation). A 2020 Report by REN21, an international multi-stakeholder network registered in Germany and based in Paris, quantifies this increase at approximately 5.7%, which is lower than the increase of 7.2% in overall energy demand over the same period (2013-2018), but an increase nevertheless.[11] It is therefore not in the absolute figures that the transition is most visible but in the relative shares. In the same period, modern renewables (mainly solar and wind) grew much faster (21.5%) than both energy consumption and other energy sources.

When one looks at new financial investment (annual) in new energy generation capacity, the growth of modern renewables is also striking. Between 2018 and 2019, the capacity to generate electricity (measured in gigawatts) increased from 512 to 627GW for solar photovoltaic (22%) and from 591 to 651GW for wind power (10%). The leading country at the level of investment and new capacity in solar PV and wind is China, followed by the United States, and then other countries such as Japan (for overall investment and solar PV), India (for overall investment, solar PV and wind power) and the UK (only for wind power).

According to the *World Energy Outlook 2020*, an influential annual report produced by the International Energy Agency (IEA), solar power schemes in most major countries can now produce electricity at a cost which is lower than coal and gas.[12] Another important conclusion from this report is that the gains from cheaper and cleaner electricity (with electricity gaining ground in the provision of thermal and transportation services)[13] puts great pressure on the need for suitable electricity networks (grids and transmission lines), at a time when the COVID-19 shock has financially weakened the utilities undertaking such infrastructure developments. Thus, 'electricity grids could prove to be the weak link in the transformation of the power sector'.[14]

The technological transition is therefore clear when seen from the perspective of modern renewable energies. The broader implications of the transition, however, are far more difficult to determine.

3. From transition to transformation

3.1 Geopolitics of the energy transformation

An attempt at mapping the profound implications or, in other words, the 'transformation' driven by the energy transition is provided in a 2019 Report from the Global Commission on the Geopolitics of the Energy Transformation,[15] convened by the Director of the International Renewable Energy Agency (IRENA) and chaired by the former President of Iceland, Ólafur Ragnar Grímsson.

8. See *United States v. California*, 322 U.S. 19 (1947), at 38-39; *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Louisiana*, 339 U.S. 699 (1950). The principle stated in these cases was eventually reversed by statute, with the adoption in 1953 of the Submerged Lands Act, 43 U.S.C. §§ 1301-15 (1953). R. B. Krueger, 'The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act' (1970) 10 *Natural Resources Journal* 442, at 452-453.
9. A vivid account of the struggle for oil is provided in Yergin's classic book *The Prize*.
10. See J. R. McNeill, 'Cheap Energy and Ecological Teleconnections of the Industrial Revolution, 1780-1920' (2019) 24 *Environmental History* 492.
11. See generally REN21, *Renewables 2020. Global Status Report* (2020) [REN21, *Renewables 2020*].
12. IEA, *World Energy Outlook* (2020), Executive Summary, at 18.
13. On this specific issue see M. Grubb, P. Drummond, N. Hughes, *The Shape and Pace of Change in the Electricity Transition: Sectoral Dynamics and Indicators of Progress* (UCL/We mean business coalition, October 2020).
14. IEA, *World Energy Outlook* (2020), Executive Summary, at 19.
15. Global Commission on the Geopolitics of the Energy Transformation, *A New World: The Geopolitics of the Energy Transformation* (IRENA, 2019) [The Geopolitics of the Energy Transformation].

This is an important attempt to map and assess the implications of the ongoing energy transition from the perspective of global power redistribution. As noted in the introduction to the report: "[t]he accelerating deployment of renewables has set in motion a global energy transformation that will have profound geopolitical consequences. Just as fossil fuels have shaped the geopolitical map over the last two centuries, the energy transformation will alter the global distribution of power, relations between states, the risk of conflict, and the social, economic and environmental drivers of geopolitical instability."[16]

The drivers of this transformation, according to the report (which summarises a wider body of work published in major peer-reviewed journals), are the declining costs of electricity produced from non-hydro renewable sources, the problems of pollution and climate change caused by fossil fuels, the spread of renewable energy promotion policies, technological innovation, shareholders' increasing demands, and a major shift in public opinion.[17]

Regarding the reasons why this transformation affects geopolitics, they relate to the broader availability of renewable energy resources (by contrast with the geographically concentrated fossil fuels), the fact that they are 'flows' rather than 'stocks' (hence not exhaustible), the ability to deploy renewables at any scale, from a macro to a micro level (the so-called 'democratizing effects' of renewable energies), and their rapidly decreasing marginal costs, which requires however stable regulatory and market conditions.[18]

3.2 The geopolitics of stranded fossil fuel assets

An example can bring these rather abstract geopolitical considerations into focus. A widely reported study published in 2018 in *Nature Climate Change* showed that, due specifically to the diffusion of renewable energy, electric transportation systems and efficiency measures, the demand (not the supply) for fossil fuels will peak and then decline sometime between 2030 and 2040.[19]

From the perspective of countries producing at a comparatively high cost, such as Canada and Venezuela but also the United States and Russia, the decline in demand is estimated to have major effects on the viability of their entire fossil fuel industry, as such demand will be satisfied by low-cost producers (e.g. Gulf countries). By contrast, for net fossil fuel importers such as China and Japan, the effect of this phenomenon on their gross domestic product would be positive. These results were based on the use of high-resolution non-equilibrium integrated assessment modelling techniques.[20] The study identified possible 'winners' and 'losers' of this transition.

Unlike previous studies, the projections in this study are not based on whether new climate policies are adopted but entirely driven by decisions that have *already been made in the past, and which have set the world into a broad and possibly irreversible technological trajectory*. Yet, if new climate policies to reach the 'well below' 2C target of the Paris Agreement are indeed adopted and low-cost fossil fuel producers continue their production at current levels, the adverse impact on high-cost fossil fuel producers would be much deeper and more disruptive (the entire fossil fuel industries of Canada, Russia and the US may collapse). The study was widely reported in the media, retweeted by figures such as former US Vice-President Al Gore, taken up in domestic political processes (e.g. divestment campaigns and opposition to new fossil fuel development), and relied upon in major institutional reports such as the *Special Report on the 1.5C target* issued by the Intergovernmental Panel for Climate Change (IPCC),[21] the 2018 *New Climate Economy Report*,[22] and the aforementioned 2019 *Report on the Geopolitics of the Global Energy Transformation*.[23] It remains, of course, an attempt at anticipating possible future scenarios and, as such, subject to caution. But it is, at the very least, worth considering. Two potential extensions of this study concern power redistribution at the international and domestic levels.

At the international level, China would gain significantly from accelerating the energy transition, not only because it would help it address its critical air pollution problem but also because it would promote the competitiveness of its own renewable energy industry abroad and, by undermining the economic strength of the US and Russia, it would strengthen its strategic position with respect to two key geopolitical competitors. The EU, as a major importer of fossil fuels and a resolute supporter of the low-carbon transition through its industrial policy would also gain much from the acceleration of the transition, both in terms of cheaper imports and competitiveness in international markets.

However, domestically, the structural adjustment entailed by the energy transition in countries with (comparatively) uncompetitive fossil fuel industries may severely affect certain specific sectors of the population, particularly workers in these industries. Depending on which political forces are supported by these constituencies, these important implications of the transition could generate a fertile ground for populist politics in key countries, with the attendant volatility for international relations. Even in countries such as China, which have spearheaded the move to renewables, the massive implications of moving away from fossil fuels would have a massive impact on

16. *The Geopolitics of the Energy Transformation*, at 12.

17. *The Geopolitics of the Energy Transformation*, at 18-23.

18. *The Geopolitics of the Energy Transformation*, at 23-24.

19. J.F. Mercure et al, 'Macroeconomic impact of stranded fossil fuel assets' (2018) 8 *Nature Climate Change* 588.

20. J.-F. Mercure et al, 'Environmental impact assessment for climate change policy with the simulation-based integrated assessment model E3ME-FTT-GENIE' (2018) 20 *Energy Strategy Reviews* 195.

21. IPCC, *Special Report: Global warming of 1.5°C* (2018), Chapter 4, at 319, 373-375.

22. Global Commission on the Economy and Climate, *New Climate Economy: Unlocking the inclusive growth story of the 21st century: Accelerating climate action in urgent times* (2018), at 12, 39.

23. *The Geopolitics of the Energy Transformation*, at 64-65, 82.

domestic workers in this sector.

3.3. The geopolitics of critical raw materials

A dimension of the new energy geopolitics which is not adequately captured in the work discussed so far concerns so-called 'critical raw materials' (CRMs), namely certain mineral components which are strategically important for renewable energy technologies (Li-ion batteries, fuel cells, wind energy, electric traction motors, PV technology), artificial intelligence, the digital economy and defence. The EU, Japan and the US have established specific lists of CRMs, which are regularly updated.[24] The geographical distribution of the production of CRMs is highly concentrated in a number of countries. That introduces an important dimension of mineral geopolitics, akin to the concentrations of oil and gas in certain large producers. Between 2012-2016 China alone was the main global supplier of 66% of CRMs[25] and of 44% of those supplied to the EU.[26]

For certain CRMs, widely used in wind energy and electric vehicles,[27] such as Heavy Rare Earth Elements (HREEs[28]) and Light Rare Earth Elements (LREEs[29]), China alone accounted for 86% of global supply and for almost all (98-99%) of those imported by the EU.[30] As regards PV technology, it relies on CRMs such as borate, gallium, germanium, indium and silicon metal.[31] With the exception of borate, whose main global supplier is Turkey, the main global supplier of all these other CRMs is China (gallium: 80%, germanium: 80%, indium: 48%, silicon metal: 66%).[32]

To manage risks of potential supply disruption, the EU sources most of these CRMs from countries other than China (Turkey, Germany, Finland, France and Norway).[33] As for batteries, which is a key technology for both electricity storage and electric vehicles, their production relies on materials such as cobalt, lithium, natural graphite, niobium, silicon metal and titanium, as well as on non-critical materials such as copper, manganese and nickel.[34] The main global suppliers of these inputs are scattered around the globe, but not all are equally important. Cobalt and nickel (as a base for cathodes), lithium (as an electrolyte material) and natural graphite (as a base for anodes) are key. China is the main global supplier of natural graphite (69%) and the Democratic Republic of the Congo that of cobalt (59%).[35] Regarding the latter, there have been concerns that China's Belt and Road Initiative (BRI) may lead to Chinese economic control over the reserves of strategic minerals in Africa, including cobalt in the DRC.[36] Lithium, which is a key component, is mainly produced in Argentina (16%), Australia (29%) and Chile (40%), but 45% of the lithium hard rock mineral refining is based in China.[37]

The latter point raises a dimension which is well covered in the reports commissioned by the EU to update its CMRs list, namely flow disruption as a result of bottlenecks in the supply chain. Keeping with the example of batteries, China has a pre-eminent role not only at the level of raw material supply but, even more so at those of material processing (for cathodes and anodes), component development (cathodes, anodes, electrolytes, separators) and assemblies (e-ion cells).[38] In such a context, the governance of the continued flow of materials within the global supply chains remains a major issue, much like in the classical geopolitics of oil and gas. The claims against China's export restrictions of raw materials and rare earths brought in the last decade before WTO dispute settlement organs, some foreign investment disputes relating to prospection of rare earths, and the scramble for the deep seabed mining of such minerals are but some illustrations, discussed next, of the role of international law with regard to the new geopolitics of the energy transformation.

4. Governing the energy transformation

4.1 Legal 'front-lines'

In the power shifts described in the foregoing paragraphs, international law (and law in general) is a critical 'battlefront'. The broad process of energy transformation can be especially turbulent from a legal standpoint. At present, an important issue is to identify, with some degree of specificity, which are the main legal 'front lines' where the power struggle is finding expression in legal terms. Such identification is a necessary starting-point for a systematic legal strategy, a 'foreign juridical policy',[39] to be developed with respect to the geopolitics of the energy transformation and to explore adequate routes for international co-operation.

24. EU: European Commission, *Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability*, 3 September 2020, COM/2020/474 final; G.-A. Blengini et al, *Study on the EU's List of Critical Raw Materials* (European Commission, 2020) [*Study on the EU CRMs List*]; S. Bobba et al, *Critical Raw Materials for Strategic Technologies and Sectors in the EU. A Foresight Study* (European Commission, 2020) [*CRMs Foresight Study*]; Japan: Resource Securement Strategies, Prime Minister of Japan and His Cabinet, 2012, <http://www.kantei.go.jp/jp/singi/package/dai15/sankou01.pdf> (in Japanese); H. Hatayama, K. Tahara, 'Criticality Assessment of Metals for Japan's Resource Strategy' (2015) 56 *Materials Transactions* 229; US : Department of the Interior, Final List of Critical Minerals 2018, 18 May 2018, Federal Register, vol. 83, No. 97, pp. 23295-23296; M. Humphries, *Critical Materials and US Public Policy* (Congressional Research Service, 18 June 2019).
25. *Study on the EU CRMs List*, at 6.
26. *Study on the EU CRMs List*, at 8.
27. *CRMs Foresight Study*, at 17, 29-33 (wind energy), 34-37 (electric vehicles).
28. Dysprosium, erbium, europium, gadolinium, holmium, lutetium, terbium, thulium, ytterbium, yttrium.
29. Cerium, lanthanum, neodymium, praseodymium and samarium.
30. *Study on the EU CRMs List*, at 5 and 8.
31. *CRMs Foresight Study*, at 17, 38-42.
32. *Study on the EU CRMs List*, at 5.
33. *Study on the EU CRMs List*, at 8.
34. *CRMs Foresight Study*, at 17, 19-23.
35. *Study on the EU CRMs List*, at 5.
36. See J. Lee et al, 'Reviewing the material and metal security of low-carbon energy transitions' (2020) 124 *Renewable and Sustainable Energy Reviews*, https://doi.org/10.1016/j.rser.2020.109789 (at 8).
37. *CRMs Foresight Study*, at 19.
38. *Study on the EU CRMs List*, at 20.
39. See G. de Lacharrière, *La politique juridique extérieure* (Paris: Economica, 1983).

In the following paragraphs, I provide a few illustrations selected from different legal contexts. These examples can be grouped in three broad categories, namely the use of international law in relation to: tensions arising from resource control; challenges to the energy transformation; the stability of renewable energy support policies.

4.2 Control over new resources

Struggles over the control of the key resources underlying the energy transition have found expression in a range of international legal contexts.

One set of disputes concern the dominant position of China as the main global supplier of a wide range of both critical and non-critical raw materials. Even when certain raw materials have other major suppliers, China often plays a major role in subsequent stages of their supply chain, such as material processing and/or component development and/or assemblies. The more a supply chain for a given raw material is dominated by one country, the higher the risk of bottlenecks and flow disruptions. Hence the importance, as in the geopolitics of oil and gas, of the regulation of exports.

The three main cases brought before WTO dispute settlement organs in this area concern export measures, and they were triggered by complaints from either the US, *in China - Raw Materials*[40] and *China - Rare Earths*,[41] or the EU, in *China - Duties on Raw Materials*.[42] The materials at stake in each case include some which are key inputs of energy transition technologies, such as silicon metal and indium (for solar PV), rare earths (for wind energy and electric vehicles), and cobalt and graphite (for batteries).

Yet, the disputes cannot be said to be linked only to the energy transition given the broader set of materials involved and their much wider application beyond energy transition technologies. For example, the metal molybdenum, at stake in *China - Rare Earths*, is mostly used in metallurgy to make metal alloys for a range of uses including drills, jet engines and power-generation turbines. In the chemical industry, molybdenum is also used a catalyst for petroleum processing. Fluorspar, at stake in *China - Raw Materials*, is used for batteries but also for the production of aluminium and in the chemical industry to produce hydrogen fluoride, a raw material for refrigerants, gasoline, plastics and herbicide, among other applications.

The same important caveat applies to certain foreign investment claims arising from mining projects relating to some critical and non-critical raw materials. In three of them (*Stans Energy v. Kyrgystan*[43]; *Cortec v. Kenya*[44] and the notice of dispute filed by Montero Mining against Tanzania[45]), rare earths mining featured prominently. But often, the focus on metallurgical inputs, such as molybdenum (*Metal-Tech v. Uzbekistan*[46]; *Stans Energy v. Kyrgystan) or manganese (Nabodaya Trading v. Gabon*[47]), significantly blurs the connection between the dispute and the energy transition. In all cases, however, the underlying transaction illustrates the search for new deposits of these materials in countries (e.g. Kenya, Kyrgystan, Tanzania, Uzbekistan) other than the main suppliers, mostly China (for rare earths and molybdenum). A more detailed analysis of these and possibly many other disputes could bring into focus another manifestation of the energy transition at the level of mining disputes.

By way of illustration, in late 2018, a dispute arose between Chile and a US investor, *Albemarle Corp ALB.N*, regarding the discounted price offered by the latter to companies producing battery metals in Chile. Lithium is a key component in battery production and both Chile and Albemarle are major global players in the lithium supply chain. Chile threatened to bring a commercial arbitration claim to enforce the terms of a 2016 agreement, which required the discounted price, but eventually the dispute was managed through negotiations.[48] Yet, in 2020, tensions arose again, this time in a way that more clearly unveils the deep geopolitical implications of such disputes. As noted by a commentator: '*The high-stakes feud comes as Albemarle pushes to expand production in Chile and take control of Australia's Greenbushes, the world's largest lithium mine, to meet an expected tripling in demand for the key battery metal by 2025 as automakers produce more electric vehicles*'.[49] Lithium reserves are highly concentrated in South America within the so-called 'Lithium triangle' (Argentina, Bolivia and Chile), followed by Australia and China.[50] A dispute such as this one and the legal regime applicable to it have therefore wider significance for the energy transition, and hence for the energy transformation.

A final illustration is provided by the regime of deep seabed mining, i.e. mining of the 'Area', which is the seabed and subsoil beyond national jurisdiction.[51] The main targets

40. *China – Measures Related to the Exportation of Various Raw Materials*, AB Report, 30 January 2012, WT/DS394/AB/R WT/DS395/AB/R WT/DS398/AB/R 30.
41. *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, AB Report, 7 August 2014, WT/DS431/AB/RWT/DS432/AB/RWT/DS433/AB/R.
42. *China – Duties and other Measures concerning the Exportation of Certain Raw Materials - Request for the establishment of a panel by the European Union*, 27 October 2016, WT/DS509/6.
43. *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic*, PCA Case No. 2015-32, Award (20 August 2019).
44. *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018).
45. *Montero Mining and Exploration Ltd. v. United Republic of Tanzania* (Canada-Tanzania BIT), Notice of Intent to Submit a Claim to Arbitration (17 January 2020).
46. *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 October 2013).
47. *Navodaya Trading DMCC v. Gabon*, UNCITRAL Rules (OIC Investment Agreement), filed in 2018, pending.
48. A. De la Jara, 'Exclusive: Chile to delay arbitration with top lithium producer Albemarle', *Reuters* (27 December 2018).
49. D. Sherwood, 'Exclusive: Lithium giant Albemarle locks horns with Chile over reserves data', *Reuters* (10 September 2020).
50. See S. Kalantzakos, 'The Race for Critical Minerals in an Era of Geopolitical Realignments' (2020) 55 *The International Spectator* 1, at 7.
51. United National Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397 [UNCLOS], Part XI.

are polymetallic nodules (PMN), cobalt-rich ferromanganese crusts (CFCs) and seafloor massive sulphides (SMS), containing a range of critical and non-critical materials from cobalt, manganese, nickel and tungsten to lithium, germanium, molybdenum and rare earths used in batteries, renewable energy technologies and electric vehicles. Mining of such resources is expensive, hazardous and environmentally harmful. However, the growing geopolitical importance of some of the minerals found in the Area has stimulated investment in this activity.[52]

4.3. Challenging the energy transformation

The challenges to the socio-economic transformation driven by the energy transition are unveiling a range of potentialities of existing legal institutions, both international and domestic, which thus appear as particularly relevant front lines in this process.

One prominent illustration is provided by the debate on the trade-compatibility of, on the one hand, subsidies to fossil fuels and, on the other hand, subsidies to renewable energies. According to a study from IRENA,[53] the world's total direct (financial transfers) energy subsidies to fossil fuels, renewables and nuclear energy amounted to at least USD 634 billion in 2017. Fossil fuel subsidies accounted for USD 447 billion, whereas subsidies to renewable energy accounted for USD 128 billion (for electricity generation) and USD 38 billion (for biofuels). Unpriced negative externalities from subsidies to fossil fuels (negative effects caused by fossil fuel transactions and not borne – internalised – by transaction participants) amounted to a staggering USD 3.1 trillion in the same year, which is 19 times the subsidies to renewable energies (electricity and biofuels taken together).

In this context, one would expect trade law to either favour the shift away from fossil fuel subsidies or, at least, to place them legally and practically on an equal footing with subsidies to renewable energy. Yet, the conclusions of a detailed study on the treatment of these two types of subsidies under trade law suggest that trade law is more permissive and lenient for subsidies to fossil fuels than for subsidies to renewable energy.[54] In essence, renewable energy subsidies are more vulnerable to challenges under trade law because the support schemes used are more specific (hence more 'actionable' in trade law terminology) and they often rely (for political reasons) on local content requirements (LCRs).[55] By contrast, fossil fuel subsidies are consumer-targeted and introduce no clear differentiation across recipients, which makes them more difficult to challenge under existing trade law. These conclusions illustrate how trade law may not only support but also hinder the energy transformation although, as the author notes, fossil fuel subsidies have been addressed to some extent in WTO accession negotiations.[56]

For present purposes, the different regime – in practice – of fossil fuel subsidies and of certain renewable energy subsidies in use suggest that some core rules of trade law (e.g. the national treatment standard,[57] the more specific prohibition of LCRs[58] or the Agreement on Subsidies and Countervailing Duties[59]) are being construed in such a way as to restrict industrial policy, including the so-called 'green industrial policy', i.e. the policies adopted by a State to provide targeted support to certain industries and sectors as a way of realising latent comparative advantages.[60] By contrast, the sweeping fossil fuel subsidies provided by many States have been overlooked or implicitly grandfathered or, still, deliberately left unclearly regulated under the trade regime.

Another front line is illustrated by certain investment claims brought by companies adversely affected by energy transformation policies. It is difficult to ascertain exactly whether the measures at stake in different disputes are aimed to pursue the energy transition or are triggered by other considerations. Here, I provide two possible examples of such disputes, which concern nuclear energy and coal-fired electricity generation. The first example concerns a protracted set of claims by Swedish investor Vattenfall against Germany in connection with measures restricting its coal-fired electricity generation activities[61] and the phase-out of nuclear energy.[62] The first claim has been settled and the second is still pending, but they both reflect the use of certain legal instruments, *in casu* the investment protection standards of the Energy Charter Treaty,[63] to

52. On the exploration contracts concerning these resources see the website of International Seabed Authority (ISA), listing the contracts for PMN, CFCs and polymetallic sulphides: ‹https://www.isa.org.jm/exploration-contracts› (visited on 20 December 2020). On deep seabed mining see: European Commission, C*ommunication: Blue Growth – Opportunities for marine and maritime sustainable growth*, 13 September 2012, COM(2012) 494 final, Section 5.4; ECORYS, *Study to investigate the state of knowledge of deep-sea mining* (2014).

53. *M. Taylor, Energy subsidies: Evolution in the global energy transformation to 2050* (Abu Dhabi: IRENA, April 2020) [*Taylor, Energy subsidies*], at 8ff.

54. See H. B. Asmelash, 'Energy Subsidies and WTO Dispute Settlement: Why only Renewable Energy Subsidies are Challenged' (2015) 18 *Journal of International Economic Law 261 [Asmelash, Energy Subsidies*].

55. See *Canada — Certain Measures Affecting the Renewable Energy Generation Sector* (Complainant - Japan), Request for consultation (Japan), 13 September 2010, AB Report, 6 May 2013, WT/DS412/AB/RWT/DS426/AB/R (proceedings also addressed a separate complaint from the EU filed 2011) ; *India – Certain Measures Relating to Solar Cells and Solar Modules* (Complainant: US), Request for consultations, 6 February 2013, AB Report, 16 September 2016, WT/DS456/AB/R, WT/DS456/AB/R/Add.1.

56. Asmelash, *Energy Subsidies*, at 281-282.

57. General Agreement on Tariffs and Trade 1994, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187 [GATT], Art. III.

58. GATT, Article III(4)-(5), and Agreement on Trade-Related Investment Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 186, Articles 2.1, 2.2 and Annex (Illustrative List), para. 1(a).

59. Agreement on Subsidies and Countervailing Measures, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 UNTS 14, Art. 3.1(b).

60. See generally M. Wu, J. Salzman, 'The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy' (2014) 108 *Northwestern University Law Review* 401.

61. *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany*, ICSID Case No. ARB/09/6, Award (11 March 2011) (embodying the parties' settlement agreement of the same date).

62. *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, pending.

63. Energy Charter Treaty, 17 December 1994, 2080 UNTS 100.

challenge regulatory change at the level of domestic, EU and international law. The pending claim arises, more specifically, from the nuclear phase-out enacted by Germany in 2011, following the Fukushima accident,[64] which set 2022 as the deadline to shut down all remaining nuclear energy reactors, including those of Vattenfall.

On 29 September 2020 the German Constitutional Court ruled[65] in favour of Vattenfall, concluding that the compensation clause of the nuclear phase-out law was partially unconstitutional and that a 2018 amendment to this law,[66] required by a 2016 decision, was not sufficient to bring the law into conformity with the constitution. In its December 2016, the Court had considered that the fixed shut down dates set in 2011 were inconsistent with the right to property protected by Article 14(1) of the German Constitution[67] because *inter alia* it did not provide adequate compensation for unused residual electricity volumes. Aside from some significant procedural aspects, the heart of the decision lies in a proportionality assessment. According to the Court, subordinating compensation for unused residual electricity volumes (unsold electricity as a result of the shutdown) to reasonable efforts by Vattenfall to sell that capacity to another company was only admissible if the conditions of the sale were sufficiently clear, which they were not under the law.

The second example provides a clearer illustration of how foreign investment law may be used to seek to recoup the value of assets which have lost value as a result of the low-carbon transition. It concerns a US coal mining company, Westmoreland Coal Co., which as other coal mining companies, has struggled financially as a result of the transition away from coal.[68] The complaint[69] challenges a climate change-driven policy by the government of Alberta, in Canada, which shortens the lifespan of coal-fired electricity generation and thereby affects the profitability of mines supplying coal to adjacent power generation plants. Of particular note, the investor does not seem to challenge the phase-out itself but rather the allegedly discriminatory compensation policy: "Westmoreland recognizes and does not dispute that Canada and Alberta are entitled to enact regulations for the public good. However, when they do, the *must be fair to foreign investors*".[70] It claims a minimum of USD 470 million, plus interest.[71] The dispute is pending and, irrespective of its merits, which will be evaluated in due course, it provides a very clear illustration of how foreign investment claims can be used specifically to recoup investments made without sufficiently taking into account the rapid pace of the energy transformation.

This is but one manifestation of a what appears to be an emerging type of investment claims brought against energy transformation policies.[72]

4.4 Stability of renewable energy support policies

Between 1972 and 2020, at least 178 foreign investment claims with environmental components were filed,[73] out of a total of 1061 known disputes (concluded and pending).[74] Claims with environmental components are defined as those which arise from the operation of foreign investors (i) in environmental markets (e.g. waste treatment, renewable energy, nature conservation, etc.) and/or (ii) in other activities, where their impact on the environment is part of the dispute and/or (iii) when the application of domestic or international environmental law is at stake.[75] Approximately 80% (143) of these disputes have been brought after 2008, and over half of them (76) concern the energy transition, mostly (61) modern renewable energy projects (solar, wind and geothermal).

The main legal issue at stake in the overwhelming majority of these disputes are the challenges involved in navigating the changing conditions of markets, such as the renewable energy generation market, which is not only regulated but rests on a market built by regulation. There are over seventy foreign investment disputes challenging adjustments of the renewable energy regulatory framework in countries such as Albania, Bulgaria, Canada, the Czech Republic, Germany, Italy, Kenya, Romania, Spain or Tanzania,[76] and possibly many more undisclosed ones. The geographically wide span of the countries facing such challenges provides an indication of the scope of the phenomenon.

Despite their many differences, the broad underlying question raised by these disputes is the same. In the aftermath of the 2008 economic crisis, when good investment opportunities were scarce, many companies but also financial intermediaries invested heavily in renewable energy projects supported by green industrial policies. These policies were seen as offering a relatively predictable, safe and very significant return on investment, par-

64. Thirteenth Act Amending the Atomic Energy Act (13. Gesetzes zur Änderungdes Atomgesetzes, 31 July 2011, Bundesgesetzblatt 2011 Seite 1704).

65. Order of the Federal Constitutional Court (29 September 2020), 1 BvR 1550/19.

66. Sixteenth Act Amending the Atomic Energy Act (16. Gesetz zur Änderung des Atomgesetzes – 16. AtG-Novelle, 16th AtG Amendment), Article 1.

67. Judgment of the Federal Constitutional Court (6 December 2016), BVerfGE 143, 246, paras. 1, 2 and 4 (operative part).

68. See 'Westmoreland emerges from Chapter 11', Westmoreland News Release, 15 March 2019, KL2 3116482.5.

69. *Westmoreland Coal Company v. Government of Canada*, UNCITRAL Rules (NAFTA Dispute), Notice of Arbitration and Statement of Claim, 19 November 2018 [*Westmoreland NoA*], paras. 4-6.

70. *Westmoreland NoA*, para. 12.

71. *Westmoreland NoA*, para. 105.

72. See e.g. D. Charlotin, 'Netherlands poised to face its first investment treaty claim, over closure of coal plants', IAR Reporter (7 September 2019). See also *TransCanada Corporation and TransCanada PipeLines Limited v. The United States of America*, ICSID Case No. ARB/16/21, discontinued on 24 March 2017 (but possibly reignited by the executive orders signed by the Biden administration in January 2020).

73. The figures in this section are based on a dataset compiled by the author.

74. See UNCTAD's Investment Dispute Settlement Navigator (as of 5 January 2021): ‹https://investmentpolicy.unctad.org/investment-dispute-settlement›.

75. See J. E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012), at 17.

76. For an overview of some of these disputes see M. Scherer, C. Amirfar (eds.), International Arbitration in the Energy Sector (Oxford University Press, 2018).

ticularly when compared to the underwhelming investment alternatives available at the time. The uptake was so high that several countries struggled to pay the subsidies, which in some cases were perceived as windfall profits for investors at a time of national economic restraint. In such a context, a range of measures were adopted to limit the return on investment to more sustainable levels. Such measures included taxes, levies as well as adjustments in the tariff rate, volume and time-horizon of the investments. That, in turn, hit the profitability of many investors, who sought to rely on investment agreements to recoup the expected profits.

The outcomes of these cases vary significantly across countries, measures, legal instruments relied upon and specific factual circumstances. Overall, however, they provide two indications which are important to understand the link between international law and the energy transformation. First, foreign investment claims are increasingly being brought by the investors embodying the emerging low-carbon sectors. In most cases, they do not concern the lawfulness under international law of measures constraining the transaction to limit its negative externalities but, quite to the contrary, they concern the protection of a new type of energy transaction against fluctuations in the regulatory framework on which they rely. This sets energy transformation disputes apart from the broader set of investment disputes with environmental components. Secondly, the main focus of these disputes is the stability of the rules that facilitate the advent and consolidation of renewable energy generation and, thereby, the demand for equipment, technology and labour in this sector.

5. Some proposals

By way of conclusion, I would like to formulate some basic proposals arising from the considerations made in this article, which I hope may be of interest to the broad circle of readers of the *Revue européenne de droit*.

The first conclusion concerns the ongoing energy transformation. I have reviewed some of the evidence relevant both to establish whether a transformation is taking place and its multiple facets. Clearly, the transformation has many interlocked drivers, including the energy 'transition' as a technological process but also the much wider dimensions arising from environmental degradation (climate change and its impacts), economic considerations (e.g. the financial risks of stranded fossil fuel assets) and social imperatives (both the demand for a cleaner environment and the fears raised by structural adjustment and unemployment in some sectors of the population).

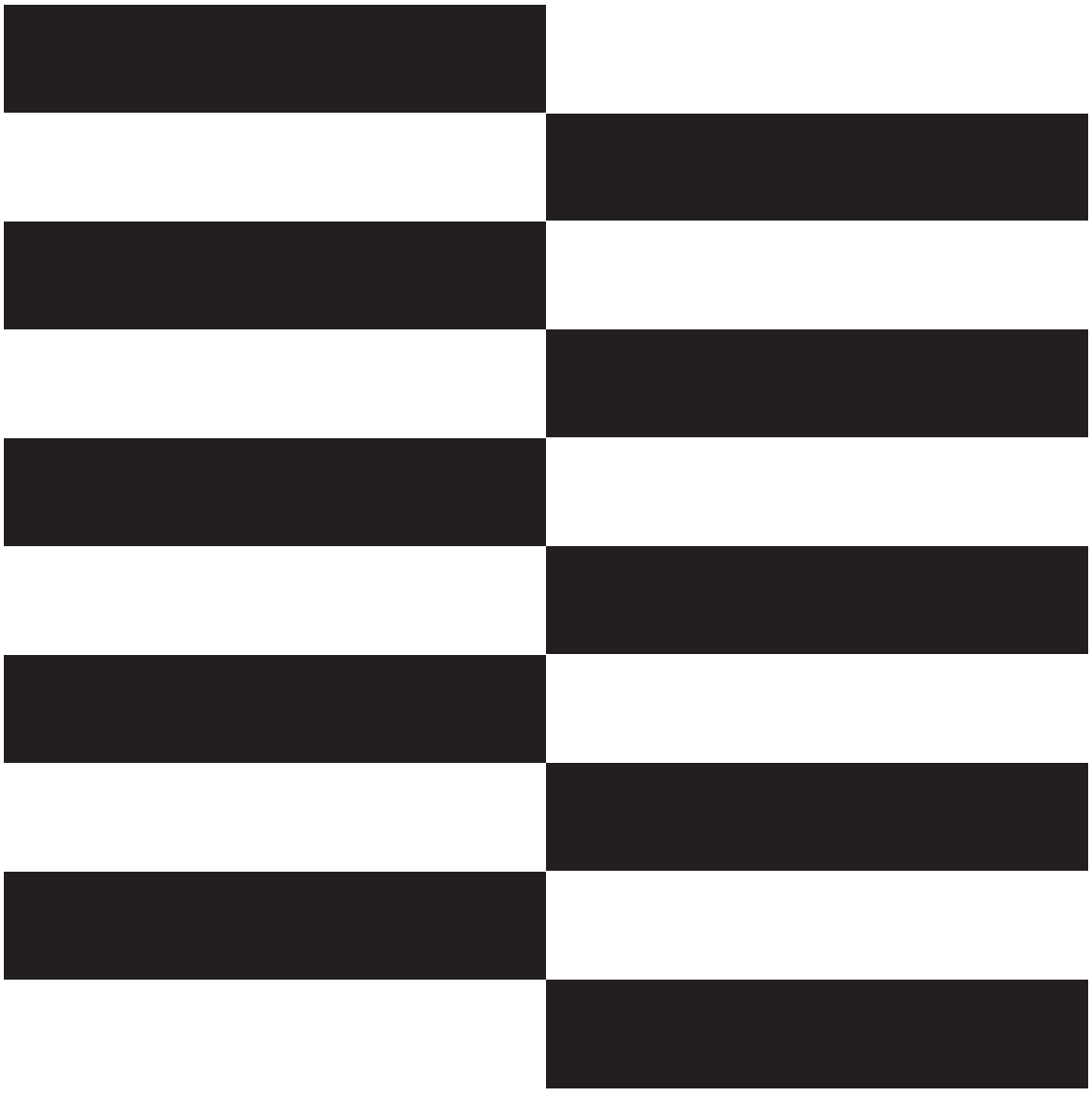
The second conclusion is that this broad process of transformation is increasingly finding expression on the legal plane.

I have concentrated in this article on international law, given its relevance for global geopolitics. The manifestations of the energy transformation from this perspective are extremely diverse and scattered around different legal contexts. Trade and investment law are, quite intuitively, major front-lines but so are other legal contexts, such as the legal regime of the seabed and subsoil beyond national jurisdiction. Many other front-lines not examined in this article would include, unsurprisingly, environmental law (from climate change negotiations to emissions regulation of air and maritime traffic to nature conservation and biodiversity protection) but also respect for human rights (in support of, but also as safeguard against certain energy transformation policies), competition law (with the efforts to unbundle energy supply and transmission), intellectual property law (with the fast-tracking of 'green patents'), and many other front-lines where the struggle is finding expression.

Much like the foreign legal policies that were developed by a range of producer and consumer countries with respect to oil and gas from the 1950s onwards, a foreign legal policy specifically addressing the energy transformation with its new geopolitical dimensions would be useful. Much work has been done to chart some of these dimensions from an empirical standpoint. But there is a major gap on the legal aspects of this transformation, particularly as regards the legal front-lines to be prioritised at the level of a State or a group such as the EU.

An initiative to chart such front-lines, understand their deeper political configuration, prioritise action and, on this basis, set a clear and coherent foreign legal policy is, in my view, necessary, indeed pressing for many countries. For the EU specifically, whose socio-economic but also geopolitical future is heavily committed to the energy transformation, an integrated foreign legal policy of this type would be fundamental. Much work has been done by the European Commission in this regard, which could be relied upon in a mapping, integration and prioritisation effort. Energy is highly but not clearly regulated in international law, and the legal implications of the energy transformation from this standpoint can only be assessed by taking an integrative approach.

Ouverture



Mireille Delmas-Marty • Professor Emeritus at Collège de France, Member of the Institut de France

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In the spiral of humanisms

The instability of our societies multiplies the crises (socio-economic, migratory, climatic, sanitary…) which are intertwined in a single poly-crisis, piling up states of emergency, from the terrorist attacks of 2001 to the pandemic of 2020, while a kind of normative madness takes hold of our societies. We must abandon the usual metaphors of legal systems (foundations, pillars, pyramids of norms evoking hierarchy, verticality and stability). Even networks ("*réseaux*"), which suggest interaction and horizontality, do not reflect this instability. Hence the appearance of more dynamic metaphors, such as clouds and then winds. But how can we orient ourselves among the various visions of the humanities in their relationship to the living, human and non-human? At first glance, humanisms follow one another, rub shoulders with one another, overlap and fight one another, in great disorder. Unless we hypothesize a kind of spiral winding, this form which symbolizes the permanence of Being in its evolution. Drawing a plural universal, the spiral of humanisms could balance and rebalance the inevitable tensions. In an attempt to grasp the dynamics at work, we engage in a conversation at the crossroads of philosophy and law.

Olivier Abel: In a short and dense contribution published in *Le Monde* last spring, Mireille, you called for "taking advantage of the pandemic to make peace with the earth." I also hear it, coming from you, as a call for a new humanism, on the scale of a fragile globality, and of what Jan Patočka superbly called "the solidarity of the shaken." We must certainly not be too quick to make sense of this crisis, but it sounds like a warning, a lesson: it teaches us to relearn how to face at the same time, in the words of Hannah Arendt, the unpredictable and the irreparable, which our "systems" do everything to eliminate, but which come back to us through our point of vulnerability, our simple *physical* condition. And then with this crisis we are, with difficulty, integrating into our cognitive and ethical schemas the reaction time of the system, which means that we don't see things as they are but as they were a certain period of time before, which is counted in days, if not weeks; and this is a lesson that can be transposed to other fields, such as the climate crisis: what we see, for the climate, corresponds to a reality that dates back several years, if not several decades. We do not see, we do not yet *feel* the current reality. And this epidemic has shown us the derisory nature of borders and protection, it teaches us the inseparable nature of taking care of oneself and taking care of others, that is to say the impossibility of saving oneself, the necessary solidarity, in short what you keep declaring: our condition of *interdependence*.

I would like, beyond what this crisis leads us to think, to go through with you in this interview some of the questions that motivate us both: sensitivity to the ecological emergency and the need to institute it, in the quasi-political sense of the term, the conflict of humanisms and the way to convert this conflict into dialogue, into a productive spiral, the relationship between the imaginative forces of ethics and those of law, and finally the extreme fragility of our democracies in the face of emergencies that overflow it from all sides. In all of this, it is the conversation of humanisms, both their plurality and their capacity to enter into a work of reciprocal humanisation, that will serve as a compass for us.

An "unusual" compass, you might say, because everything is going on as if, by becoming globalized, societies have lost their bearings. "For a long time, each community had made its own compass. Each one had a symbolic pole of attraction imposed by legal systems, written or customary law, rites and even religious commandments. According to the way in which memory and oblivion had structured its history, each community had organised itself around this pole of attraction. But globalisation is spreading in all directions. Literally disoriented, we are wandering in nostalgia for a memory that hardly exists on a global scale, or even on the scale of Europe. Instead of a pole, we would need a centre of gravity, or attraction where principles of governance inspired by the various legal humanisms meet".[1]

But to stay for a while longer on the coronavirus crisis and what it tells us, what it is the occasion for, I think of Bruno Latour's proposal that "we are switches": it is up to each one of us to see what he stops, what he starts, what he continues. In this sense it is a *critical* moment, in the Greek sense of the term, that is to say the moment of "sorting". It was high time to take, in spite of ourselves, this time to stop, and not to resume everything as before, because we were being carried away by the mad train of a "will of a power that now has no subject and that makes us what it wants".[2] We were unable to slow down our perpetual movements, to get out of our deadly addictions, our frightening communicational confinement. What we are rediscovering is that we are not just trendy brains, but vulnerable bodies. Today it's an epidemic, tomorrow it could

1. M. Delmas-Marty, *Sortir du pot au noir, L'humanisme juridique comme boussole*, Buchet Chastel, 2019.
2. J. Potočka, *Plato and Europe*, translated by Petr Lom, Stanford, CA: Stanford University Press, 2002 (text written in 1973, just after the report of the Club of Rome, to which it refers briefly).

be famine, water. We are talking subjects but also physical subjects, inhabitants and co-inhabitants of the world. We must learn to live with others, with other forms of humanity but also with other forms of life, in order to form a sustainable world. Greta Thumberg, whom you beautifully call "the little breath", warns us vigorously, and rightly so; but I remember when we were young in 1968, I was 15, we were saying the same thing and we thought we were going to change everything. We must no longer be naïve: the forces of productivism-consumerism are extremely powerful, and all the more so as it is we ourselves who have this fold, through all our lifestyles. That's what I fear, with the current crisis and its catastrophic consequences in terms of bankruptcies, unemployment, and the impossibility making it possible to respond to the diversity of clamour: it's to start again as before, worse than before, in the impossibility of agreeing on priorities, and to reorient the economy, not in order to respond to the most urgent needs, but by setting long-term goals.

It also seems to me that what characterises this crisis is that it is being carried and amplified in an unprecedented way by communicational globalisation. We are fortunate that we are living this epidemic by staying connected, but without this digital immediacy, we would never have reacted so much. In some ways, it is good that we have this unique opportunity to reorient our society, but this connectivity poses problems of governance, and therefore of democracy, of legal procedures that hinder rumours and panic. It is as if we are too informed, over-informed, in relation to our capacity to act, and we have to measure all the devastating effects of this situation... And you, Mireille, what do you think, how do you see this crisis?

Mireille Delmas-Marty: I see it first of all as an unexpected opportunity for a break in a galloping globalisation. Over the past twenty years or so, we have experienced almost permanent global crises: a security crisis with terrorist attacks, then the humanitarian disaster of the wrecking of migrants, and still more financial, social (taking the unexpected form of "yellow vests movement" in France), climatic crises with the disruption of the ecosystem, and finally health crises with the current crisis. Confronted with such an avalanche, human collectives have imperturbably pursued the same path. Now that they have immobilised themselves in the face of a pandemic which is not the first but which, for the first time, is immediately perceived as a total social fact on a planetary scale, are humans ready to change course to avoid collapse?

Indeed, everything happens as if we had entered the "doldrums",[3] that cursed place in the middle of the oceans where contrary winds neutralise each other and paralyse ships, or fight each other and cause shipwreck. Security vs. Freedom, Competition vs. Cooperation, Exclusion vs. Integration, Innovation vs. Conservation, our societies seem to go round in circles like weathervanes at the mercy of the winds that blow like so many spirits of the law. Hence the incoherence of certain political choices, for example concerning health services: recently dismantled in the name of competitiveness, then praised, like heroes, for their cooperation in the "war" against terrorism and the pandemic in the name of security. In turn, security, which has been established as an almost absolute right, suspends all rights and freedoms, starting with the freedom to come and go, or the freedom of expression. Even the right to human dignity, which is legally "non-derogable", is openly flouted in times of pandemic when the dead are deprived of burial, while the living are discriminated against as a "population at risk", or even followed by "tracing" as dangerous products.

It is impossible to remain silent in the face of practices which, in order to preserve the survival of the species, would end up destroying what is characteristic of humanity. But what can be said and, above all, what can be done to slow down this race that is leading our societies into the doldrums?

The ecological emergency and the refounding of a legal humanism

Olivier Abel: In *Une boussole des possibles, Gouvernance mondiale et humanismes juridiques*, you wrote: "Ecocide [...] is not the ultimate crime, in addition to all the others, but the first crime, the transcendental crime, the one that would ruin the very conditions of habitability of the Earth". I would like to start again from this consideration, which calls for a rethinking of a profoundly enlarged humanism, such that the human being is no longer the subject king of a world that is an object or an instrument, pliable to all the ends and whims of human desires - nor the subject that is void, superfluous, empty and pliable at will by the established Knowledge-Powers. To put it in a nutshell, the entire human species is co-inhabitant of the world, of which it cannot become too powerful a parasite without killing what it feeds on. It is a sadly banal paradox that each population tends to increase, expand and densify as long as the environment allows, to the point where it destroys that environment. The worst is not certain, moreover, and this is what complicates the matter: there are also symbioses that are more or less balanced and lasting. When one is too strong for one's environment, rather than protecting oneself as much as possible and climbing to global catastrophe, all that remains is to *deprotect ourselves*. This is the appeal that should be made to each human being, to each society, to the whole of humanity: "Let's deprotect ourselves!".

We need a humanism of deprotection, a humanism of quiet and resolute vulnerability. This is the opposite of the subjects who are engrossed in their so-called rights, who are burdened with protection and refuse to disarm their form of life, in short, who would prefer to survive their world, because nothing is above their survival! But what is a subject that survives its world?

You speak of the habitability of the Earth, and I understand it as resistance to the lamination of habitats and forms of human life, in all their diversity, but also to the

3. M. Delmas-Marty, *Aux quatre vents du monde*, Seuil, 2016 ; *Sortir du pot au noir*, Buchet Chastel, 2019.

lamination of the ecosystems of thousands of living species, this globalisation accelerating new viruses and epidemics, amplifying the climate crisis, the resource crisis, the general exacerbation of the struggle for survival. In short, this crisis is an opportunity to return in a different way to a world that was first given to us to live in, to coexist, to interpret in different ways, without claiming to make it our work or our property. How can we relate the fallacious growth of our exchanges to its condition of possibility in the fact that there are inhabitants, and think of the economy within the limits of a sustainable ecology, in the sense that the earth is our unique and ultimate habitat? The task is immense. To give a small example, shouldn't there be, alongside the *IPCC for the climate*, an international observatory, independent of state and economic powers, capable of listing the real state of the mineral resources on which development has relied? I'm not thinking only of oil, on which opacity is organised, but of all metals, rare earths, etc. I'm not thinking only of oil, on which opacity is organised, but of all metals, rare earths, etc.

You also wrote: "We would like to escape the alternative between the dream of the superman of the post-humanist currents and the haunting of the catastrophe of the ecological currents". To escape from this alternative is to think of a humanity that is both vulnerable and responsible, that is to say, capable of taking its destiny into its own hands, not only assuming the past, but measuring the future consequences of its present actions. It is here that we have a great need of the weak and *resilient*[4] powers of law. You describe "the overpowering power of technical means", which poses this question in an acute manner: "with unprecedented power, unprecedented responsibility", Ricœur summed up. In The *Human Condition*, Arendt extended Rousseau's terrible remark in his *Discourse on the Arts and Sciences*, about the disproportion between moral and technical progress: we no longer understand what we are nevertheless capable of doing. To feel what we are doing, we need institutions that make us feel it. We need legal extensions of our ethics, commensurate with the power of the technical prostheses with which we are endowed. Should we not, for example, think of a legal form of international ecological responsibility that would balance the patentability of inventions, and balance the expected gains from these patents with a kind of responsibility for the effects on the environment and on humans? How, in your opinion, can the law help us in this difficult situation? How would you pose the problem?

One last question on this topic: the ecological issue is complex, there is no ecological policy that would be the application without possible discussion of a scientific vision of what should be done. It opens up diverse and uncertain scenarios, and we cannot have everything at the same time. This is why it is also an economic and social issue that opens up a new area of conflict: it is not "us" against "them", but ourselves in certain aspects and on this scale of time and space, against ourselves in other aspects and on other scales of space and time. How can we legally and politically institute this space of conflictuality? How can we stage a conflictuality that crosses each of us, but also where some, in the global space, or in the succession of generations, are more exposed than others?

Mireille Delmas-Marty: We should take advantage of this unprecedented moment when dogmas as resistant as the absolute sovereignty of States, economic growth and its self-regulation by the market, the security dogma of zero risk, or the anthropocentrism that places man at the centre of the World, seem to be shaken.

But we must not take the wrong road. It is not a question of replacing a dogma with its opposite. The world after Covid is not the opposite of the world that was. It is a hyper-connected world, weakened by the power of the unpredictable. This is why the change of course must be a change of thought: we must renounce the certainties of dogmatic thinking for the uncertainties of a dynamic thinking, which evokes the "thought of trembling" because it oscillates from one wind to another, from one dogma to another. In fact, it is a thought in motion. Continuing the nautical metaphor, we could say that it "fades" at every turn, like the sails on a boat that "pulls out of the water" to go up against the wind. In order to adapt to the unpredictable, dynamic thinking must accept to "fade" and remain modest. Recognising its mistakes instead of hiding them, it learns to correct them, through a kind of tinkering, adjustment and readjustment. This is the condition for trying to take up the bet launched by Edouard Glissant "that it is possible to last and grow in the unpredictable.[5]

We already have legal instruments to "last in the unpredictable", and we must be aware of them in order to learn how to use them.

The first instrument is called *interdependence*. It entered international law at the first Earth Summit (Rio 1992): "The Earth, the home of humanity, constitutes a whole marked by interdependence".[6] But hardly anyone, or almost no one, has seen it. It then inspired a "Declaration of Interdependence" (which we had drafted within the *Collegium International* around Michel Rocard, Milan Kučan, Ruth Dreifuss and Mary Robinson, with notably Stéphane Hessel, Fernando H. Cardoso, Edgar Morin or Peter Sloterdijk, and the faithful Sacha Goldman). We had presented it in 2005 at the UN, but hardly anyone read it. We presented it again in 2018, shortly before the disappearance of Michel Rocard, at the UN General Secretariat, but nothing moved and when the virus arrived, we were destitute.

It is true, progress has been made in some areas, such as the preamble to the Paris Agreement, which emphasises "the global nature of the threats to the community of life on earth", but the resulting duty of cooperation for States is insufficient. The pandemic will be a cruel

4. The powers of law, it is their weakness and their strength, do not have the impossibility of technical power (competitors or adversaries must become commensurable or disappear): law is by definition transgressable, otherwise it is no longer law.

5. E. Glissant, "La pensée du tremblement n'est ni crainte ni faiblesse mais l'assurance qu'il est possible de durer et de grandir dans l'imprévisible", *La Cohée du Lamentin*, Gallimard, 2005 p. 23.

6. Preamble to the Rio Declaration, Earth Summit, 1992.

demonstration of how interdependent States, like human beings, have become, whether it be for the provision of screening tests, medicines and vaccines or even simple health protection masks. Yes, human interdependence is now an indisputable fact that should become a "watchword" and "guide our transition to tomorrow's world."[7] However, legal consequences must be drawn from this to avoid the denial of reality practised by many political leaders in the name of national sovereignty.

A great deal of energy will be needed to transform interdependencies, finally recognised, into genuine solidarity, the second instrument for lasting in the unpredictable. As Europe's current difficulties demonstrate, it is not enough to enshrine the principle of solidarity in the treaties to guarantee its effectiveness. And yet, spelling out the "common objectives" underlying solidarity is already an important step towards mutual fulfilment. This notion has, moreover, appeared on a global scale: firstly, the eight 'Millennium Development Goals', mainly focused on the fight against poverty, but still very vague (MDGs, UN General Secretariat, 2000); then the seventeen sustainable development goals (SDOs, 2015). The method is becoming more precise, with more specific qualitative and quantitative objectives for the climate (Paris Agreement, 2015), and perhaps with a view to a future model treaty on migration… or on pandemics.

However, to be effective, solidarity presupposes the legal responsibility of the most powerful actors, in other words, the rule of law enforceable against States. Although the creation of a global state is neither feasible nor desirable, it is on the other hand feasible - and urgent - to transform the solitary sovereignty of states into sovereignty in solidarity and their irresponsibility into "common but differentiated" responsibilities. What remains to be done is to provide for the responsibility of non-state actors when they exercise global power, such as transnational corporations (TNCs). Admittedly, their "social and environmental responsibility" comes under Soft Law (a law that is vague because it is imprecise, soft because it is optional and soft because it is not sanctioned); but the hardening of Hard Law is already in the offing. Without waiting for draft European regulations and UN conventions, it may come from national law when it extends the notion of social interest to certain forms of general interest (cf. The French statute on the duty of vigilance in France, Law 2017 on the duty of vigilance, ordering companies with regard to their subsidiaries and subcontractors[8] or the new PACTE statute of 2019[9] establishing the status of *société à mission*).

The fact remains that, unlike national communities, the emerging global community has neither a collective memory nor a common history born of a shared past. This is why *anticipation* is the third instrument for lasting in the unpredictable, as humanity becomes aware of its common destiny. Yet there are several tales of anticipation, and several possible fates, depending on the dominant narrative.

The most widespread anticipation, especially among the younger generations, is the *disaster narrative of the Great Collapse*. Having become a current of thought, collapsology develops "not as a one-off apocalyptic moment, but as a process that is inscribed in time."[10] Thus climate change, the depletion of planetary resources, or more broadly the transgression of planetary boundaries, and to crown it all (dare we say it) the coronavirus, are accompanied by a progressive disorganisation of society.

The only apparent alternative comes to us from China, which has launched the "New Silk Roads" programme, activating at the same time the Market Whole of the growth societies, the Digital Whole of the innovation societies and the Control Whole of the fear societies. It prescribes the conditions for the survival of a human species that is sufficiently submissive, even infantilized, to guarantee, without even the need for legal norms, the Great Harmony or the Great Peace. More than two thousand years ago, the Chinese Classics already identified this narrative with the Middle Kingdom reigning over "everything that lives under the sky" (*tianxia*). Today, fuelled by security obsession and normalising madness, this tale of the *Great Enslavement*, legitimised by the health crisis, threatens to spread to the whole planet.

Unless a third narrative emerges, inspired by Michel Serres' "natural contract" and Philippe Descola's models in his *Anthropologie de la nature*, both of which associate the destiny of humanity with that of the living world. In contrast to dehumanising globalisation, this "ecosystemic" understanding of human existence is in line with the narrative of "globalism" which the poet Edouard Glissant describes as "the unprecedented adventure we are given to live in a space-time that, for the first time, truly and lightning-fast, is conceived as both unique and multiple, and inextricable". Hence the need for everyone to change their ways of conceiving, existing and reacting in this new world. The difficulty is immense for humans who for millennia had been trained to do just the opposite, but there is no other way: "no solution to the world's problems without this enormous insurrection of the imagination."[11]

Open to the world to come, this *adventure story* is the only story of anticipation that accepts the unpredictable. It remains to be seen whether the adventure will be able to last, i.e. resist the collapse of the living world, without giving in to the enslaving power of the major players in globalisation. Above all, it remains to be seen whether it will lead us to grow through mutual humanisation.

The spiral of the humanities and reciprocal humanization

Olivier Abel: Let's come to what is at the heart of our conversation here, what we would both like to call the

7. E. Letta, "L'interdépendance humaine guidera notre transition", *Le Monde*, 22 mai 2020.

8. Loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre.

9. Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises.

10. C. Thibierge, *La garantie normative*, Mare & Martin, 2020.

11. E. Glissant, *La Cohée du Lamentin*, Gallimard, 2005 p. 23.

spiral of humanisms. You have defined several humanist paradigms, that of traditional belonging and that of individual emancipation, but also that of today where interdependence is emerging, which speaks of the necessary planetary solidarity, and that of human indetermination, which speaks of the impossibility of getting hold of what defines human beings. These different humanisms point to different and sometimes even opposing orientations, and we are going to develop this, but I would like to come back beforehand to the contemporary risk of a conflict of humanisms, in the sense here of a conflict of "humanities". For great civilisations, like small traditions, have developed diverse humanisms, and it is not always easy to make people converse, as this requires translation and mutual linguistic hospitality. Fifty years ago, Ricoeur wrote that humanity has "caught" in diverse humanities. This phenomenon of the plurality of cultures is linked to the related phenomenon of their mortality, their finitude. Only a mad culture, mortally proud, would claim to be both lonely and immortal. The "humanities" must accept themselves *among* others…

In a world where the rivalry of the large blocs is not only exercised in the geopolitical or economic field, but geo-civilisational, so to speak, how can we turn the rivalry between the West, China, the Indian world and the Muslim world, for example, into not a vicious and mutually destructive circle but the virtuous circle of a conversation of humanisms, a productive spiral of reciprocal humanisation? And I have just spoken about the West, but for our European societies alone, they do not come from a single source, but from all the "humanities", traditions, languages and literatures that have come to mingle with them, from Greek thought and biblical writings, to Roman institutions and monastic life, the Renaissance and the Reformation, the Baroque, the Enlightenment and Romanticism, the republican and socialist tradition, but of course also the traditions resulting from the waves of immigration that followed the colonial period, and the magnificently mixed traditions of the Overseas Territories, traditions that are all unfinished![12] But here too there is a vicious circle that tends to break all living links with these "humanities" that have carried us.

This is all the more serious because the ethical driving force of European civilisation seems to me to have been precisely the gap and confrontation between traditions, none of which has ever succeeded in silencing the others. It is the conflict of humanisms that has been the foundation and constitution of Europe, in the sense that the great traditions mentioned here have never ceased to correct each other, preventing European subjectivity from ever being completely unified and reconciled with itself. This could be shown with the constant tension between Socrates and Jesus. It has often been remarked, already by Machiavelli, that Europe is worked by the contradiction between an ancient morality of courage and a Christian morality of forgiveness, the one exalting confrontation and self-testing, ways of showing oneself, and the other devotion and carelessness of self, ways of self-effacement. A second fruitful tension could be pointed out in the opposition between Aristotle's ethics and Kant's morality. They represent, more than philosophical systems, different ethical styles, one that aims at happiness, the good, the common good, and the other that seeks the universal minimal rule that forbids us to do harm. There would be many more of these fertile "disputes". To use Paul Ricœur's expression, Europe's "ethico-mythical core" has been set in motion by such disputes, and its good fortune is undoubtedly that none of these disputes has been able to absorb or eliminate all the others.

Who are the people who work today in our society? Could we reformulate them as closely as possible to what is happening to us? I can see three or four that are particularly significant, and which seem to me to be very close to yours.

The first of these founding differences would be the tension between *tradition and innovation*: the most creative innovations are based on all the sedimentary achievements, that sometimes they only reopen archaic strata in a different way; and that in turn they will deposit themselves and make tradition, traditions that were all once novations, irruptions, ruptures. Far from opposing them flatly, the lively correlation between tradition and innovation must be brought into play in all its amplitude: tradition must not stifle nascent creations, and the old must have enough to resist the new, if the new is to be supported by it. This would be a first virtuous circle, a dynamic element of the spiral we are looking for, and capable of taking the opposite side of this vicious circle that you call the "doldrums". Let us beware today of our presentism, the ease with which we judge the past, its malleability under the power of our bulldozers, and our numerical capacity to rewrite it, to reshape and refigure it without it being able to resist.[13] Instead of what I call tradition, you talk about conservation, and this term also says some very strong things: it is the principle of politics according to Hobbes, the instinct to preserve life and achievements, it is also the idea of accumulation that joins the idea of sedimented traditions; it is also the great idea of the dissident Czech philosopher Jan Patočka that the wars of the twentieth century were wars between the forces of conservation of the status quo and the forces of transformation of the world.

The second one points to the tension between *emancipation* and *attachment*. The ethics of emancipation, which throughout modern history has had the monopoly of being both our moral and political motor, our lever of social criticism, our great collective narrative, is no longer sufficient.[14] It is necessary that the faculty of detachment, which breaks the chains, should be insepara-

12. O. Abel, *Le vertige de l'Europe*, Geneva, Labor et Fides, 2019.

13. We have allowed certain pasts, the colonial past, the Catholic past, for example, to be "orwellized", now both hidden in a total amalgam, concealed, disfigured, and I would say buried alive in what they had of life and experience: this is historically simplistic and politically discouraging, because we can no longer rely on anything in the past, except on an amnesic and plated imagination, which moreover prevents any real criticism.

14. O. Abel and J.-F. Lyotard, in "L'Émancipation comme problème 1789-1989", Autres Temps, *Les cahiers du christianisme social*. N°25, 1990.

ble from the faculty of rebuilding alliances, of rebuilding links. Our ideal of emancipation must be complicated by a logic or an ethic of attachment, fidelity and solidarity. And indeed, for a long time we have had to, and still have to, fight against servitude, and in particular "voluntary servitude". But today, it is also necessary to fight against exclusion and voluntary solitude. I think that there is currently a profound inability to hold on to ties. But there are bonds that liberate. The sense of free attachment, of the plurality of attachments and loyalties, but also of the faithful alliance that does not give up for a yes or a no, can be a real lever of social criticism. From now on, we must intersperse, between the chapters of the successive declarations of emancipation and independence, and this is not finished, the all too new chapters of the declarations of interdependence and solidarity. I enthusiastically endorse your idea of a charter of interdependence! This is how I see the lively tension between what you call emancipated humanity and interdependent humanity.

On the other hand, I would like to understand why, in the couples that you propose, which oppose contradictory values, but which are all true values, you place exclusion in front of integration. From a descriptive point of view, this is perfectly correct, and I think it is important to think about the "right" and the possibility of a body, however welcoming it may be to reject a foreign body, there is no community without immunity, it is sometimes and simply a vital need, and it is also the "right" to terminate, to secede. But can exclusion be a value? Shouldn't we talk about the value of exile, the right to leave, to leave one's society? This is why the third of these founding dialectics seems to me to be that between the *closed* and the *open*.

If it is certain that humanity needs exchanges and openness, it also needs closures, borders, things that are not exchanged. To remain alive, a culture sometimes needs to be a little "deaf" to others, Lévi-Strauss said. Alongside openness and exchange, we also need protection, a minimum of immunisation. We therefore need a good dialectic between opening and closing, and to establish this fine dialectic in all registers: otherwise, total opening will determine total closing. Especially since, often, we call openness anything that allows us to break down the protectionism of others, after having reinforced all the possible protective barriers for ourselves! Seen from here, the world is indeed open. But seen from the South, the walls are higher and higher, and inaccessible, and the more markets are "open", the more societies are "closed".

To name a fourth, I would like to join you in saying how important it is to find a dynamic equation between a principle of responsibility and a principle of hope. I will certainly come back to this, not from Hans Jonas nor from Marc Bloch, both of which are fascinating to read,[15] but rather from what Hannah Arendt says about the unpredictable and the promise. It seems to me that this is exactly the maximum tension to which you subject the forces, forms and principles of law. In any case, for me, these different tensions are both examples and points of support for the spiral of humanisms and mutual humanisation that we are seeking.

Mireille Delmas-Marty: Considering that Europe's good fortune is that none of the disputes that have crossed it has been able to absorb or eliminate all the others, you ask me what disputes are at work in our society today, indicating yourself some "particularly significant" examples, which seem to you to be very close to mine. I do indeed find the tensions I observe, but in order for us to build bridges, I must explain my approach and the tensions I have been working on for forty years.

Having begun to embark on the *paths of repression*[16] and then completed the study of *models of criminal policy* with that of *movements*,[17] I have always preferred dynamic metaphors, but I didn't know it would be such a long walk. Opposing *ordered clouds*[18] to the pyramid of norms has enabled me to show not only the horizontal interactions of increasingly networked systems of law, but also their instability. The clouds suggested to me the metaphor of *the winds as the blows* symbolising the spirit of rights,[19] and then the quest for a *compass* to find one's way among the headwinds.[20] I then (finally!) became aware of the limits of writing and set out, with a plastic artist-builder friend, to explore the paths between thought and matter by making a mobile object representing a compass without a North Pole, known as the "compass of possibilities".[21] Conceived as an object/manifesto, this compass symbolises tensions according to several planes of differentiation.

In the first place, it is a question of differentiating between the main winds of globalisation (freedom, cooperation, security and competition) and the "winds between the winds" (integration, conservation, exclusion and innovation). A massive, mineral Wind Rose, anchored to the ground, represents the winds of globalisation: "main winds" (security, freedom, competition, cooperation) and "winds from between the winds" (exclusion, innovation, integration, conservation). Then a minimalist cone-shaped structure supports the exact graphic projection of the rose towards the sky. Arranged in pairs at the end of each branch, emblematic figures animated by the movements of the air evoke, on a second plane, the apparently opposing winds of globalisation (Freedom vs. Security, Competition vs. Cooperation, Exclusion vs. Integration, Innovation vs. Conservation). Thus the Earth Rose, which has become an *aerial Round* suggesting the disorder of the world, illustrates the feeling of being "disoriented"

15. They should perhaps be read under the polarisation of the social imaginary (ideology-utopia) proposed by Ricœur after Mannheim (P. Ricœur, *Idéologie et Utopie*, Paris, Seuil 1997, and *Du texte à l'action*, Paris Seuil, 1986).

16. *Les chemins de la répression*, PUF, 1980 ; *Sur les chemins d'un Jus commune universalisable*, Mare & Martin, 2021 (à paraître).

17. *Modèles et mouvements de politique criminelle*, Economica 1983, *Les grands systèmes de politique criminelle*, PUF, 1992.

18. "Au Pays des nuages ordonnés" in *Pour un droit commun*, Seuil, 1994.

19. M. Delmas-Marty, *Aux quatre vents du monde*, *op. cit.*

20. M. Delmas-Marty, *Sortir du pot au noir, l'humanisme juridique comme boussole*, *op. cit.*

21. M. Delmas-Marty, *Une boussole des possibles*, *Gouvernance mondiale et humanismes juridiques*, Editions du Collège de France, 2020.

that we perceived at the beginning of our interview. This prompts us to look for an unusual compass, since without the North Pole, no one direction can predominate. On the other hand, it includes a centre of rebalancing where, immersed in the water necessary for the living world, the regulatory principles that, like the plumb bob of cathedral builders, would stabilise the governance of the world meet. Provided they are inspired by visions of humanity that are different in space and variable in time.[22]

We have "lost our way" because the choice of a pole of attraction is now impossible. You show, for example, the impossibility of choosing between innovation and tradition or conservation; also between the closed (which leads to exclusion) and the open (which allows exchanges and conditions integration). Similarly, the choice seems impossible between security and freedom: security without freedom becomes totalitarian, but freedom without security leads to chaos. Finally, competition without cooperation reinforces inequalities and fuels conflict, but cooperation without competition can lead to immobility.

To overcome these oppositions, we need values inspired by a common vision of humanism. Yet each community has developed "its" vision of humanity throughout its history, disqualifying other visions through the interplay of these anathemas of which human societies have the secret: the only truth is mine, the only acceptable identity is mine. On a planetary scale, as we have pointed out, the world community has little appreciation of its common history.

This is why it was necessary to add a third plane, precisely the one that brings us together for this interview: a *spiral of humanisms* flies over the circle of the winds, carried by a rotating and oscillating axis on a joint located at the tip of the cone. We must not be mistaken about its meaning. Symbol of the permanence of Being in evolution, the spiral is not the new habit of an imperialism that does not say its name. Testifying to the plurality of societies, it unfolds, between individuals and communities, but also between humans and non-humans, suggesting the endless winding of the forms of "Relationship".

The most familiar humanism in the West, our "great collective narrative" as you call it, remains that of the Emancipation of individuals, which asserted itself in Europe in the 18th century, during the Age of Enlightenment. On a global scale, it enshrined human rights and citizens' freedoms (civil, political, economic, social and cultural) in a "universal" Declaration which enshrined the equal dignity of every human being (1948) and prohibited inhuman or degrading practices, including slavery and torture.

Now that we have to live together in ever-increasing numbers, we are rediscovering, but on a global scale, the most ancient humanism, the one that linked each human being to the communities to which he or she belongs, whether more or less close (family, tribe, neighbourhood, village or city, nation...). Not only is it still alive in the traditions of many peoples, but you very rightly say that it should encourage us to "complicate our ideal of emancipation by a logic or an ethic of attachment, fidelity, solidarity". It will be complicated indeed, because we have had to, and still have to, fight against servitude, and in particular "voluntary servitude", which makes "communitarianism" so suspicious, as if it heralded this enslavement that we reject.

Faced with the multiplication of humanitarian, ecological and sanitary disasters, a new communitarianism is beginning to be reinvented which does not separate communities by opposing them to each other, but links them by opening them up to each other: "change by exchanging with the Other without losing myself or distorting myself" said Edouard Glissant. Beyond solidarity and conviviality, communitarianism is reinventing itself as an aid to all forms of distress (ATD). First of all, for people living in extreme poverty (*ATD Quart monde*), it extends to all the world's distresses (ATD "*Tout monde*" can we say), whether it is helping migrants, environmental exiles or sick people deprived of care. NGOs are joined by many writers and artists[23] and, more surprisingly, by institutional actors as different as the Pope (*Laudato Si encyclicals* in 2015 and *Fratelli Tutti* in 2020) and the Constitutional Council, which rediscovered fraternity as a value opposable to the so-called crime of solidarity[24] as early as 2018. Even if the practical consequences remain limited, this decision, which decriminalises assistance for migrants' stays, now associates hospitality with fraternity.

This new "communitarianism" reactivates traditional values without advocating withdrawal or confinement. All the more so as it opens up to a new humanism, that of interdependence within the "common house", a humanism that refuses to place humans in an overhanging position, linking them horizontally to other humans (social solidarity) and to non-human living beings (ecological solidarity). This is the one that will perhaps answer your question about how to transform the rivalry between the West, China, the Indian world and the Muslim world, for example, "not into a vicious and mutually destructive circle but into a virtuous circle of a conversation of humanisms, or rather into a spiral producing reciprocal humanisation?"

Provided that we also choose freedom and responsibility, that is to say, a humanism of Indeterminacy, which conditions our creativity and our responsibility. It is a difficult choice because it implies renouncing what you call "overprotection", that which a small part of humanity benefits from, physically improved by biotechnology and increased in its cognitive capacities by artificial intelligence. If it responds to the catastrophic story of the collapse, through the adventure of globalisation rather than through the Chinese programme narrative of the "New Silk Roads", this choice "deprotects" us, to use your neologism, each of us having to renounce the excesses to

22. M. Delmas-Marty, *Sortir du pot au noir*, Buchet/Chastel, 2019 ; *Une boussole des possibles*, Ed. Collège de France, 2020.

23. P. Chamoiseau, *Frères migrants*, Seuil, 2017 ; M. Le Bris (ed.), *Osons la fraternité*, ed. Philippe Rey, 2018 ; Registre sur l'hospitalité du groupe Pérou, etc.

24. Cons. cont., décision n° 2018-717/718 QPC du 6 juillet 2018, *M. Cédric H. et autre.*

which "productivism-consumerism" has accustomed us. By crossing the millions of individual data accumulated by social networks and the billions of conversations recorded by intelligence agencies, democracies are already transforming themselves into a soft totalitarianism, all the more formidable because it exploits our unlimited desire to have access to everything, all the time, without waiting : "obeying narcissistic impulses even more powerful than sex or food, we move from one platform and digital device to another, like a rat in Skinner's box who, by pressing levers, desperately seeks to be ever more stimulated and satisfied".[25]

Thus a fourth level is formed where the values that would be necessary to rebalance a world in motion form a virtuous octagon. Provided that the values you call "true", I would also say "*universalisable*", insofar as they are linked to the different visions of humanism: fraternity and hospitality linked to communitarian humanism; equality and dignity, or equal dignity, to the humanism of emancipation; social and ecological solidarity to the humanism of interdependence; finally responsibility and creativity condition a humanism of indeterminacy. This octagon of values is destined to become the centre of attraction where the opposing winds meet. Starting with the "security vs. freedom" couple rebalanced, for example in the face of terrorism or pandemics, by the equality that limits discrimination and the dignity that prohibits dehumanisation, regardless of the seriousness of the threat. In the same way, in the face of climate change, ecological solidarity should limit the effects of competition, while in the face of social crisis, human solidarity would limit the risks of cooperation (the tragedy of the common good). And so on for other opposing couples.

Linked to the "spiral of humanisms", these common values would contribute to stabilising the governance of the world in the face of the unpredictable. But where can we find the plumb line of a democratic governance that would not immobilise humans by enslaving them and would know how to liberate them while recognising their responsibility?

At the crossroads of the imaginative powers of ethics and law

Olivier Abel: You are right, it is indeed towards the question of the forms and also the orientations that a democratic governance of the world could take that everything converges, it is the keystone of our questions, but before coming to it I would like to dwell for a moment on these different "humanities", and what links in the deepest sense the ethical core of societies and the imaginative forces of law. It is precisely because there is a plurality of ethical-mythical nuclei, of civilising nuclei, and because universalism is contested as Western imperialism, that we have to start again from another, more modest humanism, the one that Levinas called "the humanism of the other man", but also that of the plurality of humanities, and of the plurality of the "minds" of laws, if we can call them the "legal humanities."

This is what allows us and even obliges us to deconstruct the concept of colony, to distinguish the "legitimate right" of persons and sometimes peoples to leave, to go elsewhere, to migrate to seek asylum and refuge, on the one hand, and on the other hand the "abuse" that there is to be invaded willingly or by force, using organised and powerful means, whether political and military, economic and financial, cultural or religious. We can clearly see the asymmetry that exists between these two situations, of which history could provide many examples. Human geography through the millennia and the whole ecology are only a succession of colonisations, but more or less brutal and overwhelming or gentle and fertile. The worst thing is to invade, but at the same time to separate from those who are invaded, by means of ghettos or separate "territories" - but today the networks largely act as such, allowing each community in an archipelago, deterritorialized, to lock itself up in its imaginary bubbles, protecting itself from any contact with anyone other than itself. The other worst thing is undoubtedly to pretend to assimilate them in the name of a saving universalism that is imposed by all means and on all registers of social life.

But this is obviously a contradiction in terms! For there is only true universality that can be resisted, that one can neither accept nor refuse, to which one can freely adhere, as can be seen in *The Critique of Judgement*. For Ricœur reading Arendt, Kant's aesthetic judgement "constitutes an extremely audacious advance in the question of universality, since communicability does not result from a prior universality. It is this paradox of communicability that establishes universality".[26] Ricœur contrasts a kind of universality from one step to the next, linked to this resistible communicability, with an overhanging universality. A universality that is not so much due to the pretension of the purpose to say the only true one, nor to the authority of the speaker, as to the free receptivity of the receivers.

This resistible *universality* that we are looking for, I would add that it is also *reiterative*, in the sense that universality, as Husserl, the founder of phenomenology, said, is a task to be constantly taken up, repeated, reinterpreted, reinvented. The American philosopher Michaël Walzer wrote a very beautiful text on this subject some thirty years ago, in the French journal *Esprit*, to show how true universals are reiterative. Ricœur also insisted on the difference between the great technical inventions, which are irreversible and cumulative, and the great ethical inventions, which are to be reinvented in each generation, by a law of creative fidelity.

This universality is *resistible* and *reiterative*, even *metaphorical*, in the sense that we only have access to universals through figures that are those of languages and cultures. For Ricœur, our "universals" are still attached to and anchored in linguistic and cultural contexts, and are not susceptible to a pure concept that would be entirely

25. B. Harcourt, *Exposed – Desire and Disobedience in the Digital Age*, Harvard University Press, Cambridge, 2015.

26. P. Ricœur, *Le Juste*, Paris, Esprit, 1995, p. 148.

free from the historical gangue and the linguistic thickness of the aim. This is what sometimes makes them difficult to translate into other languages and contexts. They are inseparable from the languages and cultural configurations which they and the cultural configurations they convey. To believe that we can settle down to the universality of human rights, for example, would be to miss the necessary confrontation of our universals, which can only improve them by meeting other languages and cultures and putting them in a state of mutual emergence. It is absurd to want to separate concepts from the metaphors that have carried them and that give them their meaning, their unfinished purpose.

In order to think about the interweaving of the various legal traditions in the imagination that is at work today, they must be put to the test of universalization in such a way that the common universals thus obtained are neither imposed nor overhanging. In this sense, human rights, the rights of men and women, the rights of citizens and stateless persons, seem to me in many ways to be a metaphorical, and reiterative, and resistible concept. The term 'law' is used here only 'at the limit', in a metaphorical way, and they are more regulatory ideas than rules: human rights come to border the law both at the infra-legal level of the basic conditions of human life and at the supra-legal level of the various ideals that animate our societies.

What interests me, however, are the powerful imaginary effects generated by the rapprochement and tension between the major ethical orientations that run through our societies. I have spoken of this "imaginary core" for Europe.

Between roman law and common law there are profoundly different ethical conceptions of man and society, which have constantly grafted onto each other. The Justinian Code and medieval sources have constantly incorporated the crazy idea of anonymous charity, the ideal of humility into the framework of Roman law and the code of warlike chivalry. The critical probity that is at the heart of the modern scientific ethos was counterbalanced by the enthusiasm of the socialist and solidarity utopias, etc. Each time, it was necessary to make this conflict between "imaginary" people who could have destroyed each other and constantly corrected each other sustainable. It is therefore not by sterilising or neutralising traditions that Europe was formed, but *by fuelling their differences.*

This point, which I have constantly stressed in *Le vertige de l'Europe*, seems to me to be vital in the face of the new quasi-imperial model that China would like to open up in order to impose "its" mondalisation. The alliance that it is in the process of being forged on all levels with an ambitious Turkey that is still seeking its place clearly shows the unprecedented stability of the proposed model, which combines political authoritarianism, a capitalism without social rules but not without steering, and a resolute return to a religious or cultural tradition that has been reshaped and unified in the form of an ideological state apparatus. On the other hand, the division of powers and the political weakness of democratic governance, the economic weakness of a capitalism that we would always like to see better regulated, controlled and restrained, and the ideological weakness of societies that have not only continued to undermine the bases of their legitimacy, but to neutralise them, is apparently not up to the task in the face of this rising empire!

I don't deny the importance of not allowing ourselves to be naively intimidated, and of rebuilding a balance of power by which the powers can hold each other in respect; nor do I deny the importance of finding, in the face of the ecological emergency, an economic and therefore also a technological model capable of winning the support of the populations for sustainable modes of production and consumption. But the crux of the matter also lies in our forms of culture and imagination, and you are right: faced with the great neo-imperial narrative proposed by China, which is imposing itself willingly or unwillingly in the rubble of decolonisation, Europe must propose another form of globality, another narrative, precisely constituted by what Ricœur called "linguistic and narrative hospitality." On this condition, European multi-lingualism, and the multiplicity of intertwined memories at this end of the continent, would not be a weakness, on the contrary. I would like to support this eccentric, peripheral and archipelagic character of Europe, of a Europe that has profoundly renounced the imperial narrative to modestly rely on the incredible diversity of its sources, and to turn quietly towards the adventure of methodical pluralism that we are defending here, and of what I called above a deprotection of the self, a condition for regaining the ability to act as a group and to feel what we are doing.

Faced with the scale of the unprecedented challenges facing humanity, we must therefore launch no less unprecedented promises, and we have full need of all these imaginative, innovative, forward-looking forces, needing this *instituted imaginary*: but I insist again, are these imaginative forces possible without taking up multiple supports in past traditions, experiences and promises, in the *instituted imaginary*? It seems to me that this is one of our great contemporary weaknesses, this refusal to take up again a large part of the sedimented traditions, that is to say precisely the plurality of the humanities.

This allows me to point out a final tension, which perhaps seeks its place in your magnificent rose of the imaginary humanities or compass of possibilities: that between individual rights and freedoms and the freedoms and rights of communities. When I say communities, I don't necessarily mean exclusive communities, there is most often a poly-attachment, a pluri-attachment. The question is very inaudible in France, which panics in the face of all that seems to it to be communitarianism - even though French society is in fact very communitarian, and all the worse for denying it. But this is an important question, on which American authors such as Michaël Walzer and others have given much thought, and which is all the more dear to my heart because cultural traditions are transmitted in different environments, and because the reduction of transmis-

sion to cultural consumption in a market system, and to communication in a system of individual freedoms, systematically privileges what separates the individual from his environment. If the channels of cultural transmission have been broken, if cultural traditions (the conditions for innovation and creativity, as has been said) are so weak, it is because they have been rolled back twice, by a kind of double razor. The republican form of the nation-state, first of all, by giving the same rights and freedoms to all citizens, has ceased to recognise any validity to their regional, linguistic, ethnic, religious, etc. affiliations. This is a good thing, but a significant part of the traditional forms of culture, which were also a treasure, have thus gradually been marginalised and eliminated. The ultra-liberal form of the market society, then, by reducing traditions or confessions to opinions, which one is free to change like a shirt, has brought these various forms of life and language back to the market of ideas, a market largely dominated by the GAFAM, which also determine imaginary contents that are anything but innocent. We know that for Hannah Arendt, the resistance of traditions, i.e. of community membership, to the totalitarian remodelling of the "new man" was at the heart of her humanism.

What do you think about it? What place should be given to Community rights and freedoms in French society and in Europe? And what place should be given, in the humanities rose, to the tension between individual rights and freedoms and the freedoms and rights of communities? Would it be enough to think methodically about multiple membership, which recognises membership but refuses to imprison individuals?

Mireille Delmas-Marty: There is perhaps the beginnings of an answer in this sense in the notion of "cultural diversity" enshrined in 2001 in the UNESCO Declaration, then in a convention in 2005. It was undoubtedly the fear of a clash of civilisations that led the General Assembly of Unesco, meeting in November 2001, less than three months after the attacks in New York, to state in a Preamble that "respect for the diversity of cultures, tolerance, dialogue and cooperation in a climate of mutual trust and understanding" is "one of the best guarantees of international peace and security." The diversity of cultures, "a source of exchange, innovation and creativity;" is therefore, for humankind, "as necessary as biodiversity is in the order of life." "Article 1 describes cultural diversity, recognised and affirmed for the benefit of present and future generations, as "the common heritage of humanity". And Article 2 affirms that cultural pluralism is the "political response to the fact of cultural diversity". The question remains as to how to reconcile the pluralism of cultural (or intercultural) rights with the universalism of other human rights.

The drafters do not entirely avoid the question, as they recognise a tension between the diversity of cultures and the "awareness of the unity of the human race." But their response is limited to encouraging the development of intercultural exchanges and making use of new information and communication technologies: although they constitute a challenge for cultural diversity (because they reduce differences?), the new technologies "create the conditions for a renewed dialogue between cultures and civilisations". On the other hand, the drafters do not say how to overcome the apparent contradiction between the two poles. On the one hand, the pluralism of cultural rights could lead to relativism, if it merely juxtaposes differences, in defiance of any universalism. According to the report presented in 2019 to the 40th session of the Human Rights Council:[27] "One of the main problems remains cultural relativism. In the future we must continue to distinguish between cultural rights that amplify human rights and relativism that diminishes them in the name of culture and is rejected by international law". Certainly Article 1 of the Convention states: "No one may invoke this Convention to infringe human rights and fundamental freedoms as enshrined in the UDHR or guaranteed by international law, nor to limit its scope". But it does not give instructions for avoiding relativism. Neither to avoid the opposite risk that the universalism inherent in the notion of humanism (IHRD and IDDEN) is taken literally to the point of denying pluralism and imposing the fusion of all cultures and the disappearance of all differences in favour of the dominant model, which would only be the new habit of an imperialism that does not say its name. In order to attempt a kind of rebalancing, it would be necessary on the one hand to "internationalise" the different cultures, and on the other hand to "pluralise" the universal.

Internationalizing different cultures means facilitating interactions. Edouard Glissant defined difference as "the elementary particle of any relationship": it is "through it that the Relationship with an R functions."[28] And he recommended "opening our particular poetics to each other." However, this opening has been facilitated as the increase in interdependencies born of globalisation (internet, migrations) multiplies the interactions making cultural rights true "intercultural" rights, the metaphor of language making it possible to distinguish, from the most modest to the most ambitious, three degrees of internationalisation.

At the first level, dialogue improves understanding, knowledge about and through the other. It facilitates rapprochement and, according to Glissant, allows "change by exchanging without getting lost or distorting oneself." This method is sometimes fruitful, as I have shown with regard to the "dialogue of judges on the death penalty."[29] However, it gives rise to a very pertinent criticism by Sophie Guérard de Latour:[30] the liberal vision "draws more a model of cultural cohabitation than it takes seriously the possibility of intercultural dialogue". It does not make it possible to go beyond an 'essentialist' vision which suggests clear boundaries between liberal and traditionalist cultures (more attached to religion and communities), whereas each culture is crossed by various currents of in-

27. K. Benoune, "Droits culturels : Rapport marquant le 10ème anniversaire du mandat", A/HCR/40/53.

28. E. Glissant, *L'imaginaire des langues*, Gallimard, 2010.

29. M. Delmas-Marty, *Le pluralisme ordonné*, Seuil, 2006, p. 53.

30. S. Guérard de Latour, "L'humanisme, une valeur à partager entre différentes cultures", Observatoire des politiques culturelles, 2017, p. 25s.

terpretation and evaluation of beliefs". And it is true that sometimes the dialogue is short lived.

On the other hand, translation (which implies the search for equivalences) goes further in the interaction. It brings cultures closer together by harmonising the differences which it sometimes helps to make compatible. A true "miracle", according to Ricoeur, translation "creates resemblance where there seemed to be only plurality."[31] Indeed, it "respects differences, while seeking equivalences". It is true that we sometimes stumble on the untranslatable and the misunderstandings they provoke, but it is still possible to find equivalents, even if they are more approximate and require a return to dialogue for deciphering. An example of this is found in Article 1 of the UDHR, which begins as follows: "Men are endowed with reason and conscience". Initially the text referred only to reason, but the Chinese delegate added the Confucian-inspired term Liangxin. However, this term was translated very loosely as Consciousness, whereas it is rather a kind of otherness. Even if it is weak, and close to misunderstanding (the freedom of "conscience", which appears in art. 18 UDHR is translated into Chinese by a different word Yishi), the equivalence had the merit of opening a dialogue.

Finally, "creolisation", the ultimate form of interaction, merges differences, but it is not a simple mechanism of crossbreeding. It is a cross-fertilisation, said Glissant, "which produces the unexpected."[32] Producing the unexpected means finding, beyond dialogue and translation, a truly common meaning, joining the idea that, even if all values are not equal, all cultures have something to say about humanity. Provided that it is made clear that creolisation, understood in this way, presupposes reciprocity: like other human rights, cultural rights are the result of a process of reciprocal hybridisation. And the same is true of the notion of crime "against humanity" which is "creolised" by gradually incorporating several visions of humanity.[33]

We then come to "pluralise the universal". Here we find the spiral of humanisms: legal humanism is intended to be universal, but refers essentially to Western modernity. Pluralising it invites us to "uncover the cultural biases that reinforce the processes of oppression."[34] It therefore means "deconstructing the claim of any dominant culture to embody the universal, in order to rehabilitate the culturally diverse forms of humanism in their own dignity."[35] In short, it means accepting the unfinished, incomplete and evolving character of cultures and exercising critical reasoning, taking into account the evolution of science, technology, knowledge and beliefs. The example of some of the major errors of the supposedly most advanced cultures is edifying: yesterday the Earth was placed at the centre of the solar system; today many still place Humanity at the centre of the Earth's ecosystem.

31. P. Ricœur, "Le paradigme de la traduction", in Le juste, Esprit, 2ème éd 2001, p. 135.
32. E. Glissant, *La Cohée du Lamentin*, Gallimard, 2005.
33. M. Delmas-Marty, *Vers une communauté de valeurs*, Seuil, 2011, pp. 81-98.
34. S. Guérard de Latour, *op. cit.*, p. 28.
35. *Ibid.*

Hence the idea that the different visions of humanity are not determined once and for all because they are characterised both in relation to other humans (individuals or communities) and in relation to other living non-human beings. They are therefore evolutionary. To extend the image of the spiral, I would say that the various humanisms succeed one another, rub shoulders with one another, overlap and combine to draw a plural universal, the inevitable tensions of which will have to be balanced.

Balancing: the plumb line of democratic governance

Olivier Abel: Finally, let us return to the crisis of democracy. We feel a slow erosion which both demoralizes us individually and depoliticizes us collectively, and therefore in every respect discourages us. We need to go into the details of this democracy fatigue and moral exhaustion, and I would like to share my perplexities with you in a few lines.

All over the world, elections, more or less manipulated by rumours, bring dangerous majorities to power. In this respect, it is not the "neo-fascist extreme right" that is the root of the problem, it is much more generally, in all our countries simultaneously, the identity and security temptation of the most centrist forces of opinion and of the "deep state". These majorities, I say, are dangerous for all minorities, because times are dark, everywhere, for "minorities", whoever they may be, and we are reaching the limits of electoral democracy, when it favours majorities too much against minorities and flouts their basic rights. But this is ultimately dangerous for the "majorities" themselves, as history has shown time and again.

What is striking today is a massive rise in resentment. Where are our assertions, our approvals, our waiting horizons? We see evil everywhere: where and how can we share the good? We are only reactive, reacting to everything that worries us, to everything we don't understand. How high will this deluge of resentment go? I would like to dwell on what I believe is one of the main drivers of this democratic collapse. Let us take up the panorama again: what is the connection between the abject crimes of the jihadists, the danger that "social networks" represent in some respects for democracy and civility, the question of freedom of expression and blasphemy, the almost warlike hardening of secularism, the yellow waistcoats, the dangerous majorities that brought Trump or Erdogan to power, and that are pushing at our doorstep? In fact we don't understand what is happening to us, these angers that rise up in a mirror without trying to understand anything more, we no longer know and feel what we are doing.

And I would like to propose a hypothesis here. We have generally taken the wrong path. The drama of the cartoons is only the visible part of a huge problem, which affects not only the social divide, but also the world of business and unemployment, our administrations and our French *Grandes Ecoles*, social networks, ordinary life. We have sunk into the denial of humiliation, of its importance, its

seriousness, its very existence. We are sensitive to violence, as we are to inequality, but insensitive to the humiliation that poisons them. As the Israeli philosopher Avishaï Margalit observed, we do not even imagine what a society whose institutions (police, prefectures, administrations, prisons, hospitals, schools, etc.) would be non-humiliating would be like. In the current state of shrinking planetary resources, it will be very difficult to make a fairer society, and in the current state of hardening power relations it is unlikely that we can make a society without violence; but why not already try a less humiliating society?

It must be said that humiliation is a complicated notion - and reality. The offence is subjective, and depends at least as much on those who receive it as on those who emit it. What will humiliate one will leave the other indifferent, and it even depends on when it happens. Humiliation is not quantifiable, measurable, like assault and battery. Hence the temptation to say that where there is no damage or harm there is no harm. It is not a matter of law, but only of personal feelings or morals, so go on, there is nothing to be said. And it is certain that certain feelings of humiliation can be stirred up and manipulated, to the point of making it an instrument of crime.

And yet, let's take a step back and think more broadly, because the issue of humiliation should not be reduced to the context of the cartoon debate alone. Humiliation is a much more general social fact, to which we are surprisingly insensitive. If violence attacks the other person's body, in his or her capacities and vulnerability, humiliation does even worse: it attacks the other person's face, in his or her self-esteem and self-respect: it makes him or her blanch or blush, and often both at the same time. For humiliation presents itself in two apparently contradictory ways. On the one hand, it undermines self-esteem, by making the individual ashamed of his expression, of what he would like to show and to assert, it rebuffs him and excludes him from the circle of those who are allowed to speak. But, on the other hand, it also undermines respect and modesty, by revealing what he wanted to hide, by forcing the individual to show what constitutes his reserve, by overexposing him to the public eye, by forbidding him to withdraw.

Humiliation ruins not so much the immediate exchanges as the long circuit of recognition, which commercial exchange cannot measure. This is why the invisible effects of humiliation are so devastating. They run through time, because the humiliated will be humiliating, and humiliation infects all the paintings of life from one moment to the next, if it is not stopped. As Ariane Bazan remarked, they can go so far as to methodically destroy every possible scene of recognition, every possible reparation: the mother will kill all her children, as Medea rejected by Jason does. Reading Euripides, Bazan concluded: "it is to humiliation that barbarity responds". The great tragedies are scenes of scorned recognition, of mutual ignorance.
Humiliation attacks the speaking subject but it also attacks the people: it is the humiliation of the Treaty of Versailles that prepares the coming of Hitler to power, that of Russia or Turkey that keeps Putin and Erdogan there, it is the manipulation of the feeling of humiliation that had propelled the figure of Trump. And this story is not over. The Machiavellian instrumentalisations of fear and resentment have never reached, in all our countries simultaneously, such a level of dangerousness. To the manipulation of fear and xenophobia by French neo-nationalists, who sacralise secularism as if it were no longer the neutral framework for freedom of expression capable of peacefully coexisting with that of others, but the very substance of the French identity (an identity as monistic and exclusive as Catholicism once was for the *Action Française*), responds to the cynical manipulation of Muslims' feelings of humiliation by the preacher-warriors of jihadism, who constantly instrumentalise resentment, in the world and in France. The jihadists here are playing on velvet, because to the old humiliation of military, economic and cultural colonisation has been added that of the suburbs and unemployment, and now the caricatures of the prophet, repeated over and over again.

We have heard a lot about the right to blaspheme: a curious expression, from all those (and I am one of them) who do not believe in blasphemy! To claim the right to blaspheme, to insist on blasphemy, isn't it still believing in it, attaching importance to it? Isn't it like the iconoclastic bands of the Reformation or the Revolution who ransacked churches in a kind of anti-superstitious superstition? The tragedy of the whole affair lies precisely in the fact that what is important for some is negligible for others. Some should learn not to attach so much importance to such satire, and others should learn to measure the importance of what they do and say.

What worries me today is the feeling that there is nothing important anymore, except the right to say that nothing is important. A society where everything is "cool" and "fun" is a society insensitive to humiliation, immune to any scandal, since there is nothing left to transgress, nothing to desecrate. And yet the function of scandal is vital to break a society's complacency towards itself. Worse, when the ironist adopts an overhanging point of view, pointing out the idiocy of others, he interrupts any possibility of conversation. We can laugh, but it is still necessary for this to revive the pact which, in the name of our common and unfinished history, authorises, in a strong sense, mutual recognition.

Our question is therefore to institute a common theatre of appearance that gives full *credit* to the word of each other. This is what we are most lacking today. Once again: my remarks do not only concern the question of caricatures, but all the registers of our living together and our institutions. I hold humiliation to be the mainspring of the depoliticisation (in the strongest sense) of our society.

To come back to what could, in the face of this, refound the political pact, I would like to return to the courage of intelligence. What our elders have made us aware

of is not only the Machiavellianism of "brutality" and "concealment" by which the despots come and stay in power; it is also the "cowardice" and "voluntary stupidity" of the peoples who surrender to these facilities. We do not lack security or communication!

What we need is the courage to confront each other, and the intelligence not to believe that we are right on our own, without even trying to understand each other, to understand together what is happening to us. In this sense, intelligence is not intellectual, it is rather the fact of having "intelligences" outside one's environment. It is also on this question of intelligence that we must learn to better articulate knowledge and power, the perspectives of scientific research and the ethical and political orientations of governance: all the more so since progress in knowledge is progress in the awareness of what we do not know, of what we must accept not to master, not to pretend to foresee.

And then, to put this crisis in the long term, we should remember that the transition from the old "Empire" regime to the modern "nation-State" regime, which was that of modern Europe, did not take place without huge massacres, population displacements and terrifying genocides – and perhaps even religious wars are deeply linked to these changes in theological-political regimes. But we are, through digital globalisation and migration flows, moving from the regime of the nation state to another regime, and this change is a particularly dangerous time, both a time of fragility and a time of dangerousness for societies, for themselves and for others. In this society of globalised networks, we must be particularly attentive to the emergence of the 'mafia' forms that political-military, commercial, financial or even religious powers take – when the only law that remains is that of 'friends of our friends', an ultra-contemporary mixture of warm clan feudalism and cynical deterritorialised connections.

I would add that we need to think as much of an instituting law, which regulates and directs from within the great choices of our societies, as of a Protestant law, I mean one that resists from the outside against the overly powerful encroachments of gigantic powers without counter-powers. It seems to me that democracy is threatened when one is left with only one or the other, with a right that only justifies the system, or a right that only resists, denounces, or protests: on both sides the law is destabilised, instrumentalised. We need a law that has been widely instituted, which is difficult to instrumentalise, all the more so in a brutal world of military, economic, but also media and cultural balances of power.

Now, whether we like it or not, "we are always barbaric with the weak", as Simone Weil summed it up extraordinarily well: this is why we must "arm" the weak (with rights that are effective counter-powers), and "deprotect" the strong (with duties that correspond to effective responsibility). In other words, we must ensure that the weak are not too powerless, and the strong not too insensitive – that some can still act (what they are experiencing), and that others can feel a little (what they are doing).

These are some of the elements by which I would describe the crisis of democracy. And in your opinion, how do you describe it, this crisis, how do you tell it, explain it, and finally fight it? How to reinvent democracy, from what? What, in the historical forms of democracy, do you think is important, has priority, must be absolutely saved, and what would you consider secondary or contingent?

Mireille Delmas-Marty: We knew that democracy was fragile, but we thought that the triptych "democracy, rule of law, human rights" that characterises it would resist abuses. But we discovered that it can easily be destroyed in a few years in most European countries, and even in our own country: targeted assassinations, surveillance society, preventive detention, predictive justice and security internment mark a shift towards an authoritarian regime. From a criminal law of responsibility, which bases punishment on proof of guilt and proportionate to the seriousness of the offence, we are moving towards a "criminal law of security", a police or even war law, which treats the suspect as a criminal by neutralising the presumption of innocence and the criminal as an enemy by replacing responsibility with undeniable dangerousness, adding to punishment a "security measure" of indefinite duration. This security right was introduced for sex offenders (French statute of 2007) and has been extended to terrorism since 2015.

Then the pandemic reinforced the obsession with security and the normative madness seized our societies of fear, all the more easily since the combination of "tracing, posting and *puçage*" makes it possible to control human "populations", assimilated to dangerous products. Then the crises multiplied. While a state of health emergency was declared, the recent return of Islamist assassinations has reactivated our questions while blurring the answers. Supporting the words of the Minister of National Education to denounce "Islamo-leftism which is wreaking havoc at the university", a group of more than a hundred academics (*Le Monde,* 1-2 Nov. 2020) asked for the creation of a body to detect Islamist aberrations, on the grounds that "it is time to name things".

Well yes, let's name them, but let's do so in the knowledge that not all denominations have the same function or the same meaning. Some of them designate values that can be called "ethical" because they pull us upwards, that is to say, towards surpassing ourselves, as a way of broadening the horizon of possibilities. This is the function of the French motto: "*liberté*, *égalité*, *fraternité*". Other denominations, such as "*laïcité*", are political principles, i.e. principles of organisation of life in society, which, by becoming legal, allow "living together". The same is true on a global scale, which is essential in these times of accelerated globalisation.[36] According to Jean-Louis Bianco, president of the Observatory of Secularism, the principle of secularism has three pillars: the freedom, to believe or

36. O. Mongin and J.-L. Schlegel, "Les défenseurs de la caricature à tous vents sont aveugles aux conséquences de la mondialisation", *Le Monde*, 4 November 2020.

not to believe, to change one's religion, to practise one's religion; the neutrality of the State and public services; and finally citizenship, a notion that adapts to all beliefs and religions: "it does not have to adapt to religions, it is the religions that have to respect it."

But there are also ways of naming in a persifling tone, such as "multiculturalist '*préchi-précha*', 'anti-Western doxa', practices that one wants to disqualify. We come to formulas, such as 'Islamo-leftism' or 'Islamophobia', which express opposing ideologies, but have the same function: to strike an individual or a group with anathema in order to place it outside the community, outside the ex-community in the literal sense of the term. Will anathema, of religious origin, be the language of our globalised societies? Will we be able to make peace, on earth and with the earth, if any thought that does not conform to ours is disqualified without real debate? Between the emancipation of religion and the intransigence of fundamentalist tendencies, tensions are thus created which lead to incomprehension and spread like a flame in a fire: from incomprehension to resentment then to anger, and finally to hatred which leads to barbarism, that is to say dehumanisation. Intended to spread terror, dehumanisation tends to abolish any possibility of living together.

To extinguish the fire, several legal techniques offer instruments but they are complex to use. On the one hand, freedom of expression, an ethical value, is enshrined in positive law and protected by law because it is necessary for democracy. But compliance with the law is not enough. Since the post-war period, the law no longer has all the rights. It must comply with the conditions laid down by supra-legislative (cf. Constitution) and supra-state (cf. European Convention for the Protection of Human Rights, ECHR) provisions. That said, the rule of law does not impose freedom of expression as a value with absolute protection. Limited in Article 12 of the Déclaration des droits de l'homme et du citoyen by the obligation to "answer for the abuse of this freedom in cases determined by law", freedom of expression is also limited by the ECHR: temporarily by derogations provided for in exceptional circumstances and permanently by "restrictions necessary in a democratic society", relaxed by a "national margin of appreciation" allowed by the European Court of Human Rights (ECHR).

More recently, the "*vivre-ensemble*" has emerged. Initially sociological and political, this concept was invoked by France to justify the law prohibiting the wearing of the full veil in the public space. Referring to the philosopher Levinas to show the importance of the face as an element of "vivre-ensemble", without thinking of the risk of contradiction with the compulsory wearing of a face mask, the argument, which was upheld before the ECHR, was accepted by European judges in 2014. However, the Court stressed the "flexibility of the notion" and the UN Human Rights Committee came to the opposite conclusion in 2018, considering that such a "vague and abstract" notion could not justify any restriction on religious freedom.

In the same year, the UN General Assembly adopted a resolution establishing an International Day of Living Together, to be celebrated for the first time by UNESCO in 2019. Presented as a "cosmopolitical vision of transition", living together remains profoundly secular in its formulation because religions are grasped at the level of the individual and his or her choices rather than as a cultural community.[37] Their place is nevertheless more important in 2018 than in 2001, shortly after the attacks of 11 September, when the Declaration on the Diversity of Cultures, described as the "common heritage of humanity", was adopted.

However necessary it may be, the art of naming things is therefore a difficult art. It is also a dangerous art when it leads to "bringing up", that is to say denouncing, "attacks on republican principles and academic freedom" and to drawing up a "guide to appropriate responses", a guide to political correctness, for academics whose job is to train emancipated citizens to think critically and to teach them to think for themselves.

It is true that thinking for oneself is a challenge when all crises are intertwined. In June 2020, France, in a state of health emergency but not yet hit by the October attacks, had voted two texts against terrorism. On the one hand, the Avia law obliging, in its flagship measure, online platform operators and search engines to remove within 24 hours, reduced to one hour for terrorist or child pornography content, "manifestly illegal" content. The expression covers incitement to hatred, but more broadly racist or anti-religious insults. Noting that operators would be encouraged to withdraw all content as soon as it is challenged, including legal content, the Constitutional Council censured this measure on 18 June 2020, on the grounds that it could lead to an infringement of the exercise of freedom of expression and communication that would not meet the three-fold test of the measure being "necessary, appropriate and proportionate". The text will not be repealed, but will be deprived of most of its substance. Similarly with the law, passed on 10 August 2020, to introduce security measures against the perpetrators of terrorist offences after the execution of their sentence. Finally, three articles out of four were censured on 7 August by the French *Conseil constitutionel*, but the security slide is accepted in principle.[38]

At the present stage, therefore, it can be said that the judge (national, European or global) remains a bulwark against security abuses, but one that is weakening, on the grounds that encroaching on the legislative power would establish a "government of judges" synonymous with the "democratic deficit". Yet democracy does not only consist of a majority of votes, which can very well lead to "legal" despotism. It presupposes the resistance of human rights and the rule of law, and the role of the judge is all the more

37. G. Renou, in *Le vivre-ensemble saisi par le droit*, Marie Rota (eds.), Pedone, 2020.

38. J. Alix, "Au tournant de la punitivité en matière terroriste", La lettre juridique no. 841, *Lexbase*, octobre 2020.

important as the trivialisation of the state of emergency legitimises a transfer of legislative power to the executive.

In our world "made up of political, military, economic, but also media and cultural balances of power", you observe "the massive rise in resentment" and denounce "the mafia-like forms taken by military, financial or even religious powers". This is why the law is more likely than ever to be used as an instrument, either to justify the system ("instituting" function) or to protest, to resist the system ("Protestant" function). In the absence of a real separation of powers, the democratic spirit could take the form of "SVP governance" (Knowledge, Will, Power): the cross-fertilisation of Knowledge (the learned and the knowing, science and experience), would enlighten the Citizens' Wants (from the city to the Nation-State, to Europe, then to the World), which would frame the Powers (political-military with the States, economic with the TNCs, cultural...). However, the responsibility of the most powerful actors must be reinforced and the most vulnerable must not be enslaved. If the adventure story is the most adapted to the democratic spirit, the trust it postulates implies that the law reinforces responsibilities, and that impartial and independent judges provide a real normative guarantee,[39] thus contributing to the organisation of solidarities and the implementation of interactions between actors and between normative levels.

As the complexity born of globalisation develops in this way, indeterminacy progresses and lawyers (re)become both gardeners and architects. As gardeners, they learn to adapt societies to the unpredictable developments in the world around them. Architects, they imitate the builders, from pyramids to cathedrals, who managed to dampen the disruptive movements of the winds by plunging a plumb line into a bucket of water, in order to regain straightness, literally and figuratively. Figuratively speaking, if the plumb line symbolises the straightness of cathedral builders, it could also symbolise the straightness of the builders of a common world and show how to move from the great disorder of deregulated globalisation to a kind of "ordered pluralism" that brings differences closer together without eliminating them, oscillating between internationalised (harmonised) diversity and pluralised (contextualised) universality. For there to be commonality, differences must remain but become compatible, and to make differences compatible it is not enough to juxtapose them, they must also be ordered around the common values generated by the processes of reciprocal humanisation we have described.

Faced with the permanence of health, ecological and social crises and the imminence of the disasters they herald, the "diversity of clamour" you spoke of at the beginning of our interview could quickly overwhelm us if we do not recognise values, ethical and/or legal, that are common enough to guide the human adventure by avoiding the two pitfalls of the Great Collapse and the Great Enslavement. Hence the need for a rebalancing between individual liberties and collective solidarities; between the spirit of responsibility and the spirit of obedience, between independence and interdependence. But this rebalancing, each of us - you said it in other words - will have to do it first of all within ourselves in order to renounce the ways of life to which "productivism-consumerism" has accustomed us. It will be difficult - the word "renunciation" is almost absent from the official discourse -, so strong are our resistances, real "deadly addictions". To achieve this, fear is not the best counsellor, especially exclusionary fear, the one that dehumanises by obeying the impulses of the paleocortex, our old reptilian brain. On the other hand, we will have to value imagination, this jubilant capacity of the neocortex, particularly developed in humans, which reassociates old elements to make something new.

This is why I would like to praise the "imaginative forces of law",[40] those that dig into the depths of national histories or welcome the emergence of new categories, whether it be, for example, rethinking the appropriation of goods or the representation of people to guide this emerging global community that now includes future generations and non-human living beings. The notion of non-appropriable goods, which goes back to the old "commons", is being extended to the new "global commons", which are goods as different as health, reliable information, or the balance of the Earth's ecosystem. At the same time, the notion of person is evolving to the point of opening up to non-human beings, therefore without responsibility, such as the Amazonian forest or a tributary of the Ganges in India. Since 2015, these new categories have inspired a great wave of "climate trials". These trials, and those that will follow, show that the imagination, when enlightened by knowledge and stimulated by 'the wonder of being part of the extraordinary adventure of being alive',[41] is a powerful engine for changing course. Provided you have a compass.

A compass of possibilities

Olivier Abel: How to think about wonder? How to welcome the unpredictable? Finally, I believe we agree with the tension you propose between the principle of responsibility and the principle of hope. Promise seems to me to be the right category here, because I am responsible for my promises, especially if I know that others count on me, but at the same time promises must always be able to be unbound, and they do not protect us against the unpredictable or the unexpected, nor against the unhoped-for. Hannah Arendt shows the impressive stabilising power that the ability to promise brings to human affairs. We can clearly see the political importance of the promise, in contracts, treaties, inviolable agreements. According to Arendt, philosophies and alliance societies accept this general unpredictability, and the promise serves here to create islands of certainty in

39. E. Nicolas notes "the increasing erosion of the legal guarantee of rights in favour of the legal guarantee of the living", in C. Thibierge, *op. cit.*

40. M. Delmas-Marty, *Les forces imaginantes du droit*, 4 vol. Seuil, 2004-2011; *Une boussole des possibles*, *op. cit.*

41. M. Delmas-Marty, "Au congrès des vents", *Aux quatre vents du monde*, *op. cit.*, p. 127 s.

an ocean of unpredictability: "when this faculty is abused to cover the whole field of the future and to trace a path well defended on all sides, they [promises] cease to bind and oblige, and the enterprise turns against itself."[42] This is what can worry us in what you call the *Great Enslavement*, whereby humans would like to swap the fragility of mutual promises for the solidity of the great programme narratives that would reshape the past and predict the future, in a totalitarian manner. The imagination of the possible reopens buried promises in the past, so that, as you say, the unpredictable becomes the unhoped-for!

Mireille Delmas-Marty: Of course, imagination doesn't have all the answers. You asked, "How high will this flood of resentment go?" We received another terrible answer with the beheading of Samuel Paty: resentment can rise to hatred and barbarism, that is to say, to dehumanisation, if we sink to what you call "denial of humiliation." But imagination is probably more powerful than fear. It is not "the fear of perishing, wrote Teilhard de Chardin in 1958, but the ambition to live that has thrown Man onto the exploration of nature and the roads of the air". The ambition to live is the vital impulse that incites us to "last and grow" in the infinity of the Cosmos, in spite of human finitude and the limits of the planet. It is the impetus given by the "little unnamed breath from the countryside", to attend Edouard Glissant's Congress of the Winds, or the "little hope, this little girl who gives us good morning every morning" and whom Charles Péguy compares to the bud, so fragile at the end of the branch that it is effortlessly destroyed, but so necessary that without it the tree dies.

You also asked "how can we conceive of a common theatre of appearance that gives full credit to the words of each and every one of us?" The word itself is not enough, and discourse is quickly outdated. During our conversation, I told you how, after having published numerous texts on the globalisation of legal systems, I felt the limits of rational discourse and used the metaphor of clouds to represent the instability of legal systems, then imagined a compass rose to represent the headwinds born of globalisation and described their disorderly round. Hence the idea, to add sensory perception to cognitive reason, of inscribing words in matter, to make a kind of compass. An unusual compass because it does not have a North Pole, but has moving figures to represent the breaths that animate the world and indicate the multiple possible directions. A "compass of possibilities", therefore, conceived as a theatre where the winds of the spirit meet the winds of the world and where human eyes on the world could tell each other, cross and recognise each other.

All this was made possible by the unlikely meeting of a jurist and a plastic artist-builder. Inspired by thought, the material took shape and then, in turn, it gave us something to think about. From thought to matter, the path goes through the symbolism of the four states: Earth, Air, Fire and Water.

Earth: a massive, mineral Wind Rose is anchored to the ground; an octagonal receptacle is hollowed out in its centre, while a minimalist cone-shaped structure supports the exact graphic projection of the rose towards the sky.

Air: emblematic figures are arranged in opposite pairs at the end of each branch. The bird, in flight or in a cage, symbolises the Freedom/Security pair; the hands, which fight or embrace each other, evoke the Competition/cooperation pair; the farandole, associative or separative, illustrates the Exclusion/integration pair; finally the cerebral sphere and the terrestrial sphere symbolise the Innovation/Conservation pair. Subjected to the world's headwinds, each figure moves differently, transforming the Earth Rose into an aerial Round, as disordered as the human world. In an attempt to stabilise them, a spiral flies over these moving figures, carried by a rotating and oscillating axis on a joint located at the tip of the cone.

Fire: the "little innominate breath", a citizen of the world who evokes the vital impulse of the new generations,[43] is perched at the top of the spiral. Materialised by a crystal splinter, it reflects the light of the solar fire, the moon and the stars.

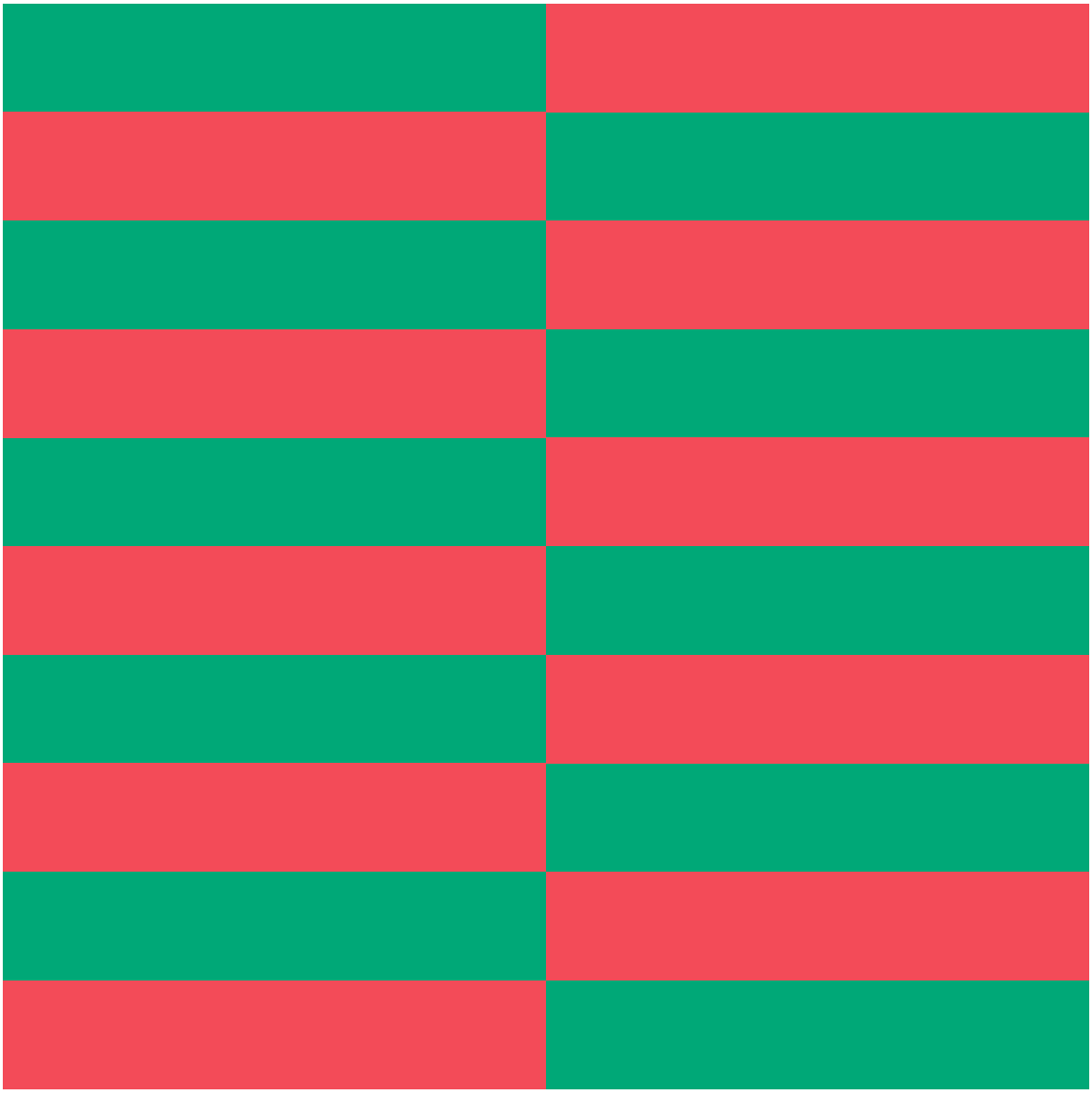
Water: the joint extends the axis of the spiral and transmits the movements resulting from the Roundness of the Winds to a plumb line, symbol of straightness. The mass of the plumb line is immersed in water, the primordial element contained in the receptacle. This stabilising place is like a centre of gravity where Earth, Air, Fire and Water meet.

In its turn, matter gives us food for thought: without the plumb line that holds it up, the spiral collapses, humanisms disappear and it is the Great Collapse announced by collapsologists. But without humanisms (the values they engender, and the regulatory principles that carry them), the world can also turn towards the Great Enslavement, which evokes the programmatic narratives inspired in particular by the New Silk Roads.

Unless we renounce the certainties of dogmatic thinking for the uncertainties of dynamic thinking and attempt open anticipation: neither predict nor prescribe, but welcome the unpredictable when it comes. The sole ambition of this "compass of possibilities" is to suggest to the spectator who plays the game of analogy between the winds of the world and the winds of the mind that the worst is not inevitable and that it is still possible to find a balance energised by the spiral of humanisms and stabilised by the plumb line of democratic governance plunged into the octagon of values and regulatory principles. To suggest that it is still possible, therefore, to imagine a world that would be pacified without being unified, harmonised without being unified, stabilised without being immobilised.

42. H. Arendt, *The Human Condition*, University of Chicago Press, 1958.

43. "Au congrès des vents", *Aux quatre vents du monde*, *op. cit.*, p. 127 *et seq.*



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