

## EDITORIAL

Karine Caunes\*

Each year, in late summer, a colourful mosaic of names decorates the Florentine sky. Alun, Marinella, Ounia, Anna, Rory, Franck, Lùcio, Matej, hailing from the four corners of Europe and beyond, meet and learn to work together at the European University Institute. Perched on the hillside, these new surroundings will become their home for the next four years. The Institute constitutes, in reality, more than simply a kind of training college for aspiring doctors of law. Above all, it is a magical site of European alchemy, and a living place of exchanges, where ways of understanding ourselves, each other and the law germinate and bloom. United in diversity, these researchers have chosen to shed their familiar national garb to pursue a common goal, that of pushing the boundaries of their knowledge and knowledge itself, harnessing the greatest resource which the Institute has to offer, its diverse cultural, intellectual and human capital.

If one day you encounter someone who has studied at the Institute, its mere mention will light up their eyes with the golden undulating Florentine hills. This should be the reaction that Europe evokes, iridescent looks of hope, desire and willingness. Europe should be a confluence of individual and collective destinies into the river of shared aspiration, a common future. Europe must be, above all, a project. To become this it must learn to appreciate and love itself, and to engage in dialogue. In the academic field, one initiative has become reality, that of a European research arena, where arguments jostle for position and ideas come to fruition. It is in response to, and in furtherance of, this movement that the European Journal of Legal Studies (EJLS) was conceived. Its goal is clear: to thrash out contemporary and future legal problems together, harvested from the field of Europe's greatest asset: its scientific and cultural diversity, and to create a community of research communities, virtual but actual, based on exchange, sharing and dissemination of knowledge.

In facilitation of this vision, the EJLS takes part in the 'Open Access' and 'Open Archives' initiatives, offering free access to its resources. Moreover, in the tradition of Europe's multilingual heritage, all articles are published in two languages. Their impartial selection, based on peer-review by renowned specialists, is guided by one criteria: quality. Innovation and in-depth understanding of law are the two principles which undergird the editorial policy of the EJLS.

Is Europe to be an 'Eldorado'[\[1\]](#)? Which one? This is a challenge for each and every one of us. The members of the Editorial Board of the EJLS

cordially invite you on the voyage of European legal research. They have chosen, for its first leg, a theme situated at the convergence of different disciplinary currents: 'Cross Perspectives', in order to juxtapose channels of thought and foster dialogue and reflection between celebrated professors, veteran practitioners and young talents, be they authors and/or readers of the contributions of this maiden voyage.

The positions expressed in the section dedicated to international law cross swords in an ongoing battle over the unity or fragmentation of international law. They confront the very sources of this problem and numerous pretenders to its solution: the nature of international law, and of the international jurist. In fact, both the diagnoses and remedies proposed possess a somewhat chameleon-like air, changing according to the colour of the surrounding conceptions of law.

Those who adopt of a definition of law based on a system of legal norms place emphasis on the unity of international law both as a legal reality and a desirable order of legal things. In this way, Pierre-Marie Dupuy does not shy away from denouncing what he considers to be the myth of 'self-contained systems', which casts a shadow over the phenomenon of growing complexification of international law, which only the concept of the legal system, in which the notions of imperative norms and/or *jus cogens* are taken seriously, would seem capable of illuminating. Without discounting such a view of the nature of international law, Enzo Cannizzaro for his part develops a vision of the reality of international law defined by the fragmentation of international jurisdictional spheres, perceived as a temporary (?) and necessary lesser evil with respect to a certain international rule of law.

Those who, on the other hand, focus their attention on actors do not try to deny this fragmentation, but in fact attempt to transcend it, seeking to find therein a textured position in line with the author's concerns. As such, Martti Koskenniemi advocates the overcoming of the functional compartmentalisation which structures international law into separate ultra-specialised boxes, hermetically defined by the defence of a kind of international-style constitutional republicanism. Tony Carty, for his part, attacks what he sees as the illusion of the unity of international law, whereby the main error is the obfuscation of the basic nature of international law. The republican image shies away before the portrait of the legal interpreter stood at the centre of the eminently dialogical dialogue which goes on between different national legal cultures.

The debate thus seems laced with both multiple conceptions of international law, and, to say the least, diverse definitions of the purported

unity or fragmentation. However, beyond these still fundamental disagreements, the basic question of classical international law resurfaces for consideration, burdened by the deification/reification of the great State monoliths, leaving behind them in their trail of destruction, the very questions they provoked unvoiced and unanswered. From afar, arrive the echoes of the voices of the great international scholars all seem to be calling for a reimagining of international law and the international community. This revival may take the guise of a Sysiphean jurist or derive from higher intangible principles. We can be guided down this path towards an international law for the twenty first century by Philip Allot's appeal for a reiventend international society.

The contributions gathered together in the section dedicated to European Law<sup>[2]</sup> restore the logic of complementarity, featuring, first and foremost, the complementarity of legal and political theory, in a field which has yet to be fully explored, and secondly the complementarity of the themes developed in each article, stirring a desire to further integrate our approaches, which can only enrich our understanding of this area. The pieces in this section all grapple with the issue of the public/private divide as it is recast by European alternative methods of regulation, seemingly redrawing the dual-sided “paradigm of regulation”, revisiting “on the one hand, the analysis of the processes by which all social groups manage to maintain their cohesion and ensure survival, despite the diversity of interests which exist within them, and, on the other hand, the analysis of the processes of change which contemporary societies are experiencing, in which the growing complexity of problems demands recourse to more supple mechanisms of coordination and integration.”<sup>[3]</sup> Pertinently, in the European context, the French and Dutch rejections of the Treaty Establishing a Constitutional Treaty for Europe - eerily reminiscent of the Irish 'No' which in its day inspired the resurgence of the European Commission with its White Paper on Governance<sup>[4]</sup> - bring new life to the questions of the legitimacy and efficiency of the European Union. We must consider the path which the Open Method of Coordination and self-regulation are taking, given their key role in bringing the European Union closer to its citizens<sup>[5]</sup> and in an incremental constitutionalism. Philippe Schmitter, an expert in European governance thinking, reminds us of the democratic stakes of the debate regarding the interweaving of the links between the European Union and organised civil society. Law appears here as the compass of democratic European governance. “Openness, participation, accountability, effectiveness and coherence”<sup>[6]</sup> become the core of good governance, be there a common framework of legislative instruments or not. It has become necessary to examine how these grand formulations are applied on the ground and to juxtapose different methods in order to understand the logic of the European (legal) system. At a time

when the coherence and integration of policies and legal instruments seem to have become Europe's leitmotivs, an intriguing question for the lawyer is whether we are witnessing a change in legal phenomena. Are alternative methods of regulation contributing to recasting law's role and image? Do they mark the passage from a law which is imposed to one which is negotiated? To attempt to answer these questions, Caroline de La Porte reveals to us the unique experiences of the Open Method of Coordination, evaluating its use in the fields of employment and social exclusion. Fabrizio Cafaggi meanwhile sheds a refracted light onto different forms of self-regulation in the creation of a European contract law. The counterpositioning of these different modes of alternative regulation, usually examined in isolation, will certainly stoke the fires of the debate regarding the nature of European legal normativity.

The section on comparative law offers the reader the chance to consider, through the lens of experts, certain questions regarding the most basic tenet of comparative law: a methodology for developing an understanding of the law. The chosen topic, the guarantee of due process in the war on terror affords us the opportunity to reconsider the *summa divisio* of comparative law, along the lines of domestic systems of private law: the placing of legal systems into families. The section looks at two legal systems – American and British – which ostensibly belong to the same common law family, by examining the key notions of constitutional law, be they objective (the institutional architecture of the legal systems through the separation of powers), or subjective (the status and protection of fundamental rights within those systems).

Furthermore, the reader is confronted with the basic question of the comparatist: which method(s) should be used in order to draw the link between points of comparison.

If a cultural approach is followed, it is best to concentrate on understanding American and British law for what they are in their own terms, to grasp their profound originality. Reconnecting legal systems to their cultural identity and societal roots serves to underline their intrinsic differences and diversity.

Contrariwise, from a functional perspective, what is at stake in comparative law is the analysis of the legal means used by the American and British legal systems in search of a response to a common problem: balancing an effective fight against terrorism with the protection of fundamental rights such as the prohibition of arbitrary detention and the respect for due process. This quite pragmatic approach is often underpinned by the conviction that there exists a core of values and principles among legal actors, whatever legal system they might find themselves in. In this way, this approach tends towards a convergence rather than a divergence of legal

systems.

Finally, if the epistemological method is preferred, one needs to focus on the study of “the internal structures of legal knowledge.”<sup>[7]</sup> The key to understanding and setting up an appropriate comparative relationship between legal systems is “located in epistemological constructions that are both historically determined and structurally significant,”<sup>[8]</sup> which reflect those legal systems. In this case, the analysis could, for example, seek to identify the legal functions which determine the structure of both the British and American systems – the executive, the legislature and the judiciary – and to examine the differences which exist in their relationships.

Thus, thematising the very nature of comparative law places the reader in the driving seat in this section of the journal. We invite them, guided by Mark Elliott and James Nickel, who consider, respectively, the British and American legal systems, to combine or choose between these different methodologies in order that a fruitful comparison may be undertaken relevant to the questions raised by the campaign against terrorism.

After plunging into the heart of legal systems, the EJLS wishes to conclude its first issue by taking the reader through the juridical looking glass. The section devoted to theories of law offers a reversed perspective. The emphasis goes from what the individual, as the protagonist in the legal theater, brings to the law, to what the law brings to the individual, and the way the latter perceives it. This is a question of seeking to define law from both the outside, incorporating sociological and anthropological outlooks on legal phenomena, as well as from the inside through the experience of individuals. The societal reality of the law is revealed in its combination of individual and collective practices. To try and capture this cultural essence, Chantal Kourilsky-Augeven takes us on an inductionary meander through the field of legal socialisation, the result of a recursive interplay between the construction of the subject's identity by the law and the construction of the law's identity by the subject. In this way, she clarifies for the lawyer the relationship between the individual and the legal norm, a key tenet that must be addressed in considering the effectiveness of law. Though Baudouin Dupret also places the individual at the centre of his inquiry, he chooses not to follow the path offered by a cultural approach, but instead sticks resolutely to a praxiological inquiry, considering the law in action and in use *in situ*. Consequently, the understanding of the law is not tackled through the representation and understanding of the law which certain collectives develop but rather by virtue of how or what individuals experience. This writer seeks to make use of an outline of the law from a socio-anthropological perspective through a critique of the dilution of the *legal* quality in the social field amid pressures from certain schools of

legal pluralism. This constitutes a valuable return to the origins of the doctrine of legal pluralism at a time when its protean and polysemous usage seems to be seeping ever deeper into the vocabulary of legal science. The lawyer is thus offered a new vista from the perspective of the other, a path often apposite in seeking to understand oneself. This is the reason why we have chosen to conclude this first issue with the joined contribution from the legal ranks, Roderick Macdonald and Thomas McMorow, who illustrate just what such extra-legal analysis can bring to our understanding of law. Basing their approach on a critical legal pluralism, the authors develop a splendid deconstruction and subsequent rare reconstruction of legal normativity in all its complexity. Bringing this issue full circle, therefore, this closing piece offers interesting synergies with other contributions – evoking for example the essential inter-subjectivity of law emphasised by Tony Carty, the actor's centrality in the elaboration of legal grammar underlined by Martti Koskenniemi, or the importance of man's responsibility in the creation of law and law's creation of its world highlighted by Philip Allot – and also between the different central themes – the burning conundrum regarding forms of legal normativity in Europe which the frame proposed by Roderick Macdonald and Thomas McMorow (norms combining, in different ways, an explicit / implicit, canonical / referential character) could well contribute to resolving.

As such, the separate sections of this first issue each in their own way shed light on different facets of law. They outline the features of cross perspectives in which we hope cross fertilisation will occur. Finally, I would like to add a personal touch to this first editorial. I would like to thank everyone who has worked on transforming this journal into a reality, who have contributed their effort, their talent and their belief in this human adventure: first of all the members of the Editorial Board, the Professors of the Law Department at the Institute, who have also made up the journal's corps of experts, the entire administration of the Institute, in particular the library staff for their fruitful collaboration, and finally and, most of all, the contributors to this first issue, for their kindness, their availability and most simply their skill. All this can only herald a great future for European scholarship.

All the members of the Editorial Board of the European Journal of Legal Studies wish you an enriching journey through the articles of this first issue, in anticipation of future rendezvous in further debates. In this vein, our second issue will be dedicated to a fascinating and intriguing theme: "Judging judges." The call for papers is launched...

\* Coordinator of the First Issue of the European Journal of Legal Studies. Doctoral

Candidate, European University Institute. A.T.E.R., Université Paris X. karine.caunes@eui.eu. Translated by Luke Mason, Doctoral Candidate, European University Institute.

I would particularly like to thank Prof Michel Troper for his valuable advice in writing this editorial.

[1] Cf. L. GAUDÉ, Eldorado, Paris, Actes Sud, 2006.

[2] The choice of title was deliberately left wide, in order to accommodate issues which cover both the European Union and the Council of Europe.

[3] J. CHEVALLIER, "La régulation juridique en question", *Droit et Société*, 2001, N° 49, pp. 827-846, at p. 830.

[4] Commission of the European Communities, European Governance. A White Paper, COM(2001) 428 final, Brussels, 25 July 2001, in particular p. 3.

[5] Cf. *Ibid.* in particular pp. 4, 8, 24. See also European Parliament, Council, Commission, Interinstitutional agreement on better law-making, JO C 321, 31 december 2003, pp. 1-5 concerning exclusively coregulation and self-regulation; More generally, Commission working document, First progress report on the strategy for the simplification of the regulatory environment, COM(2006) 690 final, Brussels, 14 November 2006, and Communication from the Commission to the Council the European Parliament, the European Economic and Social Committee and the Committee of the Regions – A strategic review of Better Regulation in the European Union, Brussels, COM(2006) 689 final, 14 November 2006.

[6] Commission of the European Communities, European Governance. A White Paper, *op. cit.*, at p. 11.

[7] G. SAMUEL, "Comparative Law and Jurisprudence", *I.C.L.Q.*, 1998, vol. 47, p. 817, at p. 827.

[8] *Ibid.*, p. 821.



## INTERNATIONAL LAW: CONSTITUTIONALISM, MANAGERIALISM AND THE ETHOS OF LEGAL EDUCATION

Martti Koskenniemi\*

*The judgment of the European Court of Justice in the Mox Plant case in 2006 is striking in its narrowness of vision. It imagines European law in fully autonomous terms, analogous to the national laws of European States under the strict "dualism" of late-19th century jurisprudence. But Mox Plant is only one example of the increasing fragmentation of law beyond the nation-State into more or less autonomous technical "boxes", each geared to realise a particular ethos, the structural bias of a particular form of expertise. Not only "European law" but also "trade law", "human rights law", "environmental law" are examples of such boxes, systems for the management of particular types of problem from a particular perspective. But law ought not to be conceived in managerial terms. It should not be reduced into an instrument of the preferences of those who manage this or that technical problem-area. Legal training – in the European University Institute and elsewhere – should be about the conditions and limits of particular forms of managerial authority. And if education in international law should be about how to attain a universal perspective, in today's conditions this means the development of a critical sensitivity to the forms of international power exercised through particular forms of technical expertise.*

Last May the European Court of Justice gave its judgment in the MOX Plant case. The case had to do with the operation of a nuclear reprocessing plant at Sellafield, United Kingdom. A complaint had been raised by Ireland against the United Kingdom on account of the potential environmental effects of the plant under two international treaties. One was the OSPAR Treaty related to the protection of the environment of the North Sea. The other was the United Nations Convention on the Law of the Sea from 1982. Having heard about these proceedings, the European Commission, for its part, raised a claim against Ireland on account of the latter's having taken the United Kingdom –another member State of the European Union– to international arbitration, that is to say, to be subject to legal scrutiny under rules other than those of European law by bodies other than European ones.

The Court found against Ireland on all grounds of the Commission's complaints. Ireland had failed to respect the exclusive jurisdiction of the ECJ and to cooperate with Community organs in accordance with the EC treaty.<sup>[1]</sup>

For an international lawyer, this is a stunning case. Not, however, because it was unprecedented, on the contrary. Since the late 19th century, nation-States understood one aspect of their sovereignty as the unconditional primacy of their legal order to anything imposed from the outside. The MOX Plant case is



stunning because it falls squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law. It shows the ECJ imagining the European Union as a sovereign whose laws override any other legal structure. To appeal to international law against the United Kingdom, Ireland was violating the sovereignty of European law, like Soviet dissidents, once upon a time, in appealing to the 1966 UN Covenant on Civil and Political Rights, seeking thereby to break out of the hermetic absolutism of the Soviet order.

The ECJ's view of the relations of European and international law follow the strictures of late-19th century German public law.<sup>[2]</sup> The two legal orders are separate, while, for EU organs, the primacy of European law is imposed as a constitutional necessity. This is the traditional dualistic position which Hans Kelsen once analysed as, in fact, a monist position with the primacy of the national legal order, a position that Kelsen saw as both solipsistic and imperialistic – this language is his.<sup>[3]</sup> Solipsistic in the sense of capable of seeing nothing other than one's own legal system; imperialistic because everything taking place in the world is judged from its perspective. Or, I should like to say, so long as this is convenient. In the *Bankovic* case, in the only slightly different context of the European human rights regime, the European Court of Human Rights held that it had no jurisdiction to adjudicate upon the bombing of Serbia by European war planes because it did not cover the actions of European States outside Europe when those acts could not be seen as regular acts of administration of the kind the ECHR had perceived in Turkey's behaviour in Northern Cyprus, and it would again see in Russia's actions in Moldova.<sup>[4]</sup>

But my point today is not to attack European self-centredness, or its hypocrisy. I refer to the *MOX Plant* case as an illustration of what is happening today to public international law, the way in which it is being sliced up into regional or functional regimes that cater for special audiences with special interests and special ethos. A managerial approach is emerging that envisages law beyond the state as an instrument for particular values, interests, preferences. This -I would like to suggest- is to give up the universalism that ought to animate international law and provide the conditions within which international actors may pursue their purposes without subscribing to those purposes itself. It is often said that international law is unable to respond to the challenges of globalisation. This critique presumes that international law is a technique for problem management. And as such, its diplomatic mores and institutional structures seem altogether too weak, even dysfunctional. The marginalisation of international law by the ECJ in the *MOX Plant* case is merely one example of a special international regime and a special ethos – the European regime, the European ethos claiming priority over anything general, even less universal. The European project, the Court is saying, enjoys precedence over the international project.

But Europe is not the only such project. Take for example, the trade law project. The WTO has been the centre of the construction of an impressive legislative edifice and case-law geared to the management of comparative advantage through free trade. The relationship of that project with other international rules is much debated: trade and human rights, trade and labour, trade and environment. The trade position was clearly stated by the Appellate Body (AB) in the *Beef Hormones* case in 1998. Faced with the question as to the status of the so-called precautionary principle under the WTO covered treaties, especially the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement), the AB concluded that whatever the status of that principle “under international environmental law”, it had not become binding for the WTO.<sup>[5]</sup> This approach suggests that international law comes to us in separate boxes such as “trade law” and “environmental law” that may have different principles and objectives that do not apply across the boundaries between such boxes. But how do such boxes relate to each other?

The existence of special regimes is a commonplace of international practice. 10 years ago in the *Legality of Nuclear Weapons* case (1996), the International Court of Justice structured its opinion by successively examining human rights law, environmental law, humanitarian law and the law on the use of force.<sup>[6]</sup> In the more recent *Palestine Wall* case (2004), it debated at length the relationship between what it called international human rights law and international humanitarian law.<sup>[7]</sup> The rules within the boxes were different: one prohibited killing, one permitted and regulated it. Which should have precedence? The importance of choosing the right box was highlighted by the Arbitral Tribunal set up under the UN Convention on the Law of the Sea in the *MOX Plant* case. Three different treaty-regimes were applicable. Let me quote the Tribunal: “even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a separate existence from those under [the UNCLOS]”.<sup>[8]</sup> This meant, the Tribunal held, that the application of even the same rules by different institutions might be different owing to the “differences in the respective context, object and purposes, subsequent practice of parties and travaux préparatoires”.<sup>[9]</sup>

It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias: to examine nuclear weapons from a human rights perspective is different from looking at it from a laws of war perspective; a free trade perspective on chemical transports does not render the same result as an environmental perspective, whatever the rules. And the objective and the ethos of a regime are not just some incidental aspect of it. What is significant about projects such as trade, human rights, or indeed “Europe”, is precisely the set of values or purposes that we link with them. To be doing “trade law” or “human rights law”, or “environmental law”

or “European law” “-as the representatives of those projects repeatedly tell us- is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that “box”.

Now this would not be too significant if the boxes had clear-cut boundaries and we could resolve jurisdictional overlaps by some superior set of rules. This is how international law saw itself in the late-19th century when the boxes were legal systems of sovereign states. But now there is no such superior set of rules. It is international law itself that is broken down into such boxes, each of them -remember- both solipsistic and imperialistic. The boxes do not emerge from any overarching plan. They grow spontaneously, through functional specialisation that has separated spheres of international life and made them increasingly autonomous from each other. Much of modern sociology is about this and tends to convey it as natural, inevitable process. But if it is so, then it is inevitable only in the sense that the predominance of powerful interests where there is no law is inevitable. In fact, there is nothing natural or inevitable about such boxes. They emerge from field-construction, of narration, of pinning informal labels on aspects of the world that describe them from the perspective of particular interests or objectives. And any international event may be described from any such perspective: the processing of nuclear materials by the sea relates at least to environmental law, trade law, the law of the sea, perhaps the law of maritime transport and certainly also human rights. The characterisations do not follow from the “nature” of the activity but the interest from which it is described. An activity does not fall into a box because of what it is like intrinsically, but what the perspective is from which we want to describe it. And, we have to ask, how is that perspective determined?

A man with a hammer sees every problem as a nail.<sup>[10]</sup> A specialised institution is bound to see every problem from the angle of its specialisation. Trade institutions see every policy as a potential trade restriction. Human rights organs see everywhere human rights problems, just like environmental treaty bodies see the political landscape in terms of environmental problems and so on. This is why the ECJ saw in the operation of the British nuclear installation a problem of European law, not a problem in the law of the sea or a problem of the pollution of the North Sea environment. Of course the ECJ would be happy to deal with matters relating to the pollution of the seas, because, in so doing, it could make sure that it was treated from the perspective of the interests and preferences -the project- it is called upon to advance. This is like the nation-State, once upon a time understood by some German lawyers as a “Gesamtplan des menschlichen Kulturlebens” – a total plan of human social life.<sup>[11]</sup> In the same way, every system, every regime is capable of extending to the whole world, covering everything from its own perspective, the combination of solipsism and empire that Kelsen detected in the project of the nation-State.

Yet the analogy with the State goes further. In the recent WTO case on the European prohibition of Genetically Modified organisms the question arose whether the Panel should take account of the 1992 Convention on Biological Diversity and the related Biosafety Protocol of 2000. It could do so under Article 31 (3) (c) of the Vienna Convention on the Law of Treaties according to which international agreements -including the WTO agreements- should be interpreted by taking account of the other obligations of the parties. The Panel found, however, that all parties to the WTO treaty had to be parties to that other treaty as well. Because the United States had not joined the biosafety protocol, it could not be applied.<sup>[12]</sup> The position is identical with the classical constitutional law dualism that accepts that international obligations may be applied in domestic organs only if their provisions have been incorporated as parts of domestic law. Applied to a multilateral treaty with dozens of parties, the requirement of identical membership makes it practically impossible ever to find a multilateral context where reference to other treaties -the other box- would be allowed. The panel buys what it calls the “consistency” of the WTO Treaty at the cost of the consistency of international law.

Now the various regimes or boxes -European law, trade law, human rights law, environmental law, investment law and so on- all tend to act in this way. Human rights bodies have developed a steady jurisprudence under which the interpretative principles applicable to human rights treaties differ from principles applicable to other treaties, enabling an activist role by human rights bodies.<sup>[13]</sup> Or think of the criminal law box. In the *Tadic* case, the ICTY, observed that the standard of responsibility to judge foreign involvement in civil war set down by the ICJ in 1986 -that is, whether that foreign power had effective control over domestic guerrillas- was not applicable in international criminal law where a broader standard of “overall control” was applicable.<sup>[14]</sup> It is hardly a surprise that the direction of the deviation is in favour of wider jurisdiction of the relevant expert organ.

This is managerialism. Each regime understood as a purposive association and each institution assumed to have jurisdiction wide enough for realising it. There would be nothing irregular here if that process were controlled by something like an international political society determining the jurisdiction of each regime. This was the utopia of inter-war sociological jurisprudence that saw the League of Nations and other international organisations as parts of a global process of functional differentiation through which a global society regulated its own affairs. This was a radical cosmopolitan view that took from Kant and Benjamin Constant the view that trade and interdependence will lead into a global federation in which humanity’s affairs are conducted under a universal republic.

But there is no global legislative power, no world government under which the WTO could be seen like a global ministry of trade, the Kyoto process as

activities of a global environmental ministry or trials of war criminals as something carried out by a global executive arm. Carla del Ponte looks almost like a private entrepreneur. Differentiation does not take place under any single political society. Instead it works through struggle in which every purpose is hegemonic in the sense of seeking to describe the social world through its own vocabulary so that its own expertise would apply and its structural bias would become the rule. The “wide reading of security” by the Security Council is one example. “Sustainable development” is still a fragile compromise between development and environmental experts. Every conceptual move is a move in a game of power where the one that has mastery over the concept, will also have the power to decide.

The realisation of a particular purpose is no automatic affair, however. Contingent events and novel problems emerge constantly. The purpose needs to be translated into appropriate reactions to changing circumstances. To undertake this, there have to be experts -treaty bodies, committees, compliance groups and so on- to find the right policy that will guarantee the optimal realisation of the purpose in practice, to interpret and draw conclusions from it. Out of a huge scope of materials, let me give you just one recent example. At its most recent session in 2006, the International Law Commission (ILC) finalised a “Draft Convention on the Law of Transboundary Aquifers” – the rights and obligations with regard to the world’s groundwater resources.<sup>[15]</sup> The draft invites States to construct “plans” for each aquifer system, taking into account “the present and future needs and alternative water sources for the aquifer states”. The “relevant factors” that should be taken into account include items such as “the natural characteristic of the aquifer system”, “the social and economic needs of the States concerned” and “the existing and potential utilisation of the aquifer” and so on, with the final paragraph according to which:

“The weight to be given to each factor is to be determined by its importance with regard to specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs”.<sup>[16]</sup>

This pattern is repeated in many recent instruments.<sup>[17]</sup> To agree to a treaty is to agree on a continued negotiation and contextual deal-striking, with functional interests in a decisive position. It is easy to understand why this would be so. Management on a global scale is difficult. The unforeseeability of future events, including the effect that any determining rules might have in practice suggests that such rules ought not to be laid out at the outset. For every rule might cover some case which we would not wish to cover – and it might fail to attach to situations where we would have wanted to apply it, had



we only known of such situations beforehand. Hence global management will have to take place by open-ended standards that leave experts with sufficient latitude to adjust and optimize, to balance and calculate.

So we are left with managerialism in the precise sense that law turns onto rules of thumb or soft standards that refer to the best judgement of the experts in the box - substance, thoroughly committed to advance the purposes of the appropriate box. That is why they have been elected to serve in those bodies in the first place. That is why solipsism and empire seem unavoidable: Trade bodies condemned to advance trade, human rights bodies human rights, environmental bodies, environmental interests and so on.

International lawyers -especially European international lawyers- have sought to combat this through the vocabulary of constitutionalism. They have tried to imagine that a kind of a federal world is already there, that the UN Charter can (and ought to) be read like a world constitution. Perhaps, after all, Latin formulas such as *jus cogens* or obligations *erga omnes* represent universal values.<sup>[18]</sup> But which values? No doubt, free trade for trade bodies, human rights for human rights organs, environmental values for environmental regimes, security for the Security Council, each such “value” again sub-divided into a mainstream understanding of its practical implications and a minority challenge. Constitutionalism, as we know it historically, relies on some basic understanding of the common good, some sense of a law as a shared project for a reasonably clearly defined (and often historically informed) objective.<sup>[19]</sup> In the international world, there is no semblance of this – that is to say, beyond the very values of free trade, human rights, clean environment, fight against impunity and so on – values that demand managerial regimes for their realisation. If fragmentation and deformalisation have set the house of international law on fire, grasping at values is to throw gas on the flames.

A more plausible constitutionalism is formal and suggests that no special regime has ever been understood as independent from general law. In a typical case from 1928, for example, a claims commission interpreting a treaty did not hesitate to state as follows:

“Every international convention must be deemed tacitly to refer to general principles of international law for all the questions that it does not itself resolve in express terms and in a different way”.<sup>[20]</sup>

This seems practically self-evident. No lawyer will refuse to find States as States, or ask for evidence for the rule of *audiatur et altera pars* merely because a technical regime is silent about such matters. They are structurally given, not positively enacted. This, I suppose, is why in its very first case, the WTO Appellate Body observed that the WTO agreements “should not be read in clinical isolation from public international law”<sup>[21]</sup> and later specified that “[c]ustomary international law applies generally to the agreements

between WTO members”.<sup>[22]</sup> “Boxes” such as the European or Inter-American human rights convention make constant reference to general international law without any act of incorporation.<sup>[23]</sup> Last year the ILC adopted a Report on “fragmentation” where it found no legal regimes outside general international law. The boxes of trade, environmental protection or human rights did have special rules for rule-creation, rule-application and change. This is what made them special after all. But when those rules run out, or regimes fail, then the institutions always refer back to the general law that appears to constitute the frame within which they exist.<sup>[24]</sup> In this respect, European jurisprudence seems to have got it right. Law is a whole – or in the words of the first conclusion made by the ILC Study Group, “International law is a legal system”. You cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come along.<sup>[25]</sup>

This kind of constitutional holism is right to suggest that functional regimes or expert systems do not float in a normless vacuum. Their claim to validity and speciality is completely dependent on a general law somewhere “out there”. But there do not exist definite hierarchies to resolve conflicts between such regimes. Although the ILC Study Group discovered that no regime, however special, was autonomous from international law, it did not feel it appropriate to give indication of whether in cases of conflict the special regime should be read as an exception to or an application of the general law. Practice showed examples of both, and it was impossible to determine which way the equation should go in the abstract. After all, such cases express the tension between particularism and universalism and the mere speciality or generality of a regime gives no conclusive reason to prefer it.<sup>[26]</sup> It is not even clear what “general” and “special” mean in this context. It may be natural for international lawyers to think of their specialisation as “general”. But it is unsurprising that other lawyers see it as a particularly exotic craft relevant mainly for the quaint rituals of the diplomatic tribe, living somewhere between 45th and 52nd Streets, Second Avenue, NYC. The same is true of cases of lateral “box-conflict”. Of course, an EU rule might conflict with the law of the sea, or a regime on the use of force might conflict with a principle of humanitarian law. But in the absence of a meta-rule about what to do in such a case – a rule, in other words, that would set definite priorities between the preferences of “trade”, “human rights”, “environment” and so on – what to do will have to depend on the circumstances.<sup>[27]</sup>

Constitutionalism responds to the worry about the “unity of international law” by suggesting a hierarchical priority to institutions representing general international law (especially the United Nations Charter).<sup>[28]</sup> Yet it seems difficult to see how any politically meaningful project for the common good (as distinct from the various notions of particular good) could be articulated around the diplomatic practices of United Nations organs, or notions such as *jus cogens* in the Vienna Convention on the Law of Treaties.



Fragmentation is, after all, the result of a conscious challenge to the unacceptable features of that general law and the powers of the institutions that apply it. This is why there will be no hierarchy between the various legal regimes in any near future. The agreement that some norms simply must be superior to other norms is not reflected in any consensus regarding who should have final say on this. The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a *pouvoir constituant* but because if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm.<sup>[29]</sup>

The problem with constitutionalism is that it imagines itself as a project of institutional architectonics based on the assumption that what is wrong with the world is the heterogeneity of interests, preferences, values, the nature of the international world as an “anarchical society”. Constitutionalism aligns itself with European nostalgia since the Renaissance for the Roman Empire as the uncorrupted “origin” of European politics. The constitutionalists still grapple with the division of Christendom and the fragmentation of the Holy Roman Empire – separateness and sovereign powers as a tragedy to be overcome by future unity. From this view, international law ought to be seen as an institutional project, a project about blueprints for perpetual peace, *civitas maxima*, and world government. This is why no law review article seems credible unless it ends with an institutional proposal. No talk about the United Nations is worth its salt unless it takes a stand on the UN Reform. This quintessentially modern response to social anxiety, inspired by an 18th century legacy of rational planning and pragmatic application.

Now I am aware that I am lecturing at the outset of a new term at the European University Institute, a training ground for academic lawyers. The view I have sketched suggests that this training should be above all about institution-building and management; the professional ideal the expert at a functional organisation – perhaps the WTO, perhaps the EU, perhaps the European Court of Human Rights. These institutions embody the spirit of modern functionalism to which modern lawyers, too, should be trained. It is not surprising that this educational programme is so often dressed in the language of interdisciplinarity. And so academic lawyers painstakingly learn the new vocabularies: to speak, instead of institutions, of regimes; instead of “rules”, of “regulation”; to change the language of government to “governance”; responsibility to “compliance”; lawfulness to “legitimacy”, and, finally, to think of international law as a kind of “international relations”.<sup>[30]</sup>

Through this vocabulary, law is finally drained out of international law, conceived as a professional technique for the management of values, purposes, ideals. For the managerial sensibility law was anyway always only a second best, a pointer to good purposes, but pointless if those purposes were known, and

harmful if poised against them. To be a lawyer would be to exist as a cog in the regime-machine, thoroughly committed to the fulfilment of that value, purpose, or community, assumed to exist outside the regime, as a condition of its possibility and thus outside of critical reflection.

But this creates two problems: Which value (box) to choose? And how to translate it into determinate policy-decisions? We often concentrate only on the first difficulty – as I have done in this talk, too. Should legal training be about human rights or trade? In what ratios should students receive European law and international law? We feel that much depends on such choices, the management of fragmentation at the level of the LawSchool. But I am uncertain about the crucial nature of those choices. For there is another, at least equally untractable problem, namely how to obtain access to what such values or boxes mean in practice? After all, each of them is conflictual and indeterminate. There is always a majority and minority view of what they mean -or ought to mean- in practice. Which means that even if you chose “human rights” as the appropriate box of expertise, you would still not know whether to favour the right of privacy or the freedom of speech, the freedom to act or the freedom to be safe from other peoples’ acting. And is free trade after all about creating wealth or eradicating poverty, aggregate utility or distribution? And what are the purposes of criminal law - peace or justice? And so on. To solve such questions, each regime -each box- must refer to the discretion of its managers. The rule by the regime is always rule by the structural bias in the relevant form of expertise. It may be that the box you choose as your field of specialisation will determine what kinds of decisions you will make in the future, how your professional life will turn out. But it may equally well be that it is you who decides what it means to say “human rights”, or “security”, or “free trade”. Let me retrace a bit.

This kind of critique of values and purposes – drawing attention to their conflictual and indeterminate nature, and to the hubris involved in thinking that they could rule the world, resembles the critique of Schwärmreithat was the core of Immanuel Kant’s political work. Against the popular misconception that it is some critical legal studies extravaganza, one cannot emphasise too much that every aspect of the indeterminacy of values and purposes was already laid out in Kant’s attack on both the empirically oriented natural law of Pufendorf and the tradition of civil philosophy on the one hand, and on the abstractions of Wolffian scholasticism on the other.<sup>[31]</sup> Against them, Kant conceived his strong legalism. Law as the protector of freedom against the projects of unfreedom that were the efforts to think of human beings as objects of management, best visible in the management of absolutist States. But Kant’s legalism is not – as it is often believed – a legalism of rules or institutions. It is a legalism of the legal mindset.<sup>[32]</sup> Rules are a helpful reference but in themselves, far from sufficient. In Kant’s vivid language:

“A physician therefore, a judge or a statesman, may have in his head many

admirable pathological, juridical or political rules, in a degree that may enable him to be a profound teacher in his particular science, and yet in the application of these rules he may very possibly blunder—either because he is wanting in natural judgment (though not in understanding), and whilst he can comprehend the general in abstracto, cannot distinguish whether a particular case in concreto ought to rank under the former; or because his faculty of judgment has not been sufficiently exercised by examples and real practice”.<sup>[33]</sup>

But if the rules of law do not spell out the conditions of their application, then their virtue cannot rest on what their words mean or on what they purport to achieve in practice. “Rules” are just like “policies”, “objectives” or “values” – open-ended and conflict with each other. No abstract description of a box translates automatically into action. To think otherwise was precisely the illusion that Kant detected in all previous thought. It was not a politically innocent illusion; the ancien regime stood on it, the illusion that social conflict was already settled in some ideological heaven and that the only task for the lawyer was to bring it down so that everyone could bow to its hierarchies. A Versailles of the imagination. By contrast, Kant invites us to refuse to believe in our having access to such heaven when only correctly managed. Instead, what we do have access to is our freedom that in social life means our autonomy from other people’s projects. There never lacked projects for enlisting freedom for this or that cause. But law is not one of those. Instead, it is a standpoint, or a language, through which those projects may be subjected to critical analysis. Law is that which is precisely not constrained in a box – including, of course, the box of the nation-State. This is why Kant saw all law as aiming to become universal law and a lawful external environment a precondition for legality at home.<sup>[34]</sup>

This redefines legal training as education not in box-management but in critical sensitivity to the contexts in which lawyers are called upon to act as professional wielders of power. Where managerialism thinks of the legal judgment as a product of regime-rationality, and thus attributable to the institution, or to technique, Kant sees the judgement as the original product of the decision-maker, and thus attributable to that person. Against managerialism as ideology, law is enlightenment as responsibility, but not as any particular meaning of a text or practice, nor as a systemic effort to apply some external objective, purpose, or value. Instead, it would have to be law as a mindset with which the law-applier approaches the task of judgement within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a “legal nothing” (decisionism). I think about this in terms of the spirit of the legal profession, and the aim of legal training.

It is, I suppose, with this in mind that in 1795, observing the French

Revolution, Kant made the distinction between the “political moralist” and the “moral politician.” [35] The former, he wrote “makes the principles subordinate to the end.”[36] These ends have no independence from the ends of some people, namely, those managing the regimes and their advisers. Kant stresses the degree to which political moralists are enchanted by their “realism,” that always enables finding a strategic consideration to justify coercing other people. For Kant, their particular vice is viewing society –that is, other human beings– as objects for external purposes – that is to say, not ends in themselves. And when those others, the objects of what I see as the right purpose, realise that they are no longer treated as free, Kant writes, they “become, in their own eyes, the most wretched of all earthy creatures”. [37]

Against managerialism, Kant endorsed the mindset of the moral politician, the actor conscious that the right judgement cannot be reduced to the use of instrumental reason. Instead, in judging, that person would seek to act as what Kant calls a “genuine republican” – that is, someone who sees it as his or her task to encompass the perspective of the whole.[38] And how is that possible? As is well-known, Kant’s political theory is complemented by his analysis of the faculty of imagination operative in aesthetic judgement.[39] Such judgement –for instance, awe before the Brunelleschi Cupola– cannot be subsumed under a rule but it is not just a subjective whim either. For it claims general assent somewhat like the legal judgement, too, claims it. To say, “this is valid law” is not to say this is good or useful or something I happen to desire. None of us as lawyers would mistake a sentence about valid law to be only about social objectives or states of mind. And yet, we puzzle over what legal “validity” –the legal proprium– might mean. What is it, that differentiates the lawyer from the trade expert, the human rights expert, the environmental specialist, or the international relations scholar?

Contemporary constitutionalists sometimes take Kant’s aesthetic move literally, and describe law as the practice of creating coherence out of the disparate materials that positive law is: law as commitment to system. But this is too tranquil an image, a scholar’s image that looks away from the complex play of power in which lawyers and Kant’s moral politicians act. There is no innocent standpoint, no meeting of horizons at some moment of brilliant hermeneutic reflection. Some will continue to win, others to lose. Losing consciousness of this is perhaps the worst possible contribution a lawyer can make. Therefore, I want to look at something else in Kant. Not law as the narrating of social power in its most coherent terms in the seclusion of the scholar’s chamber or behind the official edifice of the Bar – but law as the platform on which social conflict is articulated. Today, that articulation takes place in the debates about what “human rights”, “trade”, “security” or indeed “Europe” and “the world” should mean and how they ought to relate to each other. To wage that debate in terms of “law” means to wage it with the effort of not being confined in any such box a priori, in not thinking of oneself as merely the mouthpiece of this or that series of preferences but of thinking of

oneself -and thus others, too- as “free” in the (Kantian) sense of being able to take distance from those preferences and to seek to encompass the “whole”. This is what Kant’s moral politicians do when they seek to act as “genuine republicans”, trying shake off sectarian interests, and advance the good of “all”.

The positive freedom provided by the technical boxes offers a way to govern societies. From the box-perspective, all human beings appear in a particular light; in terms of what role they occupy in the advancement of the box-substance; active or passive, positive or negative. However, it follows from conflictual nature of the boxes available to us, and the indeterminacy of each of those boxes, that we are never simply playing the roles, robots programmed to behave in particular ways. There is no one spot from which governmentality occurs, no determinate hierarchy or project from which subject-constitution should take place. If there is structure, there is also the indeterminacy of structure, the dangerous supplement, the crack in the mirror, the human stain. What if trade is human rights? What if environment is resource distribution? What if sovereignty is intervention? What if what is black is white and freedom is possible only through constraint? Last year the British High Court described incommunicado detention in Iraq as a measure to protect human rights. Well, then surely everything remains open for justification and contestation. No box is sealed, what it contains depends on what we put inside.

This is why legal education ought not to be about learning rules or principles or telling the stories of political societies in their most coherent light. Instead, it could be about retelling social histories and institutions constantly anew. Look at the EU -it has been told as a peace-making pact, a customs union, and an agency for protecting fundamental rights, each such re-telling pointing to a new form of expertise, a new bias, above all new subject-positions, new perspectives from which European power may be both exercised and criticised. Liberal hermeneutics is wrong in characterising the ideal legal sensibility as that of a scholarly Hercules having all the time in the world to write a chain novel out of law. But I do think it is right in suggesting that law is about narrating. Through law, we sometimes describe our societies in terms of rights-bearing individuals acting upon each other, sometimes as goods, services and capital crossing frontiers. Sometimes we describe the world of political alternatives in terms of environmental degradation, globalisation of democracy, a place of terror or one of sexually transmitted disease. We situate events sometimes in national histories, sometimes in world history. Each such telling is an intervention in the world that makes some things visible, renders other things invisible.

The boxes of which I have spoken consist of more or less firmly rooted vocabularies, preferences institutionalised as parts of what lawyers do, and ideas about how they ought to be educated. Although they are part of

international law, they do not exhaust its meaning. As a practice of “moral politics” I see international law as a project that uses those vocabularies -and other vocabularies- in order to tell stories that seek to appeal to everyone, that keep alive and strengthen the ideas of freedom, equality and universality – and all the familiar virtues of the “inner morality of law”. These ideas cannot be reduced to institutional architectures or particular projects, but they cannot be upheld without such institutions and projects, either. But when an institution becomes “part of the problem”, and projects freeze into systems of preference, it is time for international lawyers to take a distance from the institution and to re-imagine the project.

Kant thought that enlightenment would bring about a universal federation of free republics, ruled by law. Whether this prognosis is realistic or not is not the point. Rather, what is important is the accompanying use of law to express a particular kind of critique of present politics. The *ancien régime* existed for the privilege of particular estates; the Revolution, as Sieyès put it, upheld the rights of the “universal estate.”<sup>[40]</sup> For Kant and other sympathizers, the historical meaning of the Revolution lay in the entry into politics of the “regulative idea” of universality. This is why it was not simply one more episode in the ebb and flow of dynastic struggles. A qualitatively novel form of political order was being created that set as its horizon the liberation of humanity itself. This effect, this aesthetic effect, was brought about by a new political language. The extreme inequality of a society of estates was articulated and attacked by the vocabulary of the rule of law.

The virtue of international law lies in such a universalizing focus, allowing political injustice to be shown and condemned as a universal wrong, not only of concern to the immediate victims but of concern to “all”. Any such wrong may of course be explained by historical causes and described in economic or sociological terms. But a vocabulary of universal law is needed to make the point, for example, that an imperial war in the Middle East violates more than the interests or benefits of its victims, that it is an objective wrong, or concern to everyone. The same is true of the danger of radioactive pollution in the North Sea. There may be an interest to narrate it as a violation of a regional bargain. But there is certainly also an interest in describing it in its world-historical significance – as part of some larger violation, a structure of power and a system of global preferences that is of concern to all, for which the appropriate context is not the limited interests of Irish fishermen nor even the legislators in Brussels, but humanity tout court. The point of international law -and thus of legal education, here at the European University Institute and elsewhere- is to provide this perspective.

\* Professor (Academy of Finland), Professor of International Law (University of Helsinki), Hauser Global Professor of Law, New York University School of Law, former member (2002–2006), International Law Commission (United Nations). The text of this piece is taken from the Opening Lecture of the Academic Year 2006-7 at the European



University Institute, Florence.

[1] ECJ, Case C-459/03, 30 May 2006.

[2] See in particular, H. TRIEPEL, *Völkerrecht und Landesrecht*, Leipzig, Hirschfeld, 1899.

[3] H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tuebingen, Mohr, 1920.

[4] ECHR, *Bankovic and others v. Belgium and 16 Other Contracting States* [admissibility], 12 Dec. 2001, ECHR 2001-XII, § 82. See also ECHR, *Loizidou v. Turkey*, 18 Dec. 1996, ECHR 1996-70, § 52.1.

[5] European Communities - Measures Concerning Meat and Meat Products (Hormones), 13 Feb. 1998, WT/DS26/AB/R, WT/DS48/AB/R, §§ 123-125.

[6] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, Rec., 226.

[7] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, Rec., 130, §§ 86-113.

[8] International Tribunal for the Law of the Sea, *MOX Plant case*, Request for Provisional Measures Order [Ireland v. the United Kingdom], 3 Dec. 2001, ILR, 2005, p. 273, § 50.

[9] *Ibid.*, pp. 273-274, § 51.

[10] D. KENNEDY, "Tom Franck and the Manhattan School", *NYU-J.Int'lL&Pol.*, 2002-2003, p. 399.

[11] See E. KAUFMANN, *Das Wesen des Völkerrechts und die Clausula 'rebus sic stantibus': Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe*, Tübingen, 1911.

[12] European Communities-Measures Affecting the Approval and Marketing of Biotech Products, 29 Sept. 2006, WT/DS291-293/R, p. 335, § 7.74. On the general problem, see C. McLACHLAN, "The Principle of Systemic Integration and Article 31 § 3 (c) of the Vienna Convention", *ICLQ*, 2005, pp. 279-320.

[13] See Human Rights Committee, General Comment No. 24, relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994, UN Doc., CCPR/C/21/Rev.1/Add.6, reprinted in UN Doc. HRI/GEN/1/Rev.6, at p. 161, § 11; ECHR, *Belilos v. Switzerland*, 29 Apr. 1988, Series A, Vol. 132, § 50.

[14] See ICTY, Appeals Chamber, *Tadic Case*, IT-94-1-A, Judgement, 15 July 1999. See also ILM, 1999, pp. 1540-1546, §§ 115-145.

[15] ILC, Draft Report of the International Law Commission on the Work of its Fifty-Eighth Session, Chapter VI: Shared Natural Resources; Draft Articles on the Law of Transboundary Aquifers adopted by the Commission on First Reading, A/CN.4/L.694/Add.1, 4 July 2006.

[16] Draft Article 5 § 2, *ibid.*, p. 4.

[17] Draft Article 5 § 2, *ibid.*, p. 4.

[18] For an early twentieth-century suggestion to deal with international law in a constitutional way, see A. VERDROSS, *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna, Springer, 1926. Today, Christian Tomuschat writes of international law as a "comprehensive blueprint for social life" in his "International Law: Ensuring the Survival of Mankind on the Eve of A New Century", *RCADI*, 2001, Vol. 281, pp. 63-72. See also the commentary and elaboration in A. VON BOGDANDY, "Constitutionalism in International Law. Comment on a Proposal from Germany", *Harv.Int'lL.J.*, 2001, pp. 223-242. For a Francophone version, see P.-M. DUPUY, "L'unité de l'ordre juridique international", *RCADI*, 2002, Vol. 297, especially pp. 269-313 (on *jus cogens*). See also S. KADELBACH, "Ethik des Völkerrechts unter Bedingungen der Globalisierung", *ZaöRV*, 2004, pp. 1-20; and E.



DE WET, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", *Leiden Journal of International Law*, 2006, pp. 611-632.

[19] As articulated, e.g., in T.R.C. ALLEN, *Constitutional Justice. A Liberal Theory of the Rule of Law*, Oxford University Press, 2001, pp. 21-25.

[20] *Georges Pinson Case (Fr. v. Mex.)*, *R. Int'l Arb. Awards*, 1928, No 5, p. 422.

[21] *Appellate Body, United States - Standards of Reformulated and Conventional Gasoline*, 20 May 1996, *WT/DS2/AB/R*, *DSR* 1996-I, p. 16.

[22] *Panel Report, Korea - Measures Affecting Government Procurement*, 19 January 2000, *WT/DS163/R*, § 7.96.

[23] In the *Bankovic Case* (1999), the European Court of Human Rights "recall[ed] that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention's special character as a human rights treaty. The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms part" [*Bankovic v. Belgium and others*, at p. 351, § 57; references omitted]. For a discussion, see L. CAFLISCH and C. TRINDADE, "Les conventions américaine et européenne des droits de l'homme et le droit international général", *RGDIP*, 2004, pp. 5-63.

[24] *Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law*, Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi *A/CN.4/L.682*, 13 April 2006. The way allegedly "self-contained" regimes link to general international law is discussed on pp. 65-101. The 42 conclusions prepared by the Study Group on the question of fragmentation on the basis of the 'Analytical Report' are contained in *Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission*, *A/CN.4/L.702*, 18 July 2006, pp. 7-25.

[25] For two more recent examples in a burgeoning literature, see, A. LINDROOS and M. MEHLING, "Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO", *EJIL*, 2005, pp. 857-878; B. SIMMA and D. PULKOWSKI, "Of Planets and the Universe: Self-Contained regimes and International Law", *EJIL*, 2006, pp. 483-530.

[26] For the inconclusive discussion in international law of the status of regional vs. universal regimes and for the conclusion on 'general law'/'special law' relations see 'Analytical Report', *supra* note 24, pp. 102-115.

[27] See especially 'Conclusions', *supra* note 24

[28] See especially B. FASSBENDER, "The United Nations Charter as a Constitution of the International Community", *Col.J Transnat'l L.*, 1998, pp. 530-619.

[29] This is why international constitutionalism has always been dependent on the constructive efforts of the international law profession.

[30] For the political significance of this linguistic transformation, see my "Miserable Comforters. International law as New Natural Law", in P. KORKMAN, *Universalism in International Law and Political Philosophy*, 2007 (forthcoming).

[31] For a useful discussion of the two streams of German natural law in the 18th century, see I. HUNTER, *Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany*, Cambridge University Press, 2001.

[32] The text below follows largely my "Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization", *Theoretical Inquiries in Law*, 2007, pp. 9-36.

- [33] I. KANT, *Critique of Pure Reason* [1781], Vasilis Politis, Everyman's, 1991, pp. 140-141, A132-34.
- [34] See, I. KANT, "Perpetual Peace", in *Political Writings*, 2nd ed., Hans Reiss, Cambridge University Press, 1991, pp. 107-108.
- [35] For this link, see A. TOSEL, *Kant révolutionnaire : Droit et politique*, Paris, PUF, 1990, pp. 19-21.
- [36] I. KANT, *Perpetual Peace*, at pp. 118-1121.
- [37] *Ibid.*, p. 123.
- [38] *Ibid.*, pp. 116-125, especially at p. 122.
- [39] I. KANT, *Critique of the Power of Judgment*, Paul Guyer, Cambridge University Press, 2000. For the suggestion that the Third Critique forms the core of Kant's political theory, see especially H. ARENDT, *Lectures on Kant's Political Philosophy*, Chicago University Press, 1982. But see also A. RENAUT, *Kant aujourd'hui*, Paris, PUF, 1997, pp. 405-415.
- [40] E.J. SIEYES, *Qu'est-ce que le Tiers-État*, Roberto Zapperi, Genève, Droz, 1970, especially pp. 125-126.

## **A DOCTRINAL DEBATE IN THE GLOBALISATION ERA: ON THE “FRAGMENTATION” OF INTERNATIONAL LAW**

Pierre-Marie Dupuy\*

*The fragmentation of international law is not proven, even if the dangers of its realisation are, according to some commentators, certain; but this idea already constitutes a common point, a way of thinking, within academic theory, where it has become a phenomenon in itself. It is thus appropriate to restate the reasons for, and even more so to examine the object of, the concept of a legal order as it applies to international law. The stakes of the debate on the unity or fragmentation of international law are even higher as they involve not only legal, but also political, considerations. However, the core of the problem of unity and fragmentation, which is primarily technical, is well-defined by the International Law Commission's recent study of the topic, even if its assessment is definitively based on the invocation of well-established principles.*

On the 27th October, 2000, the President of the International Court of Justice addressed the General Assembly of the United Nations. He was, like every year, to present the Assembly with the annual report of the principal judicial organ of the United Nations. However, the national delegations gathered that day did not receive a banal administrative plan. Rather, a warning was delivered, if not a cry of alarm. The unity of what President Guillaume spontaneously termed the ‘international legal order’ was at risk of being challenged to give way to ‘fragmentation’. This danger had already been identified in the preceding years by various commentators;<sup>[1]</sup> however, the remarks of the President of the Court in 2000 placed this increasing preoccupation on an official footing, and served as proof that it was no longer a purely academic concern. Since then, the issue of the ‘fragmentation’ of international law seems to have become one of the questions which have most engaged scholars, particularly in Europe and North America. It has been the subject of innumerable conferences, seminars, books, articles and commentaries. The present author, having himself dedicated a research project at the European University Institute as well as a general course given at the Hague Academy of International Law to the topic,<sup>[2]</sup> would be misplaced to criticise what, among the admittedly small community of international law scholars, is taking the shape of a social phenomenon: the question of the fragmentation of international law constitutes the leading academic debate in the era of globalisation. Faced with what tends to be regarded as commonplace, there is however room to be vigilant. The growing number of participants in a relatively complex debate is not necessarily a measure of how well it has been clarified or understood.

In an attempt to define more precisely the essential contours of this issue, we will examine succinctly (I) the causes of the debate on fragmentation, (II) the core of this debate, (III) the purposes of maintaining the unity of the

international legal order, and (IV) reach conclusions on the substantive problem presented.

## I. THE CAUSES OF THE DEBATE ON FRAGMENTATION

There are several reasons why this debate on fragmentation has arisen. Some are technical; others political and cultural. Here we will concentrate on the former; the latter will be discussed in the course of examining the purposes of such a debate. There are mainly two technical causes which have given rise to a fear that international law is in the course of fragmentation. Both causes are linked to the general phenomenon of the ongoing expansion of international law's material scope. The first, normative, stems from the tendency towards greater autonomy of special regimes, the second, organic and institutional, is based on the growth of methods and procedures of control (not all judicial), which ensure the application of law.

### 1. *The illusion of self-contained regimes*

Here, we see at once the appearance of a spectre long raised by commentators, that of self-contained regimes, a sort of Leibnitzian monad transposed into international law, namely entities conceived of as completely autonomous and floating freely in the legal ether.<sup>[3]</sup> For advocates of the existence of such systems, these entities would indeed maintain no relation with general international law as they no longer have any reasonable need of it. They would themselves provide, using their conventional instruments, for all their needs; *lex specialis* and general international law thus being perceived as standing in a substitutive, rather than a complementary, relationship to one another. These systems are in this way deemed to have their own methods of control to ensure the application of their norms. Frequently, they incorporate their own procedures of revision. Often possessing follow-up mechanisms, they are provided with their own specific regime of sanctions. In this way, freed of all dependence on customary international law concerning primary norms or responsibility as a sanction for their non-execution, they would remain international in their scope of application, but not in the sense of belonging to the pre-existing international legal order.

The self-contained regime, whose initial invocation arose from an incorrect interpretation (nourished by a manifest ignorance of the legal reasoning of the International Court of Justice in its decision concerning the *US hostages in Iran*),<sup>[4]</sup> has itself long formed part of academic debate. This legal ectoplasm has already cast its shadow in diverse fields where the law is moreover in the course of expanding.<sup>[5]</sup> First spotted on the terrain, though customary, of the law of diplomatic relations, some commentators have identified its arrival on the newly emerging law of international trade; others have perceived it in the field of European Community law; while many, depending on their preferences or their area of research, have signalled it in

relation to human rights, environmental law and various branches of international economic law.[\[6\]](#)

However, none of the theoretical justifications advanced by those who identify special regimes wherever it suits them stand up to analysis. Even when a sub-system of law is original in terms of its secondary norms of recognition, enactment and adjudication, to use the terminology of H.L.A. Hart, it does not necessarily become cut off from the body of governing principles. This is particularly true of the interpretation of international obligations, especially those arising from conventions. For example, we have seen in other respects how international trade law, under the aegis of the WTO appeal panel, and also international environmental law, investment law, and even European Community law, have preserved substantial and fundamental links with, and remained connected to, the international legal order.[\[7\]](#) To take human rights as an example (and here one can agree with those who denounce *droit de l'hommeisme*), they do not constitute an autonomous field of law distinct from international law, but remain an evidently integral part of it. None of these bodies of law can be applied and interpreted in a clinical vacuum, to borrow the parlance of the WTO appeal panel concerning international trade law.[\[8\]](#) Being part of the international legal order, it is there that these particular norms are interpreted, and the inevitable gaps in their specific regimes of secondary norms are filled in order to ensure their application.

In other words, it is one thing to note the emergence of various sub-systems in international law, each possessing its own institutions and substantive law, according to the provisions of particular agreements. It is another to entertain the illusion that each sub-system is independent from the general normative framework constituted by the international legal order. Contrariwise, these special regimes draw on general international law for responses to certain questions, illustrating the incompleteness of the special body of rules on which they are based.[\[9\]](#) Fragmentation is thus not readily apparent when this is considered. As we will see later, and as the International Law Commission has recognised, the increasing power of the relative autonomy of *leges specialia* instead demands the development of new approaches to resolving conflicts between international norms.[\[10\]](#)

## 2. *The proliferating control mechanisms for the application of law*

The second technical cause which has provided fodder for a theory of fragmentation is not only normative, but also institutional. Moreover, it is in large part connected to the appearance and development of the convention-based sub-systems just described, and was the focus of the President of the International Court of Justice's address in 2000. The warning given that day was essentially linked to an organic phenomenon: the contemporary multiplication of international jurisdictions, and the correlative risk that contradictory international jurisprudence would appear. A particular

regional human rights court, or a specialised judicial (or quasi-judicial) organ, might thus interpret the growing number of rules of general international law in a different manner to the ICJ itself. Notwithstanding the principle of relative effect of the Court's judgments established by Article 59 of its Statute, everyone accepts that its judicial interpretations are for the most part binding on all the subjects of international law. In this regard, the Court certainly plays a central role in ensuring unity of interpretation in international law; it is this function which therefore appears most threatened. It is thus clear, in effect, why the President of the ICJ has become justifiably concerned by this matter. This preoccupation stems from the quite entrenched (and, it would seem, voluntarily dissident), approach which the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, then under the presidency of Professor A. Cassese, took in the *Tadic* case to the ICJ's jurisprudence on the conditions of State responsibility for the actions of an armed militia and the criterion of control which must be established.<sup>[11]</sup>

The continuation of sufficient unity in the international normative system will effectively depend in future on the perception which judges have of the existence and coherence of such a system as well as their actual knowledge of its content. International criminal tribunals (including, henceforth, the International Criminal Court), as well as the Tribunal for the Law of the Sea, courts and supervisory bodies for human rights, the WTO appeal panel, arbitration tribunals (not forgetting those of ICSID and NAFTA) who are now making regular use of international law, and finally, the entire cohort of follow-up mechanisms, are embarking on a common legal voyage. They must act cautiously and concertedly if they do not wish to capsize their vessel. To employ another metaphor, they all speak a language in which the common grammar is international law.

Other causes, of a strategic, ideological and even cultural character, should also be recognised, even if they fit less easily within a legal analysis. They are in reality linked to the stakes of the debate, which expand beyond the restricted domain of specialists of international law.

## **II. THE CORE OF THE DEBATE ON FRAGMENTATION**

Everyone speaks of the fragmentation of international law, but this expression only has meaning if it encompasses not only the body of rules, but the actual legal order, which is independent of that of States and which asserts itself in an objective fashion with respect to the domestic legal systems. Identifying the phenomenon of fragmentation, or verifying whether this is in fact occurring, is only possible by having regard to the notion of a legal order. What is meant by legal order here, and do all authors speak of the same thing when they suggest (and some would prefer not to have to do so) that this order is threatened by fragmentation? In formulating a response, we will return briefly to the genesis of the concept of a legal order and then its application



to international law.

1. *The genesis of the concept of a legal order*

Here too we should note certain differences, of which we should neither exaggerate the importance nor underestimate the scope, between legal cultures on each side of the Atlantic. To establish and draw upon a system, in an effort to explain the interaction of its constituent elements, is a representation coloured by a particular cultural tradition, and is a way of seeking to explain its functioning by reference to the whole. However, it is also a means of assigning certain objectives to it. In this way, the use of the term legal order appears to be a priori very technical: however, it also plays an evidently metaphorical role.<sup>[12]</sup> As a consequence, the term legal order is an explanatory device, but probably at the same time reflects a certain *Weltanschauung*, simultaneously mixing the ideology of the beholder and the methodological choices inherent to his or her alleged tradition.

Historically speaking, the appearance of the idea of a legal order is a fairly recent one, more particularly so in the sphere of international law.<sup>[13]</sup> The first commentators to invoke this idea emerged in the study of German public law in the first half of the 19th century. They can be found among the successors of the political philosophy of Kant, and later Hegel and Schelling.<sup>[14]</sup> In tandem with the theory of *Rechtsstaat* with which it is frequently associated, the concept of *Rechtsordnung*, referring to the idea of an organic and structural normative whole, first appeared, according to Jean-Louis Halperin, in Julius Stahl's writings from 1830.<sup>[15]</sup>

2. *Application of the concept to international law*

After jurists of internal legal systems, the idea of a legal order first attracted German specialists in private international law, such as Windscheid.<sup>[16]</sup> However, even if previously encountered in the work of Jellinek, the concept of legal order did not really gain ground in the public international legal community until the celebrated work of Triepel<sup>[17]</sup> *Droit international et droit interne* (1899) at the very end of the 19th century.<sup>[18]</sup> It is true that the application of this expression to legal relations between States was until then very limited, due to the stringent opposition of several commentators.<sup>[19]</sup> However, in the same period, the young Anzilotti, having an excellent knowledge of German legal theory, introduced the concept of legal order in his writings on private international law.<sup>[20]</sup> He later appeared to have no hesitation in describing international law as such a system, for example in his academic course, translated into French in 1929 by Gilbert Gidel.<sup>[21]</sup> In Italy, it was, however, Santi Romano who applied this concept to international law in his influential book *l'Ordinamento giuridico*, published in 1917.<sup>[22]</sup> We then find a generalised use of the concept in the work of Roberto Ago on public international law, at least following his course on international law given



at The Hague Academy in 1939.<sup>[23]</sup> Hans Kelsen, for his part, built his theory around this concept from the first years of the 20th century, and applied it almost instantly in an authoritative fashion to international law.<sup>[24]</sup>

In France, however, the concept of legal order appeared relatively late in public law theory,<sup>[25]</sup> in the *Traité de droit constitutionnel* of Léon Deguit, published in 1927.<sup>[26]</sup> In international law, it remained completely unknown at the end of the 19th century in the work of international specialists such as Louis Renault<sup>[27]</sup> and Henry Bonfils.<sup>[28]</sup> It finally appeared in the interwar period in the work of Georges Scelle.<sup>[29]</sup> However, it was not until the publication of Scelle's *Manuel de droit international public*, published in 1948, that its use became widespread.<sup>[30]</sup> Today in France, the term is generally no longer challenged, not even by commentators who are very dismissive of this last author.<sup>[31]</sup>

The concept of a legal order is not ignored by commentators in the English-speaking world though it seems to hold little interest for American academics,<sup>[32]</sup> - at least international scholars. It appears in the legal philosophy of Ronald Dworkin, who is, admittedly, at Oxford and was a colleague of HLA Hart.<sup>[33]</sup> It is evident in the work of Hersch Lauterpacht and Wolfgang Friedman, who are really jurists from an essentially German legal and philosophical background, but are recognised authorities in the Anglo-Saxon world. In Great Britain, however, in addition to Hart's masterpiece *The Concept of Law*, Joseph Raz dedicated an entire book to the idea of a legal system.<sup>[34]</sup>

Nevertheless, English international specialists themselves use the term much less frequently<sup>[35]</sup> than contemporary German international academia, where it is often linked to the idea of a constitution, with particular reference being made to the UN Charter.<sup>[36]</sup> If conceptions of a legal order vary significantly between authors, all agree that the expression refers to the organisation of a more or less complex system of norms and institutions intended effectively to apply to the constitutive subjects of a determined community.<sup>[37]</sup>

If one remarks on the recently increasing academic recourse to the concept of an international order, moreover now intertwined with considerations of its fragmentation, it is necessary to realise that this use of a generic notion of order is more than a device of language. More frequently, the use of this term flows from the following observations: firstly, that although some of its initial characteristics survive, the structure of international law is now (and for at least fifty years has been) supported by a growing number of elements: such as an ever thicker tapestry of general multilateral treaties enshrining its rules and basic principles; several hundred international organisations which themselves produce a substantial body of secondary law; an increasing body of case law, whose overlap and accumulation gives a density and complexity to international law, in which commentators must seek to demonstrate an

intrinsic coherence, on the one hand apparent and on the other hidden. Caused to panic by the breadth and complexity of this task, some of them prefer to dissemble the whole into pieces and speak of the inexorable fragmentation of international law. So what are nonetheless the purposes of maintaining unity?

### III. THE PURPOSES OF MAINTAINING THE UNITY OF THE INTERNATIONAL LEGAL ORDER

An international legal order can only exist as long as it guarantees to its subjects a unity which is sufficiently organic and substantial to serve as an effective framework for their international relations. The question of maintaining its unity presents a two-sided issue in which none of the elements are always immediately clear. The first facet is technical and legal. The second facet is political, but that is no reason to disregard it.

#### 1. *Technical aspects*

In several leading works,<sup>[38]</sup> Pierre Legendre showed, in magisterial fashion, how Western legal thought remained branded with the mark of scholastic thought. We have inherited, via Thomism, the Roman conception of law as laid down by the Justinian Code. If one agrees briefly to locate oneself within a critical perspective (as the Critical Legal Studies movement would have you do), one could ask whether, in spite of the triumph of positivism in the 20th century, in its voluntarist and normativist forms, a successor of scholastic thought and natural law cannot be found in this irrational fear of losing the centre, the initial source of all legal meaning, a unique origin from which the meaning of the whole would flow; an essential source in which, rather ironically, Kelsen's *Urnorm* would be nostalgically manifest. It is here that legal and theological thought are reunited in our background consciousness, the former having served as a support for the latter throughout fifteen centuries of a Christianity integrated into State religion, before itself having generated a religion of the State. The mere passage of several decades cannot erase such a profound mark on legal thought.

How do we respond to this? This influence has in fact remained, but it is testimony of a continuing need, no longer theological, but simply logical, for a centre. While Dionisio Anzilotti, in his course on international law in 1929, described a legal universe totally conditioned by the sole will of sovereign States, he recognised the alterity of an international legal order in relation to sovereigns, although they would be both the authors and subjects of such an order.<sup>[39]</sup> He also acknowledged, following the example of Kelsen (whose work he was very familiar with), the necessity of a basic norm, which he qualified – in a meaningful way – as metaphysical, and thus, as such, escaping from legal analysis. As for Kelsen himself, the role of this same norm in his work is well-known; even if, throughout his existence, he uses different

foundations or terminology for this norm.<sup>[40]</sup> Moreover, Kelsen insisted several times that a legal order could not exist without unity. Following on from this, he distinguished two categories of legal system, one static and the other dynamic, a fertile distinction which will not be explored further here.<sup>[41]</sup>

Firstly, why unity in the technical sense of the term? Above all, unity is required for the sense, that is to say both the direction and the meaning, of a system articulated in terms of norms, subjects and sanctions. To take one of several examples: the expression ‘international responsibility’ should have the same object and meaning, regardless of the obligation whose violation it refers to. This remains the case even if the particular type of international responsibility has different forms, and even different foundations, within the system of application concerned. In this manner, we see how the dictum of the I.C.J. in the *Lotus* case on the obligation of reparations for damage caused by the illegal acts of a State is inexorably invoked in the writings of authors, and even more so, in the pleadings of parties before the Court or any arbitration tribunal hearing a case on responsibility, either between States or transnationally. An omnipresent *Leitmotiv*, whatever the field of application, this *Lotus* adage concerning the obligation of reparations thus exemplifies the unity of sense given both to a term, and to the legal institution to which it refers, responsibility.

One could give numerous examples showing the link between the technical and social necessities of ‘maintaining order’, meaning here the unity of the international legal order. From this latter viewpoint, if ideas such as the ‘nullity’ of legal acts, ‘recognition’ (of a State, a government or a legal situation), ‘acquiescence’, of ‘territorial sovereignty’, ‘legal title’, ‘nationality’, ‘diplomatic protection’ and the rules encompassed by these terms acquired a different meaning according to their geographical or material scope of application, the very security and efficacy of relations governed by international law would be severely challenged. The unity of application of international law is, like the application of Community law in the framework of the European Union, a condition of both its efficacy and its survival, nothing less than that.

Nowadays, as illustrated by the comparative jurisprudence of contemporary international legal (and quasi-legal) tribunals, there is a constant interpenetration between the application of general international law and the rules of special international regimes. As the latter can only be defined by reference to the former, general international law provides the conceptual, linguistic and instrumental framework facilitating the application, even if it is a derogation therefrom, of special rules. Moreover, it is especially striking to note that particular areas, such as the law governing relations between States and foreign private investors (long disputed by competing systems of rules), now have increasing resort to the application of rules and principles of general international law, which provides with both the sense and scope of such laws.

In a time when one speaks more and more of fragmentation, here it is rather more appropriate to speak of unification under the banner of international law.<sup>[42]</sup>

The paradox of all legal systems, which is but a fictitious one, is the following: the very idea of a legal order depends in part on a subjective base provided by the recognition of its existence by the subjects and entities concerned.<sup>[43]</sup> However, once this 'contractual' base (in the wider sense that the subjects and entities are persuaded, by convention and general social assent, of its existence) is constituted, the system acquires a quasi-objective dimension: its existence is obvious to all, provided that it can adapt to the needs of the community governed. This adaptation is the respective task of legislators (here, States acting by way of treaty and also by the progressive accumulation of declarations reiterating the appearance of a new *opinio juris*, as well as judges and arbitrators.

In this regard, one is probably closer to Santi Romano than to Kelsen, as the former made use of the old adage *Ubi societas, ibi jus* as the foundation of his theory of *l'ordinamento giuridico*.<sup>[44]</sup> However, as stated earlier, the master of Vienna himself did not conceive of a legal order in the absence of unity of principle and structure. In his theory of dynamic systems, what is thus at stake is not only the unity of meaning of key principles and concepts, but the attribution of their validity to norms, and to the legal situations governed by those norms.<sup>[45]</sup>

This being the case, we understand that the struggle against the fragmentation of the international legal order is not a vain crusade led by an exhausted troop of neo-conservatives. It is simply the result of a realisation, initially empirical, by legal practitioners, judges, State legal advisors and even civil society actors concerned with law, that we cannot have an international community governed effectively by law if there is not a common understanding of its terms.

Academic comment, for its part, mainly arrives after (a little like Offenbach's policemen); and generally a little late, whether it is mainstreamed, critical, or a post-modern version...let us be indulgent with scholars, however. It also has its role to play. Scholarly analysis is useful, not only in terms of interrogating its own legitimacy, as Critical Legal Studies sometimes usefully does, but primarily to fulfil a technical function: to contribute to the intelligibility of a normative edifice of arborescent complexity, and whose entangled ramifications are in a constant state of development. As it is the coherence, and thus the unity, of the international legal order which gives meaning to norms and institutions, authors should, as a matter of functional exigency, firstly act as guardians of unity in the technical analysis of norms and of their interpretation by those who created them.<sup>[46]</sup> Again, this does not rule out questioning the ideological origins of a particular legal discourse, contrary to what the classical positivist school itself has long believed (even

though, as Norberto Bobbio has shown, positivism itself is possessed not only of a theory and a method, but also of an ideology).<sup>[47]</sup>

## 2. *Political considerations*

The question of maintaining unity is not only of interest to academics. It is also a practical and political question, in the most direct, if not trivial, sense of the term. Save for deliberate exceptions, all treaty regimes and special rules of international law, limited to a specific object, can be rejected by sovereign States. A treaty can be repudiated. However, one cannot reject a legal system of which one is not only the subject but also, among two hundred others, the author. Challenging the unity of the international legal order by spreading the idea of its fragmentation, creates a doubt over both its existence and its survival, caused by the casual affirmations of 'realists', who have probably never worked in an international firm or participated in the negotiation of an international convention. In a slightly amended form, fragmentation would paradoxically verify the fact that, having previously existed, the unity of international law has not in reality resisted the proliferation of the overrated 'free-riding' self-contained regimes, which inexorably erode the protective envelope of international law!

Without putting all advocates of a thesis of fragmentation into the same basket, or putting words in their mouths, it is possible to establish a rapprochement at least between some of them and the growing number of commentators, particularly in the United States, who now challenge either the existence or the legitimacy of public international law, in order to contest its ability to constrain the foreign policy options of the world's foremost superpower.<sup>[48]</sup> In each case, why continue to refer to law, since it only serves an à la carte function? The basis of the problem is thus to succeed in safeguarding the unity of interpretation of international law in order to ensure its coherent application.

## **IV. THE BASIS OF THE PROBLEM: SAFEGUARDING THE UNITY OF APPLICATION OF INTERNATIONAL LAW**

At its 58th session in 2006, the International Law Commission concluded its study on the fragmentation of international law by the adoption of conclusions<sup>[49]</sup> to its lengthy report. We have not sufficient space to analyse the details of this document here, but the conclusions merit several remarks. They illustrate once more the restrained distance that may separate optimism from pessimism! In an accomplished and pertinent commentary in Issue 1 of 2007 of the *Revue Générale de Droit International Public*, Professor Benedetto Conforti, a former judge of the European Court of Human Rights, highlights the heavy and obvious statements (or affirmations of evidence) made by this text and calls into question its very utility. The conclusions seem for the most part content to summarise the well-known rules of interpretation of

international law, and of relations between treaty-based and customary law.<sup>[50]</sup> Nothing is new in these conclusions: they have the character of a somewhat rigid summary of elementary principles.

Nevertheless, several points of merit can be found in these laborious conclusions. This is particularly so if we consider them in relation to the increased study of this topic in recent years. It is also in keeping with the spirit of what we have just remarked upon concerning the cultural differences in international academia that these conclusions should be of interest: precisely because they place a little order on the discussion by limiting their concentration to the basis of the problem, i.e. the interpretation of norms and the relations between *lex specialis* and customary international law. As it constitutes a pedagogical work inviting commentators to return to basics, the International Law Commission report is probably deserving of our gratitude.

1) The heading of these conclusions itself is careful to reset the context of its subject: it does not speak of fragmentation but of the ‘diversification’ and the ‘expansion’ of international law, which necessarily results in a growing complexity of relations between international rules. Under this heading, the conclusions of the Commission concerning the relationship of self-contained regimes to general international law serve as a useful clarification. Subject to the same conditions as any *lex specialis*, these regimes can certainly derogate from international law, but international law preserves its entire validity. In particular, it is called upon, as noted above, to fill the inevitable lacunas in these regimes. It can also serve as a substitute where these particular normative constructions have demonstrably failed.<sup>[51]</sup> That is self-evident for any well-informed international specialist, but it is probably as well to state it explicitly!

In this way, the problems, mistakenly discussed using the equivocal term of ‘fragmentation’, are not denied by the ILC’s text. However, they are resituated within their correct dimensions and their appropriate context. Within this re-adjusted framework, interesting observations are made on the use which should be made of the rule established by Article 31.3 (c) of the Vienna Convention on the Law of Treaties, according to which a provision of a convention should be interpreted by taking account of “any relevant rules of international law applicable in relations between the parties.”<sup>[52]</sup> The increasingly successful reference to this provision in international jurisprudence, including that of the International Court of Justice, is well-known.<sup>[53]</sup>

2) The second interesting point made by these conclusions is that they affirm, strongly and clearly, that there exists an order or system of international law. In this regard, the first conclusion of the report deserves to be quoted in part:



“International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms.”

This seems evident to those, including myself, who have been raised in this vision of international law. However, it serves as a highly useful restatement to those who negate both the validity and existence of international law, for whom the theme of ‘fragmentation’ allowed a means of continuing the old refrain of its inexistence. One could hardly have wished for a stronger reaffirmation of the unity of international law. Having personally dedicated almost 500 pages to illustrating this unity several years ago, I can only approve of the clear stance adopted by the UN body for the codification of international law.

3) The third source of satisfaction derived from reading the conclusions reached by the ILC in 2006 stems from the fact that they also directly affirm the existence of peremptory norms of international law, and identify a large part of their content, pointing out that the usual rules for resolving conflicts between norms are not applicable in this instance. In particular, conclusion 32 provides:

“A rule of international law may be superior to other rules on account of its content as well as the universal acceptance of its superiority. This is the case of peremptory norms of international law...”

Here again, we can only regard such an affirmation as the enunciation of a truism. However, we know that the oppositions of principle to the recognition of peremptory norms remain numerous, at least in certain countries, and it was not until February 2006 that the International Court of Justice itself decided to recognise the existence of *jus cogens* norms.<sup>[54]</sup> This obvious finding of the ILC, although it is but a reference to a convention provision of nearly forty years’ standing (Article 53 VCLT), serves in any case to prove that contemporary international law is not principally threatened by the fragility of its supposed fragmentation. In fact, it is animated by an inherent tension between two competing unitary principles, which are in certain respects contradictory.

Having already explained elsewhere the ‘theory of the two unities’,<sup>[55]</sup> I will limit myself here to an exposition of its two axes. The first is that of the formal unity of international law as a legal order. It refers to the fact that general international law is composed of a certain number of formal rules, all secondary norms pursuant to Hart’s theory: they govern the conditions of production of primary norms, their application, their revision and sanctions for their breach (the rules of State responsibility). These rules are precisely those which are called upon to complete or supplement those of special international



law (*lex specialis*), whether the latter crystallise or not into a legal sub-system, misleadingly described as ‘self-contained’. Since the adoption of the United Nations Charter, which possesses, in this regard at least, a material constitutional dimension,<sup>[56]</sup> there exists a second principle of unity: the substantive or material unity, as shown by the existence of peremptory norms, which relates to the content of such norms and not merely their form. However, these two types of unity both obey distinct logics. The first logic, that of formal unity, is found in the principle of identity. Here, for example, a treaty is negotiated and responsibility is established generally in the same way, regardless of the content of the particular norm. The other, characterising substantive unity, corresponds to a hierarchical logic; not the lateral one of identity, but the vertical one of authority. These two logics happen to contradict with one another because the social importance accorded to a norm causes it, even outside any treaty-based framework, to derogate from the rule. The issues of reservations and accession to human rights treaties, State immunity and head-of-State immunity, confronted by the systematic pursuit of those responsible for “crimes of international law”<sup>[57]</sup> such as genocide, torture or systematic rape, are more than illustrations of these relations in the foundations of international law, tugged between obedience to State sovereignty and the affirmation of fundamental human rights. The character of imperative norms, as the ILC’s conclusions point out, is to prevail in all cases over norms which are merely obligatory.

In recognising this phenomenon, the text adopted by the International Law Commission is not a work of progressive development. It limits itself to taking account of positive law, as it has developed pursuant to Article 53 of the Vienna Convention on the Law of Treaties, even though close to eighty States have not ratified this Convention. However, the persistent opposition of these States to the system created by the Convention for the interpretation and application of such norms (Articles 64 and 66) is one thing. It is another to note that the doctrine of *jus cogens*, led by State practice and its increasing recognition in international jurisprudence, has greatly altered the very structure of international law as a legal order, in spite of the fact that the values affirmed by these norms remain so often disregarded. The equal necessity of placing order on the manner in which this jurisprudence refers to *jus cogens* is not in doubt, but is another issue, already dealt with elsewhere.<sup>[58]</sup>

The ILC’s conclusions will certainly not close the debate on fragmentation, an academic leitmotiv in an era of globalisation. However, they will allow the debate to regain its true dimension, and thus pay a service to an academic discussion where too many of the participants were probably leading themselves astray.

---

## REFERENCES

\* Chair in public international law, European University Institute and University of Paris II (Panthéon-Assas). Translation to English by Claire McHugh, BCL, LLB, LLM(EU), with the collaboration of Karine Caunes, LLM (European Academy of Legal Theory), doctoral Candidate (EU), Lecturer ATER (Université Paris X)

[1] Among the most prescient works, see in particular K. WELLENS, "Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends", 25 N.Y.I.L., 1994, p. 3637; among the most prescient studies, see particularly I. BROWNLIE, "Problems Concerning the Unity of International Law", in *Le droit international à l'heure de sa codification, Etudes en l'honneur de Roberto Ago*, Vol. 1, Milan, Giuffrè, 1987, pp. 156-ff; M. PEREZ GONZALEZ, "En torno a la tension entre lo general y lo particular en Derecho de gentes", in *Homenaje al Profesor Alfonso Otero*, Santiago de Compostela, 1981, pp. 665-685; P.M. DUPUY, "Sur le maintien ou la disparition de l'unité de l'ordre juridique internationale", in *Harmonie et contradiction en droit international (Rencontres internationales de la Faculté des sciences juridiques, politiques et sociales de Tunis, Colloque des 11-13 avril 1996, Paris, Pedone, 1996, pp. 17-54*. See also O. CASANOVA, *Unity and Pluralism in Public International Law*, Martinus Nijhoff Publishers, 2001, p. 272; "The Proliferation of International Tribunals: Piecing Together the Puzzle", NYJIL, Vol. 31, 1998-1999, pp. 679-ff; "Diversity or Cacophony: New Sources of Norms in International Law", MichJIL, Vol. 2003-2004, pp. 845-ff; of recent works, see in particular A. GATTINI, "Un regard procédural sur la fragmentation du droit international", RGDIP, 2006/2, pp. 303-336; K. WELLENS and R. HUESA-VINAIXA, *L'influence des sources sur l'unité et la fragmentation du droit international*, Brussels, Bruylant, 2006. Introduction by P.M. DUPUY.

[2] P.M. DUPUY, *L'unité de l'ordre juridique international*, RCADI, 2002, Vol. 297.

[3] See P.M. DUPUY, *o.c.*, pp. 432-438; B. SIMMA, "Self-contained Regimes", NYIL, Vol. 16, 1985, pp. 111-ff; see also B. SIMMA, D. PULKOWSKI, "Of Planets and the Universe: Self-contained Regimes in International Law", EJIL, 2006, pp. 483-ff.

[4] See the reports of the Special Rapporteur to the ILC, W. RIPHAGEN, ACDI, 1982, I, pp. 200-ff and the merited criticisms of the subsequent Special Rapporteur, G. ARANGIO-RUIZ, ACDI, 1991, II, Chapter VIII, 1992; II, Chapter VII, §§ 97-126.

[5] See P.M. DUPUY, "L'unité de l'ordre juridique international", *Cours général de droit international public*, RCADI, 2002, Vol. 297, pp. 432-450.

[6] *Ibid.*

[7] *Ibid.*, pp. 450-ff.

[8] See the first report of the WTO Appeal Panel, 29 April 1996, p. 9; G. MARCEAU, "A Call for Coherence in International Law – Praises for the Prohibition Against 'Clinicum Isolation' ", *WTO Dispute Settlement Journal of World Trade*, 1999, No 5, pp. 87-152.

[9] Put simply, to be able to take into account the existing links between general and special rules of international law, one shouldn't confine one's legal knowledge to a narrow domain of specialisation (trade, health law, intellectual property or crisis prevention) or have a thorough but isolated knowledge of refugee or environmental law, while believing that it is not necessary to also understand international law itself.

[10] ILC, 58th Session (2006), "Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law", Report of the Study Group, Doc. A/CN.4/L.682 (hereinafter cited as Report of the Study Group).

[11] Compare, in particular, §§ 108, 109 and 115 of the decision of the ICJ of 27 June 1986 between Nicaragua and the United States (Rec., 1986) and the second decision of the Appeal Chamber of the ICTY in the Tadic Case, IT-94-I-T, 15 July 1999, §§ 112-114.

On this divergence in jurisprudence, see especially C. KRESS, “L’organe de facto en droit international public”, *RGDIP*, 2001/1, pp. 93-144.

[12] See G. TIMSIT, “L’ordre juridique comme métaphore”, *Droits*, Oct. 2001, pp. 3-18.

[13] In this regard, see the stimulating article of D. ALLAND, “De l’ordre juridique international”, *Droits*, Oct. 2002, pp. 79-101.

[14] See J.L. HALPERIN, “L’apparition et la portée de la notion d’ordre juridique dans la doctrine internationaliste du XIX<sup>ème</sup> siècle”, *Droits*, Oct. 2001, pp. 41-51; see also N. LUHMANN, “L’unité du système juridique”, *Archives de philosophie du droit*, 1986, pp. 163-188. For a historical overview of German public law theory, the indispensable work is that of M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, München, 1992, particularly Vol. 2. See also J.F. KERGEVAN, “L’Etat après Hegel: Le dépassement social et politique”, in S.GOYARD-FABRE, *L’Etat moderne, 1715-1848*, Paris, Vrin, 2000, pp. 294-ff.

[15] J.L. HALPERIN, o.c., p.43.

[16] Windscheid, *Recht und Rechtswissenschaft*, 1854. See M. STOLLEIS, o.c., Vol. 2, pp. 156-ff.

[17] This work was not translated into French until 1920: H. TRIEPEL, *Droit international et droit interne*, French translation, Paris, Brunet, 1920. In any case, it is hardly surprising that this concept won acceptance in public international law, coming from private international law. The objective of the latter was to examine the conditions of engagement between different domestic legal orders, in order to analyse the rules applicable to conflicts of law. From there, the concept of a legal order became of significance to public international law in examining the relationship between internal rules and international law, and was thus recognised as a singular concept as well as a normative system.

[18] Denis Alland noted that, in this foundational work, one frequently finds the expressions “legal system” and “legal order”, but not yet “international legal order,” even if the author comes very close to recognising this. O.c., p. 80.

[19] Notably Puchta and Adolf Lasson, cited by J.L. HALPERIN, o.c., pp. 48-49.

[20] D. ANZILOTTI, *Studi critici di diritto internazionale privato*, 1898, pp. 128-161.

[21] D. ANZILOTTI, *Cours de droit international*, translation by G. GIDEL, Paris, Sirey, 1929, re-edited by P.M. Dupuy and Charles Leben, Paris, Panthéon-Assas, 1999; see, in particular, p. 44.

[22] Of which only the second edition, dating from 1946, would be translated into French in 1975: S. ROMANO, *L’ordre juridique*, translated by L. François and P. Gothot, Preface by P. Franceskakis, Paris, Dalloz, 1975, §17; “Le concept d’institution et l’ordre juridique international”.

[23] R. AGO, “Le délit international”, *RCADI*, 1939-II, p. 415.

[24] See, in particular, his academic course for the Hague Academy in 1926, “Les rapports de système entre le droit interne et le droit international public”, *RCADI*, 1926-IV, p. 231; see also, his “Théorie générale du droit international public”, presented to The Hague Academy of International Law six years later, *RCADI*, 1932-IV, p. 117.

[25] For an analysis of the reasons for this divergence, see the observations of J.L. HALPERIN, o.c. pp. 45-47. In the work of an author such as R. CARRE DE MARLBURG, it is clear that the State in fact conformed to the definition of a legal order, even if he himself didn’t ordinarily employ this term. See his *Contribution à la théorie générale de l’Etat*, Paris, Sirey, 1920, reprint C.N.R.S., 1962, Vol. 1, p. 194-ff. See also J. CHEVALLIER, “L’ordre juridique”, in *CURAPP, Le droit en procès*, Paris, PUF, 1983, pp. 7-49.

[26] L. DUGUIT, *Traité de droit constitutionnel*, Vol. 1, Ch. III, § 31, p. 326. J.L. Halperin notes however the use of the concept by Fr. Gény, in a text entitled “La notion de droit subjectif à la veille du XX<sup>ème</sup> siècle”, o.c., p. 45.

- [27] L. RENAULT, *Introduction à l'étude du droit international*, Paris, Sirey, 1879.
- [28] H. BONFILS, *Manuel de droit international public (Droit des gens)*, Paris, Rousseau, 1894.
- [29] In addition to his *Précis de droit des gens (Principes et systématique)*, Vol. 2, Paris, Sirey, 1932-34, reprint C.N.R.S., 1984, one may also consult a relatively unknown article written by G. SCELLE, in the *Revue de droit public*, 1944, pp. 85-106, entitled "La notion d'ordre juridique".
- [30] G. SCELLE, *Manuel de droit international public*, Paris, Montchrestien, 1948, in particular the introductory section dealing with relations between legal orders, pp. 20-ff.
- [31] See, in particular, J. COMBACAU, "Le droit international: Bric-à-brac ou système ?", in *Archives de philosophie du droit*, Vol. 31, Paris, Sirey, 1986, pp. 85-105. See also the personal and stimulating analysis of C. SANTULLI, *Le statut international de l'ordre juridique étatique*, Paris, Pedone, 2001, preface by J. COMBACAU, pp. 13-21; D. ALLAND, *Droit international public*, PUF, 2000, pp. 17-ff. The same author had already abandoned use of the concept in his thesis, *Justice privée et ordre juridique international*, Paris, Pedone, 1994, particularly pp. 38-ff.
- [32] See, however, O. SCHACHTER, "International Law in Theory and Practice", *RCADI*, 1982-V, p. 9.
- [33] R. DWORKIN, *Taking Rights Seriously*, London, Duckworth, 1977, pp. 79-ff.
- [34] J. RAZ, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, Oxford, Clarendon Press, 1970, particularly pp. 224-ff; see also A. ROSS, *Directives and Norms*, London, Routledge & Kegan, 1968.
- [35] In this regard, Denis Alland points out that it is never encountered in the work of I. Brownlie or Akehurst; *o.c.*, p. 83.
- [36] See, in particular, C. TOMUSCHAT, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *RCADI*, 1999, Vol. 281, pp. 25-ff. On the idea of the UN Charter as the constitution of an international legal order, see *infra*.
- [37] It is precisely in this manner which I myself use the term, in my *Précis* of public international law, P.M. DUPUY, *Droit international public*, Paris, *Précis Dalloz*, 8th ed., 2006, §§ 15-27.
- [38] See, in particular, *L'amour du censeur: Essai sur l'ordre dogmatique*, Paris, Seuil, new ed.; *Sur la question dogmatique en Occident*, Paris, Fayard; *Le désir politique de Dieu, Leçons VIII, Etude sur les montages de l'Etat et du droit*, Paris, Fayard, new ed.
- [39] See D. ANZILOTTI, *Cours de droit international*, Translation by G. GIDEL, Panthéon-Assas, Preface by P.M. Dupuy and Ch. Leben, 1999, p. 43.
- [40] Its equivalent can be found in Hart's category of 'secondary legal rules', of which the Kelsenian *Urnorm* offers a perfect illustration.
- [41] See N. BOBBIO, "Struttura et funzione nella teoria del diritto di Kelsen", in *Rivista internazionale di filosofia del diritto*, 1973, pp. 187-215, republished and translated into French in N. BOBBIO, *Essais de théorie du droit*, Paris, Bruylant, LGDJ, 1998, pp. 207-ff; see also P.M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 67-ff; and C. LEBEN, "Ordre juridique", in *Dictionnaire de la culture juridique*, Paris, PUF, 2003, pp. 1113-ff.
- [42] See C. LEBEN, "La responsabilité internationale de l'Etat sur le fondement des traités de promotion et de protection des investissements", *A.F.D.I.*, 2004, pp. 683-714.
- [43] Once again, this is even truer of international law where the sanction has neither the verticality nor centralisation assured by a State to a domestic legal sanction.
- [44] See P.M. DUPUY, *L'unité de l'ordre juridique international*, *o.c.*, pp. 69-ff.
- [45] *Ibid.*, pp. 67-ff.

[46] See P.M. DUPUY, *L'unité de l'ordre juridique international*, o.c., particularly pp. 200-ff.

[47] See in particular this author's "Sur le positivisme juridique" in *Essais de théorie du droit*, Paris, LGDJ, 1998, pp. 23-38, based on an article published in Italian in 1961. See also P.M. DUPUY, *L'unité de l'ordre juridique*, o.c., especially pp. 26-32 et 207-213.

[48] J. GOLDSMITH and E. A. POSNER, *The Limits of International Law*, Oxford University Press, 2005, pp. 23-43; J. YOO and W. TRACHMAN, "Less than Bargained for: the Use of Force and the Declining Relevance of the United Nations", *Chi.J.ofIL*, 2005, No 5, p. 384.

[49] ILC, "Report of the Study Group on the fragmentation of international law: Difficulties arising from the diversification and expansion of international law", AN/CN.4/L.702, 18th July 2006. Available on the United Nations website.

[50] B.CONFORTI, "Unité et fragmentation du droit international: Glissez mortels, n'appuyez pas", *RGDIP*, 2001, pp. 5-ff.

[51] Conclusions 15 and 16.

[52] Conclusions 18-22.

[53] "[...] under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties", Article 31 § 3 (c). The Court cannot accept that Article XX § 1 (d) of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law[...]. The application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation entrusted to the Court [...] by the 1955 Treaty"; ICJ, *Case Concerning Oil Platforms [Iran v. United States of America]*, 6 Nov. 2003, § 41.

[54] "[...] the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute"; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) [Democratic Republic of Congo v. Rwanda]*, *Jurisdiction of the Court and Admissibility of the Application*, 3 Feb. 2006, §§ 60 and 64.

[55] See P.M. DUPUY, *L'unité de l'ordre juridique international*, o.c., in which the theory of the two unities is the underlying thesis of the work.

[56] *Ibid.*, pp. 215-245.

[57] To use the terminology of the Statute of the International Criminal Court.

[58] I address this issue in my article "La convention de Vienne: Un bilan", *Revue belge de droit international*, 2007 (forthcoming).



# **INTERCONNECTING INTERNATIONAL JURISDICTIONS: A CONTRIBUTION FROM THE GENOCIDE DECISION OF THE ICJ**

Enzo Cannizzaro\*

*In the Genocide Convention case the ICJ seemed to adopt a twofold attitude towards the findings of the ICTY. Whereas it tended to show a certain deference to these findings, in matters of common concern, it radically denied the relevance of findings allegedly adopted by that judicial body outside the scope of its jurisdiction. Although both kind of references can be traced back to a principle of judicial propriety, the conclusions of the ICJ might lend some element of support to the idea that findings of the ICTY in proceedings before the ICJ might be relevant not qua judicial decisions but rather as international law rules binding for the parties of these proceedings. This unusual approach seems to shape a normative methodology, which can be of some avail in the study of overlapping international jurisdiction. The article engages in a technical analysis of this methodology and tries to shed some light on some of its far-reaching implications. The paper closes with some cursory remarks on the role of this methodology in the debate on the unity of international law, and, in particular, on the possible use of substantive law as a remedy to the incoherence which ensues from the proliferation of international jurisdictions.*

## **I. INTRODUCTION**

In its judgment of 26 February 2007 (Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Serbia and Montenegro), the International Court of Justice (ICJ) made frequent reference to the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).

In a number of cases, the Court has referred to the Tribunal's interpretation of general notions of the Genocide Convention. This was done mainly in part IV of the judgment, which concerns the identification of the law applicable to the dispute. Notable examples are the passages in which reference to the case law of the ICTY was made in order to determine whether the notion of genocide includes ethnic cleansing (§ 190), whether negatively defined groups come within the purview of the Convention (§ 194) and the 'substantiality' of the part of a group to be destroyed (§ 198). A reading of these passages conveys the impression that these references served the aim of enhancing the persuasiveness of the interpretation which the ICJ itself was ready to embrace.

More numerous are the references to the fact-finding of the Tribunal as an authoritative source of evidence. Although the Court carefully refrained from attributing binding value to these findings, it seems nonetheless to consider that facts ascertained by the Tribunal, in discharging its function as a criminal court of justice, do not need to be further proven.



Finally, the Court referred largely to ICTY determinations in which the Tribunal assessed the legality of conduct under obligations contained in the Genocide Convention which address individuals as well as states. Examples abound in part VI, in which the ICJ considered whether the alleged conduct constituted genocide under the Convention. Just to mention a few examples, §§ 281-ff refer to the case law of the ICTY in order to determine the degree of clarity necessary for finding that a specific *mens rea* existed; §§ 300-ff do the same in order to determine the material deeds which, accompanied by an appropriate *mens rea*, would constitute an act of genocide.

In the situations briefly mentioned, the ICJ carefully abstained from any comment which could be read as implying that findings of the ICTY are binding upon the Court. However, in all but one case, the views of the two courts coincided perfectly. The only – but noteworthy – exception is the reference to the test employed by the ICTY in order to determine the attribution to states of actions carried out by individuals. In §§ 396-ff of the decision, the Court focused on whether conduct amounting to acts of genocide performed by individuals not having the status of state organs should be attributed to the FRY. In order to make that determination, the Court expressly departed from the test adopted by the Court of Appeals of the ICTY in the *Tadic Case*,<sup>[1]</sup> a test universally known as the “overall control” test, and relied instead on the classical test enshrined in Article 8 of the International Law Commission’s Draft Articles on State Responsibility, commonly known as the “effective control” test. Yet the Court felt it necessary to justify the failure to comply with the ICTY case law, and dwelt at some length upon the difference between the two tests and their propriety in relation to the law of State responsibility.

Speaking in general terms, the Court concluded at § 403 that:

“The Court has given careful consideration to the Appeals Chamber’s reasoning in support of the foregoing conclusion, but finds itself unable to subscribe to the Chamber’s view. First, the Court observes that the ICTY was not called upon in the *Tadic case*, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. Thus, in that Judgment the Tribunal addressed an issue which was not indispensable for the exercise of its jurisdiction. The Court attaches the utmost importance to the factual and legal findings made by the ICTY in ruling on the criminal liability of the accused before it and, in the present case, the Court takes fullest account of the ICTY’s trial and appellate judgments dealing with the events underlying the dispute. The situation is not the same for positions adopted by the ICTY on issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases

before it”.<sup>[2]</sup>

This short but meaningful excerpt gives us two pieces of information. First, it tells us that, in deciding a dispute between States, the ICJ gives a certain value – although it is not clear precisely what that value is – to the findings of the ICTY on matters which come within the jurisdiction of that tribunal and which might be of relevance for the settlement of the dispute. Second, the ICJ tells us that it will give no value to findings of the ICTY on matters falling outside the jurisdiction of that Tribunal. This passage seems thus to stress the varying degree of authority of the decisions of the ICTY in proceedings before the ICJ. More precisely, the authority of the Tribunal would depend on whether, in deciding a certain question, the Tribunal remained within the scope of its jurisdiction, as ascertained by the ICJ.

The interest of this observation speaks for itself. In situations in which the two courts are called on to qualify legally the same or analogous conduct under rules which are formally different, although of identical content, pertaining respectively to individual and to State responsibility, an analysis of the scope of their respective jurisdictions might serve to avoid overlapping judicial findings. Comprehensively considered, these two contentions may be taken as expounding a new method for handling the conflict arising from the exercise of overlapping jurisdictions.<sup>[3]</sup> Instead of looking at the effect of diverging decisions, this new methodology seems rather to focus on the normative interplay between the diverse acts which establish different bases of jurisdiction. By assigning authority only to those decisions taken by the “competent” judicial organ, and, correspondingly, by denying such authority to decisions taken by the “incompetent” organ, this approach, instead of settling conflicts, would prevent them from arising. This approach, which seems to take shape for the first time in the Genocide Convention Case, seems very promising and worthy of being further explored. However, the road toward recognition of this methodology as a working instrument for avoiding conflicts of jurisdiction is very tortuous and may reveal technical and theoretical difficulties. In the present contribution, I will present some preliminary reflections on this methodology, and I will try to examine some of its merits and limits. Further, I will try to apply this methodology to certain categories of conflict in order to explore its scope and implications. These sparse reflections are by no means intended to constitute a complete frame of reference for a multifaceted issue which, in my view, can hardly be captured by a unitary methodology.

## **II. THE CONFRONTATION BETWEEN THE ICJ AND THE ICTY: WAS THERE A CONFLICT OF JURISDICTION?**

Inconsistency between decisions taken by two of the most respected permanent (or semi-permanent) judicial bodies of the international legal order was by and large referred to in the legal literature as one example of conflicts

which may lead to the fragmentation of international law.<sup>[4]</sup> Yet, not every inconsistency between decisions of different judicial organs constitutes a conflict of jurisdiction. Therefore, the first step in the analysis is to determine whether a true conflict between the two courts has arisen, which needs to be settled.

Diverging interpretations of a legal rule in the context of different dispute-settlement procedures do not generally create a true conflict of jurisdiction.<sup>[5]</sup> It may be regrettable that different jurisdictions do not agree on a given interpretation of the same rule, but the conceptual difference between diverging interpretations and conflict of jurisdiction is well rooted in theory and in judicial practice, and no further discussion of this question seems necessary.

More problematic by far are the situations belonging to the second and third classes referred to above. Independent fact-findings made, respectively, by the ICTY and by the ICJ may lead to different assessments of fact. Independent legal assessments of the same conduct may lead to diverging conclusions with respect to the legality of that conduct. For example, the ICTY could decide that certain conduct attributed to individuals amounts to acts of genocide, whereas the ICJ could decide differently with regard to the same conduct where it is attributed to a State.

Even in situations of this kind, one could wonder whether we are really in the presence of a true conflict of jurisdictions. The answer would probably be negative if one assumed a strict notion of conflict, which would require the concomitant presence of the three classical tests: the same parties, the same object, and the same legal ground. It is easily demonstrated that the situations referred to above do not meet these criteria, as both the parties and the object of the two proceedings are necessarily different. In one forum the proceeding seeks to ascertain the criminal responsibility of individuals, whereas the other concerns an interstate claim and implicates the rules on State responsibility.

This conclusion, coherent as it is from a formalistic perspective, does not intuitively meet the sense of coherence one would expect when approaching legal questions. To condemn individuals for conduct which, attributed to States would not give rise to responsibility, seems to contradict basic requirements of logic to which, one would expect, every system of law should be subject. Indeed, in a number of legal traditions, quite sophisticated conflict-avoidance techniques have been developed so that the independent assessment of diverse legal consequences flowing from the same conduct does not lead to incoherent judicial decisions. For example, this concern is at the origin of the rule which, in a number of countries from the civil law tradition, requires courts assessing the civil consequences of conduct amounting to crimes to accept the factual and legal assessments of that conduct already made by criminal courts.

It does not seem unreasonable to draw a conceptual analogy with the case at hand, where the same conduct may simultaneously give rise to a double set of legal consequences: criminal responsibility for individuals, and State responsibility for those States to which this conduct is attributed. After all, on a number of other occasions, international tribunals have accepted a broader notion of legal conflict for a variety of aims. In the case at hand, quite unusual in international practice, the identical issues, in spite of the formal differences between the parties and object, would plead for the unity of the legal assessment of the same conduct under the same rule of law.

However, it would be overly simplistic to push the analogy further, to the point of transposing automatically at the international level solutions adopted at the state level. What seems natural in an integrated legal order, in which different proceedings are part of the same judicial function, may not be assumed to be natural in the international legal order. In spite of the fact that both the ICJ and the ICTY are judicial organs of the United Nations, it would be inappropriate to refer to them as organs of one and the same system of administration of justice. The reasons which could be relied upon in order to dismiss this conclusion are well known and need not detain us. The acknowledgement of the typical dynamics of the international legal order induces one to look elsewhere in order to find a remedy for what appears to be a logical gap in that order.

### **III. JUDICIAL DISCRETION OR CONFLICT-AVOIDANCE TECHNIQUE?**

The first explanation that crosses one's mind of the quite ambiguous passage of the Genocide Convention is that the Court, by deciding the degree of deference to be afforded to a finding of the ICTY, did not intend to point to a new conflict-avoidance technique, but, more simply, was exercising its judicial discretion. In other words, absent a conflict, or absent a firmly rooted legal basis for a conflict-avoidance technique, the ICJ may have referred to the Tribunal's case law as an argumentative device, primarily useful for enhancing the persuasiveness of the ICJ's decisions and for buttressing the logic underlying its reasoning. By showing that a certain solution was adopted by a different judicial authority, the ICJ can rely on the moral authority of the Tribunal and in this way it can avoid elaborating its reasoning in full detail. The idea that the ICJ, the only existing international court of universal jurisdiction, should pay attention to the case law of specialised courts when settling disputes touching upon subject matter that come even partially within their ambit is spread widely among international law scholars.

Even if above reading were the correct one, the solution adopted by the Court would still be important. Indeed, the Court not only showed deference to the decisions of the ICTY but also enunciated a test designed to give guidance for future cases as to the type and degree of deference which should be used: a

very unusual step for the ICJ.

The existence of such a form of pre-determination makes it difficult to adopt definite conclusions as to the nature of that test. It presents elements of judicial discretion as well as of a true conflict-avoidance technique and, possibly, is more akin to the latter than to the former. There was no need, for a court of justice exercising its judicial discretion, to stress the *ultra vires* nature of a finding of another court in order to deviate from it and to embark upon a different course. The emphasis on the limited scope of its jurisdiction could indicate that the Court did not feel confident enough to rely only on its subjective appreciation in disregarding the authority of the Tribunal, and needed to rely on a more objective element (to the extent that concluding that another tribunal has made an *ultra vires* determination can be regarded as “objective”).

It seems risky to draw from this short and quite mysterious passage more implications than it can offer. However, it certainly seems to reveal a tendency to ground the authority of the ICTY on more solid footing than that offered by uncertain mechanisms which some might call judicial discretion and others may prefer to label as comity.[\[6\]](#)

One is therefore tempted to advance the hypothesis that this passage of the judgment, perhaps beyond the subjective intention of its judges, foreshadows a methodological approach which can be useful in case of jurisdictional overlaps. I propose therefore to explore this perspective (although only hypothetically) with a view to determining, to a certain degree of precision, how to devise an instrument of coordination that would vest decisions of the ICTY with a conditional authority in proceedings before the ICJ.

The starting point for this analysis is that such coordination was not achieved through procedural instruments, i.e., through instruments aimed at establishing the legal effect of a judicial decision for a different judge. If this were the case, there would be a strong presumption that these effects would flow from the existence of a decision independently of the fact that it was pronounced within the scope of the judge's jurisdiction. The fact that the ICJ felt empowered to review this assessment cannot but point out that decisions of the ICTY do not have effect by themselves in proceedings before the ICJ. Thus, in order to explain the quite unusual stance of the ICJ we are induced to look elsewhere, and to see whether decisions of the ICTY, far from being considered for their procedural force, might be considered for their normative force, as rules of law binding among the parties of the proceedings before the ICJ. This would be a normative approach, which, instead of relying on the procedural effects of a judicial decision, tends rather to emphasise its normative force.

#### **IV. TOWARDS A NORMATIVE APPROACH?**

From this perspective, one could assume that provisions conferring overlapping jurisdiction, and competing decisions of international judicial bodies, can be taken mutually into account by these bodies as rules applicable to the parties, which therefore enter into dynamic interrelations with other international law rules. It would be this dynamic interrelation, ultimately, which can explain the relevance of judicial findings of a court in judicial proceedings before another judicial body.

From this perspective, the value of findings of a court of justice in another dispute settlement procedure is not brought back to the effect of rules and principles relating to the effect of a judicial decision such as the rule of *res iudicata*. Rather, we are assessing whether this value cannot be explained by virtue of the effect which a rule of law exerts upon other rules of the same system. It is, in other words, the capacity of an international law rule to enter into dynamic relations with other rules of the same system. This element could recast the unity of the international order, potentially threatened as it is by the proliferation of international judicial bodies. This possibility has been explored, with varying degrees of success, in relation to the applicable law in a case before an international tribunal. The step I am now proposing to attempt would go a little bit further and would try to examine this possibility as regards coordinating the actions of a plurality of international tribunals. After all, a court, when determining the scope of its jurisdiction, must also take into account other international law rules in force among the parties. This is the rule which has been expressed, albeit in quite limited terms, by Article 31, § 3 (c) of the 1969 Vienna Convention on the Law of Treaties.

In the particular situation which prompted the current study, one may wonder whether decisions of the ICTY constitute binding legal rules for the parties to the proceedings in the Genocide Convention Case. A number of arguments can be made for answering the question positively. The Statute addresses obligations to states with regard to specific situations, such as, for example, the obligation to cooperate, in accordance with Article 29 of the Statute. Although no provision of the Statute explicitly imposes an obligation to recognise decisions of the Tribunal, it is meaningful to note that the obligation to cooperate was interpreted in quite broad terms by national laws carrying out that obligation, which proclaimed that judgments of the Tribunal are recognised within the internal legal order, for example as concerns their effect in municipal civil proceedings.<sup>[7]</sup>

As concerns, in particular, the parties to the proceedings before the ICJ, the binding force of these rules can be justified by a plurality of legal bases, such as the possible succession of the Federal Republic of Yugoslavia (FRY - Serbia and Montenegro) in the membership of the UN of the Socialist Federal Republic of Yugoslavia, or the retroactive effect of the membership of the new State in the United Nations, following its application of 27 October 2000.



The demonstration of this assumption might appear to require a lengthy technical explanation. However, such an explanation is unnecessary in the light of the holding of the ICJ, which found, at § 447 of its Genocide decision, that “from 14 December 1995 at the latest, and at least on the basis of the Dayton Agreement, the FRY must be regarded as having ‘accepted [the] jurisdiction’ of the ICTY within the meaning of Article VI of the Convention”. In the same vein, one could conclude that the parties to the proceedings before the ICJ were, as from that date, bound by the Security Council Resolution 827(1993),<sup>[8]</sup> which confers jurisdiction on the ICTY in regard to individual conduct which can constitute genocide under the Genocide Convention, and by the decisions of that Tribunal, including those adopted before that date.<sup>[9]</sup> In § 445, i.e., a few lines earlier in its decision, the ICJ had concluded that the Tribunal constitutes an “international penal tribunal” within the meaning of Article VI of the Convention, i.e., a Tribunal having jurisdiction for individual conduct in breach of the obligation contained in the same convention which bestows jurisdiction upon the ICJ for State conduct.

## **V. NORMATIVE APPROACH AND DYNAMICS OF THE INTERNATIONAL LEGAL ORDER**

I propose now to go further along this line of argument and explore the implications following from the consideration of decisions of the ICTY as international law binding upon the parties to the dispute before the ICJ.

There does not seem to be any theoretical obstacle to regarding judicial decisions, from a normative viewpoint, as rules of law applying to specific situations and governing the individual, rather than general, conduct of its addressees. In such a case, the decisions of the Tribunal do in fact constitute rules of law, affecting the legal positions of the individuals tried by the Tribunal, but also of all the states bound by Resolution 827(1993) and by the Statute of the Tribunal, which are required by the Statute to recognize the decisions and to give them effect, if the need arises, within their municipal orders. From this premise, it follows that the ICJ, in deciding a dispute between parties, must take into consideration these decisions, as they may be relevant for settling the dispute, as part of its task of determining and applying the law in force between the parties.

From this perspective, therefore, decisions of the Tribunal do not constitute judicial determinations, but rather normative acts. Their effect must not be determined on the basis of the particular procedural mechanisms which are normally employed in order to determine the binding force of a judicial decision for another judge, such as the *res iudicata* rule and the like.<sup>[10]</sup> Such a search would be made in vain. Neither customary international law, nor the particular provisions setting up the ICY and the

ICTY, and establishing their jurisdiction, require either court to give deference to decisions of the other. However the jurisdictional 'splendid isolation' of either court may be tempered by the recognition that decisions of another court do exist, which are binding for the parties and which must therefore be considered by the other when deciding the case before it.

The existence of a procedural mechanism connecting the respective jurisdictions of the ICJ and of the ICTY would have given unconditional priority to decisions of one court upon the other. But the effect of anormative mechanism connecting the jurisdictions of the two courts is more nuanced by far. Decisions of the ICTY in proceedings before the ICJ enjoy, at best, a relative priority, in the sense that they must be taken into account as law in force between the parties, subject, as such, to the legal dynamics of the sources of international law. This might explain why the ICJ considered itself capable of ruling on the validity of these decisions, and, having found that they were taken *ultra vires*, to deny their effect in proceedings before it. The Court must have considered that decisions *ultra vires* constitute invalid law and therefore must be discarded. This seems perfectly consistent if one considers that these acts are not applied *qua* judicial decisions, but rather *qua* international law, and therefore, deprived of any procedural shield such as that afforded by the principle of the *res iudicata*.

The flipside of the normative approach to the overlapping jurisdiction is that, in the reverse situation, decisions of the ICJ should not constitute rules of law for the ICTY, which does not settle disputes among States but rather administers justice in the public interest.

## **VI. DECISIONS OF THE ICTY AND ARTICLE 103 OF THE UN CHARTER**

One may wonder whether, among the normative dynamics which help to shape the respective interplay of decisions of the ICTY and of the ICJ, the legal basis of their jurisdiction may play a role. The issue does indeed have some importance, as the jurisdiction of the two courts depends on acts having different legal value.

It is well known that the jurisdiction of the ICJ in the case at hand was based on the Genocide Convention, whose Article IX bestows jurisdiction upon the Court for disputes relating to the interpretation, application or fulfilment of the Convention. The competence of the Tribunal is established by Resolution 827 (1993), and by the Statute attached thereto, which, in the relevant part, confers jurisdiction on the Tribunal in order to determine the criminal responsibility of individuals charged with conduct amounting to genocide.

At first sight, one could be tempted to conclude that the jurisdiction of the ICTY, having been conferred by a resolution of the Security Council, enjoys the special status of the obligations deriving from the Charter of the UN,

which, as is well known, take priority over any other treaty obligation, by virtue of Article 103 of the Charter.<sup>[11]</sup> Moreover, as Resolution 827 (1993) was taken under Chapter VII of the Charter, decisions of a Tribunal pursuant to a competence decided by the Security Council should be considered as measures aimed at maintaining or restoring international peace and security; measures which, therefore, should be recognised as having a higher rank than simple measures aimed at settling a dispute between States.

In spite of its apparent logic, such a solution does not appear persuasive. Although one can accept that diverging assessments by the two courts as to the legality of conduct attributed to individuals and to states under the Genocide Convention can give rise to a conflict of jurisdiction, it is much more problematic to assume that such a conflict falls within the scope of Article 103 of the UN Charter. This provision seems, rather, to envisage a situation where the performance of a treaty obligation would affect compliance with obligations established by the Charter. The very strict sanction envisaged by Article 103 seems to indicate precisely that the mechanism set up by that provision is triggered only by a conflict potentially capable of affecting the implementation of the Charter.

Article 103 can be used to enhance the normative value of the rules establishing the Tribunal, and bestowing jurisdiction upon it, in the sense that States cannot, by special convention, disregard such rules and thus undertake an obligation not to recognise the competence of the Tribunal or the decisions taken by it. It is a much larger step to conclude that the Security Council, by creating a Tribunal with competence to ascertain the criminal responsibility of individuals, also intended to rule out the jurisdiction of other international courts, and in particular, of the ICJ, in the interpretation of the Genocide Convention. The aim pursued by the Security Council in creating the ICTY was that of conferring on it the necessary authority to try individuals charged with international crimes, and not to confer priority upon diverging interpretations of the Genocide Convention adopted by a Court in the context of an interstate dispute. If that had been the intention, the SC would undoubtedly have expressed it in much clearer terms. Moreover, there are no elements in the Genocide Convention which could be read as implying that findings of the ICTY enjoy a higher authority than findings of the ICJ.

## **VII. THE NORMATIVE APPROACH AND SOME OF ITS IMPLICATIONS**

In this final section, I would like to point to some of the advantages and disadvantages of the normative approach to the study of the conflict of jurisdictions in international law. By no means are the observations which will be offered to the reader intended to constitute a general frame of reference. For this, I must refer to the many excellent contributions already existing, which have explored this complex topic in full detail.<sup>[12]</sup> For my part, I will be content to offer a cursory analysis of just some of the potentially infinite

situations of jurisdictional conflict by referring to the most known recent practice and to illustrate the potential application of this methodology.

The general features of this approach should finally be clear. The normative approach consists of an analysis of the effects produced by provisions conferring jurisdiction on a tribunal, and by decisions of that tribunal, in a different dispute settlement procedure, *qua* international law rules in force among the parties. This effect is thus, in a certain sense, intermediate between the possible effect which would be produced by procedural means for coordinating competing jurisdictions, if existing, and the effect of a 'soft' means of coordination, such as comity and judicial discretion, the legal basis of which would be uncertain and the content of which would be indeterminate. It is of course possible that the parties, by conferring upon a tribunal the power to settle a dispute, also bestow upon it the power to disregard previous judicial decisions applicable *qua* international law in force among them. This is naturally a question of interpretation for each court of justice to decide, taking into account all pertinent factors.

However, the natural field of application of this methodology is that of the conflict of jurisdiction in the proper sense, in which diverging judicial decisions might place inconsistent obligations on the same parties. One could assume that decisions of a court of justice deciding certain aspects of a dispute can be taken as rules of law in force among the parties by another tribunal deciding a different but related aspect of the same dispute, in order to reach a complete settlement of the dispute. This effect can typically occur in the case of parallel proceedings, concerning the legality of the same conduct under a different, and possibly diverging, set of rules. Whereas it is very possible that all or some of the jurisdictions concerned will in fact have the competence to adjudicate the dispute in its entirety (applying, for this purpose, the entire body of international law), that may not always be the case. For example, a tendency gaining more and more ground in the jurisprudence of specialised tribunals is to consider that the dispute before them concerns only the legality of certain conduct under the constituent treaty, leaving aside the application of other international law rules which, comprehensively considered, could afford a justification for conduct inconsistent with that treaty and, thus, lead towards a definite settlement of the dispute.<sup>[13]</sup>

Irrespective of the merits of this tendency, there is a case for arguing that a remedy for the fragmenting effect which ensues from it can be found in the normative approach described above, which consists in interconnecting partial settlements of distinctive sub-issues of normatively complex disputes by using, as an interconnecting factor, the dynamics of substantive rules of the international legal system. One could well conclude that a decision of a specialised tribunal concerning the legality of conduct in its own sub-system can be taken into consideration as binding law among the parties, and that the decision may be applied by other tribunals if it is relevant for deciding the

disputes before them.

From the same logical perspective, it does not seem impossible to make a further step forward and to assume that even the rules conferring jurisdiction on (and not only the decisions of) a specialised tribunal can be taken into consideration by another tribunal in order to delimit the sphere of its competence. As the identification of the scope of the jurisdiction conferred on a court of justice more often than not entails the interpretation of treaty provisions, this operation can find its legal basis in Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of the Treaties. Of course, this is an operation which cannot be accomplished in the abstract, but whose structural elements must be weighted in relation to the concrete case and in relation to the content of the rules conferring jurisdiction. It seems reasonable to assume that a tribunal having jurisdiction to settle a dispute among Member States of the EC must take into account, in determining the scope of its jurisdiction, Article 292 of the Treaty Establishing the European Community (EC Treaty), which provides that the parties have conferred exclusive jurisdiction to the ECJ for issues concerning the interpretation and application of EC law.<sup>[14]</sup> The diverging jurisdictional provisions could be construed consistently so as to avoid a conflict of jurisdiction from arising.

This phenomenon of cross-reference among international tribunals, sometimes enthusiastically welcomed as a fertilization of the international judicial function, obviously has limits. In particular, the normative approach described above, based as it is on the consideration of technical dynamics among sources or norms of the international legal order, requires, for its application, the identification of a well-grounded legal basis. It goes without saying that the judicial decisions can be applied as binding law for its parties only in judicial proceedings having effect for parties to the previous decision. I pointed out above that considering the ICTY decisions as law applicable in disputes among States before the ICJ does not entail that the reverse situation applies as well. Decisions of the ICJ cannot be considered as binding law in proceedings before the ICTY, for the simple reason that these proceedings are developed in the public interest and on behalf of the international community as a whole, thus excluding the legal relevance of special agreements among states.

An analogous rationale should have dissuaded the European Court of Human Rights (ECHR) from giving relevance, in deciding a question before it, to the international engagements of some parties to the European Convention only, such as the Member States of the EC. Indeed, this is precisely what the ECHR did in the *Bosphorus Case*.<sup>[15]</sup> In this case, as is well known, the Court overruled its previous jurisprudence, according to which the existence of equivalent protection of fundamental rights under the EC Treaty and under the ECHR had the effect of limiting the exercise of its jurisdiction in regard to acts of the EC. While such a solution was technically questionable, the solution adopted in *Bosphorus* appears even more objectionable.

In *Bosphorus*, the Court considered that the existence of a normative subsystem among some states parties to the Convention only, in which protection of fundamental rights is guaranteed “in a manner which can be considered at least equivalent to that for which the Convention provides jurisdiction” must be taken into account when interpreting the provisions providing for a justification to States’ actions that are not in compliance with the Convention.

This line of reasoning indeed presents a certain analogy with the normative approach, with the important caveat that, in that case, the ECHR gave relevance not to a single decision, concerning the same or even analogous conduct, but rather to the overall jurisprudence of another tribunal. Regardless of the impact of that case on the very delicate balance between fundamental rights and States’ interests as reflected in the Convention, this conclusion appears technically flawed, as it gives relevance to engagements binding to some parties only, in order to interpret general notions of the European Convention, applying to a wider circle of states. Thus, the *Bosphorus* Case, although inspired by the noble aim of avoiding a conflict between competing jurisdictions by giving relevance to the case law of another forum, and although applying an approach bearing some resemblance to the normative approach, cannot be considered an accomplished precedent in that direction and, rather, exemplifies the pitfalls of an incautious use of that approach.

### **VIII. CONCLUDING REMARKS: UNITY OF SUBSTANTIVE LAW AS A REMEDY FOR JURISDICTIONAL FRAGMENTATION?**

The adoption of a normative approach is not an all-embracing technique aimed at dealing with the problems arising in connexion with the proliferation of international fora. Still less is it a panacea for the looming fragmentation of international law which accompanies the growing tendency of establishing specialised tribunals for specialised sets of rules. No approach can cure the structural weakness of the international order and transform it into a more integrated system such as those which lawyers are accustomed to observing at the state level and which they are often, albeit improperly, accustomed to using as a yardstick for legal research. More modestly, the normative approach can serve, in particular cases and under particular technical conditions, in order to bridge a gap in the exercise of different jurisdictions.

While the practical relevance of such an approach may be significant yet not overwhelming, it is also important from a theoretical point of view. There is a growing awareness that the existence of limitations on the jurisdiction of international judicial bodies should not, by itself, entail a corresponding limitation on the law applicable in order to settle the dispute.<sup>[16]</sup> Yet it is undeniable that the jurisdiction of international courts may be determined by the state in order drastically to narrow down the law which the courts are empowered to apply. The tendency of specialised courts to settle disputes



under their respective constitutive treaties only, and thus to render awards which are structurally incomplete, endangers the unity of international law and makes it impossible to use it a remedy for the fragmentation of international judicial functions.

In this conceptual line of research, the adoption of a normative approach in order to determine the effect of judicial decisions in the context of other dispute settlement procedures may thus constitute a step forward. It may contribute to reaffirm the unity of the international legal order and the unity of law as a means to settle judicial disputes also by recourse to different means of judicial redress, and beyond the restraints, at least beyond some of them, which curtail the application of jurisdiction-regulating norms. The consideration of judicial determinations as part of the substantive law binding its addressees may perhaps serve the aim of recasting the unity of international law more than the search for means of coordination in the exercise of competing jurisdictions. In other words, this normative approach better serves the purpose of avoiding a fragmentation of international law than any attempt to use procedural remedies instead.

Thus, the attainment of a more in-depth knowledge of such an approach seems to be a task which is worth making investments in attention and energy. Though well beyond the narrow scope of the present, introductory, contribution, this is a task to which the international legal scholarship might tend in the near future.

---

## REFERENCES

\* Professor of International Law, University of Macerata ([cannizzaro@unimc.it](mailto:cannizzaro@unimc.it)).

[1] ICTY, Appeals Chamber, Tadić Case, IT-94-I-A, Judgment, 15 July 1999.

[2] The reasons for denying legal value to the criterion of overall control, applied by the Court of Appeals in the Tadić Case, were further clarified by the Court. According to it, “the ‘overall control’ test [was not only] employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide”; rather, “the ICTY presented the ‘overall control’ test as equally applicable under the law of State responsibility for the purpose of determining when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs”, an issue for which, according to the ICJ, the ICTY did not have jurisdiction.

[3] There are, indeed, appreciable differences between that case and the previous cases in which the ICJ felt enabled to ascertain the validity of decisions of other international tribunals. See, in particular, the decision of 18 November 1960 in the case of the *Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, in which the Court accepted a claim to review the validity of a previous international decision. Indeed, the ICJ reached this conclusion when it found that its jurisdiction covered a dispute arising from a “disagreement existing between them with respect to the Arbitral Award”, as stated in the agreement constituting the legal basis of the jurisdiction of the Court. In the same vein, in the judgment of 12 November 1991, in the case of the *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, the Court concluded that the parties had conferred upon it jurisdiction to decide on the nullity of

the previous decision and not on its merits. In particular, the Court concluded that it could not review the determination of the Arbitral Tribunal on its own jurisdiction. “By proceeding in that way the Court would be treating this request as an appeal and not as a recours en nullité [the Court had] simply to ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction.” (§§ 46-47).

[4] See the Study of the International Law Commission on Fragmentation of International Law, finalized by Martti Koskenniemi. ILC, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law - Report of the Study Group, UN Doc. A/CN.4/L.682, §§ 49-ff. However the Study expressly avoids dealing with conflicts of jurisdiction.

[5] There is, however, a certain tendency on the part of international courts to show deference to the jurisprudence of other judicial or quasi-judicial bodies in order to determine the law applicable to a certain conduct. In its advisory opinion on the 9 July 2004 on the Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court made frequent reference to the jurisprudence of the Human Rights Committee (see, in particular, §§ 109-ff of the opinion), giving the impression that the interpretation adopted by a specialized body such as the HRC has a particularly strong force of persuasion.

[6] It is doubtful that there is any meaningful difference between comity and judicial deference on the part of a court of justice. In the case law of US courts, reference to comity was made, in a different context, in the famous case before the Supreme Court, *Hilton v. Guyot*, 1895, 159 US 113.

[7] For a clear example, see Article 26 of the Austrian Federal Law on Cooperation with the International Tribunals, 1 June 1996, which reads: “In proceedings before the Austrian courts relating to legal action taken against the convicted person by the victim, a final judgment of the International Tribunal shall constitute full proof of that which was declared in the said final judgment on the basis of evidence. Proof of the incorrectness of declarations is admissible”.

[8] Security Council, Resolution 827(1993), 25 May 1993, UN Doc. S/RES/827 (1993).

[9] The Court deemed it unnecessary to determine whether the RFY failed to comply with its duty to cooperate with the Tribunal before 14 December 1995, since no failure to respect that obligation prior to that date was required by the Applicant (§447). One could note that, even if it were ascertained that the obligation to cooperate with the Tribunal did not extend to conduct occurring before that date, the acceptance of the jurisdiction of the Tribunal implies that, after that date, all the decisions of the Tribunal adopted before or after the critical date became, by virtue of their *erga omnes* character, binding legal rules for the RFY.

[10] See A. GATTINI, “Un regard procédural sur la fragmentation du droit international”, *Revue générale de droit international public*, 2006, Vol. 110, No 2, pp. 303-336.

[11] In particular, the special status enjoyed by substantive provisions of the Genocide Convention, generally considered as having peremptory character, should not cover the provisions of the Convention conferring jurisdiction on the ICJ. In its decision of 3 February 2006, *Case Concerning Armed Activities on the Territory of the Congo*, New Application: 2002, (Democratic Republic of Congo v. Rwanda), the ICJ dismissed the idea that these provisions are so closely connected with the object and purpose of the Convention that they could not be subject to a reservation by the parties (see §§ 64-ff). The same rationale should exclude, *a fortiori*, their peremptory character.

[12] See, in particular, the comprehensive contribution by Y. SHANY, *The Competing Jurisdiction of International Courts and Tribunals*, Oxford, Oxford University Press, 2003.

[13] One example might be the recent decision of the WTO Appellate body in the dispute between Mexico and the United States on the case Mexico – Tax Measures on Soft Drinks and Other Beverages. WTO Appellate Body, WT/DS308/AB/R, Report, 6 March 2006.

[14] A variety of elements buttressing or weakening such a conclusion might come from a consideration of the full array of decisions which constitute the well known Mox Plant saga. For a complete reference to it, see N. LAVRANOS, “The MOX Plant and IJzeren Rijn Disputes: Which Court is the Supreme Arbiter?”, *Leiden Journal of International Law*, 2006, No 19, p. 223.

[15] ECHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi V. Ireland*, Decision of the Grand Chamber of 30 June 2005, on Application No 45036/98. For a comment, I refer to my note “Sulla responsabilità internazionale per condotte di Stati membri dell’Unione europea: In margine al caso Bosphorus”, *Rivista di diritto internazionale*, 2005, No 88, pp. 762-ff.

[16] See E. CANNIZZARO and B. BONAFÉ, “Fragmenting International Law through Compromissory Clauses?”, *European Journal of International Law*, 2005, No 16, pp. 481- ff.

# THE YEARNING FOR UNITY AND THE ETERNAL RETURN OF THE TOWER OF BABEL

Anthony Carty\*

*International lawyers frequently aspire to affirm the existence of international community and the presence of authority to speak on its behalf. However by forcing a hierarchical representation of legal values upon nations, which have not accepted them, international lawyers, and the politicians whom they advise, risk unleashing a whirlwind of violence. The myth or the Biblical story of the Tower of Babel, is a millenniums old warning of the presumption which can lie behind an apparently reasonable desire for global unity and harmony. I take as a welcome task assigned to me by the coordinator of this issue of the journal, to demonstrate that those who support the idea of international community fail to address the horizontal inter-state fragmentation of international society.*

## I. INTRODUCTION

International lawyers frequently aspire to affirm the existence of international community and the presence of authority to speak on its behalf. However by forcing a hierarchical representation of legal values upon nations, which have not accepted them, international lawyers, and the politicians whom they advise, risk unleashing a whirlwind of violence. The myth or the Biblical story of the Tower of Babel, is a millenniums old warning of the presumption which can lie behind an apparently reasonable desire for global unity and harmony. I take as a welcome task assigned to me by the coordinator of this issue of the journal,[\[1\]](#) to demonstrate that those who support the idea of international community fail to address the horizontal inter-state fragmentation of international society.

I am going to approach this task, which I have been labouring for approximating twenty years since the publication of *The Decay of International Law*,[\[2\]](#) not by elaborating what I see as all the stages necessary to set the scene for a non-foundational dialectic in international legal argument,[\[3\]](#) but merely by focussing on what I think is just one of the many stumbling blocks in the way of placing any dialectical arguments at all on the agenda of mainstream formalist international lawyers.[\[4\]](#) The stumbling block is the formalist definition of the state as the primary subject of international law. This entity, which is, of course, an invention of the lively imagination of the formalist international lawyers, can hardly be any more capable of dialectical argument than its creators.

Non-foundational dialectical legal argument takes as its starting point, the contingency and, therefore, relativity of legal arguments presented by states. These arguments may appear to the states themselves as objective

representations of legal truths, i.e. in terms of analytical or normative legal theory, correct approximations to already valid legal norms. This will usually have the corollary that, where disagreement arises, one or more states are taken to misrepresent legal truth and are therefore delinquent, and must be punished. Legal formalists, who are all foundationalists, tend to be rather violent people, always running to the Security Council, or around it, to enforce their legal representations on others. The non-foundationalist, who is as sceptical of himself as he is of others, must endeavour, in the present climate of international violence,<sup>[5]</sup> to try to reassert the egalitarian priority of the inter-subjective as itself the only formal category with which to work. All legal argument will in fact be perspective driven, contingent to time and place, and, above all, relational, reactive, i.e., whether the parties are aware of it or not, dialectical. The non-foundational argument is anti-objectivist in the sense that it resists the search for a point of validity to resolve an argument, which is outside the parties themselves.

The difficulty with all of this for the formalist international lawyer is, quite simply, he does not see what it can mean to say that states could argue. Political scientists such as Raymond Aron may call states “cold monsters”, prone to quite glacial argument, but, for lawyers these entities have no personality at all in an anthropomorphic sense. This is why the first difficulty for both legal formalists generally, as well as for those who want to see a legal form to an international community, is how there can be any language of understanding, misunderstanding, recognition or mis-recognition in relations among states. How can one reach so far as a dialectic of clashing cultures among entities conceived by formalist lawyers as corporatist in character, and conceived by international constitutionalists as stepping-stones on the way to a world corporate entity? The corporatist way of thinking excludes any direct contact with the human elements, which make up the community behind the state.

The corporatist way of thinking about the state resolves the problem of political legitimacy through a theory of representation, which has its roots in various forms of contractarianism. All of these theories suppose that legitimacy arises through the consent of the individual and this can be supposed - here enters the mythical character of contractarianism - to be given because of an original contract whereby he can be taken to have consented to the institutional framework whereby he is politically represented. Political legitimacy will be the equivalent of legal validity. If decisions are taken by corporatively authorized representatives then they will be legally valid and binding. The formalist lawyer's self-appointed task will be to assess whether decisions taken by supposed authorized representatives have been so taken. I say self-appointed task, because the most dominant theory of contractarianism applied by international lawyers is the Hobbsean variety, whereby the representor and represented are subsumed into one person, so that issues of invalid state actions, at least at the international level, are difficult to imagine.

Of course, state representatives accuse one another readily, of having committed invalid and illegal acts, but as there is not yet a world state, a world corporate entity which could resolve the validity of these allegations, it is precisely this type of mutual abuse that states find so frustrating and leads them to behave violently towards one another. So, whatever limited function the international lawyer may have as an external relations lawyer, a branch of constitutional law, at the international level he has really almost nothing to do. Nonetheless his conceptual framework for approaching international legal personality bars him from more productive avenues, such as the development of international legal dialectic.

It is proposed here to reiterate this argument by means of a close reading of contemporary French doctrine on international law, also as French is the second language into which this article will be translated. While by no means every country follows French doctrine, it is sufficiently sophisticated, in terms of awareness of the background of political theory underlying international law, to be taken as a genuine challenge for my project. The French state as a corporate entity in the formalist legal imagination is incapable of recognising any internationally significant dialectic, because it is, at the internal, domestic level, unitary and uni-dimensional. This primary international law understanding of corporatism is Hobbsean. It requires a unity of the represented and the representative in the latter. The essence of the state as a subject is a single will, which projects itself externally. There is quite simply no place for inter-subjectivity within the state and inter-state meeting is confined to a formal convergence of wills which represents a thoroughly statically conceived fettering of otherwise sovereign state discretion. This Hobbsean approach recognises that at the international level, there is no world corporate entity.

## **II. CORPORATIVISM AND CONTRACTARIAN THEORY**

It is the actual corporate character of the state that counts. A state as a structure is inconceivable<sup>[6]</sup> if it does not have a constitution, which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity, (*les agissements du fait du corps social*) constitutes already, can be imputed to the legal corporative body (*corps de droit*) which it claims to become.<sup>[7]</sup> The co-author Sur says of the relation state/nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. Sovereignty itself signifies a power to command. As Combacau says<sup>[8]</sup> sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginnings of the institutions of the state are a matter of fact because, by



definition, the state does not pre-exist them- that is, the institutions have not come into being by a constitutional procedure. They may claim legitimacy from a struggle which the collectivity has against a state which it judges oppressive, but international law is indifferent to the internal organisation of collectivities. Nothing requires that organs be representative, but merely that they have power “[...] de quelques moyens qu’ils aient usé pour le prendre et qu’ils usent pour l’exercer”.[9]

This obliteration of the social body or community as against the corporate character of the state itself is reproduced across the whole spectrum of French international law textbooks, regardless of their ideological tone. In *Droit International Public* by Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, the authors say that for the definition of the elements of a state, among the terms population, nation and people, only the first is accepted. Disagreement is total on the meaning of the term “nation”. The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination of peoples, would be unlimited territorial claims. So any recognition of the material substance of the social body is seen by Daillier and Pellet as an immediate recipe for international social chaos. Once a state is created it confiscates the rights of peoples.[10]

In the collective volume directed by Denis Alland, *Droit International Public* provides a very lucid third chapter on the state as a subject of international law, which makes rather explicit the philosophical and ideological foundations of French formalism. Using virtually identical metaphors to Daillier and Pellet he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, after which the people effaces itself once again behind the state.[11] He draws a distinction between the sociological and juridical definition of the state, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law.[12]

It is only in the work of Dupuy, arguably the most purely technical, in the international law sense, that the inherent confusion of the whole French approach is brought to light. In his *Droit International Public*, Pierre-Marie Dupuy gives extensive attention to the relationship between the classical definition of the state and the right of self-determination of peoples, saying that the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts (my italics).[13] He looks to international recognition as a solution, with the qualification that there are not clearly objective criteria to identify what constitutes a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be a question whether the traditional elements of the state, which express effectiveness, are reunited in a particular case.[14] This position more

accurately recognises the confusion that international law does experience, between corporatist and ethnic or other social concepts of the personality of the main subject of international law.

Once constituted, the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements that compose it. This reasoning allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the consequence that the greater or lesser modification of the spacial basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognised.<sup>[15]</sup>

The historical significance of the corporatist approach (effectively Hobbsean in the French case) for the impossibility of a hermeneutic of inter-state traditions is made clear in the work of Jens Bartelson who describes the rupture with the past more contextually. The late medieval tradition, which included Vitoria and especially Grotius, started from the premise that Man is still embedded in a universal society and in the Cosmos. As Bartelson puts it "...the question was not how to solve a conflict between conflicting sovereigns over the foundation of a legal order, but how to relate concentric circles of resembling laws, ranging from the divine law down to a natural and positive law".<sup>[16]</sup> Whether Vitoria or Grotius, they would look to the resemblance of episodes and events by drawing upon an almost infinite corpus of political learning recovered from antiquity, whether legendary or documented, "...because it is assumed that they (modern rulers) share the same reality, and occupy the same space of possible political experience."<sup>[17]</sup> Neither Grotius nor Vitoria would countenance any opposition between the kind of law that applies between States and within States, since this would imply an absence of law.<sup>[18]</sup>

The break with the Medieval-Renaissance picture comes with the modern state arising out of the wars of religion of the 16th and 17th centuries. The conception of this state broke with any attempt to ground its existence in a transcendent order. The new state had to self-ground itself in the absolute, unquestionable value of its own security, as defined and understood by itself. The science of this state was Hobbsean, concerning the sovereign who obliges, but is not obliged, to whom everyone is bound, but which is itself not bound. Territorial integrity is an aspect of the security, which rests in the already established territorial control. This control of territory comes to be what the so-called law of territory has to authenticate and validate. The extent of the territory of one sovereign is marked by the boundary of the territory of other sovereigns. The actual population of each sovereign territory is limited to the extent of power of the sovereign, measured geopolitically. The populations of other sovereigns are not unknown "others" in the modern anthropological

sense, but simply people beyond the geo-political boundary of the state (my italics).[\[19\]](#)

The purpose of law is no longer to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information about the limits, as boundaries, of the sovereign state, whose security rests precisely upon the success with which it has guaranteed territorial order within its boundaries, regardless of whatever is happening beyond these boundaries. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely an analytical recognition of factual, territorial separation, which, so long as it lasts, serves to guarantee some measure of security. However, as Bartelson puts it, the primary definition of State interest is not a search for resemblances, affinities of religion or dynastic family. Instead interest is a concept resting upon detachment and separation (my emphasis). The rhetoric of mutual empathy or sympathy between peoples is, in a logical or categorical sense, inconceivable. International society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.[\[20\]](#)

This structure of sovereign relations remains the basic problematic, which international lawyers face today. The origin of the State is a question of fact rather than law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. Fundamentally the problem is that while there is plenty of what all the State parties are willing to identify as law, there is auto-interpretation of the extent of legal obligation.

So, law has come to be defined unilaterally by the Sovereign (of Descartes and Hobbes). The meaning of legal obligation has no communal sense. It merely attaches spacially to a geo-politically limited population. Sovereigns, detached and separate from society, can determine meanings by legal fiat, by using words to reflect their exclusive monopoly of physical power and the capacity to coerce. It has always been my wish to argue, since *The Decay of International Law* (1986), that international legal concepts have been embedded in political theory, i.e. probably long forgotten projects to give meaning to public life. The corporativist project rests upon a contractarian myth, expressing the belief that all political legitimacy, and with it legal validity, must rest upon being able to draw a contractual chain, however implicit or supposed, between the consent of the individual and the act of the state. Thereby the state act has a legally and politically representative character. If the chain is clearly broken at any point, both the lawyer and political

theorist will say that legal validity and political legitimacy have vanished. That is all either of these two would-be professionals have to do or indeed can do. They do not have to recognise or understand anyone, or indeed engage in any material argument, dialectical or otherwise with anyone. Formalism is a matter of chasing after the imaginary contractual chain.

The most penetrating criticism of contractarian theory known to me comes from political theology, which has the perspective sufficiently broad to appreciate the mythical character of the theory and how it blocks the way to a legal politics of cultural identity. Oliver O'Donovan points out how any community identity rests upon historical provenance.<sup>[21]</sup> He objects, contrary to the Hobbsean and other contractarian myths, that contractarian theory as a way to political authority cannot actually constitute a people.<sup>[22]</sup> A state structure, the outcome of a successful argument for political authority, serves for the defence of something other than itself. O'Donovan makes the vital claim that contractarianism, as a mythical foundation for political authority, offers no theory of identity that could support the moral unity of a people.<sup>[23]</sup> He affords a brilliant insight into the extraordinary violence of self-styled Western democracies; when he goes on to argue that this huge deficiency in contractarian theory leads its proponents into a compensatory compulsion to impregnate the shell of their societies with an ideological self-consciousness from the very start. For instance, Rawls' language distinguishing liberal from so-called decent peoples is abstract political invention, not rooted in ordinary life. The narrative myth of constitution has to perform the task of political analysis.

O'Donovan has also understood the inevitable path which contractarian theory will follow at the global level and makes the point that the theory will be self-driven to think globally of a single world government, reigning over a non-existent world people, since the theory has no place for identity. The theory makes impossible any material, mutual dialectic of identities, because contractarianism ignores any moment or place for recognition, conceiving the representative relation as achieved by a once and for all act of the human will<sup>[24]</sup> i.e. in the founding Hobbsean contractarian myth, which combines the representative and the represented in one entity. As there are no possibilities of mutual recognition – given the once and for all expression of a single unified will – whether of Hobbes or Rawls – the newly constructed entity, whether national or global, cannot be self-reflective or exist in relationship. A government of a people without internal relations of mutual recognition can have no identity (p.214). So, at the global level, contractarianism can only jump to a theory of world government, once again striving forcefully to reproduce globally a single world people, just as the single state produces ideologically its own people.<sup>[25]</sup>

Again, a crucial insight into contractarianism that O'Donovan provides is that the single global people reproduced by a global constitution ignores the idea of

a people as a subject in a world of reciprocating others. This is why it inevitably happens that schemes of world government cannot be distinguished from the realities of imperial- colonial enterprise, given that they work with an abstract idea of a government of a people with no internal relations of mutual recognition.<sup>[26]</sup> In whatever their claims to universality, all empires need strong boundaries – empires are driven, metaphysically to recreate the I-Thou relationship, for instance as Rome did through Byzantium.

The brutality of contractarian universalism can be seen so clearly in the solipsist argument of Robert Kagan's *Paradise and Power*, where, as O'Donovan would lead us to expect, an ideologised concept of American democracy, as an objective value, is projected onto the global scene, whose violence is above all a failure of cognition, rooted in a two-fold failure of both internal and external self-recognition and mutual recognition. As O'Donovan has pointed out<sup>[27]</sup> a people must have internal relations of mutual recognition to have a capacity for identity and hence external relations of recognition. The ideological aspiration of a single state to be a global government - anyway only ideologically implicated – ignores the idea of a people as a subject in a world of reciprocating others. It may not be fashionable in academic scholarship to pinpoint a particular country and a particular personality, but the issue of imposition of a constitutional order, outside American policy, is purely academic. I agree with Kagan, "that EU foreign policy is probably the most anaemic of all the products of European integration". <sup>[28]</sup>

The challenge of global liberal constitutionalism, effectively, comes only from this American source. Of course, the irony is that it is not conceived in terms of multilateral institutionalism, but, as O'Donovan warns, it depends upon a confusion of the self with the global. It is best to quote Kagan, as paraphrasing of Kagan's delirious script will risk the accusation of anti-American bias in anaemic European academic circles:

"The United States is a behemoth with a conscience... Americans do not argue, even to themselves, that their actions may be justified by *raison d'état*. They do not claim the right of the stronger or insist to the rest of the world that "the strong rule where they can and the weak suffer what they must. The United States is a liberal, progressive society through and through, and to the extent that Americans believe in power, they believe it must be a means of advancing the principles of a liberal civilization and a liberal world order".<sup>[29]</sup>

"Americans have always been internationalists, but their internationalism has always been a by-product of their nationalism. When Americans sought legitimacy for their actions abroad, they sought it not from supranational institutions but from their own principles. That is why it was always so easy for so many Americans to believe that by advancing their own

n interests they advance the interests of humanity”.<sup>[30]</sup>

This perspective will not change, in Kagan’s view, and it has long been the American position. Both the Clinton and Bush administrations rested on the assumption of America as the indispensable nation.<sup>[31]</sup> Kagan continues: “Americans seek to defend and advance a liberal international order. But the only stable and successful international order Americans can imagine is one that has the United States at its centre”.<sup>[32]</sup> This is not described as an expansion of international law, because supranational governance means for Kagan, working with other nations.<sup>[33]</sup> Instead Kagan means actual government of the whole world by the United States. So he says:

“Just as the Japanese attack on Pearl Harbour led to an enduring American role in East Asia and in Europe, so September 11, which future historians will no doubt depict as the inevitable consequence of American involvement in the Muslim world, will likely produce a lasting American military presence in the Persian Gulf and Central Asia, and perhaps a long term occupation of one of the Arab world’s largest countries. Americans may be surprised to find themselves in such a position...But viewed from the perspective of the grand sweep of American history, a history marked by the nation’s steady expansion and a seemingly ineluctable rise from perilous weakness to the present global hegemony, this latest expansion of America’s strategic role may be less than shocking”.<sup>[34]</sup>

### **III. INTERNATIONAL LAW FORMALISM: THE ETERNAL QUEST FOR THE WILL OF THE STATE AND SOCIOLOGICAL CRITIQUE THEREOF**

At the level of legal formalism in Europe the difficulties with contractarian positivism are less pressing, because whatever schemes of world domination may be afloat in academic circles of legal and political cosmopolitanism, they are not going to be realised politically. Instead, the problem is more sclerosis in academic work. The only form legal communication among states can take is a Triepel-like meeting of state wills as they go beyond their institutional state boundaries to conclude international legal agreements. These could lead to the foundation of international institutions having the pretension to be constitutions of world society. Some German doctrinal study does choose to interpret the UN Charter in these terms. Critical Legal Studies has enjoyed mounting a campaign to demonstrate that the search for the “original intention” of the inter-state legislators cannot be found. The common intention of the somehow originally unified individual state wills is taken to be an ideological illusion.

In other words Critical Legal Studies does not itself afford any way out of this impasse. It will be sceptical that there is a coherent, or dense, culture behind the institution of the state that will allow any recourse to a rebirth of international studies by focussing on the interplay between different national



legal traditions and understandings. That would be to “essentialize” collective social beings. Critical Legal Studies shares with contractarianism the absence of any social theory beyond legal institutions. Just as it will question whether there is any “intention of the legislator” beyond the projection of the legal interpreter, so it will treat the idea of cultural community as a construction of the intellectual. The exercise that I am now proposing will appear to Critical Legal Studies as a form of regressive positivism, social and historical realism. With respect to actual states in the world, whether France, China or Uruguay, one should search for a concrete understanding of how particular states have been constructed and open a way to include the dimension of self-awareness of nation states as frameworks of epistemological self-awareness. This points the way to collective, inherited traditions and prejudices etc., which contribute to the style and content of collective behaviour.

The Swedish philosopher Axel Haegerstrom deconstructs, as a natural law myth, the argument that one can speak of the will of the state as an organised authority within society. That is to say, he begins the sociological task of trying to unearth the whereabouts of the structures, which are the figments of the legal and political formalist imagination. Empirically no organised authority in a society can be so centralised that it is confined to a single person. Any system of law is merely maintained by a majority of the population for an infinite variety of motives, so long as they have no sufficiently focussed motives for breaking with that system of law. The idea that a society governing itself implies a unitary willing, in turn implying a unitary subject is perhaps habitual. However, it can only mean that certain rules relating to a group are supposed to be applied by specifically appointed persons, somehow “through forces operative within the group”. In the end it is a judge who declares a legal principle in litigation.[\[35\]](#)

If law understood as an imperative is called the will of the state, one will still not be able to look to an identifiable group maintaining the system of rules within the group. The reason is that all sorts of factors make up the social forces that maintain the impact of the rules. This medley of factors includes the habits of people to obey decrees, popular feelings of justice, class interests, the lack of organisation among the discontented, the positive acquiescence of the military. Even if each person wishes to conform to the law that does not imply a unitary will in all those individuals participating, that they have a common end as a unifying focus. The force of a law never depends merely upon the fact that a certain section of persons within a group desire it to be obeyed. The concept of a unitary will as a measuring rod for judging the claims of other original sources of law e.g. custom, equity, by resort to the supposed real will of the state authority, is in fact a continuing spectre of natural law.[\[36\]](#)

The idea that there must be a supreme rule of law, which is a principle of validity of all legal systems translates into the idea that every group is a

corporate entity with a supreme holder of power whose ordinances must be followed. This proposition is supposed to be a necessity of thought but rules are applied in practice, as applications of law, in consequence of the already mentioned medley of general extra-legal factors. There is no factual continuity or coherence in legal rules other than what is stated by the judges. Authority is not in fact clearly attributed to individuals in a corporate hierarchy if one is to look to rules, and practices actually followed. Such as way of thinking is in fact all a part of the already mentioned naturalist myth of contractarianism, supposedly legitimising politically and validating legally every decision taken in a way that can be traced back, purely hypothetically, to individual consent. So the belief of positivist international lawyers that there is an identifiable state "complete with will" is a natural law (contractarian) fantasy. There is now absent the classical natural law association with a supposed objective justice, but the obsession with legal validity has simply replaced that idea of justice with a concept of legitimacy based on a fictional individual consent. Haegerstrom's basic point is that this approach to law fails to regard legal systems as actual social-psychological phenomena. Indeed he appears to go so far as to argue that any theory of the sources of law will presuppose naturalist fantasies of unitary harmony, when in fact the very idea of the existence of laws supposes a continued application of them, which is as difficult to unravel sociologically, in terms of actual driving forces, as the idea that one can unravel the intentions behind any original declaration of the laws.<sup>[37]</sup>

As a heuristic device Haegerstrom's so-called sociological realism is immensely helpful in deconstructing the intellectual apparatus with which the formal and particularly French tradition of international law works. Traditionally a legal question is usually a variant of the theme: whether the sovereignty of the state is limited by some international rule, willed explicitly or implicitly by itself alone or in conjunction with others or by the international community as a whole, which has, equally, expressed its will if only implicitly. The international or national judge is set in search of valid rules. Thereby national sovereign space is either limited or extended as a result of the judgement reached as to the whereabouts of the international legal rule. To accomplish all of this, international lawyers at present think with the formalist triangle of sovereignty, international law and community, without any regard for the concrete factors, which are peculiar to the evolution of nations and their relations with one another. Formal logic does not express the reality of actual social movement and so the society of nations, the so-called international community, has a form as unitary as the so-called sovereign state (the organised nation), hiding as much profound difference as exists within states. The UN Charter, in this "objectivist logic", rediscovers its conclusions at its point of departure. For instance, the international conditions the national, modifying it or abrogating it ipso facto. Indeed the two cannot logically conflict, because the trio state, international society and legal order are uni-dimensional elements of a formal equation. For instance municipal law cannot overrule or be invoked against international law. Equally, the principle *rebus sic stantibus* cannot, in

promissory commitments, override the principle *pacta sunt servanda* etc., effectively the same as the principles either of the priority of the international community or of the inevitable harmony of the international and national communities.[\[38\]](#)

Critical Legal Studies is correct that the illusory search for any of these national or international “legal wills” is merely a projection of the interpreting judge, who never undertakes what Haegerstrom, or any sociologist, might remotely recognize as a realistic, empirical search for the actual intentions of real people. However, the difficulty with the critical school, is that it leaves matters there. It recognises, in very vague and general terms, the contingency of the social reality, or at least what it might call, “that which lies beyond the purely projected legal forms”, but it does not attempt to reach out beyond these forms. And indeed, it cannot, for it accepts Haegerstroem’s radical critique of the subjective premises of the contemporary dreamy legal formalism. So, Haegerstrom rejects the Kantian idea that human reason can introduce an “ought” into human behaviour, because subjective attitudes in terms of feelings are reduced to, or explained in terms of, the outcomes of social upbringing and tradition. A clash of subjective attitudes has no moral significance and cannot be resolved. The idea of normative judgement tries to retain the element that something is true because it springs from our will as intelligence and so from our proper self. However, this merely refers to feelings with which, in Humean terms, the person assumes a certain attitude to what is given. If the person lacks the appropriate attitude of feeling and volition, the feeling of attachment to obligation vanishes. Any search for external authority is illusory, which means that any search for “objective standards for normative judgement” will be authoritarian and produce fanaticism.[\[39\]](#) Hence the critical legal scholar will treat any essential search for “objective normative foundations” as fanatical, hegemonial or whatever. Instead he will preach to the judicial interpreter, the virtues of modesty and conversationalism, while still supposing, quite inexplicably, that somehow the international legal enterprise, and particularly its judiciary, should continue to function.[\[40\]](#)

#### **IV. FROM SOCIOLOGICAL CRITIQUE TO CULTURAL, PHENOMENOLOGICAL INTERPRETATION**

However, the next step on the way to a more constructive inter-cultural dialectic, and with it, exercises in international legal translation, is to recognise, as does Raymond Aron, that psycho-social collectivities are a primary fact of international society. Individual life rests, dually on heredity and reflection, (my emphasis) which is not so much racial or territorial as cultural. With a collection or assembly of beliefs and conduct, nations find some internal or domestic harmony in relations of culture, in the narrower sense, politics, history and reason, which ground their language and also law as distinctive styles of existence.[\[41\]](#) These are a mixture of prejudice and reflection,

whereby the nation becomes an epistemological framework of perception, expressing divergences of experiences in time and place, quite simply human limitations of horizon. The essential element of this perspective, over a purely observatory, behavioural, sociological approach, is that one recognises how cultural patterns of behaviour are shot through with human imaginings and intentions, however prejudiced and confused. As Aron says, as long as human groups have languages and beliefs, which are different, they will “mis-recognize” one another and conflicts will arise out of different hierarchies of values. Interests and strategic considerations are all to be given a special, distinctive interpretation by differing groups.<sup>[42]</sup> Aron lays stress upon the rivalry of cultures, the permanent tendency which pushes each to claim that it is superior, where the will to be a nation becomes a collective arrogance.<sup>[43]</sup>

Indeed collective psychological investigation can lead us to even more alarming insights. Negative forces can be at work in collective identities, which need never work themselves through constructively. Depression and paranoia work sharply in the definition of difference that will equally be accompanied by a struggle for superiority.<sup>[44]</sup> Since Hegel first formulated his phenomenology of the Master-Slave relationship it has been clear that at the root of modern phenomenologies of self-determination there is a vigorous if not violent struggle for self-expression. It is rooted in a logic of identity that is conflictual and anti-social in the sense that it represents a perhaps-obsessive struggle against the “outside threat” of objectification. While it may work towards the goal of inter-subjective recognition – which must suppose frontiers – the struggle is apparently inherently unstable. The Hegelian paradigm was popularized for international relations by Alexandre Kojève’s lectures on Hegel’s *Phenomenology of the Spirit*.<sup>[45]</sup> The Hegelian influence on Sartre, and its implications for international relations theory, have been followed up by James Der Derian.<sup>[46]</sup> Its influence on feminist phenomenologies of struggle is developed by Jessica Benjamin.<sup>[47]</sup>

Yet it is precisely this dark social reality of explosive prejudice that an existential phenomenology of international law has the task to challenge and overcome, and not the dreamy worlds of formal validity that an equally formalist Critical Legal Studies denounces as vacuous. It is possible, phenomenologically, to become aware of one’s embeddedness in a “sea” of prejudice, to grasp a meaning from a different standpoint, engage in acts of imaginative projection, premised, certainly, on existential uncertainty – the consciousness of an absence of foundations – but also upon the existence of constituted, intentional worlds. These worlds allow of interpenetration and we are not compelled to remain imprisoned in solipsist monologues. Nations are intentional worlds, but it is possible, for the international lawyer, to achieve transcendence, also of himself, through a dialectical process of moving from one intentional world to the other.

The fragments of legal institutions can be understood, as intentional acts, if

placed in this wider context of relations among nations, as the cultural complexes which Aron understands and describes. “Wars” against terrorism etc. and Islamic militants, struggles over proliferation of weapons of mass destruction, quarrels over the relationship of environmental to commercial concerns (GM foods), migratory movements and asylum appeals, issues of humanitarian assistance and limits to humanitarian interventions, disputes over minority and secessionist movements – all of these issues and many others, are, in practice, embedded in concrete relations among particular groups. The essential part of a non-essentialist argument is that the parties should appreciate that their perspectives cannot have, as far as their powers of self-reflection go, any measure of objectivity. They are completely situation determined and in this sense, lack any final foundation. The following are some examples:

For instance the arguments about Iran acquiring nuclear weapons are in a context of the Palestine Israel conflict and the covert assistance of Israel by the Western powers to acquire such weapons in the 1960s and 1970s. Iran accepts, voluntarily, a legal duty not to acquire the weapons. The difficulty is the notoriously ambiguous legal duty not to enrich uranium for the purpose of developing nuclear weapons – a subjective standard. Yet the nuclear powers have also a duty to work towards their own disarmament. More especially the Non- Proliferation Treaty is itself consensual and can be denounced. Arguments about proliferation have something to do with treaty obligations, but much more to do with attitudes that communities have towards one another, themselves rooted in fairly long histories of antagonistic association. The question of equality of treatment is glaring. Arguments that “weapons cannot be allowed to fall into the hands of certain types of states” are prevalent here, and yet involve cultural, political and moral evaluations inseparable from interpretation of treaty terms. Interpretation of any scattered and random treaty obligations (why should not Israel be a party to the NPT?) will be, it can safely be said, entirely a matter of judgement by particular historical cultural communities, of other such communities.

Secondly, the security issue, war against terrorism and humanitarian atrocities generally, has become polarised between most of Europe and the United States. Ulrich Beck has offered a picture, Orwellian in character, of what the recent American impact on international law has come to, while at the same time he regards the European response as a form of stone-walling, producing global stale-mate. In particular he takes up Orwell’s ideas as to how words are given opposite meaning, e.g. Fascism is Democracy, and he applies this to particular “developments” in international law, such as the doctrine of humanitarian intervention. So Beck comes back precisely to the idea of the just war. He finds it paradoxical that the most successful institutionalisations of cosmopolitan culture – the so-called societies of the language of individual and democratic freedom – lead the call for a legitimisation and legalisation of war, (Krieg ist Frieden, Über den

postnationalen Krieg), in particular what he graphically calls Human Rights Wars and Wars against Terrorism. The boundaries that have preserved the world against total war since the 17th century, dualities such as war/peace, civil/military society, military/police action disappear. Beck speaks of a culture of world turbulence, which is a mixture of poverty, religious intolerance, racial hatred and anti-Americanism. He does not prefer the European to the American model, for just as one seeks revolutionary solutions through unilateral action, the other seeks a negotiation without force from the standpoint of the status quo. For one thing, the threats now facing Europeans and Americans, also among other threats, include a diffuse ideological terrorism (so-called militant Islam) and international criminality, a privatisation of violence, which neither European nor American models of international order accommodate.<sup>[48]</sup>

Thirdly, Beck so impressively recognises with respect to the interface between environmental and commercial questions, that we are here on the border between reason and belief, if not madness. The nature of objectivity is what is at stake, both whether it exists and whether we can reach it. Dangers, whether of terrorism or more European anxieties, such as global warming and genetic food manipulation (Frankenstein foods) are real because they are real in the eyes of the beholders. The reality and the perception of dangers are difficult to separate. Indeed Beck appears to claim there is no objectivity of a danger apart from the perception of it from a cultural (meaning relative, particular) perception and evaluation. The objectivity of a danger, he says, exists and has its origin essentially in the belief in its existence. Here Beck turns his own discourse into an Orwellian paradox. That one person's mortal danger is another's infantile hysteria means that the struggle or striving for objectivity throws us completely into the realm of belief, that is, quite simply faith, that from which the conscience of the Enlightenment is supposed to have escaped. Those who believe in the dangers of atomic terrorism live in a totally different world from those who believe in the dangers of fall-out from the use of atomic energy. What shakes the NATO and the EU to the foundations is existential threat to one person and pathological hysteria to the other. How to come out of this impasse?<sup>[49]</sup>

Shweder's work on cultures makes the connection between culture and phenomenology, the philosophical framework for a non-foundational dialectic. Phenomenology, as a philosophy of the "Obvious", is a matter of becoming aware of the Self, aware of one's embeddedness, of prejudice, in the sense of the framework within which one pre-judges matters. Shweder argues that it is possible to assume that one particular culture will grasp a meaning from a standpoint different from any other but at the same time representing a striving for objective meaning which can, and should and will have an impact on others. Shweder opposes what he calls Nietzsche's ontological atheism, his reductionist reification of thought as radical subjectivist imagining, without contact with an external, objective world. Instead Shweder believes that



existential seizures of meaning represent “irrepressible acts of imaginative projection across the inherent gap between appearance and reality”.<sup>[50]</sup> That is, one can come out of inherited prejudice.

Cultural psychology for Shweder is premised on human existential uncertainty (the search for meaning) and on an “intentional” conception of “constituted worlds”. The principle of intentional (or constituted) worlds asserts that subjects and objects, practitioners and practices, interpenetrate each other’s identities and cannot be analyzed into independent and dependent variables. A socio-cultural environment is an intentional world, in so far as a community of persons direct their purposes and emotions towards it.<sup>[51]</sup> It is not possible to achieve transcendence and self-transformation except through a dialectical process of moving from one intentional world into the next.<sup>[52]</sup> It is precisely this dialectic, which saves us from the stagnant bigotry of nationalism, which legal formalists and critical legal scholars equally distrust.

## **V. PHENOMENOLOGICAL PATHWAYS TO INTER-SUBJECTIVE NORMATIVITY IN INTERNATIONAL LAW**

From a phenomenological perspective, international society does not have to be seen as a normative vacuum, even in the absence of the acceptance of corporatist language of global states or inter-governmentalism. A sense of obligation can arise for both the individual and society from a consciousness of a sense of identity with oneself and a memory of relationships with others. The unity of the self may possibly not have any absolute foundation because, as far as self-reflection takes us, the unity of the self is of a gradually acquired and eventually consistent pattern of acted on intentions. Obligation arises from awareness of the need for unity through consistency and through comprehension of the similar needs in the other. This position may or may not be ultimately foundational. Anyway, phenomenology itself does accept the ultimately solid nature of the individual person. Equally, while it is fashionable to say that nations are social-historical constructions, it stretches the fashion to say that, for instance China is the construction of some dissatisfied, over westernised “Chinese” intellectuals, if this is taken to mean there is no continuity from present Chinese identity, back into the 19th century and beyond. Nonetheless, for the sake of the construction of dialectical argument, the working assumption here as to the pariah spectacle of objective national essences is that they will never be grasped, as increasing self-awareness increases doubt as to the compelling nature of one’s own perspective.

So, Edmund Husserl does explain that the starting point has to be the supposition of an “I” from which conscious experience originates. The “I” is not an empty ideal point. It becomes originally the one who has decided and creates a history, which persists for it habitually as the same “I”. The direction towards the personal is towards how persons define themselves in relationships, friendships, marriages and unions, above all how they form mental meanings in

a useful way. It is the self-objectification of the monad as psyche that makes the self aware of the self as self among others. This happens not in cognition but in action, in praxis. Husserl abandons the impersonal subject of Descartes, Kant etc., orienting towards the inter-subjective network. This inter-monadic relation includes a structure resistant to our arbitrary actions. It is starting from the “own” self that the alien is understood, but this contact is a matter of suffering and doing whereby the ego or man becomes a person in community. The outcome is an objective order in the sense of an inter-subjective order.[\[53\]](#)

Something more needs to be said about the constraints of inter-subjectivity compared to the apparently transcendental search for objective validity. Inter-subjectivity is the kernel point for Husserl, replacing Descartes’ search for a final foundation point, such as divine veracity.[\[54\]](#) In other words the lawyers’ search for a final, “nodal” point of validity is replaced by the search for the point where mutual comprehension of intentionalities can be reached. Intentionality refers to the intending of a sense and not to some sort of contact with an absolute external world. At the same time the life of the Cogito is not an anarchic outburst but is guided by permanences of signification.[\[55\]](#) In other words, contrary to the “anti-essentialists” who believe that all would-be substances are purely social constructions, it is maintained that the ego does constitute the substratum of its permanent properties. The crucial point is that the ego gives itself coherence by its manner of “retaining” and of “maintaining its position-takings”. This includes “my world around me”, including my experience of “the other”, a radical triumph of interiority over exteriority.[\[56\]](#) The ego has to imagine itself in order to break away from itself as brute fact. Yet this imaginative self-distancing is anything but a self-construction. It bridges the disparity between positing of the self and the positing of “the other” in a subjectivity in general. There is a capacity to bring the presence of “the other” back to the presence of the self, because of the power of consciousness to go beyond the latter into its implicit horizons.[\[57\]](#)

The crucial next step is to realise that the histories of nations, in Aron’s sense, places them in the grip of inter-subjective constraints similar to those that affect individuals, and these nations the myth of the Tower of Babel would have us believe, have always existed in one form or another.[\[58\]](#) It is the inter-subjective constraint that exists at this level, which is crucial for international law. These debates themselves only make sense in the context of a material definition of the personality of the state as an historical cultural community, the descriptive analysis of which has also to be evaluative. The most helpful categorisations here are from Barry Buzan, in terms of mature and immature political societies, also embedded in institutionalised structures. The definition and application of international legal rules can be understood, across the board in terms of a phenomenology, to a greater or lesser extent, of maturity and immaturity, i.e. in the anthropomorphic sense of being self-assured,

balanced, internally stable, in contrast to being fragmented, disturbed, or otherwise prone to attack others.<sup>[59]</sup> At the same time his definition of (im)maturity extends to relations among states, for instance India and Pakistan, or the United States and the Soviet Union during the Cold War. Clusters of relationships cover a mixture of (im)mature relations. How far two states define themselves against one another depends on the circumstances. The state practice needs to be illustrated more fully with respect to clusters of recognisable international legal rules.

One may take an example of how international law needs to be seen in the context of its embeddedness in inter-communal relations by looking at the law on the use of force and particularly the idea of self-defence against the threat of danger from another country. Buzan identifies precisely the problem of defining ideas of “threat” and “security” in a manner, which is decisive for international law. The formalist international law concept of threat of force or use of force is purely directed against the physical territory and “physical” institutions of the state, in particular its government officials. This is to ignore the vital element of the character of the state, itself dependent upon distinctions between the idea of the state, the institutions of the state and its physical base.<sup>[60]</sup> Whether a state such as the US feels “threatened”, e.g. by the Soviet Union, in the time of the Cold War (1982) will depend crucially upon the part played by anti-communism in the construction of the idea of the United States. This type of inherent instability continues to be built into many of the world’s “trouble spots”, particular Israel/Palestine and India/Pakistan. It is difficult to see how “threats” to security can be eliminated in these areas without a fundamental change in the idea, and, at the same time, the institutions and physical base of these states. The viability of legal rules based on reciprocity, such as mutual recognition, of equality and non-intervention is put into question in these cases.

Equally decisive are internal weaknesses in the idea of the state as such. When the population have no common interests, purposes and ideas, the society or population of the state will be liable to internal divisions which will automatically lead other states to treat the physical base of that state as a legal vacuum, making it prey to various levels of intervention. A mature anarchy in the relations of states supposes that the states are themselves mature as distinct from immature. By mature Buzan means “well ordered and stable within themselves”.<sup>[61]</sup> Only mature states can support strong common norms for the system as a whole. The idea of international law expresses this mature anarchy, mutual recognition of sovereign equality, the right of national self-determination, the sanctity of territorial boundaries, the resolution to settle disputes without recourse to force and, most importantly, refraining from interfering in the domestic affairs of other equal states. Any state, which does not reach the necessary level of maturity automatically, falls out of this net of reciprocity and the vacuum of physical space that it represents is not filled by international law. So the international lawyer has to make his way

through a web of ideas, expressing political culture, more or less unevenly within and between states, and it is these alone that can possibly support a law based upon reciprocity. If the unity is not there, the law cannot create it, because normativity -as inter-subjective constraint- can only develop and function if there is a minimum of stability and coherence in the intentions of the partners. In this sense the legal order remains non-foundational.

It would be useful, by way of a concrete example, to show how the deformation of relations among several states can work to disadvantage and indeed harm in relations with third states. It is no part of the phenomenological approach outlined here, that somehow a cast iron method has been devised to uphold the existing fabric of international law. Quite the contrary – if the personality of the individual or the state fragments, then any hope of legal order will fragment with it. It is only by understanding, or becoming aware of the facts of, and dynamics of this fragmentation that any hope of recovering maturity exists. This does not have to happen. Somehow it rests upon the free choice of persons and communities, who can as easily be the cause of the destruction of others as of themselves. The task of the academic, independent, international lawyer or whomever, remains, at most, as a mediator, to translate the confusion of fragmented relations into a lucidity that might pave the way to an international calm. Whether he can rise to the occasion is anyone's guess. The non-foundational world is not one full of predictable methods and foolproof techniques.

The example chosen is the UK participation in the US aggression against Iraq in 2003. There may be many valid explanations of the motives of the Blair Government, but the one suggested here, is to see its decision for war as enmeshed in the dependency of the so-called special relationship between the two countries. This may be seen, briefly, without cataloguing the whole episode once again, in placing in context an important meeting in the summer of 2002, alongside the faraway participation of the UK in the Korean War in 1950. The UK intention to go to war is clearly demonstrated to have dated at least from the time of a meeting in 10 Downing Street London on 23 July 2002.<sup>[62]</sup> The key features of this meeting are that the US has decided to take military action and the UK is going to support that. The problem, so to speak, given that Britain is a democracy, is to how to manage public opinion within Britain, not whether the UK should follow the US. The latter choice is impossible to make, given the present level of consciousness of British elites.

In the words of the Foreign Secretary, Jack Straw, while Bush had made up his mind to take military action, “[...] the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. We should work up a plan for an ultimatum to Saddam to allow back the UN weapons inspectors. This would help with the legal justification for the use of force....”(my italics).<sup>[63]</sup> Clearly

the Foreign Secretary was concerned with problems of public presentation, with what he himself thought to be a weak case, this approach was also endorsed by the Prime Minister; he said “it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors... There were different strategies for dealing with Libya and Iran. If the political context were right, people would support regime change. The two key issues were whether the military plan worked and whether we had the political strategy to give the military plan the space to work” (my italics).

The Attorney General, Lord Goldsmith, said that the desire for regime change was not a legal base for military action, nor was either self-defence or humanitarian intervention grounds that could be used in the circumstances at present, and use of a prior UNSCR 1205 would be difficult.

The issues to do with oscillations in the legal advice of the Attorney General, Lord Goldsmith to his government on the question of war, are well known. I wish here only to highlight one part, the influence of the US international lawyers upon him. What I consider significant is the view that what moved Goldsmith from the position that UNSCR 1441 used unclear language allowing arguments on both sides, to the standpoint that a reasonable case could be made for it reviving UNSCR 678, was a visit to the US. This aspect of the history is extensively reported in *The Observer* May 1, 2005. Goldsmith was sent to Washington by the Foreign Secretary, Jack Straw, to “pit some steel in his spine”, as one official said. On February 11, 2003 he met William Taft IV, Powell’s chief legal adviser, and after a “gruelling 90 minute meeting in Taft’s conference room 6419, he met many other key lawyers, including John Bellinger, legal adviser to Condoleezza Rice, National Security Adviser. Bellinger is reported to have said: “We had trouble with your Attorney, we got there eventually”. Taft commented to *The Observer*, that all the American legal advisers told Goldsmith their views in the same way and he did not at the time indicate what his own conclusion would be. *The Observer* reports of Taft: “Laughing he added: ‘I will say that, when we heard his statement in Parliament, which was the next thing we heard about, what he said sounded very familiar’”.

The real challenge for anyone wishing to reflect upon these apparent streams of consciousness, whether of the politicians or the lawyer, Goldsmith, is to fathom the intensity of the Anglo-American relationship. All is predetermined by the felt necessity to follow whatever the Americans are going to do. This is a permanent feature of British foreign policy at least since the Korean War. It is not a party difference in Britain, except for the minority Liberal Democrats. The Conservatives are still saying that, even without evidence of Weapons of Mass Destruction and even with the legal mess, they support the decision to go to war against Iraq. It is impossible in the space here to exhaustively describe the phenomenon of “the need to be with the Americans”, but one can

illustrate it from the decisions of the British Cabinet in January 1951 to embrace the American demand for whole-scale rearmament, despite the internal advice that it would be disastrous for the rejuvenation of the British post-war economy. While Anaurin Bevan, the Minister of Health could not believe the American argument that the Soviet Union posed an urgent threat of a full-scale attack on the West (and resigned from the Cabinet), Hugh Gaitskell, as Chancellor, “[...] in relation to the Cold War acted within the Cabinet as the influential voice of subservience to America, as a British quisling [...]. Since Gaitskell thus wholeheartedly embraced America’s anti-Communist crusade and the Western rearmament driven by it, he was resolved that expenditure on defence must be preserved at the cost of the health service [...]”. In their resignation speeches Bevan and the future Prime Minister Harold Wilson explained the rearmament programme “was more than the economy could bear without crippling damage”.<sup>[64]</sup>

This is one of innumerable further examples, which Barnett gives, from the British National Archive, of a policy of subordinating British state interests to those of the United States, which Barnett thinks can only be explained, if at all, in terms of some extraordinary, and in his view, mistaken trust that Britain feels towards the United States. Whether the relationship is always so consistently intense, in the case of the Iraq war the sheer ferocity of this relationship effectively undermined any prospect that Britain could observe the rules of the UN Charter. This perception cannot be reached by international lawyers adopting a quasi administrative law search for breaches of legal competence through exploring such corporatist formalities as British House of Commons and Cabinet votes, but go instead to the heart of what Haegerstroem calls “the forces operative within the group”, the sofa politics of Prime Minister Blair’s inner circle and the closed circles of military and civil servants who see themselves as dependent on this sofa politics.<sup>[65]</sup> This is where one has to go to understand why what happened did happen and it is also the target to be deconstructed if it is not to happen again.

## VI. CONCLUSION

What is demonstrated by this final example is that any in-depth exploration of serious conflict about the place of international law in inter-state relations has to show that however lucid individual politicians and lawyers may think they are, structural anthropology is correct that their very language and thought patterns will be embedded so deeply in their ethnic-cultural context that arguments about truth/falsity, honesty/deception will be impossible to unravel. One is, as an accidentally external, cultural legal critical voice, up against such a density and stubbornness of opinions and convictions that it appears impossible to move forward with rational argument. Debate can only take on a personal language of individual accountability and responsibility, in which doctrine i.e., the struggle of individual, relatively independent academic international lawyers, has a part to play. They try to call both political leaders



and government lawyers to account by appeal to international standards.

The difficulty for the very idea of international legal order remains its seriously inchoate institutional character and that international law ideas held nationally are embedded or even encrusted in prejudices and emotions tied up with the national history and identity of the country and its favoured international associations, i.e., special relationships. Behind the inchoate international nature of international legal order lies the perpetual threat of unilateralism, in the sense of solipsistic activity by states. It is also the counterpart of a relative lack of international institutional authority. The only response to this deficiency, however weak, remains international legal doctrine. Doctrine is itself weaker than ever in its foundations. It rests on nothing more than the non-foundational, inter-subjective dialectic which can challenge the prejudices of individuals who claim an individual sovereignty for the meaning of the language they use, however comically they may be enmeshed in prejudices which only a most elaborate anthropological and phenomenological analysis can unravel. As for a positive outcome it can only come, if at all, from live and personal dialectical engagement. Learned writing has to be accompanied by social confrontation before there is any prospect of psychological movement. It is conceivable that the individual scholar can reconstruct the entire process from within himself, but this is most unlikely.

It is the corporatist myth of the state, grounded in the political theory of contractarianism, which leads the international lawyer astray from the real ground of inter-subjective dialectic in legal relations among states, into the sterile world of inconclusive arguments about legal competences of states, of the legal validity of their behaviour. Legally transcendent standards and transcendent legal authorities to interpret and enforce these standards are logically conceivable to the imaginations of legal formalists, but their implementation within the next centuries will only mean the coercion of some nations by others. In the meantime let us try to understand why we quarrel so much.

---

## REFERENCES

\* Professor of Public Law, University of Aberdeen.

[1] A letter from Karine Caunes, 08.11.06

[2] A. CARTY, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester University Press, 1986, to whose arguments Ms Caunes kindly refers in her letter.

[3] I prefer the expression non-foundational to anti-foundationalist, as the latter expresses an aggressive conclusiveness about the concrete circumstances of individual persons and nations, which would, in my judgment, need to be individually demonstrated. Anti-foundationalists tend not to feel they need to take the trouble to do this.

- [4] This will still involve some repetition of arguments already published, but since they have not evoked a positive response, as far as I am aware, they probably need more succinct expression.
- [5] So graphically and accurately described by the Russian President, Putin, at the Security Conference in Munich on the weekend of the 10-11 February 2007.
- [6] J. COMBACAU and S. SUR, *Droit International Public*, 1st ed., Paris, Domat Montchrestien, 1993, p. 268.
- [7] Ibid.
- [8] Ibid, p. 226.
- [9] Ibid, p. 269.
- [10] NGUYEN QUOC DINHP, D. AILLER and A. PELLET, *Droit International Public*, 6th ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1999, pp. 407-408.
- [11] D. ALLAND, *Droit International Public*, 1st ed., Paris, PUF, 2000, in the Chapter by H. ASCENSIO, "Etat", pp. 99-ff, § 91.
- [12] Ibid, §§ 73-75.
- [13] P.M. DUPUY, *Droit International Public*, 4th ed., Paris, Dalloz, § 133.
- [14] Ibid, §§ 30-34 and 130-132.
- [15] J. COMBACAU and S. SUR, *Droit International Public*, 1st ed., Paris, Domat Montchrestien, 1993, pp. 219-220.
- [16] J. BARTELSON, *A Genealogy of Sovereignty*, Cambridge, Cambridge University Press, 1995, p. 128.
- [17] Ibid., p. 110.
- [18] Ibid., pp. 130-131; Bartelson applies these remarks to Vitoria.
- [19] Ibid., a summary of the whole of Bartelson's chapter 5, 'How Policy Became Foreign', pp. 137-185.
- [20] Ibid.
- [21] O. O'DONOVAN, *The Ways of Judgement*, Cambridge, Eerdmans, 2005, p. 140.
- [22] Ibid., p. 150.
- [23] Ibid., pp. 155-156.
- [24] Ibid., p. 163.
- [25] Ibid., pp. 219-220.
- [26] Ibid., p. 214.
- [27] Ibid., p. 214.
- [28] R. KAGAN, *Paradise and Power*, London, Atlantic Books, 2003, p. 65.
- [29] Ibid., p. 41.
- [30] Ibid., p. 88.
- [31] Ibid., p. 94.
- [32] Ibid.
- [33] Ibid., p. 95.
- [34] Ibid., p. 96.
- [35] A. HAEGERSTROEM, *Inquiries into the Nature of Law and Morals*, edited by K. OLIVECRONA, translated by C.D. BROAD, Almqvist and Wiksell, Stockholm, 1953, pp. 36-38.
- [36] Ibid., pp. 39-42.
- [37] Ibid., pp. 43-45 and 48-51. Of course Haegerstroem applies his views only to the contractarian theory of the state. I endeavour to elaborate their international law consequences.
- [38] This style of critique of particularly French international law formalism is set out by C. APOSTOLIDIS, *Histoire du droit international: Doctrines juridiques et droit international; Critique de la connaissance*, Paris 1991.
- [39] See J. BJARUP, "Reality and Ought: Haegerstroem's Inaugural Lecture Re-examined", *Scandinavian Studies in Law*, 2000, pp. 57-68.

- [40] This is the very vague conclusion of M. KOSKENNIEMI, *From Apology to Utopia*, Finnish Lawyers Publishers, Helsinki, 1988.
- [41] R. ARON, *Paix et Guerre*, Flammarion, Paris, 1962, pp. 735-736.
- [42] *Ibid.*, p. 741.
- [43] *Ibid.*, pp. 297-298.
- [44] *Ibid.*; C. OLIEVENSTEIN, *L'Homme Parano*, Paris, Livre de Poche, 1993, pp. 103-108.
- [45] A. KOJEVE, *Introduction a la lecture de Hegel*, Paris, Gallimard, Paris, 1947.
- [46] J.D. DERIAN *On Diplomacy*, Oxford, Blackwell, 1987, pp. 152-160.
- [47] J. BENJAMIN, *The Bonds of Love*, New York, Verago, 1990, pp. 51-84.
- [48] U. BECK, *Der kosmopolitische Blick oder: Krieg ust Frieden*, Frankfurt am Mein, Suhrkamp, 2004, especially Chapter 5: "Krieg ist Frieden: Ueber den postnationalen Krieg", pp. 197-244.
- [49] *Ibid.*
- [50] R. SHWEDER, *Thinking Through Cultures*, Cambridge, (Mass.), Harvard University Press, 1991 p. 68.
- [51] *Ibid.*, p. 74.
- [52] *Ibid.*, p. 99.
- [53] P. RICOEUR, *Husserl: An Analysis of His Phenomenology*, translated by E.G. BALLARD, Evanston, Northwestern University, 1967, pp. 137-141 and 168.
- [54] *Ibid.*, p. 84.
- [55] *Ibid.*, p. 94.
- [56] *Ibid.*, pp. 106-107.
- [57] *Ibid.*, pp. 108-113.
- [58] Also the view of A.D. SMITH, *The Ethnic Origin of Nations*, Oxford, Blackwell, 1986.
- [59] B. BUZAN, *People, States and Fear*, Brighton, Wheatsheaf Books Ltd, 1982.
- [60] *Ibid.*, especially Chapters 2 and 4.
- [61] *Ibid.*, pp. 96-98.
- [62] Reported and reproduced in the Sunday Times, 1 May 2005, available on [www.timesonline.co.uk](http://www.timesonline.co.uk) - the Secret Downing Street Memo.
- [63] *Ibid.*
- [64] C. BARNETT, *The Verdict of Peace*, London, Macmillan, 2001, pp. 51-52, from the Chapter, "The Principal Partner of America in World Affairs".
- [65] The reference to sofa politics is taken from the so-called Lord Butler, *Inquiry into war: Review of Intelligence of Weapons of Mass Destruction*, HC898, July 2004.

## THE OPENING OF THE HUMAN MIND

Philip Allott\*

*An anthropology of law is a useful method for diagnosing the mental health of a given society. The sad state of the idea of international law has made, and has been made by, the sickness of international society. Social forms are products of the human imagination. Throughout the whole of recorded human history, the self-socialising human mind has struggled to find ways to overcome the natural self-corrupting tendency of government and law, a pathological process in which the governors and the governed are liable to be co-conspirators. For better and worse, the European mind has played a leading part in the long story of the making of social forms, national and international, including the self-destructive mythology of the international system, dominated by the social forms of diplomacy and war. Since 1945, the European mind has abdicated its global intellectual responsibility, as it has constructed an inadequately imagined system of law and government in Europe, a state without a society – an ominous precedent. In the new social situation, national and international, of the twenty-first century, the human mind will imagine new ideas of law and government, new ideas of international society and international law.*

THIS IS NOT the first period in human history when the spirit of the time is characterised by an equilibrium of evils, when mankind veers between savagery and lethargy, superstition and immoralism.<sup>[1]</sup> This is not the first period in human history when the governing classes parade themselves as shameless corrupters and corruptees, collusive manipulators of the masses who manipulate them.<sup>[2]</sup> But this is surely the first period in human history when humanity feels powerless in the face of the products of human power. And among the most intractable of those products are the products of the power of the human mind.

At the heart of the drama of human history is law – author and director and chorus and actor and cold-eyed spectator. Law is the mysterious drama of the human will magnified and collectivised. Each of us is master and slave of our will. Each of us is master and slave of the law.<sup>[3]</sup> Law is artificial<sup>[4]</sup> necessity,<sup>[5]</sup> the salutary yoke.<sup>[6]</sup>

An anthropology of law is at least as useful as any other possible form of intellectual inquiry which seeks to make sense of the overwhelming complexity and obscurity and mutability of human society. A given society's idea of law at any given time is a valuable diagnostic clue as to that society's state of mental health at that time. An anthropology of law at the outer limit of human self-socialising, at the so-called 'international' level<sup>[7]</sup> – the universal legal system – should provide us with particularly precious clues as to the present state of the mental health of all-humanity.

The present state of the idea of international law is a sad reflection of human

social history, a symptom of the sad state of humanity's mental health. The European mind bears an exceptional responsibility for the present state of humanity's mental health. For twenty-seven centuries, for better and for worse, socially constitutive ideas have flowed from the European mind. Only humanity can cure humanity's sickness. But the European mind bears an exceptional clinical responsibility. The re-opening of the European mind is a necessary condition of the opening of the human mind.

THE LIFE-STORY OF LAW has certainly been dramatic. Law has been a Mother Courage with a wagon full of motley goods inherited from a murky past, assailed by every kind of lawlessness, always ready to exploit new opportunities, following an unsteady course through overwhelming events, including wars and revolutions and fundamental social transformations of every kind.<sup>[8]</sup> The courage of the law, like the courage of Brecht's heroine, has been ambiguous. It has certainly included a socialised form of what the French have called civil courage and the Germans have called Zivilcourage – giving a socially effective form to values that the individual human being, or at least the individual citizen, would regard as values that should be enforced socially. Such collectivised high values have included abstracted values grouped under suspiciously grandiose titles – the Rule of Law (État de droit, Rechtsstaat), human rights and fundamental freedoms, constitutionalism, republicanism, democracy.

The more poetic the title of a given social phenomenon the more likely is it to contain a large part of fiction. We would tend to be less suspicious of a public building called 'the law courts' than of a building called 'the palace of justice'. The courage of the law has also included a substantial proportion of what can only be called abusive courage, the form of political wisdom (virtù) which is characterised by the clever manipulation of that other ambiguous heroine, Machiavelli's disorderly fortuna.<sup>[9]</sup> The law is the best means that humanity has found for taming social entropy in ways that suit the desires and interests of those who make the law, and the law's best source of strength has been found in the human imagination. The law enacts what the imagination invents; promise, property, tort, crime, government, nations and state, all of these, and countless others, are works of the human imagination trans-substantiated into everyday social reality, fiction made fact.<sup>[10]</sup> Change the story you tell the people and you change the reality which you and they inhabit.

A SOCIETY needs a shared mythology.<sup>[11]</sup> A shared mythology does not necessarily make a society. We have inherited a shared international mythology which is not the shared mythology of a society.

The naïve animism of Vattel – personifying 'nations or states' as if they were the lumbering Übermenschen of a Norse saga or a Wagner music-drama (1758).<sup>[12]</sup> Herder's psychologising of the 'nation' – each with its own Fichtean ego full of the violence of repressed desire (1774).<sup>[13]</sup> Clausewitz

and the rationalising of Napoleonic total war – nation against nation as gladiators in a permanent existential struggle, political, economic and military (1832).<sup>[14]</sup> The fertile fictions of ‘law’ could obviously be used and abused to serve the purposes of the masters of this new world of the imagination, this new symbolic universe.<sup>[15]</sup> They could not be expected to cause it to civilise itself, let alone to socialise itself.

Romantic nationalism was the most deadly form of collusion between government and people. Enthusing the people with a fraudulent image of their ideal identity enabled governments to take absolute power over the people, body and mind. The industrialising of national economies, integrating the labour of the masses into superhuman wealth-creating machines, transformed governments from the disreputable successors of medieval royal courts into general managers of apparently unlimited concentrations of public power. The making and enforcement of the law became the power over all social power. The expansion of socio-economic might, through international trade and colonisation, extended the gladiatorial arena of the nations to cover most of the human world. People discovered that total government and total war require total sacrifice and such was a legacy of the symbolic universe of Europe’s nineteenth century to the real world of the twentieth century.

Mysteriously, however, the agonistic co-existence of the new state-molochs within the nineteenth-century symbolic universe not only survived what should have been its twentieth-century *Götterdämmerung*. It managed to retain the trappings of a much more ancient symbolic universe – the world of diplomacy. Relations between states are conducted in forms that derive from medieval Europe, most characteristically from the bizarre process of mutual self-constituting of the two emerging nation-states of England and France. From the eleventh century, and for five centuries thereafter, it was impossible to say whether the essential nature of the querulous Anglo-French sibling rivalry was diplomacy punctuated by episodes of war, or war punctuated by episodes of diplomacy.<sup>[16]</sup>

War and diplomacy were natural pastimes of the nobility, especially the feudal barons whose social power was based on land-holding. The acquisition of land, and disputes over title to land, could be submitted to the arbitration of violence, if they could not be submitted to a court. War had the advantage over jousting that it could be conducted by proxy and would risk the lives of expendable retainers and the otherwise worthless rabble. The manipulation of relations with rival land-holders through negotiation and marriage could be a profitable art for those who mastered it. For the king, lord of all lords, war and diplomacy had the additional attraction of being conducted on a larger stage, with larger, more thrilling challenges and rewards.

That this medieval paradigm of the co-existence of rival feudal land-holders should have survived into the new symbolic universe made by Vattel, Herder,



and Clausewitz is a tragic and terrible irony of history. The vast impersonal power-machines of the nation-states were apparently still supposed to have not only interpersonal relations, but even personal feelings about each other.<sup>[17]</sup> Even in the twentieth century, their formal relations were seen, by otherwise intelligent and knowledgeable observers, in the same glamorous and theatrical light as they had always been, as they had been in the days of Henry V or François I or Henry VIII, Wolsey or Richelieu or Mazarin.<sup>[18]</sup>

EUROPEAN INTEGRATION cannot escape its genetic inheritance. The European Union contains the whole of European history. A re-opening of the European mind begins with the effort to understand the true nature of European integration, an effort that is directly related to the challenge of understanding the true nature of a globalising world.

The masters of European integration want the people to believe that the EU is something essentially new, a new chapter in a new volume of European history. But the inarticulate historical sense of the people tells them that, on the contrary, the EU seems very much like yet another episode in the three-thousand-year history of the relationship between the governed and the governors, the many and the few. And the people certainly see that, in the vast legal structure of the 'new Europe', they are witnessing yet again the ambiguous wonder-working of law, the projection of the master-servant relationship onto a third thing (a *tertium quid*) which rules them both.

The masters of European integration want also to convince themselves, and the European people, that the EU is a form of mental re-engineering, a re-forming of the ego-psychologies of the European peoples. The problem is that the ego-psychology of the European peoples is not merely a psychology of their identity. In the course of European history, the peoples of Europe have developed substantially different constitutionalpsychologies, different stories about the nature of society and government.<sup>[19]</sup>

The remarkable clairvoyance of Alexis de Tocqueville was able to explain the new United States better than the Americans explain it to themselves.<sup>[20]</sup> But he was also able to propose a masterly, if controversial, interpretation of the true nature of the French Revolution, that most obscure of historical events. De Tocqueville saw a unifying logic in the event, a logic whose source was not to be found in distorted ideas about 'political freedom' gleaned from Locke or Voltaire or Montesquieu or Rousseau or the abbé Sieyès.<sup>[21]</sup> He suggested the much more interesting idea that the true spiritual progenitors of the Revolution were the French 'Economists' or 'Physiocrats' (he used both terms) of the 18th century.<sup>[22]</sup> We may be inclined to believe that they are also the true spiritual progenitors of the European Union.

Chapter three of part three of de Tocqueville's *The Old Regime and the*

French Revolution should be read by anyone generally benevolent towards the idea of European integration but anxious about the particular form that it has taken. He presents 'the Economists' as the masters of rationalist political absolutism or absolutist political rationalism. Royal power would be adopted and adapted to become the instrument of revolutionary social transformation.<sup>[23]</sup> He describes how the French people had come to regard "the ideal social system as one whose aristocracy consisted exclusively of government officials and in which an all-powerful bureaucracy not only took charge of affairs of state but controlled men's private lives". But, to reconcile this with their ancient love of freedom, they decided to combine "a strong central administration with a paramount legislative assembly: [combining] the bureaucratic system with government by the electorate. The nation as a whole had sovereign rights, while the individual citizen was kept in the strictest tutelage; the former [the nation] was expected to display the sagacity and virtues of a free race, the latter [the citizen] to behave like an obedient servant".<sup>[24]</sup>

Whoever the true spiritual progenitors of European integration may be thought to be, its birth was attended by two ghosts from Europe's past – war and diplomacy. The governing class claim to have cured themselves from their addiction to war by using diplomacy to create a new kind of social system, in which rational absolutism and representative legitimation are combined to create a legal order superior to, but integrated with, the ancient national legal orders. By governmental fiat, all-Europe would become, for the first time, a single constitutional order, folding the national constitutional orders into the integrated constitutional order.<sup>[25]</sup> However, this ingenious and ambiguous process is beset by a deep-structural and life-threatening problem. The masters of European integration failed to achieve the mental re-engineering of the people. They failed to find a mythology of European integration, a society-forming story to tell the people.<sup>[26]</sup> But, worse than that, they failed to re-engineer their own mentality. The masters of European integration live in two different symbolic universes – the new universe of the rational-absolutist European legal constitution and the old universe of diplomacy. They have extrapolated the ethos of diplomacy –the functional reconciling of rational and irrational national claims and interests– to embrace the practice of government and, in particular, the practice of law-making. It seems unlikely that they will re-form their self-imagining or their practice in the foreseeable future. It seems unlikely that the people will embrace such an equivocal half-revolution in the foreseeable future. It is an ominous precedent for the imagining and the practice of a globalising world.

IN 1945, exhausted and ashamed, the European mind closed. European integration took place in a philosophical void. The colonial empires disintegrated and evaporated in a philosophical void. Profound social transformation at the national level took place under the aegis of nineteenth-century ideas of bureaucratic rationalism and socialist meliorism, with

imperious economic forces as the driving force and legislation as the engine of social change, as in the nineteenth century. Philosophy had made its own philosophical void. Philosophy had convinced itself philosophically of its own impossibility.

All this in a century when the blood of uncounted millions had been shed and the lives of countless more millions had been ruined, all over the world, in the name of ideas which had originated in Europe. Over the course of the three thousand years of its recorded history, Europe had accumulated a vast cultural mass made from all the arts and sciences, from all that the human mind and the human hand can make. Now Europe has found that its remarkable essence had been distilled into the form of a hypertrophic state, in the internal sense of the word 'state' and equally a pusillanimous state, in the external sense of the word 'state'. Adrift in a bleak and primitive world in which the European presence seemed condemned to be a secondary presence, a world in which all the perennial social problems were grossly magnified, a world dominated by a parody of the old balance of power – a balance of ultimate evil, in which the Soviet Union and the United States were the Fafner and Fasolt of a crazy psycho-drama,<sup>[27]</sup> a folie à deux which nevertheless determined and threatened the existence of all-humanity for almost fifty years and which, since 1989, has left the human world in a state of perilous confusion. Was it the old world order under new management, or a new kind of world order emancipated from its European roots? The answer is: neither. It is the old world order hopelessly out-of-step with the new reality of the human world.

The anthropology of law, at the global level, reveals a human world that is anything but lawless. The universal legal system is in three layers – national legal systems, transnational law (national legal systems applied to persons and events outside national jurisdiction), and international law (law applicable to the human world as a whole, to persons and events everywhere). At the global level, the fossil of international law remains as a *lusus naturae*, a sport of human nature, a mental taxon surviving from the mythological period of modern history, from the mind-world of Vattel, Herder and Clausewitz, tragically inappropriate for the post-1945 world, hopelessly inappropriate for the the globalising world of the twenty-first century.

The state of law at the two subordinate levels is radically diverse in effectiveness and sophistication from legal system to legal system. But everywhere it contains a troubling characteristic, even in the most sophisticated of national societies. It is a characteristic that has posed a crucial challenge for the redeeming of the EU and that now presents a crucial challenge for the making of a new kind of international society.

Bentham's analysis of public corruption<sup>[28]</sup> centred on what he called the 'sinister sacrifice' – when the holder of public power substitutes personal

interest for the public interest. Within a characteristic British intellectual tradition (Hobbes, Milton, Locke, Hume, Paine, Godwin, Mill), Bentham regarded government as nothing better than a necessary evil.<sup>[29]</sup> Governmental corruption is as natural to government as evil is to the fallen human being. Bentham saw only two possible means for redeeming government from its original sin – public opinion and the law. To make government safe as an instrument for the well-being of the people rather than merely a source of privilege and profit for ‘the ruling few’, Bentham proposed a vast and detailed constitutional system in which public opinion and law could be made to act as what he called ‘counterforces’, to resist the permanent and ineradicable threat of public corruption. A Tribunal of Public Opinion, resting on the two pillars of ‘transparency’ in the business of government and a ‘free press’, would permanently observe and judge the words and deeds of the holders of public power. The law, master and servant of the constitutional order, would permanently correct and punish the abuse of public power, not in the name of so-called ‘natural’ rights but as a matter of everyday prudential practice.<sup>[30]</sup>

Bentham might have foreseen the way in which the economic dimension of society would join law and government in a collusive hegemony with politics to form a ruling triumvirate of ultimate social power. The economy – the struggle to make the wealth of the nation and to distribute it unequally in the form of the legal fiction of property.<sup>[31]</sup> Politics – the struggle to take power over law and government in the name of ideas. Law and government – master and servant of the economy and of politics. He might not have foreseen how law and government would come to see the facilitating of the economy as their primary task, with another ancient legal fiction – the corporation – as the leading actor in the drama of political economy, an imaginary entity demanding from law and government an unceasing flow of new legal fictions to make possible the wonder-working mysteries of the imaginary social arena known as ‘the market’.

Bentham might also not have foreseen that, in the most highly developed societies, endemic collusive corruption would take on a much more complex and productive form – a public-private conspiracy which would leave the private minds and private lives of the citizens as barely residual human phenomena in a form of society in which private ambition and public policy would coalesce. Our social existence was redefined. Society exists for the benefit of us the citizens because we the citizens exist for the benefit of society. It is the task of law and government to mediate this new existential human relationship with ruthless precision.<sup>[32]</sup>

Now, in the first years of the twenty-first century, we are able to observe a remarkable phenomenon. Globalisation is the globalising of social phenomena, including the best and worst aspects of society. The very old and the very new challenges of human society are manifesting themselves now at the global level,

the level of the society of all-humanity. The great question of the relation of law and government, the great problem of governmental corruption, the troubling phenomenon of the reciprocal manipulation of the governors and the governed, and the perennial absolutist tendency of law and government, exacerbated now by the new form of public-private collusion – all these great challenges are now present at the level of international society. Globalisation is the globalising of both social good and social evil.

WHAT WILL BE the presence and the role of law and government at the level of the new international society, the society of all societies, the society of all-humanity? One safe prediction is that the triumvirate of law and government, the economy, and politics will also be the driving forces of the new international society. Together they fashioned the old symbolic universe which suited the desires and needs of the masters of the old international system. Together they will dominate the making of the symbolic universe of the new international society.

The old idea of international law was made on the basis of an ingenious manipulation of two powerful ideas taken from general social philosophy – custom and consent. Those ideas have served again and again as the constitutive elements of powerful social philosophies. Customary law and its deep structure of consent is a social form as old as human societies.<sup>[33]</sup> In the making of international law, they were used cynically to prevent the emergence of law as a third thing, a *tertium quid* capable of ruling the rulers, capable of mastering the makers of the law themselves.<sup>[34]</sup>

We may already be able to detect the first signs of a new human springtime. We may see a new kind of international law and government emerging from from the roots of the old international system, like green shoots after a drought or a flood. The new organic international law and government will be as complex and dynamic and specific as the social situations it is designed to regulate. Eventually, the new ascending organic international law and government will meet the decaying remnants of the autumn of the old order, the order of diplomacy and war.<sup>[35]</sup> It will not be a natural self-socialising of properly constituted state-systems, which was a more modest aspect of the great Kantian dream.<sup>[36]</sup> It will be a form of law and government in the making of which other social phenomena –commercial and industrial corporations, non-governmental interests, global political and economic forces of all kinds, old and new threats to world public order– will play an increasing role. It will be a form of law that may at last be able to act as a powerful counterforce to resist the unlimited opportunities for the abuse of public power and public-private power present in a globalising world.

To re-imagine Europe requires yet another re-opening of the European mind, a re-awakening from its restless and dreamless sleep.<sup>[37]</sup> The European Union is an intermediate social formation between nationalism and globalism.

It is a daring sublation of many dialectical oppositions in Europe's past - France-Germany, Britain-Germany, France-Britain, Germany-Poland, Britain-Spain, Britain-the United States of America, Roman Catholicism-Protestantism, faith-reason, Christianity-Islam, and many others. Europe has been made by a long series of productive frictional contiguities. A better future for the EU requires a sublation of two profound dialectical oppositions in its present situation - (1) the unresolved tension between the Union and its member states with their ancient institutions and their peculiar social psychologies, and (2) Europe's relationship to a new frictional contiguity - the radically new external reality in which Europe now finds itself.

The European mind already contains within itself a rich store of creative ideas which will inspire its contribution to the opening of the human mind, to the re-imagining of international society and international law - ideas about a possible universal social ideal<sup>[38]</sup> or about a possible universal social model.<sup>[39]</sup> We should enjoy the task of finding a new *bella menzogna*<sup>[40]</sup> - a new story for human beings to tell themselves about the social life of the whole human species. We must never cease to take responsibility for constantly correcting the equilibrium of evils which is the natural default condition of human social order, the continuous reconciling of man the god and man the beast.<sup>[41]</sup> Above all, we must never cease to believe in our power over the products of the power of the human mind. We must believe in the permanent possibility of human self-perfecting.<sup>[42]</sup>

---

## REFERENCES

\* Professor of Public International Law at the University of Cambridge

[1] "Man portrays himself in his actions. And what a figure he cuts in the drama of the present time! On the one hand, a return of the savage state; on the other, a complete lethargy: in other words, to the two extremes of depravity, and both united in a single epoch....Thus do we see the spirit of the age [Geist der Zeit] wavering between perversity and brutality, between unnaturalness and mere nature, between superstition and moral unbelief; and it is only through an equilibrium of evils [Gleichgewicht des Schlimmens] that it is still sometimes kept within bounds." F. SCHILLER, *On the Aesthetic Education of Man, in a Series of Letters* (1794), Fifth Letter, E.M. WILKINSON & L.A. WILLOUGHBY, eds. & trs.; Oxford, Clarendon Press; 1967 at p. 25, 29.

[2] "In every political state the whole body of public functionaries constituting the supreme operative require to be considered in the character of corruptors and corruptees: at the best, they are at all times exposed to the temptation of being so, and in a greater or less degree are sure to be made to yield to that temptation." J. BENTHAM, *The Constitutional Code*, ch. 10 in J. BOWRING, ed., Edinburgh, William Tait; 1843 vol. ix, 69. Bentham's extensive writing on political corruption, inspired by the systematic corruption of British public life in the 18th century, is permanently topical. James Frazer suggested that the reciprocal and collusive nature of government is to be found in its very origins. "The idea that early kingdoms are despotisms in which the people exist



only for the sovereign, is wholly inapplicable to the monarchies we are considering. On the contrary, the sovereign in them exists only for his subjects; his life is only valuable so long as he discharges the duties of his position by ordering the course of nature for his people's benefit." J.G. FRAZER, *The Golden Bough: A Study in Magic and Religion* (1890) London, Macmillan and Co.; 2nd ed., 1900, vol. I, 237-8. There can even be detected an ambiguous collusive reciprocity in the origins of the idea of 'representative government'. In the early English parliaments, the consent of the representatives of the people is sought and given but they thereby legally bind the community they are deemed to represent. See J.G. EDWARDS, "The Plena Potestas of English Parliamentary Representatives", in E.B. FRYDE & E. MILLER, eds., *Historical Studies of the English Parliament Vol. I*, Cambridge, Cambridge University Press 1970 at p.136. Writing in the 1560's, Sir Thomas Smith, formerly Regius Professor of Civil Law at Cambridge, later Secretary of State under King Edward VI and Queen Elizabeth, was able to say: "And the consent of the parliament is taken to be every man's consent." T. SMITH, *De Republica Anglorum* (first published 1583), bk. II, ch. 1, M. DEWAR, ed.; Cambridge, CUP; 1982), 79 (spelling modernised). For an ominous implication of Smith's statement, see *infra*, fn. 30.

[3] "How can it be that all should obey, yet nobody take upon him to command, and that all should serve, and yet have no masters, but be the more free, as, in apparent subjection, each loses no part of his liberty but what might be hurtful to another. These wonders are the work of law." J-J. ROUSSEAU, *A Discourse on Political Economy* (1755), in J-J. ROUSSEAU, *The Social Contract and Discourses*, G.D.H. COLE, tr.; London, J.M. Dent & Sons; 1913 / 1973, 115-153, at 124. Rousseau may or may not have known that Cicero, in his forensic role, had said: *legum denique idcirco omnes servi sumus, ut liberi esse possimus* ("and so we are all slaves of the law in order that we can be free"). CICERO, *Pro Cluentio*, liii.

[4] The philosophically sceptical David Hume's ingenious explanation of the idea of 'justice' is that it is both natural and artificial. It is the way in which the human mind chooses to present to itself the most necessary condition of human social co-existence. "The word, natural, is commonly taken in so many senses, and is of so loose a signification, that it seems vain to dispute, whether justice be natural or not. ... Men's inclination, their necessities lead them to combine; their understanding and experience tell them, that this combination is impossible, where each governs himself by no rule, and pays no regard to the possessions of others: And from these passions and reflections conjoined, as soon as we observe like passions and reflections in others, the sentiment of justice, throughout all ages, has infallibly and certainly had place, to some degree or other, in every individual of the human species. In so sagacious an animal, what necessarily arises from the exertion of his intellectual faculties, may justly be esteemed natural." D. HUME, *An Enquiry concerning the Principles of Morals* (1751), Appendix 3, T.L. BEAUCHAMP, ed.; Oxford, Oxford University Press; 1998, at p. 173.

[5] 'Necessity' is here used in the traditional philosophical sense, as the negation of that 'freedom' which the human mind seems to find within itself, a freedom that includes a free choice among possible courses of action ('freedom of the will') subject to the 'necessity' imposed, above all, by the 'causation' characteristic of the natural world. The problem of the relationship between necessity and freedom is a central focus of the philosophical tradition stemming from ancient Greece.

[6] "I should have wished to live and die free: that is, so far subject to the laws that neither I, nor nobody else, should be able to cast off their honourable yoke: the easy and salutary yoke which the haughtiest necks bear with the greatest docility, as they are made to bear no other." J-J. ROUSSEAU, *A Discourse on the Origin of Inequality* (1754), in *The Social Contract and Discourses* (*supra*, fn. 3), 27-114, at 29.

[7] Bentham's introduction of the term 'international law', subsequently taken up in other languages, was "calculated to express, in a more significant way, the branch of law which goes under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence". J. BENTHAM, *An Introduction to the Principles of Morals and Legislation* (1789/1823), XVIII, §25, fn, J.H. BURNS & H.L.A. HART, eds.; Oxford, Clarendon Press; 1996 at p.296. (The term was introduced, and the footnote added, in the 1823 edition.) The word 'international' must now be re-programmed semantically to replace the idea of a mere pluralism of nations or states with the idea of the dynamic co-existence of human societies in general, including nations and states.

[8] Of his own ambiguous heroine, Bertolt Brecht comments: "Courage's unflagging readiness to work is important. She is hardly ever seen not working. It is her energy and competence that make her lack of success so shattering." B. BRECHT, *Mother Courage and Her Children* (1940) (J. WILLETT, tr.; London, Eyre Methuen; 1980), 116. This edition reproduces, in translation, comments (Anmerkungen) which Brecht appended to an edition of the play published in 1956 (East Berlin, Henschel-Verlag).

[9] "It is not unknown to me how many men have had, and still have, the opinion that the affairs of the world are in such wise governed by fortune and by God that men with their wisdom cannot direct them and that no one can even help them; and because of this they would have us believe that it is not necessary to labour much in affairs, but to let chance govern them. This opinion has been more credited in our times because of the great changes in affairs which have been seen, and may still be seen, every day, beyond all human conjecture. Sometimes pondering over this, I am in some degree inclined to their opinion. Nevertheless, not to extinguish our free will, I hold it to be true that Fortune is the arbiter of one-half of our actions, but that she still leaves us to direct the other half, or perhaps a little less." N. MACHIAVELLI, *The Prince* (1513/32) ch. XXV; W.K. MARRIOTT tr. & ed.; London, J.M. Dent & Sons, Everyman's Library; 1908 at p.197.

[10] "A fictitious entity is an entity to which, though by the grammatical form of the discourse employed in speaking of it, existence be ascribed, yet in truth and reality existence is not meant to be ascribed." J. BENTHAM, *The Constitutional Code*, J. BOWRING, ed., supra fn. 2, vol. ix at p.77. "By fiction, in the sense in which it is used by lawyers, understand a false assertion which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true." "Constitutional Code Rationale", in J. BENTHAM, *First Principles Preparatory to Constitutional Code* (1822), P. SCHOFIELD, ed.; Oxford, Clarendon Press; 1989, at p.267. Bentham saw fictions as a central feature of the law, and a prime source of the abuse of social power – "instruments of delusion employed for reconciling the people to the dominion of the one and the few". *The Constitutional Code* (above), 76. There is a convenient compilation of Bentham's scattered writings on fictions in C.K. OGDEN, *Bentham's Theory of Fictions*, London, Kegan Paul; 1932, Georges Sorel (1847-1922) said that in 'poetic fictions' we have "the ability to substitute an imaginary world for scientific truths which we populate with plastic creations and that we perceive with much greater clarity than the material world. It is these idols which penetrate our will and are the sisters of our soul." Quoted in J. STANLEY, *The Sociology of Virtue: The Political and Social Theories of George Sorel*, Berkeley, University of California Press; 1981 at p.90. The quotation is from an article by Sorel: "La science et la morale" in *Questions de morale* (Paris, Félix Alcan; 1900, at 7.

[11] In *La mentalité primitive*, Paris, Librairie Félix Alcan; 1922, LUCIEN LEVY-BRUHL, one of the old masters of anthropology, recognised that thinking in terms of a hidden world of supernatural explanations of natural phenomena is not an inferior form of thinking as compared with European rational thinking, merely a different form dictated by different conditions of life. More modern anthropologists (Marcel Mauss,

Claude Lévi-Strauss) see such thinking as reflecting a general human need felt by human societies to have a story of the origin and nature of their unique identity and character, a story which may be constantly re-interpreted but can never be abandoned. The same has been said of 'religion', in a more general sense: "...society has been built and cemented to a great extent on a foundation of religion, and it is impossible to loosen the cement and shake the foundation without endangering the superstructure." J. FRAZER, *The Belief in Immortality and the Worship of the Dead*, London, Macmillan and Co; 1913, vols. I and 4.

[12] "Such a society has its own affairs and interests; it deliberates and takes resolutions in common, and is thus become a moral person having understanding, and a will peculiar to itself, and susceptible at once of obligations and of rights." E. de VATTEL, *The Law of Nations, or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and Sovereigns*; C.G. FENWICK, tr.; Washington DC, Carnegie Institution; 1916, at p.3. "But as its duties towards itself clearly prevail over its duties towards others, a Nation owes to itself, as a prior consideration, whatever it can do for its own happiness and advancement." (ibid., 7). Writing about animism, David Hume said: "There is an universal tendency amongst mankind to conceive all beings like themselves, and to transfer to every object those qualities, with which they are familiarly acquainted, and of which they are intimately conscious." D. HUME, *The Natural History of Religion*, A.W. COLVER, ed.; Oxford, Clarendon Press; 1976 at p.33.

[13] Herder speaks of *der gemeinschaftliche Geist* (the mind or spirit of a community), *der Gefühl einer Nation* (the feeling of a nation), and of the *Seele, Herz, Tiefe* (soul, heart, depth) of a people or nation. J.G. HERDER, *Auch eine Philosophie der Geschichte zur Bildung der Menschheit* ("Yet Another Philosophy for the Education of Mankind", München/Wien, C. Hanser Verlag; 1984, at p.612. Herder insists that, in traditional societies, the shamans are powerful because they themselves believe the stories they tell the people. J.G. Fichte (1762-1814) had proposed an idealist philosophy centred on a self (ego) which creates a world-for-itself which the self regards as containing also the self-consciousness of other 'selves'.

[14] "War therefore is an act of violence intended to compel our opponent to fulfil our will...Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of International Law, accompany it without essentially impairing its power." C. von CLAUSEWITZ, *On War* (J.J. GRAHAM, tr.; A. RAPOPORT, ed.; London, Penguin Books; 1968), 101.

[15] For the idea of 'symbolic universes', see P.L. BERGER & T. LUCKMANN, *The Social Construction of Reality*, London, Allen Lane; 1967, 113 ff.

[16] "We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own. We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means." C. von CLAUSEWITZ, *On War* (supra, fn 14, at p.402.

[17] "Practically every nation in Europe was afraid of Germany, and the use which Germany might make of her armaments. Germany was not afraid, because she believed her army to be invincible, but she was afraid that a few years hence she might be afraid...In 1914 Europe had arrived at a point in which every country was afraid of the present, and Germany was afraid of the future." Viscount Grey, who had been British Foreign Secretary before and during the First World War, speaking in the House of Lords in 1924. Quoted in G.M. TREVELYAN, *Grey of Fallodon*, London, Longmans, Green & Co.; 1937 at p.244.

[18] "The world on the verge of its catastrophe was very brilliant. Nations and Empires crowned with princes and potentates rose majestically on every side, lapped in the accumulated treasures of the long peace. All were fitted and fastened – it seemed

securely – into an immense cantilever. The two mighty European systems faced each other glittering and clanking in their panoply, but with a tranquil gaze. A polite, discreet, pacific, and on the whole sincere diplomacy spread its web of connections over both.” W.S. CHURCHILL, *The World Crisis 1911-1918* (1923), London, Odhams Press Limited; no date of publication at p.151. At the outbreak of the war, Churchill had been First Lord of the Admiralty (the British Cabinet Minister responsible for the Royal Navy).

[19] For fuller discussion of the constitutional psychologies of three member states of the EU, see “The Crisis of European constitutionalism: reflections on a half-revolution”, in P. ALLOTT, *The Health of Nations: Society and Law beyond the State*, Cambridge, CUP; 2002, ch. 7. Previously published in 34 *Common Market Law Review*, 439-490 (1997). It is there suggested that the central focus of the British constitution is the idea of ‘society’, of the French constitution the idea of ‘nation’, of the German constitution the idea of ‘state’.

[20] A.C. de TOCQUEVILLE, *De la démocratie en Amérique* (1835-40). In other writings, he was even able to explain the true nature of the British constitution as the constitution of a monarchical republic.

[21] Another clear-eyed and prophetic observer of the French Revolution had seen the Revolution differently, as a sort of religious revolution invoking such distorted ideas, and threatening a sinister campaign to extend its ‘dogmas’, by force if necessary, across the whole of Europe. E. BURKE, *Reflections on the Revolution in France* (1790) and *Thoughts on French Affairs* (1791).

[22] The French Physiocrats laid the foundations of the modern discipline of economics. But they did so at a time when the ‘economic’ aspect of society was discussed as an integral part of a discussion of social organisation in general. Their discipline was therefore correctly called ‘political economy’. It was in the 19th century that the study of more narrowly ‘economic’ phenomena became a separate discipline under the name of ‘economics’.

[23] “Thus there could be no question of destroying this absolute power; far better, turn it to account. ‘The State should govern in accordance with the rules basic to the maintenance of a well-organized society,’ was the opinion of Mercier de la Rivière, ‘and, this being so, it should be all-powerful’.” A.C. de TOCQUEVILLE, *The Old Régime and the French Revolution* (1856) S. GILBERT, tr.; Garden City, Doubleday & Company, Anchor Books; 1955, at p.162. “It is a curious fact that when they envisaged all the social and administrative reforms subsequently carried out by our revolutionaries, the idea of free institutions never crossed their minds. True, they were all in favour of *laissez faire* and *laissez passer* in commerce and industry, but political liberty in the full sense of the term was something that passed their imagination or was promptly dismissed from their thoughts if by any chance it occurred to them.” *Ibid.*, 159. “It is commonly thought that the subversive theories of what today is known as socialism are of recent origin. This is not so; views of this kind were sponsored by the earliest Economists.” *Ibid.*, 164.

[24] *Ibid.*, 167.

[25] For the idea that the EU is a union of constitutional orders rather than a union of states, see P. ALLOTT, “Integration von Verfassungen, nicht von Staaten”, *Frankfurter Allgemeine Zeitung*, 9 May 2001, 13.

[26] The rebellious Americans of 1776 had two great advantages in inventing their national myth. (i) They could, and did, claim to be the true and better heirs of a thousand-year constitutional tradition, a tradition itself seasoned with myth, fantasy and poetry. Thomas Jefferson himself agreed with the ‘Anglo-Saxonist’ view, that the essence of the British constitution stemmed from the period before the Norman invasion

of 1066. See “The

Theory of the British Constitution”, in P. ALLOTT, *Towards the International Rule of Law: Essays in*

*Integrated Constitutional Theory*, London, Cameron May; 2005, ch. 1. Previously published in *Jurisprudence:*

Cambridge Essays, H. GROSS & R. HARRISON, eds.; Oxford, Clarendon Press; 1992, 173 - 205. (2) They

had a double creation-myth, itself as much fiction as fact, to the effect that the original settlers in 1620 were

escaping from the clutches of oppression and that they themselves were throwing off the yoke of tyranny. They

then created a federal constitution (1787), an elegant distillation of an idealised British constitution, which they

made into a sacred totem.

[27] In *Das Rheingold*, the first part of Richard Wagner’s four-part music-drama *Der Ring des Niebelungen*, Fasolt and Fafner are two giants who are responsible for building Valhalla, the home of the gods, and who destroy each other in fighting over the stolen gold which is to be their payment. In *Götterdämmerung* (Twilight of the Gods), the last part of the drama, Valhalla and the old gods are destroyed and, with them, the reign of greed, hatred, vengeance and perverted love, leaving the memory of Brünnhilde, improbably capable of pure love, and of Siegfried representing the improbable possibility of a new human being and a new Germany.

[28] *Supra*, fn. 2. Bentham has a further discussion of corruption in “Constitutional Code Rationale” in *First Principles*, *supra*, fn. 10, ch. 3.

[29] “All government is in the very essence of it an evil...To exercise the powers of government is accordingly to do evil.” J. BENTHAM, “Economy as applied to office”, in *First Principles* (*supra*, fn. 10), 4. “Society is produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices.” T. PAINE, *Common Sense* (1776), in *Common Sense and Other Political Writings*, N.F. ADKINS, ed.; New York, Bobbs Merrill Co, American Heritage Series; 1953 at p.4. William Godwin (1756-1836), mistakenly supposed to be an apostle of anarchism, suggested that as human beings and human societies perfected themselves, government would wither away and human beings would become self-governing.

[30] Bentham, for once in agreement with Edmund Burke, classed the fiction of ‘natural rights’ as a fraudulent and nonsensical delusion. “The tyrant Henry the Eighth of England...did not know what an effectual instrument of despotism was to be found in that grand magazine of offensive wepaons, the rights of men...Had fate reserved him to our times, four technical terms would have done his business...- ‘Philosophy, Light, Liberality, the Rights of Men.’” E. BURKE, *Reflections on the Revolution in France* (1790), London, J.M. Dent & Sons, Everyman’s Library; 1910, 112-3. We may also recall de Tocqueville’s opinion of the Tudor monarchs (1485-1603), not the least of whom was King Henry VIII: *Nulle part en Europe, le despotisme ne s’y montra plus terrible, parce que nulle part il ne fut plus légal.* A.C. de TOCQUEVILLE, *Voyages en Angleterre et en Irlande* (J.P. MAYER, ed.; Paris, Gallimard; 1982, 56. “Nowhere in Europe was despotism more terrible, because nowhere else was it more ‘legal’.” A. C. de TOCQUEVILLE, *Journeys to England and Ireland*, J.P. MAYER, ed.; G. LAWRENCE & K.P. MAYER, trs.; London, Faber & Faber; 1958, at p.38.

[31] “Laws and government may be considered...as a combination of the rich to oppress the poor, and preserve to themselves the inequality of goods which would otherwise soon be destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence. The government and the laws...tell them they must either continue poor or acquire wealth in the same



manner as they have done.” A. SMITH, *Lectures on Jurisprudence* (lecture of 22 February 1763), R.L. MEEK et al., eds.; Oxford, Clarendon Press; 1978, 208-9. “Civil government, so far as it is instituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all.” A. SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), R. CAMPBELL & A. SKINNER, eds.; Oxford, Clarendon Press; 1976, vol. II at p.715.

[32] Suspicion of such over-government is a leading theme of much of John Stuart Mill’s writing. He says that experience proves “that the depositaries of power who are mere delegates of the people, that is of a majority, are quite as ready (when they think they can count on popular support) as any organs of oligarchy, to assume arbitrary power, and encroach unduly on the liberty of private life. The public collectively is abundantly ready to impose, not only its generally narrow views of its interests, but its abstract opinions, and even its tastes, as laws binding upon individuals. And the present civilization tends so strongly to make the power of persons acting in masses the only substantial power in society, that there never was more necessity for surrounding individual independence of thought, speech, and conduct, with the most powerful defences, in order to maintain that originality of mind and individuality of character, which are the only source of any real progress, and of most of the qualities which make the human race much superior to any herd of animals.” J.S. MILL, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848), bk. V, ch. XI, J.M. ROBSON, ed.; London, University of Toronto Press; Routledge & Kegan Paul; 1965, 939-40.

[33] International law is seen as customary law made by the ‘consent’ of ‘states’. “Nothing is more reprehensible than to derive the laws prescribing what ought to be done from what is done, or to impose upon them the limits by which the latter is circumscribed.” I. KANT, *Critique of Pure Reason* (1781) N. KEMP SMITH, tr.; London, The Macmillan Press; 1929 at p.313. Kant was surely not condemning customary law which, at its best (as in the English common law), transforms into legal obligation that which has had an obligatory social effect in the past. For discussion of the idea that customary law depends on an idea of the subjects of the law acting as virtual Kantian universal legislators, see P. ALLOTT, *The Health of Nations*, *supra*, fn. 19, §§10.26 ff.

[34] Old international law was particularly well suited to a government which was capable of acting in the role of a ‘sensible knave’. “And though it is allowed, that, without a regard to property, no society could subsist; yet, according to the imperfect way in which human affairs are conducted, a sensible knave, in particular incidents, may think, that an act of iniquity or infidelity will make a considerable addition to his fortune, without causing any considerable breach in the social union and confederacy.” D. HUME, *An Enquiry concerning the Principles of Morals*, *supra* fn. 4, IX.2 at p.155.

[35] For discussion of ‘descending’ theories of government (sovereignty flowing from the king downwards) and ‘ascending’ theories (sovereignty flowing from the people upwards), see W. ULLMANN, *Medieval Political Thought*, Harmondsworth, Penguin Books; 1975, 12.

[36] I. KANT, “Idea for a Universal History with a Cosmopolitan Purpose” and “Perpetual Peace: A Philosophical Sketch”, in *Kant’s Political Writings*, H. REISS, ed., & H.B NISBET, tr.; Cambridge, CUP; 1970, 41-53, 93-130.

[37] For the idea that the European mind has experienced a succession of enlightenments at three-century intervals since the end of the Roman Empire in the West, and hence is now due for another enlightenment, see P. ALLOTT, *The Health of Nations*, *supra*, fn. 19, §3.18, fn.15.

[38] “Hence it is evident that the same life is best for each individual, and for states, and for mankind collectively.” Aristotle, *Politics*, VII.3.10, B. JOWETT, tr.; Oxford, Clarendon Press; 1905, 265.

[39] The *humana universitas* (Dante), the ‘universal society’ (Suárez), the ‘great and



natural community' of mankind (Locke), the *civitas maxima* (Wolff), the 'great city of the human race' (Vico), the 'general society of the human race' (Rousseau), a 'perfect civil union of mankind' (Kant), an 'international society of all human beings, the society of all societies' (Allott).

[40] *Una veritade ascosa sotto bella menzogna* ("a truth hidden beneath a beautiful lie"). Dante's definition of allegory (*Convivio*, II.1.3) may be used as an elegant variation of Plato's idea of the necessary social poetry as the 'noble lie' or 'opportune falsehood': Plato, *Republic*, 414b.

[41] "But he who is unable to live in society, or who has no need because he is sufficient for himself, must either be a beast or a god." Aristotle, *Politics*, I.2.14 (supra, fn. 38), 29. Kant said that the problem of attaining a civil society which can administer justice universally is "both the most difficult and the last to be solved by the human race". I. KANT, "Idea for a Universal History", in *Kant's Political Writings* (supra, fn. 36), 41-53, at 45-6.

[42] "The scales of understanding are not quite impartial, and one arm of them, which bears the inscription: Hope of the future, has a mechanical advantage...This is the sole error which I cannot set aside, and which in fact I never want to." I. KANT, *Dreams of a Spirit-Seer*, pt. I, ch. 4, F. SEWALL, ed. & E. GOERWITZ, tr.; London, Swan Sonnenschein; 1900, 365.

# CAN THE EUROPEAN UNION BE LEGITIMIZED BY GOVERNANCE?

Philippe C. Schmitter\*

*This article begins by attempting to define legitimacy and governance. Thereafter, it draws several implications from these specifications. The author reaches the interim conclusion that actors must reach consensus concerning the correct criteria to be applied when settling on shared expectations about how the EU's authority should be exercised. Furthermore, it is contended that incremental improvements in the legitimacy of the EU are more likely to stem from the praxis of governance rather than the conventional institutional makeup of government. The paper then suggests principles for the generation of legitimacy for the EU as a whole.*

## I. INTRODUCTION

'Legitimacy' is one of the most frequently used and misused concepts in political science. It ranks up there with 'power' in terms of how much it is needed, how difficult it is to define and how impossible it is to measure. Cynically, one is tempted to observe that it is precisely this ambiguity that makes it so useful to political scientists. Virtually any outcome can be "explained" (ex post) by invoking it –especially its absence– since no one can be sure that this might not have been the case.

For legitimacy usually enters the analytical picture when it is missing or deficient. Only when a regime or arrangement is being manifestly challenged by its citizens/subjects/victims/beneficiaries do political scientists tend to invoke lack of legitimacy as a cause for the crisis. When it is functioning well, legitimacy recedes into the background and persons seem to take for granted that the actions of their authorities are "proper," "normal," or "justified". One is reminded of the famous observation of U.S Supreme Court Justice, Lewis Powell, with regard to pornography: "I don't know what it is, but I know it when I see it". With regard to legitimacy, it would be more correct to say: "I may not be able to define (or measure) it, but I know it when it is not there".

Now, if this is true for polities –i.e., national states– that have fixed boundaries, unique identities, formal constitutions, well-established practices and sovereignty over other claimants to authority, imagine how difficult it will be to make any sense of the legitimacy of a polity that has none of the above! The European Union (EU) is, if nothing else, a "polity in formation". No one believes that its borders and rules are going to remain the same for the foreseeable future. Everyone "knows" that it is not

only going to enlarge itself to include an, as yet undetermined, number of new countries, but it is also very likely to expand the scope of its activities and to modify the weights and thresholds of its decision-making system. If this were not enough, there is also the fact that the EU is an unprecedented experiment in the peaceful and voluntary creation of a large-scale polity out of previously independent ones. It is, therefore, singularly difficult for its citizens/subjects/victims/beneficiaries to compare this *objet politique non-identifié* with anything they have experienced before. No doubt, there exists a temptation to apply the standards that they are already using to evaluate their respective national authorities, but eventually they may learn other normative expectations with regard to EU actions and benefits.

## II. ONE DEFINITION AND FIVE IMPLICATIONS

First, let us try to define legitimacy in a way that is generic enough to allow us to apply it to the widest possible range of polities.

Legitimacy is a shared expectation among actors in an arrangement of authority such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to pre-established and acceptable norms.

From this, I draw the following implications:

(1) The basis upon which these norms are pre-established can vary from one arrangement to another – not only from one country or culture to another, but also within a single country/culture according to function or location. While it is often claimed that in the contemporary context “democracy” provides the exclusive basis for exercising authority, this denies the possibility (and obvious fact) that particular arrangements within an otherwise democratic polity can be (and often are) successfully legitimated according to other norms.<sup>[1]</sup> It also obscures the fact that “democracy” can be defined normatively and institutionalized historically in such a different fashion that authority relations which are legitimate in one democracy would be regarded as quite illegitimate in another. The “coincidence” that all of the EU members are self-proclaimed democracies and recognize each other as such does not *eo ipso* provide the norms for its legitimation – indeed, well-entrenched differences in the democratic institutions of its members may actually make it more difficult.

(2) The unit within which relations of sub- and super-ordination are being voluntarily practiced can vary in both time and space. While there is a tendency in the political science literature passively to accept the

sovereign national state as the “natural” and “exclusive” site for legitimacy, there is no reason why other (sub- or supra-national) “polities” –provided that they have sufficient autonomy in making and implementing collective decisions– cannot have their own normative basis of authority. In the case of the EU, the problem is compounded by the simultaneous need to legitimate – not only what the unit should be, i.e. to define what “Europe” is, but also the regime that should govern it, i.e. what its institutions should be.

(3) The norms must be “shared” by the actors, both those who rule and those who are ruled. This implies, first of all, that they must know who they are and what their respective roles should be. It also implies that the exercise of authority is “systemic”, i.e. that it is embedded in a collectivity that is sufficiently interdependent and mutually trusting so that disputes over the validity of rules can be (and usually are) resolved by the intervention of third parties within them. Institutions such as courts specialize in this “referential” behavior, but most disputes over rules involve less formal interactions within civil society and between firms in which the intervention of outsiders (actual or potential) is sufficient to produce a mutually accepted outcome. The citizens/subjects/victims/beneficiaries of the EU do not yet know who they are – and not all of them are members of it and, therefore, entitled to participate in its government. Moreover, they remain anchored in relatively independent polities of varying size and power whose roles within EU institutions have yet to be established definitively. Nor have they achieved the level of social interdependence that allows them to rely on informal –“social”, “pre-political” or “extra-judicial”– means for resolving disputes legitimately.

(4) The actors involved may be individuals or collectivities of various sorts. The literature conveniently makes the liberal assumption that the unique judges of legitimacy are individual human beings. This allows it to rely heavily on notions of family socialization, “moral sentiment”, and a personal ethic of responsibility as the source of norms and the virtually unconscious mechanism for their enforcement. And this in turn tends to lead one to the conclusion that it is only in polities that have previously established a high degree of cultural homogeneity –e.g., nation-states– that legitimate political authority is possible. When one introduces, however, the unorthodox idea that most of the exchanges in modern political life are between organizations and, moreover, that these organizations share norms of prudence, legal propriety and “best practice” that transcend individual preferences and even national borders, it then becomes more possible to imagine how a “non-national” and “non-state” polity such as the EU might be able to generate valid and binding decisions. Which is not

the same thing as to say that it will be easy for it to come up with such norms. Given all the caveats introduced above, plus the fact that in such a “multi-layered” and “poly-centric” arrangement as the EU, it may be very difficult to trace the origin and responsibility for legitimizing norms.

(5) The basis for voluntary conformity is presumably normative, not instrumental, consequentialist or strategic. In a legitimate polity, actors agree to obey decisions that they have not supported made by rulers whom they may not have voted for. They also agree to do so even if it is not in their (immediate and self-assessed) interest to do so – and they are expected to continue to do so even when the effectiveness of the polity is in manifest decline. Needless to say, it will not always be easy to assess if this. Rulers often can control the means of communication and distort the flow of information to make it appear as if they were following prescribed norms; the ruled may only be pretending to comply in order to build up a reputation that they can subsequently “cash in” for material or other self-regarding purposes. Conversely, resistance to specific commands –whatever the accompanying rhetoric– may have nothing to do with challenging the legitimacy of the authority that issued them, just with the performance of individual rulers or agencies. Needless to say, in the case of the EU the compelling nature of norms is even more difficult to gauge. The intergovernmental nature of its Council of Ministers and the European Council virtually licenses actors to pursue national interests exclusively – or, at least, to proclaim to their citizens that they are doing so. The confidentiality of its many committees makes it almost impossible to detect when interaction produces a shared norm rather than a strategic compromise or a concession to hegemony. Add to all this, the propensity for national rulers who can no longer “deliver the goods” themselves to blame the obscure and distant processes of European integration when they have to take unpopular decisions and you have a polity that is bound to appear less legitimate than it is.

### **III. ONE (INTERIM) CONCLUSION AND TWO (VERY IMPORTANT) IMPLICATIONS**

From this conceptual analysis, I draw the following conclusion: if we are to make any sense of the present and future legitimacy of the European Union, we have to reach a consensus concerning the apposite criteria – the operative norms– that actors should apply when establishing their presumably shared expectations about how its authority should be exercised.

Moreover, in the present circumstance –at least until the EU has acquired sufficient properties of stateness and nationality– one should not presume

an isomorphism between the norms operative in the respective national member states and those that should prevail at the supra-national level. Most scholars naturally make this presumption. This leads them inevitably to the conclusion that the EU must suffer from a “democratic deficit” and that the only way of filling that deficit is to insert “conventional democratic institutions” into the way it makes binding decisions, e.g. assert parliamentary sovereignty, institute direct elections for the President of the Commission and/or, above all, draft and ratify a “federal” constitution. It is that natural tendency that I wish to contest, although I am aware of the risk that the more that the EU uses distinctive criteria in the design and evaluation of its institutions, the more difficult it will be (at least, initially) to convince its citizens that what it is doing is “really” democratic. Nevertheless, this is a political paradox that will have to be tackled – and, like many such paradoxes, it is only by learning from experience that the apparent contradiction can be resolved.

I am taking two things for granted at this point:

- (1) that the apposite criteria for the legitimation of the EU will have to be “democratic”, but only in some fundamental or foundational sense – and not necessarily in terms of specific institutions or decision-rules;
- (2) that the individual citizens and collectivities that are members of the EU, now and for the foreseeable future, share a “reasonable pluralism” in the interests and passions that they wish to obtain through the integration of Europe.

Just a bit of explication of both points:

- (1) The meaning and, hence, the institutions and values of democracy have changed radically over time. Robert Dahl has spoken of several “revolutions” in its past practice (often without their proponents being aware of it) and argued that “democracy can be independently invented and reinvented whenever appropriate conditions exist”.<sup>[2]</sup> The European Union is unavoidably part and parcel of these changes. Not only must it reflect transformations in the nature of actors (e.g. from individual to collective citizens) and role of the state (e.g. from redistribution to regulation) that are well underway in the ‘domestic democracies’ of its member states, but it must also adapt to its own uniqueness as a non-national, non-state, multi-level and poly-centric polity that encompasses an unprecedented (for Europe) variety of cultures, languages, memories and habits and is expected to govern effectively on an unprecedented scale – all this, with very limited human and material resources at the present



moment.

(2) Despite the heterogeneity of its national and sub-national components and, hence, the strong likelihood that major actors will not be in agreement on either rules of the game or substantive goals, its members are “reasonably pluralistic”, i.e. the range of their differences is limited and they are pre-disposed to bargain, negotiate and deliberate until an agreement is found. To use another expression of John Rawls, those who participate in the EU enjoy an “overlapping consensus”.<sup>[3]</sup> Moreover, they understand and accept that the outcome of the process of integration will itself be pluralistic, i.e. it will protect the diversity of experiences rather than attempt to assimilate them into a single “European” culture or identity.

Based on this (interim) conclusion, I am first convinced that it is neither feasible nor desirable to try to democratize the European Union *tutto e subito* -completely and immediately.<sup>[4]</sup> Not only would the politicians not know how to do it, but there is also no compelling evidence that Europeans want it. Nothing could be more dangerous for the future of an eventual Euro-democracy than to have it thrust upon a citizenry that is not prepared to exercise it, and that continues to believe its interests and rights are best defended by national not supranational democracy.

Moreover, the EU at this stage in its political development neither needs, nor is prepared for a full-scale constitutionalization of its polity. The timing is simply wrong. In the absence of revolution, coup d'état, liberation from foreign occupation, defeat or victory in international war, armed conflict between domestic opponents, sustained mobilization of urban populations against the *ancien régime* and/or major economic collapse, virtually none of its member states have been able to find the “political opportunity space” for a major overhaul of its ruling institutions.<sup>[5]</sup> The fact that all of its states (with one exception) have written constitutions and that this is a presumptive *sine qua non* for enduring democracy indicates that at some time this issue will have to be tackled -if the EU is ever to be democratized definitively- but not now!

However, as I have explored in a recent book, it may be timely to begin sooner rather than later to experiment with improvements in the quality of embryonic Euro-democracy through what I call “modest reforms” in the way citizenship, representation and decision-making are practiced within the institutions of the European Union.<sup>[6]</sup> Even in the absence of a comprehensive, i.e. constitutional, vision of what the supra-national end-product will look like, specific and incremental steps could be taken to supplement (and not supplant) the mechanisms of accountability that

presently exist within its member states. Since, as seems obvious to me, the rules and practices of an eventual Euro-democracy will have to be quite different from those existing at the national level, it is all the more imperative that Europeans act cautiously when experimenting with political arrangements whose configuration will have to be unprecedented, and whose consequences could prove to be unexpected – perhaps, even unfortunate.

I will not enter into the details of the twenty-some “modest” (and some not so modest reforms) that I proposed in this book for the simple reason that I am not convinced that, even in the unlikely event that all of them were implemented, their joint impact would succeed in legitimizing the EU. Introducing one or another of them *au fur et à mesure* might improve selected aspects of the regime’s capacity to invoke voluntary compliance, but given the “systemic” aspect that was mentioned above, one should not expect miracles. For one thing, it would take some time for any one of them to produce its intended effects – especially, since several of them were calibrated to take into consideration the pace and extent of Eastern Enlargement. All of them, despite their modesty, entail unforeseeable risks and are likely to generate unintended consequences – indeed, the entire exercise was predicated upon exploiting these political externalities to press gradually and stealthily toward further democratization.

My second (“very important”) implication is that marginal improvements in the legitimacy of the European Union are much more likely to come from the admittedly “fuzzy” but innovative practices of governance than from the much more clearly delineated and conventional institutions of government.

#### **IV. ANOTHER DEFINITION AND (MORE THAN) SEVEN IMPLICATIONS**

The concept of “governance” has spread with such astonishing rapidity over the past three decades and has been applied by both academics and practitioners in so many different settings that it must connote something significant. I have become convinced that behind all this capaciousness lurks a distinctive method or, better, mechanism for resolving conflicts and solving problems that reflects some profound changes in the exercise of authority that have been emerging in almost all contemporary societies and economies – and, not just in those that are trying to catch up with the more developed ones. Capturing what is distinctive about this method has not been helped by the fact that the concept is almost always preceded by a qualifier such as “corporate”, “participatory”, “democratic”, “stakeholder”,

and of course, “good”, Here, however, is my attempt to grasp that core meaning:

Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and co-operating in the implementation of these decisions.

Hidden in this complex and dense definition are a number of implications.

(1) Governance rests on horizontal forms of interaction between actors who have conflicting objectives, but who are sufficiently independent of each other so that neither can impose a solution on the other, and yet sufficiently interdependent so that both would lose if no solution were found.<sup>[7]</sup>

(2) In contemporary developed societies the actors involved in governance mechanisms are usually non-profit, semi-public and, at least, semi-voluntary organizations with leaders and members; and it is the embeddedness of these organizations into something approximating a civil society that is crucial for the success of governance.

(3) These organizations do not have to be equal in their size, wealth or capability, but they have to be able to hurt or to help each other.

(4) The participating organizations interact not just once to solve a single common problem, but repeatedly and predictably over a period of time to deal with a range of functionally related issues.

(5) This implies that they can learn more about each other's preferences, exchange favors, experience successive compromises, widen the range of their mutual concerns and develop a commitment to the process of governance itself. Here, the code-words tend to be trust and mutual accommodation - specifically, trust and mutual accommodation between organizations that effectively represent more or less permanent social, cultural, economic or ideological divisions within their respective societies.

(6) Although it is not explicitly stated, the rule for arriving at “mutually satisfactory and binding” decisions in governance arrangements is usually consensus – definitely not voting among equals (or weighted participants, and even more definitely not imposition by the most powerful or the most concerned. In principle, negotiation and deliberation should be sufficient to produce an outcome that may not be unanimously favored, but accepted by all. Its bindingness rests on a shared preference for avoiding either

no decision at all or the un-coordinated actions of member governments.

Also implicit is the assumption that participation in such arrangements is voluntary. Actors can opt-in and opt-out of them, provided they are willing to forego their estimated benefits or refuse to accept their additional costs. Needless to say, a dynamic notion of governance arrangements would stress their tendency to become “path dependent”, i.e. to lock in exclusive advantages, as well as to generate increased defection costs.

Note also that, in its ideal-typical configuration, governance is not just about making consensual decisions via consultation, deliberation, and negotiation, but also about implementing policies. Indeed, the longer and more extensively it is practiced, the more the participating organizations develop an on-going interest in this implementation process since they come to derive a good deal of their legitimacy (and material rewards) from the administration of mutually rewarding policies.

Governance is not a goal in itself, but a means for achieving a variety of goals that are chosen independently by the actors involved and affected. Pace the frequent expression, “good governance”, resort to it is no guarantee that these goals will be successfully achieved or equally satisfactory. It can produce “bad” as well as “good” outcomes. Nevertheless, it may be a more appropriate method than the more traditional ones of resorting to public coercion or relying upon private competition.

Moreover, it is never applied alone, but always in conjunction with state and market mechanisms. For “governance” is not the same thing as “government”, i.e. the utilisation of public authority by some subset of elected or (self-) selected actors, backed by the coercive power of the state and (sometimes) the legitimate support of the citizenry to accomplish collective goals. Nor is it just another euphemism for the “market”, i.e. for turning over the distribution of scarce public goods to competition between independent capitalist producers or suppliers.

It goes without saying that, if this is the case, the legitimacy of applying governance to resolving conflicts and solving problems will depend upon different principles and operative norms than are used to justify the actions of either governments or markets. It will be my purpose in the remaining portion of this essay to elaborate upon this implication by specifying what these principles and norms might be.

The fact that governance arrangements are typically thought to be “second-best solutions” is a serious impediment to their legitimation. If

states and markets worked well -and worked well together- there would be no need for governance. It only emerges as an attractive option when there are manifest state failures and/or market failures. It is almost never the initially preferred way of dealing with problems or resolving conflicts. States and markets are much more visible and better justified ways of dealing with social conflicts and economic allocations. Preference for one or the other has changed over time and across issues following what Albert Hirschman has identified as a cycle of “shifting involvements” between public actions and private interests.<sup>[8]</sup> Actors, however, are familiar with both and will “naturally” gravitate toward one of them when they are in trouble. Governance arrangements tend to be much less obvious and much more specific in nature. To form such an arrangement successfully requires both a good deal of “local knowledge” about those affected and, not infrequently, the presence of an outside agent to pay for the initial costs and to provide reassurance -even coercive backing- in order to overcome the rational tendency not to contribute. As we shall see, this almost always involves some favorable treatment from public authorities as well as (semi-)voluntary contributions from private individuals or firms. What is novel about the present epoch is that, increasingly, support for governance arrangements has been coming from private (and not just public) actors and from trans- and supra-national sources (and not just from national and sub-national ones). And the European Union has been among the most active and innovative producers of such arrangements.

## **V. COMBINING GOVERNANCE AND LEGITIMACY IN THE EUROPEAN UNION**

With its “White Paper” on European governance,<sup>[9]</sup> the EU literally announced its intention to stake its future legitimacy on the successful application of governance arrangements in order to solve interest conflicts among its member states and satisfy normative political expectations across its national publics. In so doing, it also implicitly recognized that it could not compete on legitimacy grounds with well-established national democracies. Whatever modifications might be introduced in its rules and practices -including those in the draft Constitutional Treaty- they would not suffice to convince most of its citizens that the EU could function as a “real-existing” liberal-representative-parliamentary-electoral-constitutional-democratic regime. Something else had to justify why the decisions of this unavoidably complex and remote trans-national regional polity were legitimate and worthy of being obeyed. And ‘governance’ was chosen to fill this bill of particulars.

It should be noted that the evidence for a serious “legitimacy deficit” is

still sporadic and thin: a steady decline in turnout for European Parliamentary elections, lower proportions of citizens in mass Eurobaromètresurveys declaring that “the EU has been a good thing for their country”, an increase in complaints before the European Court of Justice. None of these was or is especially threatening. Matched against this was the impressive extent to which member states and mass publics have quietly consented to the “authoritative allocations” of its myriad committees, the directives of its Council of Ministers and the decisions of its Court of Justice. It is certainly premature to claim that the EU is a “producer” rather than a “consumer” of legitimacy – depending, as it does so heavily, on the borrowed authority of its Member governments. As David Beetham and Christopher Lord have argued so persuasively, it is the interaction between the different levels of aggregation and identity that reciprocally justifies the process of European integration.<sup>[10]</sup> In such a complex and still contingent polity, it becomes rather difficult to discern who is loaning and who is borrowing legitimacy – not to mention, for what purpose and according to what principles.

Much of what is happening within the EU on a regular basis is more the result of issue-specific expediency, pragmatic tinkering, time pressures, the diffusion of “best practices”, ad hoc and even ad hominem solutions than of shared principles and explicit design. My (untested) presumption is that, if the EU were to elaborate and defend such principles and to design its arrangements of governance accordingly, this would improve their legitimacy in the long run and, just maybe, convert the EU from a consumer of national legitimacy into the producer of a new type of supra-national legitimacy.

## **VI. INSERTING SOME GENERIC DESIGN PRINCIPLES**

First, one should start with the notion of chartering, i.e. of how a governance arrangement gets established at the EU level (hereafter an EGA) to deal with a particular task. This question of “why are these actors making decisions on this issue?” should be resolved through an explicit delegation of authority from a legitimate pre-existing institution, i.e. by means of a charter.

This notion of a charter rests on the presumption that a particular issue or policy arena is “appropriate” for such an arrangement, ergo, it is not better handled by good old-fashioned market competition or government regulation.<sup>[11]</sup> What has to be demonstrated and defended is the notion that some particular set of actors is thought to be capable of making decisions that will resolve the conflicts involved and provide the resources necessary for dealing with the issue pre-designated by its charter.



Moreover, these decisions once implemented will be accepted as legitimate by those who did not participate and who have suffered or enjoyed their consequences. And, if this were not enough, a successful EGA would also have to demonstrate that its capacity to resolve conflicts and provide resources is superior to anything that a national or sub-national arrangement could have done. Looked at strictly from this perspective, there may not be that many policy arenas that should acquire “their” respective EGAs!

#### Six Principles for Chartering EGAs:

(1) THE PRINCIPLE OF ‘MANDATED AUTHORITY’: No EGA should be established that does not have a clear and circumscribed mandate that is delegated to it by an appropriate EU institution. Any EU institution should be entitled to recommend the initial formation and design of an EGA, i.e. its charter, its composition and its rules, but (following the provisions of the Treaty of Rome) only those approved by the Commission should actually be established, whether or not they are subsequently staffed, funded, “housed” and/or supervised by the Commission.

(2) THE ‘SUNSET’ PRINCIPLE: No EGA should be chartered for an indefinite period, irrespective of its performance. While it is important that participants in all EGAs should expect to interact with each other on a regular and iterative basis (and it is important that the number and identity of participants be kept as constant as possible), each EGA should have a pre-established date at which it should expire. Of course, if the EU institution that delegated its existence explicitly agrees, its charter can be renewed and extended, but again only for a definite period.

(3) THE PRINCIPLE OF ‘FUNCTIONAL SEPARABILITY’: No EGA should be chartered to accomplish a task that is not sufficiently differentiated from tasks already being accomplished by other EGAs and that cannot be feasibly accomplished through its own deliberation and decision.

(4) THE PRINCIPLE OF ‘SUPPLEMENTARITY’: No EGA should be chartered (or allowed to shift its tasks) in such a way as to duplicate, displace or even threaten the *compétences* of existing EU institutions. European governance arrangements are not substitutes for European government, but should be designed to supplement and, hence, to improve the performance of the Commission, the Council and the Parliament.

(5) THE PRINCIPLE OF ‘REQUISITE VARIETY’: Each EGA should

be free –within the limits set by its charter– to establish the internal procedures that its participants deem appropriate for accomplishing the task assigned to it. Given the diversity inherent in these functionally differentiated tasks, it is to be expected that EGAs will adopt a wide variety of distinctive formats for defining their work program, their criteria for participation and their rules of decision-making – while (hopefully) conforming to similar principles of general design.

(6) THE ‘HIGH RIM’ OR ‘ANTI-SPILL-OVER’ PRINCIPLE: No EGA should be allowed by its mandating institution to exceed the tasks originally delegated to it. If, as often happens in the course of deliberations, an EGA concludes that it cannot fulfill its original mandate without taking on new tasks, it should be required to obtain a specific change in its mandate in order to do so.[\[12\]](#)

Second, now that the EGA has been chartered, it must be composed, i.e. those who are to participate in it must be selected (and not elected). Whether specified *ex ante* in the charter or chosen *ex post* by some authoritative body, these persons (or, better said, representatives of organizations) should have some justifiable reason for being included in the negotiations and deliberations and for entering into the (anticipated) consensus. This code-word in the present discussion surrounding the concept of governance is *stakeholders*. Unlike democratic government where all citizens are presumed to have an equal right to participate, in governance arrangements only some subset of these citizens, i.e. those who have expressed a greater concern or are deemed to be more likely to be affected, should participate. The calculation seems to be that if stakeholders can reach a consensus on what is to be done and, even more, if they can continue to agree on how to implement what has been chosen, their fellow citizens will conform as if they themselves had had the opportunity to participate.

Four Principles for Composing EGAs:

(1) THE MINIMUM THRESHOLD PRINCIPLE: No EGA should have more active participants than is necessary for the purpose of fulfilling its mandated task. It has the autonomous right to seek information and invite consultation from any sources that it chooses; however, for the actual process of drafting prospective policies and deciding upon them, only those persons or organizations judged capable of contributing to the governance of the designated task should participate.[\[13\]](#)

(2) THE STAKE-HOLDING PRINCIPLE: No EGA should have, as active participants, persons or organizations that do not have a significant

stake in the issues surrounding the task assigned to it. Knowledge-holders (experts) specializing in dealing with the task should be considered as having a stake, even if they profess not to represent the interests of any particular stakeholder.[\[14\]](#)

(3) THE PRINCIPLE OF ‘EUROPEAN PRIVILEGE’: All things being equal, the participants in an EGA should represent Europe-wide constituencies.[\[15\]](#) Granted that, in practice, these representatives may have to rely heavily on national and even sub-national personnel and funding and may even be dominated by national and sub-national calculations of interest, and granted that the larger the constituency in numbers, territorial scale and cultural diversity, the more difficult it may be to acquire the “asset specificity” that provides the basis for stakeholding, nevertheless, the distinctive characteristic of a European governance arrangement is contingent on privileging this level of aggregation in the selection of participants.

(4) THE ADVERSARIAL PRINCIPLE: Participants in an EGA should be selected to represent constituencies that are known to have diverse and, especially, opposing interests. No EGA should be composed of a preponderance of representatives who are known to have a similar position or who have already formed an alliance for common purpose.[\[16\]](#) In the case of ‘knowledge-holders’ who are presumed not to have constituencies but ideas, they should be chosen to represent whatever differing theories or paradigms may exist with regard to a particular task.

Third, now that the EGA is chartered and composed, it must take and implement decisions. As we have seen above, the usual rules dominating inter-governmental organizations (unanimity) or democratic federations (simple or qualified majorities) should not apply. Rather, a deliberately vague “meta- rule” should prevail, namely, consensus. But what are the operative principles that could frame this process of consensus formation?

Eight Principles for Decision-Making in EGAs:

(1) THE PRINCIPLE OF ‘PUTATIVE’ EQUALITY: All participants in an EGA should be considered and treated as equals, even when they represent constituencies of greatly differing size, resources, public or private status, and “political clout” at the national level. No EGA should have second and third class participants, even though it is necessary to distinguish unambiguously between those who can participate and those who are just consulted.

(2) THE PRINCIPLE OF HORIZONTAL INTERACTION: Because of

the presumption and practice of equality among participants, the internal deliberation and decision making processes of an EGA should avoid as much as possible such internal hierarchical devices as stable delegation of tasks, distinctions between “neutral” experts and “committed” representatives, formalized leadership structures, deference arrangements, etc. and should encourage flexibility in fulfilling collective tasks, rotating arrangements for leadership and rapporteurship, extensive verbal deliberation, -- along with a general atmosphere of informality and mutual respect.

(3) THE PRINCIPLE OF CONSENSUS: Decisions in an EGA will be taken by consensus rather than by vote or by imposition.<sup>[17]</sup> This implies that no decision can be taken against the expressed opposition of any participant, although internal mechanisms usually allow for actors to abstain on a given issue or to express publicly dissenting opinions without their exercising a veto. Needless to say, the primary devices for arriving at consensus are deliberation (i.e. trying to convince one’s adversaries of the *bien-fondée* of one’s position), compromise (i.e. by accepting a solution in between the expressed preferences of actors) and accommodation (i.e. by weighing the intensity of the preferences of other actors). Regular and iterative interaction among a stable set of representatives is also important, although this should be temporally bounded.

(4) THE ‘OPEN DOOR’ PRINCIPLE: Any participant should be able to exit from an EGA at relatively modest cost and without suffering retaliation in other domains – either by other participants or EU authorities. Moreover, the former participant has the right to publicize this exit before a wider public (and the threat to do so should be considered a normal aspect of procedure), but not the assurance that, by exiting, he or she can unilaterally halt the process of governance.

(5) THE PROPORTIONALITY PRINCIPLE: Although it would be counter-productive for influences to be formally weighed or equally counted, it is desirable that across the range of decisions taken by an EGA there be an informal sense that the outcomes reached are roughly proportional to the specific assets that each participant contributes (differentially) to the process of resolving the inevitable disputes and accomplishing the delegated tasks.<sup>[18]</sup>

(6) THE PRINCIPLE OF SHIFTING ALLIANCES: Over time within a given EGA, it should be expected that the process of consensus formation will be led by different sets of participants and that no single participant or minority of participants will be persistently required to make greater

sacrifices in order to reach that consensus. Thanks to Item #14, this situation should be avoided, if only because it will be so easy and costly for marginalized actors to exit.

(7) THE PRINCIPLE OF ‘CHECKS AND BALANCES’: No EGA should take a decision binding on persons or organizations not part of its deliberations unless that decision is explicitly approved by another EU institution that is based on different practices of representation and/or of constituency. Normally, that EU institution will be the one that “chartered” the EGA initially, but one can imagine that the European Parliament through its internal committee structure could be accorded an increased role as co-appraiser of EGA decisions.

(8) THE REVERSIBILITY PRINCIPLE: No EGA should be empowered to take decisions that cannot be potentially annulled and reversed by “rights-holders”, i.e. by European citizens acting either directly through eventual referenda or indirectly through their representatives in the European Parliament.

Finally, there are a set of principles that, while not being either legal or democratic, are “prudential” with regard to decisions taken by the governance arrangements of such a complex, remote, multi-layered and poly-centric polity as the European Union. They relate less to procedure than to substance, more to those eventually affected than those that have participated in their formulation.

Meta-Principles of Prudence for EGAs:

(1) THE PRECAUTIONARY PRINCIPLE: An EGA should in the substance of its decisions take into account the full range of knowledge and, where that knowledge is uncertain or incomplete, it should err on the side of assuming the worst possible consequence – ergo, it should avoid risks rather than maximize benefits when calculations about the latter are inconclusive.

(2) THE FORWARD-REGARDING PRINCIPLE: An EGA should in the substance of its decisions take into account the furthest future projection of the consequences of its decisions. This obviously poses a serious difficulty in terms of the composition of its participants, e.g. who can legitimately represent as yet unborn generations, but some “place at the table” should be occupied by persons or organizations representing as long a time perspective as possible.

(3) THE SUBSIDIARITY PRINCIPLE: No EGA should deal with an

issue or make decisions about a policy that could be handled more effectively or more legitimately at a lower level of aggregation, i.e. at the level of member states or their sub-national units. Inversely, no EGA should occupy itself with an issue that cannot be resolved and implemented at the level of Europe, but requires a higher level of aggregation, i.e. the Trans-Atlantic or Global one.[\[19\]](#)

(4) THE PRINCIPLE OF (PARTIAL) TRANSPARENCY: No EGA should take up an issue or draft a *projet de loi* that has not been previously announced and made publicly available to potentially interested parties not participating directly in its deliberations. Conversely, none of the participants in an EGA should make public the content of deliberations while they are occurring, until a consensus has been reached. Once a decision has or has not been made and participants are no longer capable of exercising a veto, they should nevertheless be free to express their satisfaction/dissatisfaction with it to whomever they please.

(5) THE PRINCIPLE OF PROPORTIONAL EXTERNALITIES: No EGA should take a decision whose effects in financial cost, social status or political influence (especially for those not participating in it) is disproportionate either to the expectations inherent in their original charter or general standards of fairness in society. When claims of disproportionate effect are made, these externalities should be investigated and, where found to be justified, compensated for by other EU institutions – in particular, by the European Parliament.

## **VII. CONCLUDING WITH SOME DOUBTS**

Governance at the level of the EU is no panacea. It will not work to resolve all policy issues and it will not work unless it is firmly based on political as well as administrative design principles. And that means that difficult choices involving the charter, composition and decision-rules of such arrangements cannot be avoided or finessed. And, as emphasized above, governance arrangements never work alone but only in conjuncture with community norms, state authority and market competition.

The guiding hypothesis of this article has been that ‘political engineers’ and ‘policy wonks’ should take into account the principles outlined above if the arrangements they devise are to generate legitimacy for the EU as whole. In my view, these guidelines are neither autocratic, technocratic, nor democratic. They at least try to identify and provide a justification for a distinctive mechanism of solving common problems and resolving conflicts by governance. Admittedly, these principles –as stated– are vague and underspecified. They will require much more discussion and



elaboration before they can be “transposed” into operational norms and convincing justifications that could guide the chartering of EGAs, determine the composition of those who participate in them and regulate how they subsequently make and implement their decisions. My suspicion is that few of them will be easy to capture in strictly formal-legal terms. Just image how difficult it would be to define a priori and in unambiguous terms who is a “stakeholder” in a given policy area – and, by inference, who is not entitled to participate in it.

Those who have taken on the challenge of exploiting governance at the EU level will have to be careful not to use it as an excuse to expand the powers of the Commission – as was, unfortunately, the case with the now widely-ignored White Paper on Governance. According to my interpretation, if taken seriously and not opportunistically, Euro-governance could well lead to a proliferation of relatively independent regulatory agencies and functionally specific taskforces with varying memberships and degrees of supra-nationality – an outcome I have elsewhere labeled as a “condominio”. Far from promoting a “federatio” with the Commission as its core of stateness, it could even drive the EU’s *finalité politique* in quite the opposite direction and, in the process, create a radically novel form of regional polity.[\[20\]](#)

But long before this may happen, I can foresee two key dilemmas that must be addressed. I will only raise them without further explication:

(1) The proliferation of EGAs tends to occur within compartmentalized policy arenas (and more so in the EU than in its member states) – vide the extremely autonomous powers conferred on the European Central Bank by its charter. This leaves unresolved the large issue of how eventual conflicts between decisions taken by different EGAs are going to be resolved. Multiple “governances” at the micro- or meso-levels no matter how participatory, innovative, sustainable and legitimacy conferring on their own, may end up generating macro-outcomes that were not anticipated and that no one wants!

(2) The criteria for the inclusion of participants and the making of decisions in EGAs are not generally compatible with the prevailing democratic standards for legitimation used within national and sub-national polities – although experimentation with governance arrangements is occurring at all levels of aggregation. Before EGAs can be reliably deployed and generate a sense of obligation among broader publics, it may be necessary to spend a good deal of effort in changing peoples’ notions of what democracy is and what it is becoming, as well as how it has become necessary to supplement it at the supra-national level.

---

REFERENCES

\* Professorial Fellow, European University Institute, April 2007.

[1] Although it would be more accurate to stress that these “other” arrangements based on expertise, legality, personal reputation or just plain effectiveness are themselves embedded in a more encompassing framework of national democratic institutions that, at least potentially, have the power to amend or overrule whatever decisions are made by non-democratic means. This contextual property is sometimes overlooked by enthusiasts for central bank autonomy, independent regulatory agencies, oversight boards, judicial review, and so forth.

[2] On Democracy, New Haven, Yale University Press, 1998, p. 9.

[3] J. RAWLS, *Political Liberalism*, New York, Columbia University Press, 1993, pp. 133-172.

[4] What I mean by “interim” is that, in the long run, the EU might well acquire the properties of a state and even of a nation – in which case, the deployment of conventional institutions of representation and decision-making and standard notions of citizenship might become much more desirable. However, for the foreseeable future, e.g. 20-25 years, the problem will be to protect and enhance the legitimacy of political institutions that do not have these properties – and that means relying upon novel arrangements and novel norms to justify them.

[5] I can only think of one clear case: Switzerland in the early 1870s. It would be interesting to explore this exception, although the fact that this country had a “one-party-dominant-system” (Freisinnige/Radical) at the time must have been an important factor – and, not one that can be repeated at the EU-level.

[6] *How to Democratize the European Union ... and Why Bother?*, Lanham, Rowman & Littlefield, 2000.

[7] One frequently encounters in the literature that focuses on national or sub-national “governance” the concept of network being used to refer to these stable patterns of horizontal interaction between mutually respecting actors. As long as one keeps in mind that, with modern means of communication, the participants in a network may not even know each other – and certainly never have met face-to-face – it seems appropriate to extend it to cover transnational and even global arrangements.

[8] A.O. HIRSCHMAN, *Shifting Involvements. Private Interest and Public Action*, Princeton University Press, 1982.

[9] European Commission, *European Governance: A White Paper*, COM(2001) 428 final, Brussels, 2001, <http://europa.eu.int/eurolex/pdf/egp-connex-C-05-02.pdf>

[10] D. BEETHAM and C. LORD, *Legitimacy and the European Union*, Harlow, Longman, 1998.

[11] One scholar who has given concerted attention to this problem is Eleanor Ostrom. See, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge, Cambridge University Press, 1990.

[12] N.B. that this does not mean that “log-rolling” and “package-dealing” should not be an integral part of the integration process, just that EGAs are not the appropriate sites for such activity. Decisions involving the negotiation of tradeoffs across circumscribed issue areas should be the purview of other EU institutions, i.e. the Commission, the Council of Ministers, the European Council and, hopefully in the future, the European Parliament.

[13] Another way of stating this point is to stress that all participants must possess

some type or degree of “asset specificity”, i.e. they must demonstrably have material, intellectual or political resources that are apposite to the tasks to be accomplished.

[14] Needless to say, defining “the stakes” and those who hold them is bound to be politically contested, since the number of representatives and experts who can make that claim is potentially unlimited – thanks to the growing interdependence of policy domains. As an approximation, I propose that a relevant stake-holder be defined as a person or organization whose participation is necessary for the making of a (potentially) binding decision by consensus, and/or whose collaboration is necessary for the successful implementation of that decision. In practice, this is likely to be determined only by an iterative process in which those initially excluded make sufficiently known their claims to stake- and knowledge-holding so that they are subsequently included. Presumably, those initially invited to participate who turn out not to be indispensable for policy-making and implementation will leave of their own accord – although a persistent problem in EGAs is likely to be the absence of an effective mechanism for removing non-essential participants.

[15] This should not be interpreted narrowly to mean “EU-wide constituencies” since there may be significant stake-holders and knowledge-holders in prospective member-states and even in those that have explicitly chosen not to join the EU.

[16] To fulfil this principle, it may be necessary for the designers of EGAs to play a pro-active role in helping less well-endowed or more dispersed interests to get organized and sufficiently motivated to participate against their adversaries. Needless to say, this element of “sponsorship” intended to encourage a greater balance in adversarial relations can conflict with the subsequent principle of equality of treatment and status. It can also generate serious questions concerning the autonomy of such ‘sponsored’ organizations from EU authorities.

[17] N.B. this principle serves to distinguish EGAs from other institutions operating at the European level. For example, parliaments, courts, central banks and independent regulatory agencies may ultimately take their decisions by vote, even if they engage in extensive deliberation and seek to form a consensus beforehand. Some expert commissions and many executive bodies may decide by imposition when the actor recognized by the others as “superior in knowledge or stake” exercises his or her ‘sovereign’ authority.

[18] A more orthodox way of grasping this principle would be to refer to “reciprocity” – although this seems to convey the meaning of equal shares or benefits across some set of iterations. “Proportionality” is similar, but allows for the likelihood that stable inequalities in benefit will emerge and be accepted on the grounds of differential contributions or assets.

[19] This may be the only of the principles listed that has already been formally included (if not operationally defined) in the quasi-constitution of the EU, i.e. in the Treaty of Amsterdam.

[20] “Imagining the Future of the Euro-Polity with the Help of New Concepts”, in G. MARKS, F. SCHARPF, P.C. SCHMITTER AND W. STREECK, *Governance in the European Union*, London, Sage Publications, 1996, pp. 121-150.

## GOOD GOVERNANCE VIA THE OMC? THE CASES OF EMPLOYMENT AND SOCIAL INCLUSION

Caroline de la Porte\*

*This article focuses on how the EU, via the Open Method of Coordination (OMC), governs the employment and social inclusion policies of the EU Member States. It derives three operational governance principles – Participation, Coherence and Effectiveness – from the EU White Paper on Governance and the definition of the OMC itself. Participation is conceptualised as two broad categories of actors involved in the OMCs: first, a core policy community that is a closed group of insiders which prepares work in a delegated policy area, and second, a broader policy network, that is more open and that has a stake in the policy area concerned, without having any central decision-making power. Empirically, the analysis reveals that an institutionally similar policy community has been developed in employment and social inclusion within the main national-level ministries, respectively the Labour and Social Ministries. These are responsible for upstream reporting to the European level, horizontal integration across relevant ministries, and downstream integration of other levels of government, which is increasingly important in the context of devolution of employment and inclusion policies. However, the broader policy network of organised interest organisations is dissimilar in the two areas: the social partners are more superficially involved in the EES than the civil society actors in the OMCincl., that use it as a means to strengthen their own position vis-a-vis governmental actors. Policy coherence is conceptualised as political and ideological consistency of key policy objectives throughout time. In terms of policy coherence, the EES has identified a core supply-side policy means, “employability”, that has been consistent throughout time, to achieve a clear policy outcome: the full employment model. The overall policy coherence of the OMCincl. temporally has been consistent in seeking to include people in society through work, to develop a rights-based approach and to target actions towards vulnerable groups. Together, the OMC in Employment and in Social Inclusion support the economic growth and full employment model, by increasing the employment rate of the Union. Both, particularly from the perspective of the socially-oriented protagonists, also embrace social objectives of equity and decent standards of living. In a sense, the policy objectives of the Employment and Social Inclusion processes embody the hybridisation that increasingly characterises the outcome of the social policy reform processes in the different EU Member States. At the same time, the objectives of both processes can be interpreted in different ways across the political spectrum, rendering their consistency relatively fragile. Effectiveness, defined as the integration of core policies (under each OMC) into the context of Member States, is assessed via key quantitative indicators that have been created by Eurostat to reflect the objectives of each of the OMCs. In the EES, the indicators around “employability” or “activation” show that expenditure on Active Labour Market Policies (ALMP) has been*

*decreasing throughout time. However, if we turn our attention to the core outcome indicator – employment rates – which has been increasing over time, then the EES objectives are in conjunction with an increase in employment rates observed in the EU-15 over last decade. This suggests, first, that employability measures are not the main cause of employment growth and second, that while activation has become a mainstream concept in labour market reform, the EES does not have the capacity to promote the development of a particular line of employability schemes. It suggests, second, that the EES does have a capacity to promote a societal model of full employment, re-enforced by the Lisbon Strategy in 2000 and its revision in 2005. The EES as an agenda setting instrument influences or supports the core economic and employment reform agendas of the EU-15. The analysis of effectiveness of the OMCincl. takes account of the fact that the model it upholds is not as strong as that of the EES, as there are no quantitative benchmarks. Nevertheless, from the perspective of an anti-poverty policy, it does provide comparative information on poverty in the EU-15; this data is novel for more countries than the statistics of ALMP. In the countries of the EU-15, there has been a trend towards convergence of poverty rates in 2004, compared to 1997. The OMCincl., through statistics depicts poverty comparatively and for the EU as a whole, but more importantly, it proposes solutions for problems of exclusion that are increasingly similar. The OMCincl. supports the development of a policy agenda in fighting exclusion, an area that is generally underdeveloped and at the sidelines of the core social protection reform agendas. The OMCincl. nevertheless continues, in terms of information provision, and as a policy agenda, to develop incrementally and to different degrees, in the domestic context of various Member States of the EU-15.*

## **I. INTRODUCTION**

Governance in social policy is critical in the context of a deeper, wider and increasingly diverse Union, but also a politically delicate Union. Via the Lisbon Strategy, there is increasing awareness of the legitimate existence of a role for the EU in the area of social policy, where 56% of EU citizens view the role of the EU positively.[1] It is thus crucial to understand exactly how the EU not only via directives, but also via the Open Method of Coordination (OMC), governs the employment and social inclusion policies of the Member States. A centre-piece in this debate is the White Paper on Governance that established five “Principles of Good Governance” – Openness, Accountability, Participation, Effectiveness, Coherence – to establish “more democratic governance”.[2] This has been followed by vivid academic commentary[3] that influenced the debate and actions at European level.[4] The White Paper on Governance is, now as much as ever, a vibrant and relevant basis for assessing the empirical governance of different instruments in various policy areas.

This article assesses the governance of the Open Method of Co-ordination

(OMC) in social policy that is, *par excellence*, an interdisciplinary object of study. Since it was conceptualized in 2000, the academic community has been intrigued by the many issues in the Pandora's Box of the "Open Method of Co-ordination". Among legal analysts, part of the debate is normatively driven, where a more classical legal reference point, such as a directive, is the implicit point of comparison. Belonging to "soft law", the OMC is perceived as "weaker" than hard law along the dimensions of obligation, precision or delegation,[5] and is criticised for its unknown effects and its non-judiciable character.[6] However, legal analysts have also used concepts emanating from political science in approaching soft law to move away from the dichotomous hard law vs. soft law debate.[7] Scott and Trubek institutionalised "new modes of governance" (NMG) among lawyers,[8] defining NMG in a broad manner as "any major departure from the classical Community method". Political scientists have emphasised the eminently political nature of the OMC,[9] which is used for the reform of employment and social policies, a sensitive issue in all Member States.

In essence, the OMC as a NMG is an iterative non-judiciable instrument that sets policy objectives to be implemented by Member States in accordance with their national systems and practice. The rhetoric on the OMC underlines that it is to be implemented with respect to the principle of subsidiarity, which puts emphasis on who and at which level power should be exercised, in the framework of which the European Union can only take action if it brings in an element of added value.[10] The OMC was introduced during the Lisbon Summit of the Portuguese Presidency "to better implement the long-term strategy for a competitive knowledge-based economy with more and better employment and social cohesion" by 2010,[11] alongside other EU instruments – from legislation to multi-annual programmes. In procedural terms, the OMC consists of European-level "guidelines", or policy objectives, for the Union and its Member States, accompanied, where possible, by quantitative benchmarks that render the guidelines more specific. Then, at the national level, the guidelines, in view of the benchmarks, should be transposed into national and regional policies, quantitative targets, and legislation. In concrete terms, the actions of the Member States should be reflected in national reports regularly. Finally, the proposed policies and actions of Member States set out in the national reports are monitored, evaluated and peer-reviewed jointly by the Commission and the Council. In addition, the Spring Summit of the European Council, institutionalised at Lisbon and held in March every year, reviews progress and adapts the policy objectives in each policy area.[12]

This article assesses the OMC in two areas, employment and social



inclusion, according to the principles of Participation, Coherence and Effectiveness, from which operational governance criteria are derived. While Openness and Accountability are also highly pertinent criteria, they will not be used for the analysis due to problems of operationalisation. The fundamental reference documents used for drawing up operational principles of governance are the White Paper on Governance,[13] and where relevant, the Treaty establishing a Constitution for Europe (Constitutional Treaty).[14] The OMC-specific documents are the Conclusions of the Lisbon European Council[15] and the Note on the OMC by the Portuguese Presidency.[16] The article then plunges into the heart of the analysis, comparing OMC Governance in employment and social inclusion, first along the dimension of participation, then coherence, and last but not least, effectiveness. Finally, the conclusion assesses how the OMC fares with regard to Good Governance and, in the light of the revision of the Lisbon Strategy in 2005, envisages future prospects for the method in the area of social policy.

## **II. THE PRINCIPLES OF GOOD GOVERNANCE AND OPERATIONAL CRITERIA**

### **I. *Openness***

The definition of “Openness” in the White Paper is that “The Institutions should work in a more open manner... they should actively communicate about what the EU does and the decisions it takes. They should use language that is accessible and understandable for the general public”.[17] It is a conception indicating that the EU should make rules and politics more accessible, in terms of language and availability of information, to EU citizens. The “openness” principle of the White Paper concerns public accessibility and by extension, public debate.[18] In the template defining the open method of co-ordination, “open” has two slightly different dimensions. It first indicates that the EU level rules, tools and policies – guidelines, best practices, quantitative indicators, reports – can be “adapted” to the national level.[19] This means that in the OMC, compared to hard law, there is explicitly a wider margin for compliance, with regard to the national systems, institutions and rules. This is crucial for both employment and social policy, which are areas of (quasi?) exclusive member state competency. It can also be interpreted as ex-ante respect of subsidiarity – where all aspects of the OMC should be “adapted” to national, regional and local contexts – that has been the object of extensive academic analysis.[20] It indicates, second, that the operating mechanism should be “open” to “various actors of civil society”.[21] Regarding civil society participation, it is the focal issue of “Participation” and thus will not be an object of analysis here. Overall, the

principle of “openness” is partially normative, and partially, covered by Participation. Hence, no operational criteria will be derived for this analysis on the OMC.

## 2. *Accountability*

In the White Paper on Governance, the issue of accountability makes reference to clearly defined roles and mandates: “Roles in the legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe. But there is also a need for greater clarity and responsibility from Member States and all those involved in developing and implementing EU policy at whatever level.”[22] In the OMC, Member States have a double obligation in terms of accountability: first, vis-à-vis the European Commission, and second, with regard to their respective electorate for policy decisions in areas covered by the OMC. When the Member States have submitted their national reports to the European Commission, then Commission controls the content of the Member States reports. The European Commission has various instruments with which to ensure this upward accountability: Joint Reports and Recommendations. Joint Reports summarise the reports made by Member States of their respective national situations and implementation plans, and assess the implementation policy plans in light of the EU level objectives and benchmarks. Individual country recommendations are used only in some issue-areas, including the European Employment Strategy (EES). These mechanisms are set down in the Employment Title of the Amsterdam EC Treaty for the EES and are integrated into the procedural tasks of the Social Protection Committee for the Open Method in Inclusion. In this article, I will not comment on the quality of these mechanisms, as that would require in-depth national case-studies with process-tracing as the main methodological tool.[23] In her Phd, Buechs undertakes this onerous task with elegance for the cases of Germany and the United Kingdom.[24] Another dimension of accountability is related to the national level, where governments are accountable to their electorate for policy decisions in areas covered by the OMC. But, these domestically driven problems, debates and policy solutions have taken place parallel to, but independently of the OMC. This represents an exciting issue of analysis in its own right, but which is beyond the scope of this article.

## 3. *Participation*

The White Paper of Governance places considerable emphasis on participation in terms of its input legitimacy and also its expected output legitimacy: “the quality, relevance and effectiveness of EU policies depend on ensuring wide participation throughout the policy chain – from

conception to implementation.” This is in line with the conception of subsidiarity in its widened form.[25] The OMC has been conceived in this normative spirit: it is qualified as “an important tool to improve transparency and democratic participation”.[26] In the White Paper, considerable emphasis is placed on the responsibility of “central governments” to ensure meeting this principle: “Participation crucially depends on central governments following an inclusive approach when developing and implementing EU policies”.[27] The document defining the OMC sets out that governments are the main actors responsible for devising and implementing policies derived from the EU level. In addition to central governments, the White Paper highlights the value of civil society participation. The Constitutional Treaty lays down the principle of participatory democracy, according to which “...The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society...”.[28] The Lisbon Conclusions proclaim with regard to the OMC that: “A fully decentralised approach will be applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using varied forms of partnership.”[29] According to the OMC template “...the development of this method in its different stages should be open to the participation of the various actors of civil society.”[30] This participatory approach to European governance has been re-confirmed in the revision of the Lisbon Strategy in 2005.[31] In the area of social inclusion, the Constitutional Treaty recognises the OMC, although not by label. It confirms the role of the core governmental actors for “cooperation” on social protection policies and refers to the Social Protection Committee, comprised of member state and Commission civil servants. However, there is no reference to the need to involve NGOs or civil society organisations.[32]

From these principles, I derive two criteria: the first is the creation of a core policy community, which is a closed group of insiders, with relatively stable membership and meeting on a regular basis to prepare work on their delegated thematic area.[33] I analyse the membership of the Committees that have been formed at the national level. The second is the creation of a more open, more permeable and broader policy network (of social partner and/or civil society organisations) that has a stake in the issue concerned, without having any core decision-making power in the process.[34] The source of legitimacy for the involvement of actors is either Treaty or policy-based.[35]

#### 4. *Coherence*

The White Paper stipulates that, “Policies and action must be coherent

and easily understood.... Coherence requires political leadership and a strong responsibility on the part of Institutions to ensure a consistent approach within a complex system”.[36] In the Constitutional Treaty, considerable attention is devoted to consistency of policies: “The Union shall ensure consistency between the policies and activities... taking all of its objectives into account and in accordance with the principles of conferral of powers.”[37] Also, the OMC needs to be coherent within each policy field, and there needs to be an overarching coherence of the various policy fields. The application of the OMC to different policy fields is held together by the European Council, which plays an overall coordinating role. The Conclusions of the Lisbon Council set out this coordinating role for the Council, stating that it should take on a “...pre-eminent guiding and coordinating role to ensure overall coherence and the effective monitoring of progress towards a new strategic goal”.[38] The anchorage of the central coordination role for the Council has been re-enforced as of the revision of the Lisbon Strategy in 2005.[39] In this context, the link between employment and economic coordination has been strengthened, via the creation of a single set of “Integrated Guidelines” covering the co-ordination of employment and macro and micro-economic policies. This steps up the political salience of the EES with regard to the economic coordination process. In the national context, Member States commit to drawing up three-yearly “national reform programmes”, which should bring into a single document “all the existing national reports which are relevant to the Lisbon strategy”. Furthermore, this is also increasingly centralised at the national level, through the nomination of a high level national governmental representative specifically for the Lisbon Strategy - a “Mr” or “Ms” Lisbon, to enhance in the domestic context, the political coherence and ownership of the process.[40] Regarding the change with regard to the policy objectives of Lisbon, the conclusions re-confirm the main political pillar of the Lisbon Strategy: to increase employment rates, to extend working lives, to attract people to the labour market and to promote active ageing. The socially-oriented objectives, while still present, have lost some momentum in the context of the political centre of gravity that has shifted from the left in 2000 towards the right in 2005. The Conclusion stipulates that: “The Social Inclusion Process should be pursued by the Union and by Member States, with its multi-faceted approach, focusing on target groups, such as children in poverty.”[41] The social inclusion objectives are no longer part of the key objectives of the Lisbon Strategy, but run parallel to the economic growth and employment policy objectives, and should feed into the National Report Programmes.[42]

The criterion I derive from coherence is that for the policy areas under

examination, the policies have to be internally coherent, and have to be coherent with the overarching goal of the Lisbon European Summit. To analyze this, I will examine the policy content of the Employment and Social Inclusion policies, focusing on their coherence throughout time, i.e. is Europe always sending the same message to Member States, and also in terms of internal politico-ideological thrust, how coherent are the objectives in terms of their underlying political aims.

### 5. *Effectiveness*

The White Paper states that: “Policies must be effective and timely, delivering what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience.” This aspect of the White Paper is thus devoted to issues of output legitimacy, and prescribes clarity of means and objectives to achieve these.

In the template of the Open Method, two issues pertain to effectiveness. The first is that of effectiveness through “learning”;<sup>[43]</sup> i.e. Member States are incrementally to change their policies, based on what they “learn” from the European objectives and guidelines, from the specific recommendations made by the Commission in its analyses (in Joint Reports or individual country recommendations), and from horizontal exchange of best practices. In this light, the OMC template specifies that outcome in individual Member States should be assessed on the basis of contextualised achievements: via “progressions or relative achievements”.<sup>[44]</sup> There are several ambiguities with learning, notably that it is perceived in these documents both as a means and as an end. Also, much of the academic literature on the OMC highlights that one of its main achievements has been that of fostering “learning”.<sup>[45]</sup> Hence, this article will not focus in-depth on learning.

Secondly, the OMC “can foster convergence... on common priorities”.<sup>[46]</sup> These common priorities take the concrete form either of specific qualitative objectives or of Union-wide quantitative benchmarks to achieve. The criterion used in this analysis is the integration of core policies under each OMC into the context of Member States. This will be assessed via key quantitative indicators that have been created by Eurostat to reflect the objectives of each of the OMCs.

## **III. EMPIRICAL ANALYSIS**

For each governance principle - Participation, Coherence and Effectiveness - this article analyses the situation first in employment policy and thereafter in social inclusion policy. To facilitate the empirical analysis

in the areas of employment and inclusion, the countries have been organised according to their level of expenditure. In employment, core expenditure is in Active Labour Market Policies (ALMP), representing the core supply-side “employability” objectives of the EES; in social inclusion, core expenditure is represented by social transfers, which represent the main instrument to prevent poverty.

### 1. *Participation*

Regarding participation, I analyse for employment and social inclusion, the key actors in the core policy community and then actors involved in the broader policy network.

#### a. Employment

##### *Policy Community*

The primary policy community formed as a result of the EES is at national level, and the secondary one involves the devolved levels of governance. The common features, but also distinctions, of the policy community created for the EES in the domestic contexts (of the EU-14)[47] is summarised in table 1 below (columns 2 – 6).

The core of the policy community at national level is located in the Labour Ministry (see column 3). The civil servants from the Labour Ministry represent their respective governments in the meetings of the European level policy community for employment policy (EMCO). EMCO consists of two delegates per Member State as well as two members from the Commission. Its composition and mandate are set out in article 130, EC Treaty. It has an advisory status in the co-ordination of employment and labour market policies among Member States. Its tasks include monitoring the employment situation and employment policies in the Member States and the Community; formulating opinions at the request of either the Council or the Commission or on its own initiative; and contributing to the preparation of the Council proceedings. The central role of the national actors from the Labour Ministries aside, the EES model stipulates that other governmental actors which have a policy stake in the EES should be involved in devising policies during the National Action Plan for employment (NAPempl). These actors include, most importantly, the Finance Ministry, since it must approve all decisions regarding budgets and funding for employment and labour market policies. In the countries of the EU-15, there is some degree of variation as regards the Labour-Finance Ministry tandem in the development of the EES



reports and work (column 4), which is due to domestically defined patterns. Another governmental actor that has a stake in some objectives of the EES, particularly those pertaining to training and life-long learning, is the Education Ministry. In other countries, specific ministries or units regarding equal opportunities between men and women, have been involved in the EES process (column 5). A centrally-based policy community for employment policy issues has developed around the Labour Ministry as a result of, and specifically for, the EES, but also involves other Ministries. The role of that policy community “upwards” is to ensure reporting to the European Union via the NAPempl and “downwards” to ensure integration of the European policy objectives into the domestic policy process. The real test for the EES is to check whether this domestic policy community integrates the policies of the NAPempl into the process of setting domestic employment and labour market policy.[48] The means of participation in the EES, i.e. contribution to the NAP, among the members of this policy community at the national level covers a broad range of channels of communication, including meetings and formal and informal opinions and commentary on the reports destined for Europe.

The secondary aspect of the policy community consists of coordination to involve different levels of government. The main trends of the involvement of these levels of government is indicated in column 6 of table 1 below. While there is no legal mandate for regional and local level involvement in the EES, there has been political support for enhancing the involvement of these levels of governance, particularly since 2000 when the OMC and the concept of governance was in the spotlight of the Lisbon Summit. According to the template of the OMC[49] that was conceptualised and also various Commission communications on the topic,[50] the policy community should in theory include all public authorities at national, regional, and local levels, by developing appropriate vertical co-ordination procedures. Furthermore, there is increasingly a shift to devolution of some aspects of labour market policies in all countries, confirming the relevance to involve this level of governance in the EES, particularly if it is to enhance ex-post multi-level coordination as an information provision tool and more fundamentally, to act as a policy-making template. In the EU-15, regional and local level involvement depends on the division of competencies for labour market issues; where there is a higher degree of devolution, there are more chances of their involvement of the EES process. In some cases, the EES has acted as an incentive for their involvement and has contributed to the development of multi-level policy communities and coordination, e.g. Belgium,[51] Italy[52]. In other cases, regions actively devised employment policy at their level prior to the EES, and thus it allowed for a continuation or expansion of this practice, e.g. Spain.

*Policy Network*

In the context of the EES, the policy network refers to social partners and also informal interest organisations that have a stake in employment and labour market policy. National social partners' have a legal mandate for involvement. The main reference to national level social partner involvement is in article 126, paragraph 2, Amsterdam EC Treaty, which states that "Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern". Article 128.3, Amsterdam EC Treaty which asks the Member States to provide the Council and the Commission with an annual report, does not make any reference to the role of social partners in drafting the NAPs. Despite this rather ambiguous legal clause, the involvement of social partners has been encouraged by political incentives from the European Council and also by the European Commission,[53] which requires Member States to integrate social partners according to their national practice. They are encouraged to participate from decision-making (in policy issues of their remit) through implementation of policies.

The social partners are in the process of the EES requested to contribute to the objectives of their concern, notably the objectives around work organisation. Column 7 of Table 1 indicates that in half of the countries, social partners make substantial contributions to their NAPempl and are thus quite highly integrated, although this is essentially at the central national level and with the general perception that the NAP is "owned" by ministerial departments. But, there have progressively been more direct contributions and/or a qualitative improvement in the contributions: the crucial point here is a (slight) shift by the social partners to take the EES more seriously as a political vehicle, although they still lack time and also financial resources that prevents them from making more adequate contributions. In addition, in all countries, the social partners participate in the implementation of the policies under their remit in the NAP. This is logical as the NAP, at the very least, is a report that summarises all policies and measures undertaken throughout the year, including those involving the social partners.

Nevertheless, a crucial problem of social partner involvement in the EES remains that of a fundamental agenda mismatch. Wage negotiations, central to social partner activity, are not part of the EES guidelines, while employment policies are mainly considered a government prerogative. That said, the political agenda of the social partners is broadening to

debate issues related to employment policy as well.[54] Indeed, social partners have revealed interest in guidelines that are primarily addressed to governments: active and preventive measures for the unemployed and inactive, job creation and entrepreneurship, making work pay, transforming undeclared work into regular employment.[55] In essence, trade unions prefer to influence the policy process in areas of their remit through means that pre-existed the EES, that are more rooted in the national institutional setting, and with which resources (either financial or power or a combination of both) would be associated.

Regarding informal interest organisations, there is no legal mandate for their involvement, and thus their involvement is likely only in the case that firstly, they are aware of the existence of the EES and secondly, that they perceive it as an instrument to strengthen their own position or power. Column 8 of Table 1 shows that mostly there is a low take-up of the EES by civil society organisations. It has been used by informal interest organisations in Denmark, Sweden and the United Kingdom to strengthen their power vis-à-vis more central governmental actors. In Ireland, civil society has been substantially involved, with regard to their national practice. The “usage” of or “participation” in the EES among the members of the policy network at the national level is second degree if compared to the policy community, that holds the responsibility vis-à-vis the European level. Their involvement covers a broad range of channels of communication, including meetings, formal and informal opinions and commentary on the reports, and independent contributions to the NAPempl destined for Europe.

Table 1: Institutional configuration of policy community and policy networks for the EES[56]

Expenditure on labour market policies	Country	Labour Ministry	Finance Ministry	Other Ministries and departments	Regional & local integration	Formal Interest organisations (social partners)	Informal interest organisations (NGOs)
HIGH	Sweden	5	5	3	4	4	3
	Denmark	5	1	3	3	4	2
MEDIUM	France	5	4	3	2	3	0
	Belgium	5	4	3	4	4	1
	Germany	5	5	4	3	2	0
	The Netherlands	5	2	2	2	2	0
	Finland	5	3	3	2	3	0
	Ireland	5	4	3	1	4	2
LOW	Italy	5	2	3	4	2	0
	Spain	5	3	3	4	2	0
	Portugal	5	3	3	1	3	0
	Greece	5	2	2	1	2	0
	Austria	5	3	2	0	2	0
	United Kingdom	5	3	3	1	2	1

For the institutional integration of the various actors (in columns 1 to 8), different degrees of involvement can be identified, where 0 is the lowest and 5 is the highest.

0. none or information ex-post;

1. information (meeting) ex-ante and throughout;

2. separate contribution or opinion to NAP, but minimal or no integration;

3. separate contribution or opinion to NAP, with high and substantial integration;

4. contribution in drafting of the report or separate "plan" or contribution of different levels of government or plans for different levels of government;

5. Finalisation of the report

## b. Social Inclusion

### *Policy Community*

The core policy community set up as a result of the OMCincl. is constituted around Social Ministries. As for the EES, various ministries and departments that have a stake in poverty as a policy issue are involved in the OMCincl.. However, the Finance ministries are not as substantially involved as for the EES, as anti-poverty policies are further away from policies related to the promotion of economic growth. At European level, the representatives of the Social Ministries, which are responsible at

national level for writing the National Action Plan for Social Inclusion (NAPincl), meet regularly in the Social Protection Committee (SPC). It was established in 2000 (officially endorsed in article 144, EC Treaty) where one of the four objectives of its mandate was to work in the field of poverty and social exclusion.[57] Like EMCO, it has an “advisory status” and prepares reports and formulates opinions at the request of either the Council or the Commission or on its own initiative. Its mandate has in actual fact been guided by the European Councils, where one of its two key tasks has become social inclusion and the other pensions, both using the OMC. The national members of the SPC have the responsibility to report upwards to the European level and downwards to the regional and local levels for setting policy. According to the political incentives contained in the objectives of the OMCincl. itself,[58] the policy community should include all public authorities at national, regional, and local levels in all aspects of the policy process, by developing appropriate vertical co-ordination procedures. As indicated in table 2 below, in the area of social inclusion and anti-poverty policies, substantial responsibilities are devolved to the regional and local levels: in five countries, these are core responsibilities, but even in the other countries, responsibility in this area is high, especially in administration and implementation of schemes pertaining to the fight against poverty. The OMCincl. should thus, due to political incentives in the OMCincl. itself and also due to the institutional structures of the domestic policy-making in anti-poverty policy (see table 2, columns 2 – 5 below), lead to the development of multi-level policy communities. At this stage, they have been developed in many countries, particularly where there were coordination problems and where the various levels of governance have core responsibilities in policies that are directly related to poverty prevention, in particular social assistance policies.[59] In some countries, the OMCincl. has acted as an incentive for the lower levels of governance to assert their power versus central governments at the national level.[60]

Table 2: Institutional Configuration of policy-making and participation in anti-poverty policy.[61]

Dimension/ Country	Domestic Institutional Model				Institutional Configuration of Participation in OMCincl.	
	Guidance, Rules, Financing	Administration, Implementation	Reporting, targeting, monitoring	NGO and PP Participation	Participation anti-poverty NGOs in OMCincl. (consultation)	Participation of people experiencing poverty in OMCincl.
Denmark	National, local	Local	II	III	3	2
Sweden	National, local	Local	III	III	3	2
The Netherlands	National	Local	II	II	1	0
France	National	Dept, local	II	II	1	0
Germany	Federal, Regional	Regional, local	I	Federal: III Regional: I	3	2
Finland	National	Local	III	III	3	2
Belgium	National, Regional	Regional/Local	II	National: III Regional: II	3	2
Lux	National	Local	II	II	3	2
Austria	Lander	Local	I	I	0	0
UK	National, regional	National, regional	III	II	3	2
Italy	Regional, local	Regional, local	I	National: I Regional: I	0	0
Spain	Regional	Regional	I	National: II Regional: I	3	0
Portugal	National	National	I	National: I	0	2
Greece	National	National	I	National: I	3	2
Ireland	National	National	III	III	3	2

Domestic traditions in monitoring and reporting as well as domestic traditions of participation of NGOs in the conception of anti-poverty policy are indicated according to the scale below.

I: Low Development

II: Medium Development

III: High Development

For the institutional integration of the various actors (in columns 1 to 8), different degrees of involvement can be identified, where 0 is the lowest and 5 is the highest.

0: none or information ex-post;

1: indicates that there is information ex-ante by the government but no integration of their contributions.

2: indicates that there is genuine consultation by the government with non-governmental groups (EAPN network, other non-governmental groups, people experiencing poverty) and minimal integration of the work of the group

3: indicates that there is genuine consultation by the government with non-governmental groups (EAPN network, other non-governmental groups, people experiencing poverty) and substantial integration of the work of the group

### *Policy Network*

Concerning the broader policy network created around the OMCincl.,



there is a legal mandate for the involvement of social partners and an issue-specific political mandate for the involvement of civil society organisations. Concerning social partners, article 144 EC Treaty states that the Committee should establish “appropriate” contacts with social partners, but the empirical evidence reveals that social partners have in most cases not played a role.[62] At national level, there is evidence of genuine social partner participation in the social inclusion strategy in Finland, and to a lesser extent in Belgium.[63] Social partners are in general not interested in getting involved in the OMCincl., as it is even further away from the mainstream of the social partner agenda than the EES. In general terms, it is not within the areas that are central to social partners.

While there is in article 144 EC Treaty no reference to civil society involvement in the process, the political mandate is quite strong. The OMCincl. objectives embody an ambitious participative aim, to mobilise all actors concerned in the development, implementation and monitoring of anti-poverty policies. According to these objectives, aside the core policy community, the OMC should consist of enhancing horizontal dialogue and partnership between all relevant bodies, public and private, including social partners, NGOs and social service providers, and of encouraging the social responsibility and active engagement of all citizens in the fight against social exclusion, as well as of fostering the social responsibility of business. It also sets out to promote the participation and self-expression of excluded persons.[64] For NGOs involved broadly in fighting against social exclusion, the fight against poverty, which is the main objective of the OMCincl., is in line with the concerns of these organisations, although the work-based focus of the OMCincl. is not. Compared to social partners in the area of employment, NGOs in the domestic context have weaker legitimately recognised channels for putting forward their policy issues, although this has increased during the 1990s (Pochet, 2004a). Given their comparatively weak institutional means for setting issues on the national policy agenda, they would *a priori* be more likely to use the European level as a vehicle through which to put forward the policy issues on their agenda. The OMCincl. has overall acted as a tool which has empowered the non-state actors that have been seeking a legitimate institutional means for influencing policy. In countries where this already existed, notably Ireland, the OMCincl. has acted as one means among others to attempt to address poverty. But in many other countries, the OMCincl. has been about strengthening the position of the NGOs vis-à-vis their respective social ministries, and in establishing participation of persons in poverty, that in most cases did not pre-exist. Furthermore, the agenda of social inclusion is much closer to that of the NGOs, which explain why, despite a weaker legal mandate, they have in many cases been much more involved than social partners for the EES.

The core of the NGOs and “people in poverty” (see column 7, table 2) that have mobilised in the context of the OMCincl. have strong direct or indirect links with one more European umbrella organisations working on these issues, in particular the European Anti-Poverty Network, ATD Fourth World, FEANTSA (focusing on the specific issue of homelessness), or the Social Platform on NGOs.[65] Most are thus familiar with the European level anti-poverty but also other processes, while the NGOs and civil societies at regional or local levels are more focused on concrete actions, and thus less interested in the European level objectives, which overall appear too vague or too abstract for them to be utilised.[66]

### c. Comparing OMC Participation in Employment and Social Inclusion

The participatory dynamics of the core policy communities in Employment and Social Inclusion are similar: governmental actors in the relevant ministries structure the process. They include various other governmental departments horizontally, and in some cases vertically. The vertical integration of lower levels of government is stronger where regional and/or local level actors are seeking to strengthen their own position and to determine a clear policy agenda, especially vis-à-vis their national ministries. Devolution to lower levels of government is relevant particularly where lower level actors have competencies in labour market and anti-poverty policies. While regional actors have in some cases found the policy agenda of the OMCs relevant for their own purposes, it is more difficult for local level actors to grasp, since they are more concerned with concrete actions and measures, rather than broad policy aims.

The participatory dynamics of the broader policy networks in the EES and OMCincl. is dissimilar in terms of the actors involved and the usage of OMC-derived employment and anti-poverty policy agendas. Involvement of interest organisations is determined above all by the actors’ own pursuits, institutionalised power structures and political agendas. In the EES, the legal basis in the Treaty of Amsterdam, and the political incentives by the European Commission, supported by the Council (including the Kok reports[67] that influenced the revision of the Lisbon Strategy in 2005) call for substantial social partner involvement in the EES. Despite this, and although participation of social partners in the EES has improved incrementally over time, usage of the EES as a genuine policy-setting instrument has been weak. The NAPempl is overall not considered a strategic document by social partners, and the issues tackled under the EES only overlap partially with the core bargaining agenda of the social partners. National level social partners have institutionalised roles in

most Member States: they are consulted and/or informed formally about labour market and employment policies. Their exchange with public authorities is structured via bi- or tri-partite institutions and in certain areas, social partners have a co-regulatory role.[68] In the OMCincl., civil society actors have a weak legal basis for becoming more involved, but strong political and institutional incentives, from both the European and national levels. The position and role of anti-poverty civil society organisations in the institutional structures of the Member States has been enhanced since the beginning of the 1990s, but they are not nearly as deeply rooted in the national contexts as the social partners.[69] Their incentive to use the OMCincl. for their policy agenda and to strengthen their position in negotiations with public authorities has been quite strong, particularly as the agenda of the NGOs is close to the anti-poverty objectives of the OMCincl.. Some central NGOs, notably under the auspices of the EAPN, have sought to influence decision-makers at national and European levels. This has been supported by the fact that there is a direct financial incentive for NGO participation, through the resources of the Community Action Programme to Combat Social Exclusion (2002 – 2006), and PROGRESS (2007-2013). However, social exclusion is not a priority on most national agendas, and the resources for financing activities are scarce.[70]

In essence, participation from the domestic perspective is determined by the actors' pre-existing institutional and political sources for influencing policy: where this is more institutionalised, then the genuine usage of the OMC is likely to be weaker. Conversely, where actors have a less institutionalised role, then the OMC can play a useful role in agenda setting, policy planning, and governance. This explains the quite low level of take up of the EES by social partners, and the relatively high level of take up of the OMCincl. by NGOs.

## 2. *Coherence*

### a. *Employment*

The heart of the EES – that of increasing the employment rate of the European Union and its Member States – is inherently linked to the economic growth rate of Economic and Monetary Union.[71] It is the issue that has been the most consistent from the beginning and has also increased in salience throughout the evolution of the EES. This is why it will be analysed in detail according to its temporal and political coherence. “Employability” is the term in the EEG which refers to the broad aim of increasing labour market participation and facilitating take-up of employment for individuals. This is broadly synonymous to “activation”,

referring to policies to activate citizens in paid employment. It is set out as a policy solution in tackling problems of (un)employment through the development of a preventative (rather than curative) and active (rather than passive) approach. I first analyse what is meant by “employability” in the articles in the Amsterdam EC Treaty that are devoted to the Employment Title, which is the legal framework of the EES. Second, I analyse the (policy-oriented) development of the employability policy objectives throughout key moments of shifts in the lifetime of the EES (1997, 2000, 2003, 2005).

First, regarding its legal status, the overarching aim and mode of functioning of the EES is set out in the Employment Title of the Amsterdam Treaty (articles 125 EC – 130 EC). Its objective is to achieve a high level of employment, through the promotion of “...a skilled, trained and adaptable workforce and labour markets responsive to economic change” and by incorporating employment policy concerns with other Community policies and activities (article 125 EC). In line with the principle of subsidiarity, Member States “... regard promoting employment as a matter of common concern” (Article 126 EC), where the role of the Community was to “contribute to a high level of employment by encouraging cooperation between Member States and by supporting, and if necessary, complementing their action.” This legal status was agreed at the Amsterdam Summit in June 1997. It shows that employment promotion, and not the fight against unemployment, was the main backbone to the policy content agreed by all Member States in the context of the EES. As it is a broad aim set out in a legal document, it was set out in an apolitical way – i.e. neither leaning towards the socio-democratic conception, suggesting high levels of employment together with generous welfare provisions and high quality of employment, or the other extreme, the liberal workfare conception, where quality in employment, matching of qualifications or associated social benefits are not mentioned.

The precise policy-oriented foundation for the Strategy was set substantively on the basis of the legal framework provided by the Amsterdam EC Treaty. In November 1997, an Extraordinary Summit was organised to define Employment policy objectives – “EEG” - in order for the EU and its Member States to achieve a high level of employment. The policies aimed at increasing the employment rate for the active population (i.e those aged 18 to 65) were set under the term “improving employability”. Regarding macro-economic output, it seeks to maximise the participation of the active population in paid employment, which should in turn contribute to improving the economic growth rate.[72] The specific target groups of the term “improving employability” have evolved over time.[73] In the EEG for 1998, seven (out of a total of

nineteen) guidelines were devoted to policies for increasing the employment rate among various groups of the active population (i.e those aged 18 to 65). The main target population was unemployed youth and adults, for which Member States should aim to develop preventive and “active”, rather than passive labour market strategies, geared towards the needs of individuals. Here, the conception (of the socially-oriented actors involved in setting the EES) is rooted ideologically and politically in a socio-democratic conception of activation, which seeks to match the needs of individuals with their qualifications. Member States agreed to ensure that every unemployed young person would be offered a “new start” within six months of unemployment and other unemployed persons within twelve months of unemployment. This new start would concretely take the form of employment or alternatively supply-side measures, in the form of training, retraining, work practice, a job or other “employability” measure. These measures were to be implemented to promote re-employment of the long-term unemployed into the mainstream labour market. Member States also agreed to increase the share of unemployed in active programmes to 20% (average of the three best performers). Regarding who should organize and pay for the activation programmes, many actors were expected to organize measures and take up responsibility. In particular, social partners were encouraged to take up some responsibility for development for training, work experience, traineeships. They also should endeavour, together with governments, to shift towards “lifelong training” and to address the issue of the technological divide, providing training on information technology for early school leavers.[74] The employability conception of the EES has progressively become more detailed. In 2000, three elements were added. First, a more precise evaluation criterion was added: to have been successful, an individual should be integrated into the mainstream labour market after having participated in an “employability” scheme. And second, the “inactive” were explicitly included as a target group. Third, and importantly, a new policy objective was introduced, that of the modernization of the Public Employment System responsible for placing individuals in various types of employment schemes. In 2001, the inclusion of older people in the labour market was agreed in the context of the EES. After reconfiguration of the guidelines in 2003 and more substantially 2004[75], the policy objective of increasing labour market participation overall was enhanced, and new target groups were included: immigrants, women and other disadvantaged groups. The focus on enhancing labour market participation overall and for these specific groups was re-confirmed in a further revision of the objectives in 2004.[76] This conceptual evolution of employability has been accompanied by the development of statistical indicators for the core aims of the EES, notably those of activation and employment rate targets.

As has been well documented in the academic literature, the Lisbon European Council in 2000 confirmed its support for the EES and it represented a key moment in the development of the political commitment of Member States to Employment Policy objectives. While agreement had since 1997, at the political level of the Council, been on the “full employment” objective for the Union, this was not coupled with quantitative employment rate targets at the level of the European Council until Lisbon. At Lisbon, Member States agreed on quantitative employment rate objectives - 70% overall employment rate, and 60% female employment rate –to be reached by 2010. Then in 2001, an additional quantitative objective – 50% - was agreed for older workers, also to be reached by 2010. At Lisbon, when 12 of 15 countries were governed by socio-democratic parties, the employment rate targets were conceived in parallel to equally important attention to quality in work. The issue of quality in work received even more political attention in 2001, when the EU Member States agreed to create a set of indicators on the specific issue of quality in work, in order not to sideline that issue in focusing only on key employment rate targets (where 1 hour of work is equivalent to being in work). As of the mid-term revision of the Lisbon Strategy in 2005, the focus on quality decreased somewhat, and the issue of flexible work contracts, together with appropriate social security, received a more prominent place on the stage. This in essence means that the employability objectives of the EES have been coloured politically from the beginning, first in the context of a socio-democratic conception, and then in the context of a more liberal conception. The decisive ideological direction is set at the level of the Council, while the process of negotiating the objectives is always the object of confrontation between the conception of the socially-oriented and economically-oriented actors.[77] And, importantly for the issue of coherence, the objectives agreed under the EES are organised around broad themes that can be adapted, both at the European and national levels, to objectives that concur with the underlying political ideologies almost anywhere on the continuum from left or the right.[78] Indeed, governments with a left-wing orientation as well as those with a right-wing orientation have used the employability conception of the EEG to justify reforms. For example and most notably, Tony Blair ex-post justified workfare policies,[79] Berlusconi justified policies seeking more flexibility in labour market arrangements.[80] Thus, the EES has been used by governments as a means for blame-shifting.

Nevertheless, and despite inherent ideological ambiguity relating to the EES, but also to the activation concept itself, there has been temporal consistency of the policy objectives of the EES. According to the EES agenda, “employability” is defined as an important means for supporting



the development of a broader aim, to develop a full employment society. Furthermore, the full employment model has been re-enforced as of the revision of the Lisbon Strategy in 2005, supported by the amalgamation of the economic and employment coordination processes.[81]

#### a. Social Inclusion

The development of social inclusion policy objectives is nested in the conception of the European social model, that: ‘...places considerable emphasis on maintaining social solidarity and ensuring that all individuals are integrated into, and participate in, a national social and moral order’.[82] The Commission’s conception of social exclusion relates the incidence of poverty and disadvantage among some groups and in some locations to wider processes of economic and welfare state restructuring. It also emphasises the manifest nature of disadvantage and looks beyond issues of income inequality to incorporate the social and cultural aspects of disadvantage, as well as the notion of citizenship rights.[83]

Regarding the conception of poverty in the legal texts of the European Union, a provision for the fight against poverty and social exclusion as an objective for the Union and its Member States was introduced in the Amsterdam EC Treaty (1997). Regarding the means, it stipulates that “co-operation” could be encouraged by the European level, which confirms, according to the principle of subsidiarity that competence is at the level of the Member States for this area.[84] There is no equivalent to the “Employment Chapter” for the EES, although article 137 in the Amsterdam EC Treaty has been the legal anchor for the development of the social inclusion strategy. The article stipulates that the Community “... shall support and complement the actions of Member States in... (j) the combating of social exclusion”. Still, the mandate to tackle poverty and social exclusion through the OMC is a political one. When the OMC was coined, it was decided that it should be applied in a full-fledged manner for social inclusion, to eradicate poverty by 2010.

The objectives that make up the policy content on OMCincl., are as follows. For each objective I will indicate the main ideological conception(s) concerned.

1. Facilitate access to employment for all citizens as the most effective tool against social exclusion. This objective is clearly associated with a full employment society, which is overall coherent at the European level with the European economic and employment objectives. It can either be interpreted in the sense of workfare, to employ people independently of the social circumstances that these entail, or in a broader socio-democratic

conception, where quality of employment and associated issues can be included.

2. Provide access for all citizens to social rights that contribute to the development of an approach to prevent risks of exclusion. This aim promotes the creation of a preventative rights-based approach to combat monetary and non-monetary poverty. It also seeks to implement policies that seek to provide access to education, housing, health and other services, such as culture, and justice. It is in line with the anti-poverty model that has traditionally and historically been implemented in continental Europe and the Nordic countries.
3. Target actions for groups at the risk of social exclusion, seeking curatively to provide a temporary financial support for the excluded, as well as to promote their broader societal integration. The groups targeted are the disabled, older persons, women (emphasis increased since 2003), immigrants, and other groups at the risk of exclusion. A benchmark, to eliminate child poverty by 2010, was agreed in 2005. This objective is in the opposite ideological conception than the previous objective, and seeks to target groups, in line with the Anglo-Saxon tradition in fighting poverty.
4. The last policy objective concerns the policy community and especially the policy network involved in the setting of anti-poverty strategy. This tradition has roots in the Nordic countries, but also more recently in Ireland. The participative concept of policy-making in the OMCincl. originated from Ireland.

The core of this ideologically merged European conception of poverty embodied in these four objectives for social inclusion has been extended subsequently. However, in terms of the underlying ideological notions that underlie this conception of poverty, it has not been altered. The extension in 2003 concerned more attention to the gendered dimension of poverty, and the integration of vulnerable groups, particularly immigrants.[85] The policy objectives were accompanied by various quantitative indicators, first agreed in December 2001 and expanded since then. The main achievement in terms of indicators is to have agreed a European poverty threshold – at 60% of the median income – that allows for comparison of poverty across EU. The main tension in these objectives is between the rights-based versus the targeted conceptions of poverty, which are nested in two divergent ideological conceptions. The rights-based approach has been the tradition in the Nordic and Continental welfare state models, and the targeted approach in the Beveridgian Anglo-Saxon welfare state models. The ideological contradictions in the OMCincl. lie not so much in one core concept (as employability for the EES), as in the combination of

objectives. Nevertheless, the objectives of the OMCincl. are overall coherent with the overarching Full Employment Model defined at Lisbon and re-enforced since then. They have, from the outset, been temporally consistent in promoting work as the main form of inclusion, and in the development of a multi-faceted approach to poverty.

b. Comparing OMC Coherence in Employment and Social Inclusion

The overall policy coherence of the OMC in Employment has been consistent over time, promoting “employability” and “activation”. These means have been assumed to lead to full employment, which has become increasingly explicit as an all-encompassing policy aim not only in the EES, but also in the Lisbon Strategy. But, many of the EES objectives are inherently ambiguous in that they can be conceptualised according to various ideological orientations. For example, since the revision of the Lisbon Strategy in 2005, the concept of flexicurity as a means to enhance the economic and employment growth of Europe has been in the political spotlight. In essence, it seeks to combine flexible labour market and contractual arrangements to facilitate employment creation, together with a decent level of security for the worker. While the means to achieve full employment are inherently ambiguous, the finality of the full employment model has crystallized since the Member States at the Lisbon Summit agreed that the Union should achieve a general employment rate of 70% by 2010 and a female employment rate of 60%. This was complemented at the Stockholm European Council by a 50% employment rate benchmark for older workers by 2010. This full employment model is tightly associated with the coordination of economic policies of the Union in the context of the EMU, which has been enhanced since the revision of the Lisbon Strategy in 2005. In essence, then, the EES has defined ambiguous policy means to achieve a clear full employment outcome, that is at the core of the economic policy for the European Union.

The overall policy coherence of the OMC in Social Inclusion temporally has been consistent in seeking to include people in society through work, to develop a rights-based approach and to target actions towards vulnerable groups. The work-based approach, as well as the targetting of actions towards particular groups, overlaps with the EES agenda. Another aspect of the OMCincl., promoting social rights for all citizens, sets a comprehensive quality of life model to complement the economically driven full employment model promoted by the EES. Targetting people in or at the risk of poverty complements this approach, although from an ideological perspective it is in tension with the rights-based approach. Nevertheless, conceptualisation of poverty at the European level through

the OMCincl. has been important for many Member States that are facing increasingly diversified forms of exclusion. While there are no over-arching quantitative benchmarks, the European Union has defined, through the OMCincl., a poverty threshold of 60% of the median income. It is becoming an increasingly important reference point in the context of the creation of a new European database on social conditions (EU-SILC). The Inclusion process is, however, at the margins of Union policy, and has since the revision of the Lisbon Strategy in 2005 been de-coupled from the core economic-employment growth aims of the Union.

Together, the OMC in Employment and in Social Inclusion support the economic growth and full employment model, by increasing the employment rate of the Union. Both, particularly from the perspective of the socially-oriented protagonists, also embrace social objectives of equity and decent standards of living. In a sense, the policy objectives of the Employment and Social Inclusion processes embody the hybridisation that increasingly characterises the outcome of the social policy reform processes in the different EU Member States. At the same time, the objectives of both processes can be interpreted in different ways across the political spectrum, rendering their consistency relatively fragile.

### 3. *Effectiveness*

#### a. Employment

The analysis of effectiveness in the area of employment will present two sets of data regarding core objectives of the EES. The first is the evolution of expenditure in labour market policies for the EU-14[86] (Table 3), organised from highest to lowest levels of expenditure on active labour market policies (ALMP)[87], at the situation in 1999, to allow for detecting how “employability” evolves in the years of implementation of the EES.[88] Three clusters have been identified: high, medium and low expenditure countries. There is also an indication (column 2) of the welfare state configuration that the country belongs to, which will be referred to in the discussion. The main data on ALMP (columns 2 – 6) represents the “employability” objectives of the EES.[89] Column 7 indicates whether there has mostly been an increase or rather a decrease in expenditure on ALMP for the different countries of the EU (14). This data is confronted with the expenditure on passive labour market policies (PLMP) (columns 8 – 11),[90] which the EES implicitly discourages. Column 9 indicates whether during the period under consideration, there has overall been an increase or decrease in expenditure on labour market policies. The second (Table 4) is the evolution of general and female employment rates for all EU countries between 1993 and 2005. This is a core objective in

employment, as the EU agreed quantitative employment rate benchmarks for the Union and its Member States, to be reached by 2010: 70% general employment rate and 60% female employment rate.[91] It is important to take into account that the changes in expenditure on labour market policies and changes in employment rates may be due to major macro-economic factors such as economic growth and demographic changes. The aim of the analysis is to point to how the core objectives of the EES have evolved in Member States, which provides an indication of the influence of the policy objectives of the EES. However, any congruence or incongruence between the EES objectives and the outcome (in terms of expenditure on ALMP and employment rates) needs to be treated with caution, as it is not a proved causal relationship.

Table 3: Evolution in Expenditure patterns for active (ALM) and passive labour market (PLM) policies 1999 – 2004 (EU-14)[92]

Country	Welfare state	ALM 1999	ALM 2001	ALM 2003	ALM 2004	+/-	PLM 1999	PLM 2001	PLM 2003	PLM 2004	+/-
“High Expenditure” Countries											
DK	Nordic	1.839	1.649	1.516	1.523	-	2.579	2.290	2.659	2.672	+
SWE	Nordic	1.997	1.452	1.033	1.002	-	1.680	1.072	1.209	1.316	-
“Medium Expenditure” Countries											
FR	Cons	1.046	.956	.824	.726	-	1.516	1.410	1.737	1.718	+
BE	Cons	1.025	0.996	0.993	0.920	-	2.369	2.247	2.468	2.406	+
DE	Cons	1.070	0.956	0.950	0.854	-	2.111	1.924	2.281	2.314	+
NL	Cons	.952	1.168	1.206	1.123	+	2.140	1.876	2.022	2.233	+
SF	Nordic	.945	.710	.746	.780	-	2.375	2.018	2.088	2.028	-
IRL	A-S	.878	.730	.588	.492	-	1.102	0.696	0.885	0.897	-
IT	South	.557 <sup>93</sup>	.623	.683	.547	-	0.682	0.623	0.663	0.760	+
“Low Expenditure” Countries											
SP	South	.649	.606	.562	.551	-	1.477	1.371	1.457	1.498	+
POR	South	.335	.492	.516	.552	+	.851	1.030	1.219	1.319	+
GR	South	.269	.278	.109	.166	-	0.446	0.397	0.410	0.448	+
AUT	Cons	.408	.428	.449	.431	+	1.313	1.183	1.365	1.394	+
UK	A-S	0.195	0.160	0.160	0.160	-	0.555	0.394	0.343	0.285	-

The literature on the effect of the EES through “learning” (Effectiveness Type 1) highlights that over the last decade, there has been a shift to “activation” policies, that is at least partially due to the EES. But, while providing useful insights, this literature remains ambiguous regarding the precise means of influence of the EES on the politics and practice of

labour market reforms.[94] One indicator to obtain some data on the evolution of employability policies in Member States is that of expenditure on ALMP, which has not been analysed systematically. Politically, there is an assumption that activation and employability are important means to counter unemployment and to increase employment rates. Crossing the employability data with unemployment rates would allow for more precise conclusions to be drawn as to the development of ALMP as a response to unemployment. However, more complex analyses are beyond the scope of this article that merely seeks to create some yardsticks against which to assess effectiveness of the OMC. Nevertheless, the trends in expenditure on ALMP and PLMP provide general indications of the overall direction of reform across the EU-15.

Table 3 above shows that expenditure on ALMP has decreased between 1999 and 2004 for all countries but the Netherlands, Portugal and Austria. This means that despite all the rhetoric on employability and activation, actual expenditure has generally been towards a reduction in investment on activation schemes. By contrast, there has been, for all countries but Sweden, Finland, Ireland and the United Kingdom, an increase in expenditure on PLMP. The significance of these trends in expenditure will be analysed below, in conjunction with the analysis on the evolution of employment rates.

Table 4: Evolution of Total Employment Rate (TER) and Female Employment Rate (FER) between 1993 and 2005 (indication as % GDP)[95]

Country	1993 TER	1993 FER	1995 TER	1995 FER	1997 TER	1997 FER	1999 TER	1999 FER	2001 TER	2001 FER	2003 TER	2003 FER	2005 TER	2005 FER	% △ TER	% △ FER
"High Expenditure" Countries																
DK	72,1	68,2	73,4	66,7	74,9	69,1	76,0	71,1	76,2	72,0	75,1	70,5	75,9	71,9	3,8	3,7
SWE	71,3	69,7	70,9	68,8	69,5	67,2	71,7	69,4	74,0	72,3	72,9	71,5	72,5	70,4	1,2	0,7
"Medium Expenditure" Countries																
FR	59,3	51,3	59,5	52,1	59,6	52,4	60,9	54,0	62,8	56,0	63,3	57,3	63,1	57,6	3,8	6,3

BE	55,8	44,5	56,1	45,0	56,8	46,5	59,3	50,4	59,9	51,0	59,6	51,8	61,1	53,8	5,3	9,3
DE	65,1	55,1	64,6	55,3	63,7	55,3	65,2	57,4	65,8	58,7	65,0	58,9	65,4	59,6	0,3	4,5
NL	63,6	52,2	64,7	53,8	68,5	58,0	71,7	62,3	74,1	65,2	73,6	66,0	73,2	66,4	9,6	14,2
SF	61,0	59,5	61,6	59,0	63,3	60,3	66,4	63,4	68,1	65,4	67,7	65,7	68,4	66,5	7,4	6,0
IRL	51,7	38,5	54,4	41,6	57,6	45,9	63,3	52,0	65,8	54,9	65,5	55,7	67,6	58,3	15,9	19,8
"Low Expenditure" Countries																
IT	52,3	35,8	51,0	35,4	51,3	36,4	52,7	38,3	54,8	41,1	56,1	42,7	57,6	45,3	5,3	9,5
ES	46,6	30,7	46,9	31,7	49,5	34,6	53,8	38,5	57,8	43,1	59,8	46,3	63,3	51,2	16,7	20,5
POR	65,1	55,0	63,7	54,4	65,7	56,5	67,4	59,4	69,0	61,3	68,1	61,4	67,5	61,7	2,5	6,7
GR	53,7	36,6	54,7	38,1	55,1	39,3	55,9	41,0	56,3	41,5	58,7	44,3	60,1	46,1	6,4	9,5
AUT	-	-	68,8	59,0	67,8	58,6	68,6	59,6	68,5	60,7	68,9	61,6	68,9	62,0	0,1	3,0
UK	67,4	60,8	68,5	61,7	69,9	63,1	71,0	64,2	71,4	65,0	71,5	65,3	71,7	65,9	4,3	5,1

TER: Total employment rate

FER: Female employment rate

%  $\Delta$ : Change (in all cases increase) in % of employment rates between 1993 and 2005.

The trend in "high expenditure" countries, both from the Nordic Welfare State model, is of cost-cutting in ALMP. Interestingly, this trend has been much stronger in Sweden, with a social-democratic government (until the elections in 2006), than in Denmark, with a liberal government. In Sweden, there has also been cost-cutting in PLMP. By contrast, in Denmark, the expenditure on PLMP has shown a slight upward trend. If there is an evolution in the direction of labour market reforms, it is towards more targeting of specific groups. The data on employment rates for Sweden and Denmark suggests relative stability of the full employment model, with very incremental shifts in employment rates over time. In Denmark, the increase has been higher (% r: 3,8 for TER and 3,7 for FER) compared to a very slight increase in Sweden (% r: 1,2 TER and 0,7 FER) This finding suggests that the employability pillar of the EES has had no influence on the content or outcome of the social policy reform process.

In the "medium expenditure" countries, a distinction in outcome can be drawn between the core conservative countries (France, Belgium and Germany), where shifts have been incremental, and countries where particular circumstances (the Netherlands, Finland, Ireland) have led to a more dynamic reform outcome. In the core conservative countries, the trend has been towards a decrease in expenditure for ALMP, and a persistent increase in expenditure on PLMP. These countries also reveal relatively slow increases in overall employment rates (% r of TER: 0,3 in Germany, 3,8 in France and 5,3 in Belgium).

However, there have been proportionally much higher increases in the female employment rates (% r of TER: 4,5 in Germany, 6,3



in France and 9,3 in Belgium). This is a clear indication of a shift away from the classic male-breadwinner/female-carer model, which has characterised the welfare regimes in these countries.[96] The policy reforms in these countries have shifted to “activation” for particular groups, notably, but not only women and older workers. France, Belgium and Germany have many and strong veto players, thus slowing the reform process, even during periods of slow economic growth.

In the other countries of the medium expenditure group – the Netherlands, Finland and Ireland – public policy intervention in economic and labour market reform has been much stronger over the last two decades. In terms not only of public policy intervention, but also outcome (employment rates), there are more clear-cut lines of change. In the Netherlands,[97] expenditure on ALMP has increased, and there has been a substantial increase in the employment rates generally (% r TER: 9,6 and of women in particular (% r FER: 14,2), especially in part-time employment. This re-enforces the one-and-half breadwinner model.[98] Furthermore, the state remains relatively generous, revealed through the persistence of comparatively high levels of expenditure on PLMP. Finland implemented a substantial multi-annual reform programme to restore economic and employment growth at the beginning of the 1990s that included combating fraud and cost-cutting in both active and passive labour market policies. Rather than the development of a new model in Finland, the evolution of employment rates over the past decade suggests an incremental catch-up with the other Nordic countries, compared to which it has always been a late-comer:[99] indeed the evolution of employment rates only began to increase after 1995 (% r TER: 7,4 and % r FER: 6,0). In Ireland, economic and structural reform in the 1980s has led to a substantial expansion of the economic and employment growth rates (% r TER: 7,4 and %r FER: 6,0). These reforms, however, have a liberal flavour, where expenditure for both active and passive labour market policies has decreased. Thus, in Ireland, the evolution has been towards the development of a full employment model. In 1993, the overall employment rate was 51,7% and the female employment rate only 38,5%, similar to the employment rate configuration in the southern European countries. The total employment rate increased by 15,9% to reach 67.6% and the female employment rate increase by 19,8% to reach 58,3%. This evolution has taken place in the context of a residual implication of the state, particularly for issues related to incentivisation of female labour market participation, notably affordable public child-care structures, on which Ireland has yearly received recommendations from the European Commission. While the Social Ministry supports this aim, the Finance

Ministry has its hand on the lever in as far as it has to agree financial support for the development of such services. Thus far, there are expensive private care structures and virtually no public regulation in this area. [100]

The “low expenditure” countries are all the southern European countries, Austria and the UK. Among this group, Italy and Greece reveal comparable trends: decrease in expenditure on ALMP and persistence or increases in expenditure on PLMP. Furthermore, in Italy and Greece, there has been an upward evolution of the employment rates generally, especially among women (% r TER: 5,3 for Italy and 6,4 for Greece and % r FER: 9,5% for Italy and 9,5% for Greece). There is a tendency towards the development of a full employment model, with a residual state. In the Italian case, the introduction of the EES coincided with other domestic reforms affecting what was formerly a dominantly passive labour market. This includes the Treu Law on flexibility in 1997 and the Bassanini Law of 1997 that devolved public employment services (with an enhanced activation component) to regional and local authorities.[101] The White on the Labour Market (2001) enhanced the dimension of flexibility, using the EES in a blame-shifting logic.[102] The quantitative increases in employment are particularly due to flexible and precarious female employment, and the shift towards activation is at least partly due to the EES.[103] In Greece, the public employment system (PES) was being reformed from the mid-1990s onwards, instituting supervision of the PES with the Ministry. Another set of policies focused on rendering the labour market more flexible through tax incentives and the reduction of non-wage labour costs.[104] Thus, the EES was introduced in a relatively fluid context during which the system was being structured, with some supply-side employment promotion measures, as well as promotion of incentives for enterprise-creation. In Portugal, where the general and female employment rates were approximately 15% higher than in Italy and Greece in 1993, the change over the past decade has not been as striking (% r TER: 2,5 and % r FER: 6,7%). But, the labour market in Portugal is characterised by low wages, and high rates of working poor. The high full time female employment rate in Portugal, already manifest in 1993 (55% FER), is partly due to economic need, but also to stronger female emancipation, particularly pronounced in the post-1974 period.[105] Spain is the southern European country where the change has been the most substantial during the 1993 to 2005 period: % r TER: 16,7 and % r FER: 20,5%. As a response to the economic crisis where Spain was the worst hit of all EU-15 in the 1990s, public policy sought to promote structurally-oriented growth[106], including aims of decreasing unemployment and increasing employment (in practice there has been an

increase in precarious work contracts).

In the other countries of the “low expenditure” countries, the welfare state structures and policy responses have been different. In the UK, the data reveals an overall decrease in expenditure on ALMP. But investment in the activation of public employment services is not taken into account in this data. In the UK, there is also a very clear decrease in expenditure on PLMP and an incremental increase in employment rates generally (% r TER: 4,3) and also among women (%r FER: 5,1), from a relatively high starting point. This suggests that the full employment model as implemented by New Labour is more liberal than the Third Way in its ideological foundations. Conversely, in Austria, the conservative foundations of the welfare state regime continue to persist, with relatively low (although having revealed a slight increase between 1999 and 2004) levels of expenditure on ALMP, and three times as high expenditure on PLMP. Furthermore, with regard to all the EU countries under analysis, Austria is the country with the most inertia in terms of the evolution of its employment rate targets (% r TER: 0,1% and % r FER: 3,0%).

In essence, the EES has not successfully promoted the development of socially and economically comprehensive employability schemes, nor has it led to a shift in terms of expenditure from passive to active labour market policies. Regarding PLMP, reforms have been made in most countries of the EU-15 to increase the employment rate of older workers, also a Lisbon priority area, which should decrease the pre-retirement schemes. However, due to the path-dependent of pensions policy, and the demographic ageing of the population, the effect of reforms may not yet be reflected substantially in the statistics on PLMP.[107] Despite the decrease in ALMP expenditure as well as the increase in PLMP expenditure, the overall evolution for the EU-15 in terms of outcome is towards the development of a full employment model. The variations are due first, to diverging starting points in terms of institutional configurations, where more substantial changes are likely in countries with lower employment rates; second, to economic crises, that have acted as stimuli for reform (ES, NL, SF, IRL), and third, to public policy approaches by the governments. Overall, the EES undoubtedly reflects the development of an “activation” discourse, while it may not be the only policy instrument promoting that discourse. However, it is not capable of mobilizing governments to develop “employability” in line with a clear socially and economically viable model. Secondly, its policy objectives promote a full employment model, but without defining a clear role for the state. In terms of outcome, the EU-15 converge towards a full employment model, but whether it is the EES that has been the main stimulus for this

development is less clear.

b. Social Inclusion

To analyse effectiveness in the area of social inclusion, data around the main objectives of the inclusion strategy will be presented. However, the analysis of effectiveness is complex, partially due to the fact that in all countries, the issue of poverty is part of various policy agendas, from changing family models and lone parents to flexible working contracts.

In Table 5 below, the countries are organised according to the level of generosity of their social transfers (from most to least generous), which is the first instrument against poverty (column 2). Four groups of countries are drawn from this classification: very high; high; medium; and low expenditure countries. The role of social transfers in combating poverty is apparent when taking a quick glance at the poverty rates before social transfers. Column 3 indicates that the poverty rates before social transfers in the EU-15 would be between 34 and 44% and column 4 shows the differential effect of pensions in combating poverty, particularly high in the continental and southern European countries. Columns 5 to 8 indicate the level of development (from low to high) of policies in the fight against poverty, drawn from the social inclusion objectives. Column 5 indicates the level of development of the multi-dimensional concept of social exclusion, as opposed to a more limited approach deriving from monetary poverty. Column 6 indicates the level of development of poverty policies with integrated employment conditionality. Column 7 indicates the level of development of a rights-based approach to poverty and column 8 indicates the level of development of a targeted approach to poverty problems. The effect of social transfers in preventing poverty is indicated in more detail in table 6.

Table 5: Social Transfers, Poverty Rates (PR) Before Social Transfers and Policy Content analysis for Social Inclusion (EU-15)[108]

Dimension/ Country	Social Transfers & Poverty			Policy Content			
	Social transfers % GDP 2001*	PR** 2001	PR *** 2001	Social Exclusion	Employment- linked	Rights- based	Targetted
“Very High” Social Transfers							
Sweden	19,5	34	30	II	II	III	I
Denmark	18,8	36	29	II	II	III	I
The Netherlands	19,5	35	22	II	II	III	II
“High” Social Transfers							
Finland	16,8	40	30	II	II	III	II
France	16,3	44	27	III	II	III	II
Germany	15,8	39	24	II	II	III	I
“Medium” Social Transfers							
Belgium	12,5	38	25	III	II	III	II
Lux	13,6	40	23	III	II	III	I
Austria	14,6	38	25	I	I	II	III
UK	14,5	42	30	III	III	I	III
“Low” Social Transfers							
Italy	8,7	42	22	I	II	I	III
Spain	10,4	37	23	I	II	I	III
Portugal	10,7	37	24	I	II	I	III
Greece	11,9	36	23	I	II	I	III
Ireland	10,5	36	30	III	III	I	III

I – Low Development

II – Medium Development

III – High Development

\* - Social Transfers, excluding pensions

\*\* - Poverty Rate before social transfers

\*\*\* - Poverty Rate before social transfers, but including pensions

Several general observations are worth making: first, the rights-based approach prevails in the “very high”, “high” and to some extent “medium” expenditure countries. As an issue per se, poverty has entered the political debate in the preventive and universalistic welfare state (Sweden, Denmark and the Netherlands), at least partially due to the OMCincl.. The same is to some extent true for the southern European countries. This is due mostly to poverty becoming a concrete reality with more varied economic and social conditions, and to the more incremental

“learning” effect from the European level. Also, the multi-dimensional conception of social exclusion as opposed to a more limited conception of poverty, has entered the debate in many countries, partially due to the OMCincl.. This is particularly true for countries where sociological transformations related, for example, to an increase of single-parent households, have become widespread more recently (notably the continental and southern European countries). Finally, in countries with a low development of the rights-based approach, i.e. the Anglo-Saxon and southern European countries, targeting is more prominent. In Ireland and the UK, poverty as well as very strong employment-conditionality is integrated into welfare state structure.[109] In both, it brings the rights-based approach onto the agenda, but there is resistance to the development of the approach for ideological reasons. In southern European countries, the resistance to the development of a rights-based approach is ideological (but related more to the role of the family), as much as it is also about economic resources. In sum, the ideologically contradictory OMCincl. has, at least at the level of the governmental agenda, brought conceptions related to approaching poverty, to the fore in the countries of the EU-15. There have been some incremental changes in the approach to poverty, but a more radical transformation of these conceptions related to social inclusion into policy has been weaker, due to institutional inertia and to government reluctance to devote budgetary sources to fighting poverty. Table 6 below complements this analysis by focusing on outcome, i.e. the evolution of general and female poverty rates between 1997 and 2004.

Table 6: Evolution of General (G) and Female (F) poverty rates between 1997 and 2004[110]

	1997 G	1997 F	1999 G	1999 F	2001 G	2001 F	2003 G	2003 F	2004 G	2004 F	+/-
	“Very High” Social Transfers										
DK	10	n.a.	10	n.a.	10	n.a.	12	12	11	11	+
SWE	8	n.a.	8	n.a.	8	n.a.	n.a.	n.a.	11	12	+
NL	10	11	11	11	11	12	12	12	n.a.	n.a.	+
	“High” Social Transfers										
SF	8	9	11	12	11	12	11	12	11	11	+
FR	15	16	15	16	13	13	12	13	14	14	-
DE	12	13	11	12	n.a.	n.a.	15	17	16	18	+
	“Medium” Social Transfers										
BE	13	15	11	14	12	15	14	16	14	16	+
LUX	11	12	12	13	12	13	9	11	11	11	+
AUT	11	14	10	14	9	14	12	14	11	14	+/-
UK	16	19	18	21	17	19	17	19	n.a.	n.a.	+
	“Low” Social Transfers										
IT	20	19	18	18	20	19	n.a.	n.a.	20	18	-
ES	21	20	19	18	20	17	20	18	21	19	-
POR	22	23	21	22	20	20	19	n.a.	21	22	-
GR	22	21	21	20	22	19	22	20	21	19	-
IRL	20	18	20	17	23	20	22	20	23	19	+

G: General population (male and female)

F: Females

Several empirical findings on the evolution of poverty rates are worth highlighting. First, there is a general correlation between generosity of social transfers and level of poverty: i.e. the countries that are socially more generous in effect have lower poverty records and vice-versa. Second, looking at the evolution over time, there has overall been towards an upward trend among the EU-15. For 9 countries, the poverty rate has increased, it has remained stable in one (Austria), and has decreased in 5. Third, the poverty rate has increased in countries that traditionally have not had poverty as a policy problem (universalist and Bismarckian male-breadwinner welfare states) and in the Anglo-saxon countries, where poverty is integrated into the welfare structure. By contrast, the poverty rate has decreased in the southern European Countries and in the “low” social transfer countries, although the starting point was much higher, and still remains higher than for the other groups of countries. The OMCincl. as a policy area, focusing on the diverse dimensions of poverty and exclusion, is of relevance, to varying degrees, for all Member States. As to the effectiveness thus far as a policy tool that has successfully prevented or fought poverty, is at best limited, but this does not exclude a more incremental effect through comparative statistical information about



poverty and an associated policy agenda that governmental actors can use to set policy.

c. Comparing OMC Effectiveness in Employment and Social Inclusion

If effectiveness is analysed from the perspective of the capacity of the European Employment Strategy to promote “employability” or “activation”, then the indicators on ALMP would suggest that the EES has not been effective, as the expenditure on ALMP has generally been decreasing. However, if we turn our attention to the core outcome indicator – employment rates – then the EES objectives are in conjunction with the increase in employment rates that appears from the last decade. This suggests, first, that employability measures are not the main cause of employment growth and that while “activation” has become a mainstream concept in labour market reform, the EES does not have the capacity to promote the development of a particular line of employability schemes. It suggests, second, that the EES does have a capacity to promote a societal model of full employment, re-enforced by the Lisbon Strategy in 2000 and its revision in 2005. Especially an upward swing of female employment rates, particularly in conservative and southern European countries, has contributed to the empirical development of this model in the EU. However, it is ultimately difficult to establish the extent to which it is only or primarily the EES that has successfully mobilised member state governments to strengthen economic and employment growth in their public policy approach. Pressures that all Member States have had to respond to are, *inter alia*, demographic ageing, the requirements associated with EMU, and increasingly, the objectives of the Lisbon Strategy. The development of the full employment model is due to a conjunction of factors, mostly domestically driven, but where the EES can support a reform agenda.

Conclusions on the effectiveness of the OMCincl. should first take account of the fact that the model it upholds is not as strong as that of the EES, as there are no quantitative benchmarks. Nevertheless, from the perspective of an anti-poverty policy, it does, first, provide comparative information, which has been less institutionalised in the EU-15 than information on labour market and employment policies. On the basis of the comparative data on the topography of poverty in the EU-15 between 1997 and 2004, it appears that poverty rates have been increasing in countries where they have traditionally low poverty rates, due to prevention in the welfare state configuration, but have been decreasing in countries where poverty has been higher. In the countries of the EU-15, there is a trend towards convergence of poverty rates in 2004, compared to

1997. The OMCincl., in addition to depicting poverty comparatively and for the EU as a whole, also proposes solutions for problems that are increasingly similar. In some countries, the OMCincl. has introduced social exclusion as a policy problem on the agenda. But, regarding its effectiveness in fighting exclusion, like the EES, it is difficult to determine which factors lead to the changes in poverty rates and exclusion. However, one important means, an indirect policy aim of the OMCincl. – high level of social transfers – confirms that globally higher levels of social expenditure successfully prevent poverty. Poverty rates have, however, also been increasing in countries with comparatively higher levels of social expenditure, which confirms that welfare state restructuring is affecting the quality of life in Nordic and Corporatist welfare states. In this context, hybridisation, i.e. cross-fertilization of the types of measures across various welfare state configurations, is developing in combating social exclusion among the EU-15. Targetting of actions towards vulnerable groups has been developed not only in the Anglo-Saxon countries, but also in the countries with more comprehensive welfare systems with inherent poverty prevention aims. The rights-based approach is introduced on the agenda in countries where it has previously been absent. Like for the EES, the factors that explain these policy developments are multiple and mostly domestic. Nevertheless, the OMCincl. supports the development of a policy agenda in fighting exclusion, an area that is generally underdeveloped and at the sidelines of the core social protection reform agendas. At Lisbon, the OMCincl. was part of the core reform strategy agreed for the EU. As of its revision in 2005, it was de-coupled from the core of the strategy, while its multi-faceted approach, targetting and a focus on child poverty, were agreed. The OMCincl. nevertheless continues, in terms of information provision, and as a policy agenda, to develop incrementally and to different degrees, in the domestic context of various Member States of the EU-15.

## II. CONCLUSION

Governance through the OMC could be envisaged from a cynical perspective as a reflection of existing patterns of participation in governance, existing contradictions in ideological foundations of labour market or anti-poverty policies, and due to its soft nature, an inherent incapacity to bring about novel measures or policies. From an optimistic perspective, governance through the OMC could be envisaged as a motor for the development of new forms of participation, a completely new and coherent approach to old and new policy problems, with a high capacity to transform the politics and policies of labour market and inclusion policies. As this article has attempted to show, governance through the OMC lies somewhere between these two perspectives. In this article, I have sought

to assess the empirical governance in the areas of employment and social inclusion policy via the Open Method of Co-ordination. Specifically, I have analysed participation, coherence and effectiveness, derived from the principles of Good Governance set out by the European Commission in its White Paper.[111]

Regarding its participative dimension, the core actors of the key policy community are in the cases of employment and social inclusion within the main national-level ministries, respectively the Labour and Social Ministries. These are responsible for upstream reporting to the European level and horizontal integration across relevant ministries. The core actors at national level are also responsible for downstream integration of other levels of government, which is increasingly important in the context of devolution of employment and inclusion policies. Regarding the broader policy network that has been formed, social partner involvement in the EES is formal, but the EES agenda is a side-issue compared to the core of the social partner agenda: wage negotiation. Furthermore, social partners have other institutionalised channels through which to influence the policy and politics of employment and labour market policies, hence a limited scope for the EES as an instrument or policy agenda. By contrast, civil society organisations, which have less formal channels for influencing policy in domestic contexts, used the OMCincl. to strengthen their agendas and positions vis-à-vis governments. Furthermore, the anti-poverty objectives of the OMC entirely fit the agenda of the civil society organisations. Thus, the OMCincl. provides a perfect laboratory for them to defend and develop their existing agendas and to develop stronger means to influence Social Ministries. The main determinant for development of a genuine policy network in the context of the OMC is thus determined by the institutional position of the various social actors, their agenda, and their former institutionalised means of influencing policy.

Regarding policy coherence, both the employability objectives of the EES and the anti-poverty aims of the OMCincl. are the result of a compromise between approaches that are rooted in different ideological traditions. The employability objectives of the EES can be used and interpreted in different ways across the political spectrum, from liberal workfare to inclusive and tailored activation. This renders it on the one hand a truly flexible policy approach, but also a problematic one regarding its usage in a blame-shifting logic by governments. The objectives of the OMCincl. are rooted in two different traditions: targetting in the Anglo-Saxon approach, and rights-based approaches in continental and Nordic European countries. But, the OMCincl. also brings an over-arching conception that is not confronted with deep ideological problems: that of social exclusion as a multi-dimensional phenomenon. While the OMCincl. objectives are also

somewhat ambiguous, they are more innovative in that they touch upon an area that for many countries was not an empirical or a policy problem until the dawn of this millennium.

Regarding effectiveness of the EES, first, “employability” measures have mostly been decreasing in terms of expenditure. Second, despite persisting differences in expenditure on labour market policies, welfare state configuration and economic growth trends in the EU-15, there has been a paradigmatic shift towards a full employment model for Europe. The OMCincl., although through softer incentive mechanisms, supports this full employment model, as “jobs” are set as the first aim to get out of poverty. But, it has also more visibly led to some incremental changes in the approach to poverty, via a multi-dimensional approach to exclusion, taking due account of health, education and other factors. In the context of the increase of poverty in countries where it has traditionally been low and the persistence (albeit decreasing slightly) of poverty in the southern European countries, the policy agenda of the OMCincl. is highly relevant. The OMCincl. adds a more social flavor to the full employment model that underlies and continues to dominate the Lisbon Strategy and the re-enforced growth agenda that undergirds the Revised Lisbon Strategy.

---

#### REFERENCES

\* Researcher, Political Science Department, EUI. I would like to thank the editorial team of the EJLS for the initiative for this first issue of the Journal, and in particular Karine Caunes for her professional responsiveness and comments. Special thanks also to David Natali and Pedro Adão e Silva for incisive comments on an earlier draft of this article.

[1] EUROPEAN COMMISSION, “European Employment and Social Policy”, Special Eurobarometer Report No 261, October 2006, at p. 8.

[2] EUROPEAN COMMISSION, European Governance: A White Paper, COM (2001) 428 final, 25.7.2001 at p. 10.

[3] See notably Jean Monnet Working Paper Series No 6/01 Symposium, New York University School of Law, 2001.

[4] [http://ec.europa.eu/governance/index\\_en.htm](http://ec.europa.eu/governance/index_en.htm)

[5] K. ABBOTT and D. SNIDAL, “Hard and Soft Law in International Governance”, International Organisation, 2000, Vol. 54, No 3, pp. 421-456.

[6] S. SMISMANS, “EU Employment Policy: Decentralisation or Centralisation through the Open Method of Co-ordination”, Law Department Working Papers, No. 2004/01, 2004, European University Institute, Florence.

[7] D. TRUBEK, and L. TRUBEK, “The Open Method of Co-ordination and the Debate over “Hard” and “Soft” Law”, in J. ZEITLIN, P. POCHET, and L. MAGNUSSON, (eds.), Opening the Open Method of Co-ordination: The European Employment and Social Inclusion Strategies, P.I.E-Peter Lang, Brussels, 2006, pp. 83 – 106.

[8] J. SCOTT and D. TRUBEK, “Mind the Gap: Law and New Approaches to

Governance in the European Union”, *European Law Journal*, Vol. 8, No 1, March 2002, pp. 1-18.

[9] C. DE LA PORTE and P. POCHET, “The OMC Intertwined with the Debates on Governance, Democracy and Social Europe”, Report prepared for the Belgian Ministry of Pensions and Social Affairs, Brussels, March 2003.

[10] G. DE BURCA, “Reappraising Subsidiarity’s Significance After Amsterdam”, Harvard Jean Monnet Working Paper 7, in the framework of a seminar and workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO, 1999.

[11] EUROPEAN COUNCIL, Lisbon European Council, Presidency Conclusions, 23-24 March 2000.

[12] EUROPEAN COUNCIL, 2000, *supra* note 12.

[13] EUROPEAN COMMISSION, 2001, *supra* note 2.

[14] Even if the Constitutional Treaty may not be ratified by the Member States, it provides some indications of the governance principles that could be agreed upon in a future Treaty revision for the EU-27, and is in this respect pertinent.

[15] EUROPEAN COUNCIL, 2000, *supra* note 12.

[16] COUNCIL OF THE EUROPEAN UNION, “The On-going Experience of the Open Method of Co-ordination”, Presidency Note, Doc. No 90088/00, Lisbon, 13 June 2000.

[17] EUROPEAN COMMISSION, 2001, *supra* note 2.

[18] C. MEYER, “Towards a Europeanisation of Socio-economic discourses? A Study of Quality Press Coverage of Economic Policy Co-ordination since Amsterdam”, Contribution to the EUROPUB Conference Europeanisation of Public Spheres? Political Mobilisation, Public Communication, and the European Union, 20-22 June 2003; DE LA PORTE and NANZ, « The OMC – A Deliberative-Democratic Mode of Governance ? The Cases of Employment and Pensions” *Journal of European Public Policy*, Vol. 11, No 2, April 2004, pp. 267 – 288.

[19] COUNCIL OF THE EUROPEAN UNION, 2001, *supra* note 17, at p. 6.

[20] G. DE BURCA, “Reappraising Subsidiarity’s Significance After Amsterdam”, Harvard Jean Monnet Working Paper 7, in the framework of a seminar and workshop on Advanced Issues in Law and Policy of the European Union, NAFTA and the WTO, 1999.

[21] COUNCIL OF THE EUROPEAN UNION, 2001, *supra* note 17, at p. 6.

[22] EUROPEAN COMMISSION, 2001, *supra* note 2, at p. 10.

[23] J. CHECKEL, “It’s the Process, Stupid! Process Tracing in the Study of European and International Politics”, Arena Working Paper Series 26/2005 of 18.10.2005.

[24] M. BUECHS, “Dilemmas of post-regulatory European social policy coordination: the EES in Germany and the United Kingdom”, PhD thesis, Humboldt University, Berlin, 2005.

[25] Protocol on the application of the principles subsidiarity and proportionality, Maastricht EC Treaty.

[26] COUNCIL OF THE EUROPEAN UNION, 2001, *supra* note 17, at p. 7.

[27] EUROPEAN COMMISSION, 2001, *supra* note 2, at p. 10.

[28] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Article 1-47.

[29] EUROPEAN COUNCIL, 2000, *supra* note 12.

[30] COUNCIL OF THE EUROPEAN UNION, 2001, *supra* note 17, at p. 6

[31] EUROPEAN COUNCIL, 2005, *supra* note 39.

- [32] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Article III-217.
- [33] For an analysis of the policy community and network at European level, see DE LA PORTE and POCHET, "Participation in the OMC – the cases of employment and social inclusion", in J. ZEITLIN, POCHET, P. and L. MAGNUSSON, (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, Brussels, P.I.E-Peter Lang, 2005pp. 353-390.
- [34] M. THATCHER, "The Development of Policy Network Analyses: From Modest Origins to Overarching Frameworks", *Journal of Theoretical Politics*, Vol.10, No 4, 1998, pp. 389-416 at pp. 392 – 393.
- [35] C. DE LA PORTE and P. POCHET, 2005, *supra* note 26.
- [36] EUROPEAN COMMISSION, 2001, *supra* note 2, at p.10.
- [37] TREATY ESTABLISHING A CONSTITUTION FOR EUROPE, Article III-115.
- [38] EUROPEAN COUNCIL, 2000, *supra* note 12, at § 36.
- [39] EUROPEAN COUNCIL, Presidency Conclusions, European Council Brussels, 22 and 23 March 2005.
- [40] EUROPEAN COMMISSION, Communication "Working together for growth and jobs: a New Start for the Lisbon Strategy", COM (2005) 24 February 2004.
- [41] EUROPEAN COUNCIL, 2005, *supra* note 40.
- [42] EUROPEAN COUNCIL, 2005, *supra* note 40..
- [43] C. DE LA PORTE, and P. POCHET, "The European Employment Strategy: Existing research and remaining questions", *Journal of European Social Policy*, Vol. 14, No 1, 2004, pp. 71-79.
- [44] COUNCIL OF THE EUROPEAN UNION, 2000, *supra* note 17.
- [45] J. ZEITLIN, "The Open Method of Co-ordination in Action. Theoretical Promise, Empirical Realities, Reform Strategy" in in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *Opening the Open Method of Co-ordination: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005, pp. 447 - 504.
- [46] COUNCIL OF THE EUROPEAN UNION, 2001, o.c (footnote 17).
- [47] Luxembourg is excluded since data for the analysis of effectiveness was incomplete.
- [48] For national case studies (Sweden, Denmark, Italy, the Netherlands, France, Germany, UK, Ireland) see national chapters in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005.
- [49] COUNCIL OF THE EUROPEAN UNION, 2001, o.c (footnote 17).
- [50] DE LA PORTE, C. and POCHET, P. 2005, o. c. (footnote 30).
- [51] BECKERS, M., "Capturing the impact of the European Employment Strategy in Belgium: The Europeanisation of employment policies as a catalyser of domestic change?", Master Thesis, Katholieke Universiteit Leuven, Leuven, 2006.
- [52] FERRERA, M. and SACCHI, S, "The Open Method of Coordination and National Institutional Capabilities. The Italian Experience" in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels,, 107-136.
- [53] DE LA PORTE, C. and POCHET, P. 2005, o. c. (footnote 30).

- [54] LEONARD, E., "Social Parts: The Employment Side", unpublished paper, 2004.
- [55] ETUC, UNICE/UEAPME and CEEP, Report on Social Partner Actions in Member States to Implement Employment Guidelines, March 2004, Brussels.
- [56] Table prepared from national cases in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), 2005, *Opening the Open Method of Co-ordination: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels); EUROPEAN COMMISSION, Joint Employment Reports, various years ([http://ec.europa.eu/employment\\_social/employment\\_strategy/employ\\_en.htm](http://ec.europa.eu/employment_social/employment_strategy/employ_en.htm)); GOVECOR project, National reports (**Error! Hyperlink reference not valid.**); European Foundation of Living and Working Conditions, Surveys on national social partner participation, various years ([www.eiro.eurofound.ie](http://www.eiro.eurofound.ie)).
- [57] The other fields of its mandate are to make work pay, to make pension systems socially and financially sustainable, and to make health care systems accessible for all, of high quality and sustainable.
- [58] EUROPEAN COUNCIL, 2000, o.c. (footnote 12).
- [59] For in-depth analysis of recent developments and coordination of anti-poverty policies in southern Europe, see FERRERA, M. (ed.) *Welfare State Reform in Southern Europe: Fighting poverty and social exclusion in Italy, Spain, Portugal and Greece*, Routledge/EUI studies in the political economy of welfare, Routledge, London, 2005.
- [60] See for example the excellent analysis on the UK case: ARMSTRONG, K., "How Open is the United Kingdom to the OMC Process on Social Inclusion?", in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005 pp. 287 – 310.
- [61] Data for domestic institutional model derived from GOUGH, I. et al. (1997), « Social Assistance in OECD Countries », *Journal of European Social Policy*, 7(1), pp. 17-43; the national analyses in FERRERA, M. (ed.) (2005) , *Welfare State Reform in Southern Europe: Fighting poverty and social exclusion in Italy, Spain, Portugal and Greece*, Routledge/EUI studies in the political economy of welfare, Routledge, London, 2005. Data for Institutional Configuration of Participation in OMCincl derived from the NATIONAL RESPONSES (2005) to the European Commission "Questionnaire for the Assessment of the Open Method of Coordination in order to prepare the streamlining in the field of social protection"; National case studies in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005, KROEGER, S. (2006), "When learning hits politics or: social policy coordination left to the administrations and the NGOs?", *European Integration Online Papers*, Vol. 10, No 3, <http://eiop.or.at/eiop/texte/2006-003a.htm>
- [62] EAPN, "National Action Plans on Inclusion 2003 – 2005 – Where is the Political Energy? EAPN's response to the second round of plans, Report, October 2003.
- [63] Interview ETUC, 14 January 2004.
- [64] COUNCIL OF THE EUROPEAN UNION, 2001, o.c. (footnote 17).
- [65] For analysis on the action of the European level NGOs, see DE LA PORTE, C. and POCHET, P. 2005, o. c. (footnote 26), at pp.375 – 376.
- [66] PENA-CASAS, R., DEGRYSE, C. And POCHET, P., "Stratégie Européenne en Matière de Pauvreté et d'Exclusion Sociale", Report for local



authorities in Belgium on OMC inclusion, 2002.

[67] KOK, W. et al. (2003), "Jobs, Jobs, Jobs – Creating More Employment in Europe", Report of the Employment Task-force chaired by Wim Kok, Brussels, November 2003

([http://europa.eu.int/comm/employment\\_social/employment\\_strategy/pdf/etf\\_en.pdf](http://europa.eu.int/comm/employment_social/employment_strategy/pdf/etf_en.pdf)) and KOK, W. et al. (2004), "Facing the Challenge. The Lisbon Strategy for Growth and Employment", Report from the High Level Group chaired by Wim Kok, Office for Official Publications of the European Communities, Luxembourg, November 2004 ([http://europa.eu.int/comm/lisbon\\_strategy/pdf/2004-1866-EN-complet.pdf](http://europa.eu.int/comm/lisbon_strategy/pdf/2004-1866-EN-complet.pdf)).

[68] See also DE LA PORTE and POCHET, 2005, o.c. (footnote 33)

[69] POCHET, P., "La MOC et la protection sociale: des développements ambigus", in DEHOUSSE, R. (ed.), *L'Europe sans Bruxelles ? Une analyse de la méthode ouverte de coordination*, L'Harmattan, Paris, pp.99-127.

[70] EAPN, 2003, o.c (footnote 42).

[71] The other objectives – reconciliation of work and family life, work organisation issues, striking a balance in the combination of flexibility and security, facilitating and promoting entrepreneurship – are equally relevant but will not be discussed in detail due to the limit in scope of this analysis.

[72] For an analysis of the diverse ideological origins of activation, see BARBIER, J.-C., "The European Employment Strategy, a Channel for Activating Social Protection?", in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *Opening the Open Method of Co-ordination: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005, pp. 417 – 446.

[73] see also DE LA PORTE, C. and POCHET, P., "Supple Co-ordination at EU level", in DE LA PORTE, C. and POCHET, P., (eds.), *Building Social Europe Through the Open Method of Co-ordination*, P.I.E.-Peter Lang, Brussels, 2002, pp.31-71 on conceptualization of economically vs. socially-oriented actors.

[74] COUNCIL, "The 1998 Employment Guidelines", Council Resolution of 15 December 1997, document no 13200/97.

[75] In 2003 it was agreed that from 2005 onwards, the guidelines were to cover a three-year rather than yearly cycle, and in principle to be closer attached to the process of revision of the broad economic policy guidelines (EUROPEAN COMMISSION, *The Future of the European Employment Strategy: A Strategy for Full Employment and Better Jobs for All*, COM (2003) 6 final of 14 January 2003).

[76] DE LA PORTE, C. and POCHET, P. 2005, o.c. (footnote 30).

[77] DE LA PORTE, C. and POCHET, P. 2002, o.c (footnote 61).

[78] See also VISSER, J., "The OMC as Selective Amplifier for National Strategies of Reform. What the Netherlands Want to Learn from Europe", in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005, pp. 173 – 216.

[79] BUECHS, M., 2006, o.c. (footnote 25).

[80] FERRERA, M. and SACCHI, S., "The Open Method of Co-ordination and National Institutional Capabilities. The Italian Experience", in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels 2005, pp. 137 – 172.

[81] EUROPEAN COUNCIL, 2005, o.c.(footnote 39).

- [82] ATKINSON, R. and DAVOUDI, S., 'The concept of Social Exclusion in the European Union', *Journal of Common Market Studies*, Vol. 38, no. 3, 2000 at p. 434.
- [83] ATKINSON, R. and DAVOUDI, S. *Ibid*, p. 438
- [84] ARMSTRONG, K. (2006), "The 'Europeanisation' of Social Exclusion: British Adaptation to EU Co-ordination", in *The British Journal of Politics and International Relations*, Vol. 8, 79-100.
- [85] SOCIAL PROTECTION COMMITTEE, "Common Outline for the 2003/2005 NAPs/inclusion", Brussels, 2003.
- [86] Luxembourg is excluded since the relevant data on ALMP (from Eurostat) is not available.
- [87] The categories that make up active labour market policies are: Training, job rotation/job sharing, employment incentives, integration of the disabled, direct job creation and start-up incentives. The data has been created explicitly by Eurostat to reflect the employability pillar of the European Employment Strategy (EUROPEAN COMMISSION, 2006, *European Social Statistics: Labour market policy expenditure and participants*, Luxembourg: 6).
- [88] Expenditure on the reform of public employment services (PES), a key "employability" objective of the EES, has only been included in Eurostat recently (from 2004 onwards). Furthermore, that data is partial, hence the decision to exclude it from the analysis. But, qualitative analyses suggest that the EES has initiated or strengthened reform of the PES in countries where it was underdeveloped. This specific question of whether the EES has initiated reform of PES, in some cases supported by the European Social Fund, is a research topic in its own right.
- [89] Politically, there is an assumption that activation and employability are important means to counter unemployment and to increase employment rates. Crossing the employability data with unemployment rates would allow for more precise conclusions to be drawn as to the development of ALMP as a response to unemployment. However, more complex analyses are beyond the scope of this article that merely seeks to create some yardsticks against which to assess effectiveness of the OMC.
- [90] The categories that make up passive labour market policies are: "out-of-work income maintenance" (mostly unemployment benefits) and "early retirement" (European Commission, 2006, *ibid*, at p. 6)
- [91] EUROPEAN COUNCIL, 2000, o.c. (footnote 12 )
- [92] Data for table (columns 3 – 6 and 8 – 11) obtained from EUROPEAN COMMISSION: EUROSTAT: Labour Market Series, date of extraction from database <http://www.eurostat.eu> October 2006; welfare state configurations (Nordic, Conservative, Anglo-Saxon) from ESPING-ANDERSON, G., *The Three Worlds of Welfare Capitalism*, Polity Press, 1990 and southern welfare state configuration from FERRERA, M., "The 'Southern Model' of Welfare in Social Europe", *Journal of European Social Policy*, Vol.6, No.1, pp.17-37.
- [93] Data for 2000, as data for 1999 not available.
- [94] DE LA PORTE, C. and POCHET, P. 2004, o.c footnote 35.
- [95] Data for table obtained from EUROPEAN COMMISSION: EUROSTAT: Labour Market Series, date of extraction from database <http://www.eurostat.eu> October 2006.
- [96] ESPING-ANDERSON, G., *The Three Worlds of Welfare Capitalism*, Polity Press, 1990, Oxford.
- [97] VISSER, J., "The OMC as a selective amplifier for national strategies of Reform. What the Netherlands wants to learn from Europe", in Zeitlin et al. (eds)

The Open Method of Coordination in Action, PIE-Peter Lang, Brussels.

[98] VISSER, J. and HEMERIJCK, A., "A Dutch Miracle: Job Growth, Welfare Reform and Corporatism in the Netherlands", Amsterdam University Press, 1997, Amsterdam.

[99] KAUTTO, M. et al. (1999) "Introduction: the Nordic Welfare States in the 1990s", in *Nordic Social Policy: Changing Welfare State*, KAUTTO, M. et al. (eds), Routledge, 1999.

[100] O'DONNELL, R. and MOSS, B., "Ireland: The Very Idea of An Open Method of Co-ordination" in Zeitlin et al. (2005), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005, 311 – 352.

[101] FERRERA, M. and SACCHI, S., 2005, o.c., (footnote 53), p. 143.

[102] Ibid., p. 149

[103] Ibid., p. 151.

[104] OMAS, 2002, "Evaluation of the Employment Strategy in Greece", Ministry of Labour, Athens.

63-63

[105] Sousa, S. to be completed

[106] GONZALEZ-CALVET, J., "Employment Policies in Spain: From Flexibilisation to the European Employment Strategy" in DE LA PORTE, C. and POCHET, P., (eds.), *Building Social Europe Through the Open Method of Co-ordination*, P.I.E.-Peter Lang, Brussels, 2002.

[107] NATALI, D. and DE LA PORTE, C. « OMC Pensions: What role for Europe in Co-ordinating the reform of different pension systems? The cases of France and the Netherlands » in Jorgensen, H. Baerentsen, M. and Monks, J. *European Trade Union Yearbook 2003/2004*, ETUI, Brussels pp. 255-282, 2005.

[108] Data for columns 2, 3, 4 of the table obtained from EUROPEAN COMMISSION: Eurostat, ESSPROS (social protection expenditure) series, date of extraction from database <http://www.eurostat.eu> November 2006; Data for columns 5-8 obtained from Joint Reports on Inclusion 2001-2003, European Commission and 2003-2005, European Commission (ADD final ref) GOUGH, I. et al., 1997 o.c (footnote 61), national analyses in Ferrera (ed), 2005, o.c. (footnote 61), National case studies in ZEITLIN, J. POCHET, P. and MAGNUSSON, L. (eds.), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies*, P.I.E-Peter Lang, Brussels, 2005.

[109] GOUGH, I. et al. (1997), « Social Assistance in OECD Countries », *Journal of European Social Policy*, 7(1), pp. 17-43.

[110] Data for columns for the table obtained from EUROPEAN COMMISSION: EUROSTAT, European Community Household Panel (ECHP) and EU-SILC, date of extraction from database <http://www.eurostat.eu>: November 2006.

[111] EUROPEAN COMMISSION, 2001, o.c. footnote

## SELF-REGULATION IN EUROPEAN CONTRACT LAW

Fabrizio Cafaggi\*

*This essay focuses on rule-making procedures in European Contract Law and the role of self-regulation. Self-regulation may serve different purposes in this respect: it operates as a standard-setting mechanism for contracts, in particular through standardisation; it may interpret European and national law offering firms and consumers guidelines; and finally it contributes to monitoring the conduct of contracting parties to ensure compliance, and it provides enforcement mechanisms. Self-regulation plays already a significant role at European level, it is already relevant for European Contract Law and may perform important functions in the process of drafting the Common frame of references and more broadly in the process of harmonisation of ECL. This paper addresses self-regulation as a complementary means to harmonize and regulate ECL. Two main choices may characterize the use of self-regulation as a means of harmonising European Contract Law. On the one hand, self-regulation can be a partial or a total device for harmonization, i.e. (a) it can be a complement to hard or soft law harmonisation or (b) it can, in certain areas, substitute hard law harmonization. On the other hand, self-regulation can be general and/or sector specific, i.e. it can operate within the general Common Frame of reference or it can specify the general standard forms to be used for individual sectors, unregulated or regulated (banking, insurance, securities). The choice between the first two alternatives, complementarity or substitution will partly depend on the form of legislation. The role of self-regulation will increase in a principle-based legislative framework and decrease in a rule-based framework. In practical terms self-regulation operates both as a complement and as a substitute. It is a complement when it specifies or interprets existing legislation. It is a substitute when harmonises, by means of Standard contract forms, Framework contracts or Master Agreements, contractual relationships otherwise regulated at State level in different fashions. In turn from the perspective of the State or the European institutions the use of self-regulation in ECL may imply a functional change: from the 'theoretical' monopoly of law making to a duopoly. But the change could be even more radical if the public legislator, be it at European or national level, becomes a coordinator and/or a mediator among different self-regulatory bodies, negotiating among themselves contract law rules. The evolution of the regulatory state in Europe will probably affect which combination between these two identities will emerge in the next future. The main aims of the paper are (1) to demonstrate the necessity to consider self-regulation as a significant component of the debate concerning the definition of Common Frame of related to European Contract law, (2) to identify the role and the limits of self-regulation in the formation of European Contract Law, and (3), more in general, to show the strong correlation between the governance of self-regulatory bodies and the substance of European Contract Law.*

## I. INTRODUCTION

This essay focuses on rule-making procedures in European Contract Law (hereinafter ECL) and the role of self-regulation (hereinafter SR). SR may serve different purposes in this respect.<sup>[1]</sup> It operates as a standard-setting mechanism for contracts, in particular through standardisation. It may interpret European and national law offering firms and consumers guidelines. It contributes to monitoring the conduct of contracting parties to ensure compliance, and it provides enforcement mechanisms.

Self-regulation plays already a significant role at European level, it is already relevant for European Contract Law and may perform important functions in the process of drafting the Common terms of references (hereinafter CFR) and more broadly in the process of harmonisation of ECL. This paper addresses self-regulation as a complementary means to harmonize and regulate ECL.

Two main choices may characterize the use of Self-regulation as a means of harmonising European Contract Law:

- 1) Complement or substitute. Self-regulation can be a partial or a total device for harmonization, i.e. (a) it can be a complement to hard or soft law harmonisation or (b) it can, in certain areas, substitute hard law harmonization .
- 2) General or sector-specific. Self-regulation can be general and/or sector specific, i.e. it can operate within the general CFR or it can specify the general standard forms to be used for individual sectors, unregulated or regulated (banking, insurance, securities).

The choice between the first two alternatives, complementarity or substitution will partly depend on the form of legislation. The role of self-regulation will increase in a principle-based legislative framework and decrease in a rule-based framework.

In practical terms SR operates both as a complement and as a substitute. It is a complement when it specifies or interprets existing legislation. It is a substitute when harmonises, by means of Standard contract forms (hereinafter SCF), Framework contracts or Master Agreements, contractual relationships otherwise regulated at State level in different fashions. In turn from the perspective of the State or the European institutions the use of self-regulation in ECL may imply a functional change: from the 'theoretical' monopoly of law making to a duopoly. But the change could be even more radical if the public legislator, be it at European or national level, becomes a coordinator and/or a mediator

among different self-regulatory bodies, negotiating among themselves contract law rules. The evolution of the regulatory state in Europe will probably affect which combination between these two identities will emerge in the next future.

The main aims of the paper are (1) to demonstrate the necessity to consider self-regulation as a significant component of the debate concerning the definition of Common Frame of References related to European Contract law, (2) to identify the role and the limits of self-regulation in the formation of European Contract Law, and (3), more in general, to show the strong correlation between the governance of self-regulatory bodies and the substance of European Contract Law .

## **II. RULE MAKING IN EUROPEAN CONTRACT LAW**

Self-regulation can operate through contractual or organizational models.

Self-regulation can perform standard setting functions both in the area of consumer protection and in that of business to business transactions. It may play a role in defining general standard terms and conditions of Contract law.<sup>[2]</sup> The functions may differ, given the complementary nature of SR to state regulation, in the areas of BtoC, BtoB, and Btob.<sup>[3]</sup> SR can play, and *de facto* plays, a more relevant role in BtoB relationships and more in general in relation to *lex mercatoria*.

Self regulation can also operate as a monitoring system to identify different modes of implementation of European Contract Law intertwined with the uses of private autonomy. If the intuitions of neoinstitutional economics are correct, there might be good reasons to believe that the exercise of freedom of contract differs in relation to institutional frameworks, but also to behavioural patterns of contracting parties. It is therefore likely that different contract clauses might be introduced due to the presence of different socio-economic actors within the same market. Self-regulatory bodies can monitor these processes and help to coordinate and govern the differences. The role of self-regulation would differ if monitoring concerns BtoB or BtoC relationships.

In addition, SR can operate to solve contractual disputes by complementing the judiciary with the use of ADR and arbitration.

In this paper, I focus on standard-setting and distinguish between its different dimensions.

SR can contribute to the definition of general terms and conditions within

the CFR envisaged by the European Commission. It can play a more significant role in the design of framework contracts and standard contracts in specific sectors (banking, insurance, security, electricity, transport, etc.).<sup>[4]</sup> We observe several SCF provided by trade associations in each field.<sup>[5]</sup> Given the enabling nature of many contract clauses, self-regulation may complement legislative activities to provide default models that can standardise terms. Several initiatives are already in place, especially for those industries with relevant network effects such as insurance, banking, telecom and transport.<sup>[6]</sup>

Within private regulation different players and forms of rule-making are examined.

In relation to players different private organizations are considered: independent organizations and self-interested organizations, which will be further differentiated according to the nature of the represented interests. In particular a key distinction for competition law which plays a less significant role in contract law is that between interest-based versus knowledge- or expertise-based organisations.<sup>[7]</sup>

In relation to the institutional environment a distinction is assumed between different modes of rule-making supply. Private organizations provide rules, including SCF, for a price or more generally for remuneration or for free. Often private organisations do both, depending on the type of rules or on the potential users.

In Europe, integrated markets require a high level of coordination, made more difficult by the coexistence of legal systems based on different languages and cultures. The still predominant choice of minimum harmonisation has made possible a high level of variation among MS currently under scrutiny.<sup>[8]</sup>

Collective private standardisation of contract forms may represent a partial response to these problems. Standardised contracts lower transaction costs but limit the space of choice for contracting parties and therefore may reduce freedom of contract. Furthermore they might decrease competition for innovative contract clauses among rival firms.

In relation to standard setting, SR can often be an agent of harmonisation operating (1) outside of legislation in the realm of freedom of contract, or (2) as a complement of European legislation contributing to producing soft law instruments or (3) as a means of implementing European harmonising legislation in place of national legislation when there is formal delegation to private organizations.



This function should be strengthened and can become part of a more structured institutional design aimed at ensuring that European private law integrates the different private competences and legal traditions. Furthermore to acknowledge the role of SR may shed light on the necessity to widen the choice among different regulatory strategies and to incorporate regulatory contracts into the domain of the new European Contract Law.

But self-regulation is not the only regulatory mode through which private regulation operates. Different regulatory strategies have developed at EU and State level and they can all contribute to the formation of ECL. But their legal regimes imply different constraints. More specifically different rules apply to pure self-regulation, to co-regulation, and to delegated self-regulation due to the role of public authorities and their duties to comply with European law, in particular with competition law principles.

SR is certainly limited by several constraints. In particular it is subject to competition law and to mandatory contract law limitations that can be found in the *acquis communautaire* and in the common principles of contract law in MS.[\[9\]](#) Competition law and contractual fairness control both what can be standardised and how it should be standardised. The following analysis is devoted to a comparative examination of these two techniques and to illustrate the different yet consistent goals they pursue. In this contribution I want to compare competition, contract and organisational limitations to private rule making to define the potential and current role of self-regulation in European Contract law.

#### 1. *Self-regulation and European contract law*

SR is concerned with different types of contractual relationships. It encompasses *lex mercatoria*, BtoB, and BtoC relationships. The use of self-regulation in contract practices has a long history and precedes the formation of nation states.[\[10\]](#) A sharp divide seems to characterize policy options concerning consumer contract law and inter-firm contracting at the European level. The combination between legislation and self-regulation, and within the former between mandatory and enabling rules are different. Yet a general approach to the use of self-regulation in ECL is possible and desirable. The main focus of the essay is related to the consumer law but some references will also be made to the role of *lex mercatoria* on the formation of European Contract Law. By choosing consumer contract law I take the hard case to analyse both the potential for self-regulation as a descriptive and normative standpoint.

Self-regulation has been indicated by the Commission and the Parliament as one of the possible means to harmonize European Contract Law. Building on the indications provided by the Action Plan, the following Communication suggested promoting the use of EU-wide standard terms and conditions.<sup>[11]</sup> Such a measure is definitely related to the development of a CFR. It can operate at the European level in the framework of a multilevel system. The Commission has however subsequently modified its initial position, rejecting the idea of operating as a facilitator hosting a website for the presentation of EU-wide standard terms and conditions.<sup>[12]</sup>

It is useful to distinguish an institutional set of functions from a substantive one performed by SR.

From an institutional perspective SR can complement :

- (1) legislative functions by contributing to the definition of contractual terms, code of conducts, framework contracts;
- (2) Regulatory functions by defining (a) sector specific guidelines or, more specifically in the area of information regulation, (b) by introducing cognitive intermediaries;<sup>[13]</sup>
- (3) Interpretive functions by offering guidelines to individual firms when they contract with other firms or consumers;
- (4) Monitoring functions of European Contract Law by verifying correct implementation of EU law at MS level;
- (5) Enforcement by defining sanctions to their members in case of violations.

From a substantive perspective it can contribute to the creation of SCF according to different models and to their correct administration, to produce codes of conducts that affect (1) the content of contract, (2) the bargaining procedures, ensuring compliance with EU legislation, and (3) more in general economic activities of the regulated. For example they can impose mandatory licensing for certain activities, quality control for other activities, i.e. certification.<sup>[14]</sup>

Private bodies define SCF concerning their members, often firms, but also standard contract forms between their members (firms or professionals) and third parties (consumers, investors, clients). Therefore they would produce both contract rules in BtoB and BtoC relationships. Then implementation can occur at national level either through national self-regulatory systems or directly through enterprises applying the framework contract to specific transactions. The Commission in this context is seen as a 'facilitator' of self-regulated production of contracts standard terms.<sup>[15]</sup>

2. *Self-regulation in European consumer contract law: Paving the way for a more general approach?*

The role of SR in consumer contract law specifically illustrates an intermediate hypothesis between the general approach which would concern the entire contract law and the sector-specific approach, regarding for example banking, electricity, telecom or securities. Consumer law stands somehow in the middle: it is a policy area which is not sector specific but is limited to transactions between firms and consumers.[\[16\]](#)

SR in the field of consumer law can support regulatory functions, pursued by legislation, aimed at ensuring competition and improving freedom of choice by consumers related to different contractual terms. In particular, the comparability of different costs and quality of services can play a major role to ensuring the consolidation of an internal competitive market. It is generally held that it is the responsibility of MS to ensure such comparability either by imposing obligations directly on undertakings or by promoting self-regulation as a response to high research costs.[\[17\]](#) The Commission could promote European initiatives to foster coordination.

In which domains can self-regulation contribute to rule-making? Self-regulation, as a form of private regulation, can in principle only concern enabling rules. A different conclusion can be reached in relation to delegated self-regulation and co-regulation when a legislative act can legitimise the use of self-regulation and its ability to deviate from mandatory rules.[\[18\]](#) But what is the current balance between mandatory and enabling rules in European contract consumer law?[\[19\]](#)

From a substantive viewpoint, the key strategic question relates to the distinction between mandatory and enabling rules. Harmonisation of mandatory rules should differ functionally from harmonisation of enabling rules. It is debatable whether similar rationales for harmonisation can be used in relation to the two sets of rules. As to the former, the main institutional consequence of harmonisation at European level may be the decrease of MS' power; as to the latter, harmonisation reduces private parties' ability to choose, primarily in the realm of freedom of contract.

Therefore in order to ensure consumer protection, interpreted as a means to expand consumers' choices and thus consumers' freedom of contract, divergent strategies may be defined as to mandatory and enabling rules. But the matter is further complicated by potential different legislative choices. A principle-based legislation concerning mandatory rules would permit higher level of differentiation than a rule-based legislation. Even within the realm of mandatory rules the form of the provision may affect

the level of differentiation across Member States.<sup>[20]</sup>

European legislation in consumer contract law has followed different patterns over time. While the initial stream was characterized by mandatory rules and the main goal of legislation by consumer protection, a second stream (the Consumer sales Directive 99/44) has opened to different types of contract rules that also encompass enabling rules.<sup>[21]</sup> In the future, it is likely that European consumer legislation and more in general European Contract Law will encompass both mandatory and enabling rules. A new culture concerning the harmonising role of enabling rules is developing although not always institutionally perceived.

The debate concerning the use of SR in consumer law has somehow followed this pattern. The dominant mandatory nature of consumer contract rules has led many scholars and legal systems to oppose the use of SR in the field, with the preoccupation that it would reduce the level of consumer protection. Now that consumer contract law is characterised by a combination of mandatory and enabling rules (see Directive 99/44), and that there is growing awareness of the regulatory capacity of enabling rules, the role of SR in consumer contract law should be re-discussed.<sup>[22]</sup> Furthermore, the important changes concerning regulatory techniques and the development of co-regulation suggests that the fears then put forward might be today largely ungrounded.

Perhaps the most significant area is that of drafting SCF. Standardising contract forms can at the same time benefit both firms and consumers. This activity can certainly reduce consumer search costs; however the regulatory function of consumer self-regulation should not be overestimated. The limits of consumers associations to operate as co-regulators are still quite significant.

Contemporary standardisation is often not only the result of traditional trade associations' activity but the outcome of negotiating processes involving consumers associations and, in many countries, public authorities. The latter can be subdivided into two main categories: (1) public interest representation organizations, such as ombudsman, and (2) public regulators (i.e. Independent Regulatory Agencies, IRAs, or governmental departments).<sup>[23]</sup> IRAs are involved primarily when markets are highly regulated, affecting contracts content and the contracting parties (imposing obligation to contract). Their intervention may modify the role of competition law as a limit to standardisation. In the field of competition negotiations between national authorities and trade associations used to take place in many countries. In some notification was mandatory in other it was just an informal practice. Regulation 1/2003 has modified the system and now ex ante control is not allowed. This is not to

say that informal consultations do not still take place.

But standardisation is not the only form of SR affecting ECL. In specific regulated sectors different forms have been employed. Master Agreements among banking associations have contributed significantly to the development of European contract banking law in both the field of BtoC and BtoB relationships.<sup>[24]</sup>

Beyond standardisation SR can provide general rules as it is the case for codes of conducts. In the field of professional associations individual contracts between clients and professionals are drafted in compliance with the rules defined by the codes. Rules about Contracts for professional services are therefore mainly defined by self-regulatory or co-regulatory arrangements.

Outside the field of ECL, Directive 2005/29 EC of 11th may 2005 concerning unfair trade practices provides another good illustration of the potential role of self-regulation and co-regulation in the consumer field.<sup>[25]</sup> This role has been strongly reduced in the final version of the directive, while being much wider and better articulated in the initial proposal.<sup>[26]</sup> However, the importance of self-regulation to define what constitutes a misleading practice is clear, as are the responsibilities arising when a binding code of conduct is in place. A new general principle is introduced: when a firm has committed itself to a code of conduct, non-compliance will be considered a misleading practice if the commitment is firm and verifiable and the trader has indicated in commercial practice that he is bound by the code.<sup>[27]</sup>

Certainly the modes of self-regulation play a very important role to ensuring that a high level of consumer protection is achieved in the building of a European system of contract law. However the analysis of different modes through which SR can contribute to the creation of ECL can not be limited to consumer law and should encompass also business to business relationships. A general model of SR related to all contractual relationships should thus be devised.

### 3. *The different models of private and self regulation in European contract law and their relevance to competition and contract law*

Different models of SR are employed in the domain of ECL. The most significant distinction is related to the alternative between contractual and organizational modes.

Within the contractual model of SR different private rule making

activities can take place:

creation of SCF,  
or broader engagements aimed at defining a complex set of rules associated with consumer transactions or other firms such as codes of conduct even more broadly to different types of transactions defined in scope by the regulatory field (energy, telecom, environment, etc.) concerning relationship with customers and end-users such as master agreements and framework contracts.

When the contractual model is employed, the parties design a contract to regulate conducts concerning contractual and non-contractual relationships. To some extent regulatory contracts may coincide with framework contracts but they may be very detailed or, on the contrary, very general, simply defining principles to be detailed in framework contracts then to be implemented by individual contracts. The regulatory chain can be very long.

The obligations arising out of these contracts can in principle only affect signatories of the contract, but in fact often also regulate relationships between signatories and third parties. For example, these contracts may oblige parties to introduce or to refrain from introducing clauses in contracts with third parties, be they firms or consumers. In BtoB relationships this often occurs both in relation to the supply chain for subcontractors or in relation to the end consumers in distribution contracts. The performance of these obligations is monitored by parties through the conventional apparatus of contract law. Although these contracts are generally not specifically regulated by civil codes or common law, with some adjustments, general contract law should be deemed applicable to them.<sup>[28]</sup>

The main issue is related to the effectiveness of these contracts in relation to third parties. For example, if the signatory of a code of conduct is bound to refrain from inserting a clause in a contract with a consumer, how can the breach of the code affect the contract between the firm and the consumer? Does it only have consequences among signatories, usually firms, or can the consumer, technically a third party, sue the enterprise on the grounds of the breach of regulatory contract or the code of conduct?<sup>[29]</sup>

Third parties beneficiary contracts can provide only a partial solution to the problem. The consumer can be considered the beneficiary of these regulatory contract and enforce them if one of the party does not comply. Legal systems of European Member States differ quite significantly but reasonable reliance on the binding nature of the regulatory contract can be



a relatively strong basis for such a claim. The principle of reliance is becoming a strong basis for enforceability in contract law and more broadly in consumer law as the Directive on unfair trade practices shows.<sup>[30]</sup> Similar problems may arise when SCF are employed along the chain. SCF involving the whole production chain may imply the necessity of alternative means of enforcement. It may be difficult for the consumer to enforce an obligation contained in the contract between supplier and distributor. These limitations are not limited to SR. To the contrary a good SR design can contribute to improve legal limitations concerning the use of functionally correlated contracts.

The complexity of these regulatory arrangements may require a stronger and broader set of devices than those currently provided by national contract laws. Parties may thus decide to set up an organization with different legal forms: association, foundation, company, cooperative, etc. Such an organization would produce rules through the enactment of codes of conduct and regulatory contracts, but also guidelines, codes of best practice, etc. dealing both with internal governance and with the activity concerning members and their relationship with third parties. The organization will generally monitor its compliance through a specific apparatus or delegate this function to an independent body unlike the contractual system which will generally refer to a public judge or an arbitrator.<sup>[31]</sup>

So far we have considered models employed by private parties and implicitly assumed that these would be firms. In the real world there may be higher diversity. Both the contractual and organizational alternative can involve different categories. In the realm of BtoC relationships there are framework contracts or organizations composed of trade and consumer associations. In the realm of BtoB relationship we observe the same phenomena with the development of framework contracts and mixed organizations. Here the main problem is connected to the relationship between these contracts and/or organizations and the individual positions of members and non-members. Do these contracts bind only members? Or can they bind non members too? In the case of consumers can a framework contract signed by consumers' associations prevent individual consumers from bringing a legal action against the firm belonging to the trade association which signed the contract? The answer, according to the general contract and organizational law, is in many legal systems negative. The main role of these contracts in relation to third parties and organizations is only persuasive due to the privity constraints. However, the rules defined by these contracts and/or organizations may have some legal effects to the extent that they are recognised as custom or practices and thus constitute minimum standards.<sup>[32]</sup>



The current relative weakness of these instruments as regulatory tools has been in part the driver for the development of co-regulation or delegated self-regulation at European and national levels.<sup>[33]</sup> There is a diffused scepticism about the credibility of self-regulation and its ability to deal with conflict of interests and with market complexity. In addition and perhaps most importantly enforcement of self-regulatory arrangement is generally deemed insufficient.

The development of regulated self-regulation in ECL has taken different forms. Worth mentioning are co-regulation and delegated self-regulation:

- a) where the government or an IRA themselves become part of the regulatory arrangement. They can sign codes of conducts, promote or favour their drafting, they can approve them *ex post*;<sup>[34]</sup>
- b) when there is a formal delegation by a legislative or administrative act without direct intervention of a public authority.<sup>[35]</sup> Delegation can concern one organisation or identify bargaining actors.<sup>[36]</sup>

These two models can be briefly analysed in relation to the alternative between contract and organizations. In the first case, co-regulation, we can further sub-divide the typologies. Contracts are generally trilateral with the participation of trade and consumer associations, and some public entity. Here the legal regimes may vary if the legal systems distinguish between government contracts and private contracts. The applicable law would depend upon the meaning attributed to the participation of a public entity to the self-regulatory arrangement. In some case it would be contract law in other cases administrative law.

In the second case contracts are still produced by one category (firms) or by two private groups (firms and consumers) but the public entity can provide the legitimacy to broaden the effects of those contracts beyond the signatories.

Symmetrically for the organizational model: we can have dual-stakeholder model in which firms and consumers, individually or associated, create an organization whose activity is legitimated *ex ante* or *ex post* by the government or multi-stakeholder organizations where the government participates directly into the organization. Direct or indirect governmental participation may affect not only governance issues but also the nature of the regulatory activity and its effects on third parties.

It should be mentioned that in countries where consumer protection is perceived as a public interest function, the role of the associations is

mainly performed by public or quasi-public entities. In these cases contracts are signed by the trade associations and the Consumer Ombudsman or Consumer Agency.<sup>[37]</sup>

To conclude, we can have different types of contractual and organizational arrangements aimed at contributing to produce contract rules in BtoC and BtoB relationships.

Contractual agreements, designed to define contract terms, can take the following forms:

- A1) Single-stakeholder agreements (only among firms)
- A2) Dual-stakeholder agreements (between firms and consumers or different firms)
- A3) Multi-stakeholder agreements (firms, consumers, government, IRAs, etc).

Organizational arrangements can also be subdivided in three categories:

- O1) Single stakeholder organization (only among firms)
- O2) Dual stakeholder organization (between firms and consumers or different firms)
- O3) Multi-stakeholder organization (firms, consumers, government, IRAs, etc.)

These distinctions are relevant for the reasons outlined above, ie the effects of contracts, and the activity of the organizations may be different according to the identity and powers of the participants.

Table 1

	One-sided (single stakeholder)	Bilateral (dual- stakeholder)	Multilateral (multi-stakeholder)
Contractual	Only among firms	Between trade and consumer (or other trade) associations	Among trade, consumer associations and public actors
Organizational	Composed only of firms	Composed of trade and consumer (or other trade) associations	Among trade, consumer associations and public actors

	One-sided (single stakeholder)	Bilateral (dual- stakeholder)	Multilateral (multi-stakeholder)
Contractual	Only among firms	Between trade and consumer (or other trade) associations	Among trade, consumer associations and public actors
Organizational	Composed only of firms	Composed of trade and consumer (or other trade) associations	Among trade, consumer associations and public actors

The content of these contracts when they regulate BtoC transactions has to be scrutinized under both competition law and contractual unfairness. The content of these contracts when they regulate BtoB transactions has to be scrutinized under competition law and unfairness either partially (see the case of late payment directive) or totally, when unfair contract terms scrutiny is applicable to all contractual relationships, including business to business. As we shall see these variables have a legal relevance both in contract for the purpose of determining fairness and in competition law.

Table 2

	Contract	Organization
Regulatory contracts	Agreements Concerted practices	Decisions by associations of undertakings

I will first explore in greater depth the alternatives above defined. Then I will identify some features of the competition scrutiny and unfairness scrutiny, and finally examine some possible reasons for variations of competition and (un)fairness evaluation in different legal systems.

To what extent might the nature of the self-regulatory body that defines the standard terms affect the regulatory output, i.e. the contractual models?

The organizational alternative implies the relevance of the composition of the self-regulatory body and the representation of different interests.

In the contractual alternative, the nature of the parties who participate in the agreement affects the nature of the regulatory contract. If the regulatory contract is defined only by undertakings it is a unilateral act, if both manufacturers and consumers participate it is a bilateral contract, if other constituencies participate is a multilateral contract. To the extent that legal systems differentiate the legal regimes of these acts there are differences.

The organizational perspective incorporates the alternative as a matter of composition of the body. If, within the self-regulatory body, only manufacturers are represented, the regulatory contract would only be a unilateral act or a contract of adhesion.<sup>[38]</sup> If in the organization both categories are represented, would the framework contract or the code of conduct have contractual basis? If this approach is accepted then the composition of the regulator would affect the nature of the act. If the composition is multi-stakeholder then the contract will be multilateral.

When contract terms are defined by an association of undertakings a question might arise as to the nature of that organization and the amenability to judicial review of the activity it performs. The regulatory contract in this case could be scrutinized under aspects impossible to scrutinize if the standard forms were simply the outcome of a contractual agreement of a purely private self-regulatory body.

Other relevant factors concerning the organizational models may be the for-profit or non-profit form of the organization and the gratuitous or non-gratuitous nature of the activity. The question is whether we can expect different outputs (standard terms and contracts) from for profit or non-profit organizations, and from selling arrangements or gratuitous ones but also how these differences may play out in competition and contract law.

Most of the organizations that produce standard contract terms and forms have a non profit form. However, this should lead not to the conclusion that they pursue charitable goals. They are typically mutual and they supply these forms to their members, which are for profit enterprises. They act in their own self-interest and in the interest of their affiliates. As it is the case for competition law purpose this distinction should not play a big role.

A more convincing perspective to distinguish among private rule makers supplying standard contract forms, is related to the distinction between mutual and public interest organizations. The former pursuing exclusively the interests of its members, the latter aiming at public interests.

The real difference among private rule makers might be between independent and not independent organizations.<sup>[39]</sup> There are some organizations that are independent from both suppliers and consumers that produce SCF. They generally operate in the international market. If we were to make a distinction between different regulations concerning standard forms this distinction, more than for profit/non profit, should be the one to look at.

There are two final points worth mentioning, concerning both contractual and organizational models.

One aspect is related to the nature of the produced services or goods. Whether these terms and contracts are sold in the market or are simply supplied gratuitously might make a difference in terms of the nature of the output and may play a role in the institutional design concerning the use of self-regulation and co-regulation at European level.

The other aspect is related to the legal protection of the regulatory output. Often SCF are copyrighted or protected through unfair competition law. An open and relatively unexplored question concerns the relationship between the modes of diffusion (for sale/gratuitous) and the nature of protection (copyright/unfair competition).[\[40\]](#)

Furthermore suppliers and users of contract terms and forms may have different preferences. Often there is segmentation on both sides and private organizations that are monopolists try to balance these interests internally through their governance systems, those which operate in a competitive setting tend to maximize their members' welfare at the expenses of other segments of the contracting population. Analogous reflections can be made for contractual models. In both cases competition law preserves the heterogeneity of the preferences system.

#### 4. *Contract standardisation and the nature of SCF: Coupling competition and contract law controls*

SR and more generally private rule making encounter limits based on:

- (1) competition law and policy, related to questions of both whether and how to regulate, and
- (2) contract law, mainly related to the mode of standardisation and the content of contract clauses, particularly unfairness.

Competition law addresses a broad range of regulatory activities performed by private regulators, through the use of contract and organisational laws. The forms may vary when there is pure self-regulation, delegated self-regulation or co-regulation.[\[41\]](#) Unfairness analysis under contract law also differs if standardisation is purely private or is mandated by a public authority.

I would like to focus specifically on the limits on standardisation as a form of self-regulation. Standardisation and differentiation of contracts

represent one feature of self-regulation of contract law worth focusing upon.<sup>[42]</sup> Trade and professional associations generally operate as contract standardisers but there are other forms of governance concerning standard contract terms which are less one-sided. Examples within SCF range from stock exchanges to sports associations. At the international level the different organisations of Chambers of Commerce define SCF. In the latter case the role of contractual or organizational arrangements is to govern differentiation of contractual terms in ways compatible with the functioning of industry. In addition to drafting contract forms they can issue guidelines concerning principles or general rules that ought to be implemented in drafting SCF. Negotiated private regulation operates also as a revision mechanism when clauses in SCF, previously held legitimate, are considered void due to new legislative intervention.

At transnational level the problem is concerned with the governance of *lex mercatoria* and the different models of self-regulation.<sup>[43]</sup> The question of standardisation in this case takes different forms. They may produce both positive and negative effects. It is very difficult, if not impossible, to define *ex ante* the optimal level of contract standardisation/differentiation.

The benefits of standardisation concern both firms and consumers.<sup>[44]</sup>

The incentives to standardise may exist independently from anticompetitive goals. The problem thus is to distinguish between competitive and anticompetitive standardisation. The proposed criterion is the incompleteness of standardisation: to be compatible with competition, standardisation of contracts should not be complete.<sup>[45]</sup> Differentiation of SCF may produce positive effects. It promotes competition among firms and it enhances freedom of consumers' choice.<sup>[46]</sup> Differentiation can also produce negative effects by increasing consumers' research costs and decreasing contracts and products comparability.

There are limits to standardisation in the interest of consumers and that of competitors. Standardisation can be scrutinized under competition law and under unfair contract terms. In addition, further scrutiny of contract standardisation may occur in regulated sectors where public or private regulators have to control the content of contracts and their compliance with regulatory goals.

According to competition law, standardisation should not be abusive, i.e. it should not be a means to introduce contract clauses



imposing unfair burdens on consumers. Consumer welfare would be negatively affected in both cases but in different ways. In fact there can be anticompetitive but not abusive contract standardisation.<sup>[47]</sup> On the other hand there might be abusive standardisation, unlawful under the Unfair Contract Terms Directive, but compatible with competition law.<sup>[48]</sup> As we shall see abusive standardisation is different from anticompetitive and has a different meaning under competition and consumer contract law.

A second issue concerning the limits of self-regulation in relation to standardisation is related to the modes of negotiating standard contract terms. Under directive 93/13, Article 3 § 2, individually negotiated terms fall outside the scope of the directive and judges can test unfairness only using general contract law.<sup>[49]</sup> When terms have not been individually negotiated they are subject to scrutiny under the unfair contract terms directive. A standard contract term is considered unfair if, contrary to the requirement of good faith, it causes a significant unbalance in the parties' rights and obligations.<sup>[50]</sup> The good faith requirement has been differently interpreted in MS according to their national traditions.<sup>[51]</sup> The ECJ has explicitly recognised the importance of national laws for the evaluation of unfairness.<sup>[52]</sup> The unfair contract clause is not binding on the consumer.<sup>[53]</sup>

No specific rules are provided in the Directive to distinguish between individual and collective negotiations. The specific reference to individual negotiation implies that collectively negotiated SCF fall within the scope of the Directive, since the directive is aimed at conferring rights upon individual consumers. Thus bilateral or multilaterally negotiated SCF, as defined above, should be subject to judicial scrutiny to test their compliance with rules concerning unfair contract terms. The legal effect of collective negotiation is not to deprive individual consumers of their individual rights if the terms negotiated by consumer associations are unfair. This interpretation, while increasing the level of individual consumer protection, weakens the strength of collective negotiations. It is worth suggesting that a different interpretation of fairness may be introduced if the clause not being individually negotiated has been collectively negotiated.

In competition law, negotiated SCF have not been treated much differently from unilaterally defined standard contract forms.<sup>[54]</sup> While collectively negotiated SCF may have a strong political impact on the rate of litigation, legally they do not deprive individual consumers of their rights to claim unfairness. To acknowledge the role of collective negotiations and more in general of self- and co-regulation may imply some



changes in current European law.<sup>[55]</sup>

Proposals for reform, though in a different domain, have been advanced by the Green Paper on the *Acquis Communautaire*.<sup>[56]</sup> In particular it is worth mentioning three aspects (1) the scope of application of the EU rules on unfair contract terms, (2) the list of unfair terms, and (3) the scope of unfairness test.

In relation to the scope of application one of the three options is to apply the unfair contract terms to individually negotiated terms while no specific indications are provided for collectively negotiated terms.<sup>[57]</sup> As to the fairness test, one of the options is to extend fairness evaluation to the main subject matter of the contract and to price adequacy.<sup>[58]</sup>

The more general question raised by the Green Paper on the *Acquis Communautaire* concerns the opportunity to introduce at the EU level a general duty to good faith and fair dealing in consumer law.<sup>[59]</sup> Here the question is related to the interpretation that such a clause would have if SCF are negotiated between trade and consumer associations. But also to the effect that negotiations among associations over SCF may have on the fairness of individual clauses.

##### 5. *The competition law limits to using self-regulation in European contract law*

The relationship between competition and consumer law has been the recent focus of scholarly debate, echoed by institutional interventions.<sup>[60]</sup> The nature of this relationship is very relevant for the questions we are addressing from both an institutional and a substantive standpoint. The main issues concern the nature of the relationship between the two areas, their scopes and functions.<sup>[61]</sup> Are consumer and competition law functional complements or equivalents when promoting consumer welfare? If consumer law is mainly interpreted as a regulatory field how can it complement competition law?<sup>[62]</sup>

It should be pointed out at the outset that in MS there are very different traditions concerning the role of trade associations, consumer associations and public authorities for the creation of contract law rules, SCF in general and specifically consumer contracts. While in Nordic countries the role of consumer associations is relatively weak and trade associations negotiate their standard terms with public entities, Ombudsmen and Consumer Agencies, in other MS they are more powerful because entrusted of public functions.<sup>[63]</sup> Finally in a third group of MS bilateral negotiations are more common and the public authority intervenes, if at all, only *ex post*.<sup>[64]</sup> In a multilevel system the institutional design related to the use

of SR should be able to incorporate these different traditions.

As described elsewhere the concept of private regulation goes beyond pure self-regulation.<sup>[65]</sup> Thus not only pure forms of self-regulation but also delegated self-regulation and co-regulation translating into drafting of standard contract forms will be considered to examine competition law controls.<sup>[66]</sup>

The competition limits are defined in articles 81 and 82 of the Treaty as interpreted by the Commission and the ECJ, and specified in Guidelines issued by the Commission.<sup>[67]</sup> The ECJ case law, applying competition law principles to self-regulatory arrangements, is very rich in relation to agreements or decisions where there is some public intervention either *ex ante* or *ex post*. Less rich is the case law regarding bilateral agreements between trade and consumer associations concerning SCF, except for cases in which these agreements are imposed by law featuring mandated or delegated self-regulation.

The analysis is focused in general on SR arrangements with special but not exclusive emphasis on SCF concerning business to consumer transactions. It is related both to consumers of goods and services.

There are normative differences related to sectors and in particular between those where contract terms define the product, as it is the case for insurance, credit or securities, and those where contract terms are instrumental to the exchange. In certain areas, for example insurance, European Regulations with block exemptions have been enacted so as to permit contract standardisation.<sup>[68]</sup> When looking at the limits imposed by competition law on self-regulatory arrangements, it becomes clear that they differ between firms producing goods and undertakings producing professional services.<sup>[69]</sup> This distinction is less relevant in relation to industry-provided services as the banking and insurance sectors show.<sup>[70]</sup>

To evaluate competition limits to the use of SR in ECL three issues have to be addressed:

- a) The framing of these agreements/arrangements for competition law purposes.
- b) The applicability of competition law to different types of private regulatory arrangements.
- c) The types of control and the effects on these arrangements once competition law is deemed applicable.

How are self-regulatory arrangements framed for the purpose of competition law scrutiny?<sup>[71]</sup> There is a relative symmetry between SR

arrangements and the different typologies considered by competition law as the following table shows.

Table 3

	Single-stakeholder	Dual-stakeholder	Multi-stakeholder
Contractual SR Agreements (Art. 81)	Contracts only among firms	Bilateral contracts between associations. <i>I.e.</i> between trade and consumer (or other trade) associations	Multilateral contracts. Among trade, consumer associations and public actors
Organizational SR Decisions of undertakings (Art. 81)	Organizations composed only by firms	Association of associations. Composed by trade and consumer associations	Association of associations. Among trade, consumer associations and public actors
Usages/Customs Concerted practices			

As the table shows the different models of SR examined above are well reflected in the competition law regime.<sup>[72]</sup> Certainly the formal differences between contract and competition law are still very relevant and for good reasons since contract and competition law perform different functions.<sup>[73]</sup> However, these differences are not such as to prevent a comparison between competition and contract for the purpose of a unified theory of self-regulation in European Contract Law.

The contractual model of self-regulation is reflected in the category of agreements in competition law while the association of undertakings can be related to the organizational model.<sup>[74]</sup> It is unclear what the functional equivalent of concerted practices can be in the field of self-regulation. Perhaps some correlation with customs and usages can be drawn but a full analysis of this comparison is beyond the scope of this essay.<sup>[75]</sup> We can therefore distinguish between contractual and organizational self-regulatory arrangements in competition law as well.

Within this framework, is the distinction between single, dual and multistakeholder agreements/organizations relevant in competition law?

Can organizations where there is bilateral (firms and consumers, or firms with different market powers) or trilateral representation (including public actors or other private organizations) be considered associations of undertakings or agreements for the purpose of Article 81? Is the applicable test different from that applied to single-stakeholder agreements and

organizations? Can agreements, signed by trade and consumer associations and approved by public authorities, be considered scrutinisable under Article 81 EC? In the case of an affirmative response, should they be scrutinized under competition law, or should they be exempted, if their main goal is to pursue consumer protection and/or public interest?

At the core of these questions is the issue concerning the relevance of the nature of different participants to self-regulatory arrangements.

On the one hand the difference between single and dual stakeholder organizations, and in particular the role of consumers associations may suggest that a different set of rules may be put in place. On the other hand the participation in different ways of public authorities may affect the nature of the self-regulatory body and its activity. In simple words, what is decisive to define the threshold for the application of competition law? Who they are, or what they do?[76]

The European Commission and the European Court of Justice are always forced to enter a functional examination of the role played by the participants to the self-regulatory arrangements and of which interests they are meant to represent. The difference between the private or public nature of the regulatory body is crucial for the purpose of state action defence. But, even when the regulator is clearly private, the applicability of competition law may be questioned if there has been delegation or ex post approval by a public entity of the regulatory activity performed by the private regulator. The inapplicability of competition law provisions, due to the public nature of the regulator, may bring about a control under the principles related to the four freedoms.[77] Though not necessarily alternative instruments often the boundary between private and public has been associated to that of competition and freedoms.[78] Competition law control and “four freedoms” based control can complement each other in relation to private regulation. In terms of the applicability of the relevant treaty provisions, it should be noted that the free movement of workers and the freedom of establishment/to provide services clearly have “horizontal direct effect”, [79] so that private regulation can be voided and private entities can incur civil liability for restricting these freedoms. With respect to the free movement of goods and the free movement of capital, the situation is not entirely clear, in the absence of a direct judicial pronouncement from the ECJ.[80] Many Article 28 cases have demonstrated a willingness on the Court’s part to interfere with decisions made by private actors, albeit always with some linkage to “state action”, either in the form of legislation allowing a restrictive decision to be taken or the public powers of a professional association that took a restrictive decision.[81]

Let us first examine the criteria to define the public/private nature of the regulatory body.

The nature of the participants in the association defining standard forms, or the signatories to the agreement is certainly a significant feature but not a decisive element to decide whether or not 'competition law control' should apply. If they represent the public interest and not only that of one category, particularly of firms, these decisions are more likely to be held compatible with competition law.<sup>[82]</sup> A frequent example is setting tariffs. In case of delegation to private bodies the rule defined does not lose its legislative character if two requirements are met (a) the explicit considerations of public interest (b) the expertise based nature of the deliberative body. If they do not occur the private body is exercising rule making power subject to competition law scrutiny unless it is subject to ex post approval by the State.<sup>[83]</sup> From a normative perspective the path along the public/private nature of the participants to the agreement or the association does not seem very promising. While relevant, this criterion should not be decisive to decide on the applicability of competition law.

Let us now move to an analysis of the differences among private participants. How does the composition of the rule-making body impact on the applicability of competition law, whether it is a formal organisation or a group of parties engaged in a contractual relationship? While it would be inappropriate for the purpose of deciding the applicability of competition law to distinguish between associations composed only by undertakings and associations with mixed composition, i.e. associations composed by both undertakings and consumers', it is clear that the latter should require a different approach when internal power's allocation reflects public interest's concern. This should imply the recognition of the specificity of negotiated self-regulation, both when it is bargained only among firms or between firms and consumers, and when public actors also participate in the drafting of codes of conduct or of standard forms contracts. Currently the negotiated nature of the agreement among different private associations does not play any meaningful role but the presence of signatories, such as consumer associations, may be revealing of public interest. In this case it should affect not the applicability of competition law but the nature of the applicable test.

A more difficult question concerns organizations and agreements where the State or a public agency is directly represented in the regulatory body. We call these bodies as hybrids. Here the divide between pure self-regulation and delegated private regulation becomes blurred. In other contexts, the substitution power by the public entity, when the activity of the self-regulatory body is unlawful, has been used to decide on the

applicability of Article 81.[84]

Anticipating the conclusion: the question of whether and how competition law is applicable to standardisation of contract forms should be dealt using a different approach from that currently employed by Commission and ECJ. The scrutiny should address the rationale for public participation into the self-regulatory arrangement in order to evaluate whether the public interest, represented by public actor's intervention, (1) justifies the limits to competition introduced by standardization, (2) should bring about modifications for the test used to analyse anticompetitiveness or (3) should permit exemption.[85]

6. *Applicability of competition law to codes of conduct and other self-regulatory arrangements influencing the formation of European contract law*

I now turn to a more detailed analysis of the distinction between different self-regulatory arrangements, characterized by the absence/presence of public authorities in competition law, and delegated self-regulation or co-regulation.

When is competition law applicable to self-regulatory arrangements? The answer is related to different kinds of SR arrangements, and in particular to the distinction between pure SR and delegated SR or co-regulation.[86] Do EU institutions have different criteria according to the regulatory model employed in each sector to decide whether and how competition law is applicable?[87] When do self-regulatory arrangements become state measures and the state action defence becomes applicable?

Two hypotheses should be distinguished: one where it is possible to decide whether the regulator is public or private, the other where the private regulator acts within delegation by a public entity or its activity is subject to ex post approval. For example whether (1) the principles concerning SCF are ex ante defined by the legislator or by the public regulator and then specified by the private regulator, or (2) when the latter is given the power to directly draft SCF but they have to be approved by a public entity before becoming effective.

The two major sets of cases concern the breach of competition law provisions by undertakings (Articles 81, 82 and 86) on the one hand, and the breach of the same provisions read together with Article 3 § 1 (g) and Article 10 of the Treaty by state measures, on the other hand.

Before entering a more specific analysis concerning different regulatory



modes, some general remarks on the distinction between the legal nature of the rule-maker and that of the regulatory activity, may be useful.

The Commission and the Court are not always clear when they use criteria to decide the applicability of Articles 81 and 82 to private regulator, to regulatory activity, or to both. In other words they sometimes apply the private-public divide to the regulator and sometimes to the regulatory activity. As I shall show later, the preferable criterion is that related to the activity, and those elements associated with the legal form of the private regulator should only be used as a proxy for defining the relevant features of the activity and its potential effect on competition.<sup>[88]</sup>

The question of applicability of competition law is partly related to the legal form of the regulator and partly to the regulatory strategy. When the public-private nature of the regulator is at stake an analysis of the nature of the association of undertakings is needed. In particular, the issue is: when does a professional body or a trade association, engaging in delegated self-regulation or co-regulation, act as an association of undertakings for the purpose of article 81 EC Treaty?<sup>[89]</sup> An association of undertakings does not have to engage in economic activity itself in order to be subject to Art 81.<sup>[90]</sup> The criterion is that its action should affect the economic sphere.<sup>[91]</sup> Private rule making can therefore be considered an economic activity for the purpose of competition law.<sup>[92]</sup>

Competition law is applicable only if the private regulator can be considered an association of undertakings for the purpose of Article 81 or a dominant undertaking for the purpose of Article 82. Alternatively it would be possible to consider the undertakings as separate entities and evaluate whether the code of conduct or the framework agreements they sign qualify as an agreement for the purpose of Article 81.

It is important to consider, from a competition law perspective, two features, already underlined in the definition of organizational models.

- a) Does the legal nature of the association have any relevance?
- b) Does the composition of its membership play a significant role? In particular, how does the distinction between associations of experts and association for interest representation play out?<sup>[93]</sup>

The first question can be broken down into more sub-questions related to the definition of association of undertakings for the purpose of applying competition law to self-regulation.

- i. Is it relevant that the association is itself qualified as an undertaking?
- ii. Is it relevant that the association is a for profit or non profit orga



nization?

iii. Is it relevant that the association has public or private status? In particular whether its board is nominated by private organizations, or by public entities? Whether the nominees, even if appointed by public entities, represent specific private interests or the public interests?<sup>[94]</sup>

The answers provided by ECJ can be summarised as follows. Professional associations can be controlled by competition law for their economic activity but not for their deontological activity, insofar as the specific deontological measures are necessary for the proper conduct of the relevant profession.<sup>[95]</sup> The association does not have to carry out economic activity itself to be subject to competition law scrutiny.<sup>[96]</sup>

As to the distinction between pure self-regulation, delegated regulation and co-regulation in relation to competition law, ECJ has developed taxonomy of different possible roles of public authorities in relation to agreements and decisions of associations, most of them related to the role of SR.<sup>[97]</sup> This taxonomy is due to the general principle that competition law applies to undertakings, and does not apply directly to States. However, early on the ECJ pointed out that according to articles 3(1), 10, 81, 82 of the EC treaty States have to comply with the duty of loyal cooperation and can not enact measures that violate community law.<sup>[98]</sup> Private regulatory arrangements in which not only individual firms and trade associations but also public authorities are involved can be scrutinized under competition law as long as they translate into economic activity and the agreement has been made or the decision has been taken by an undertaking or an association of undertakings.<sup>[99]</sup> An association of undertakings, which has been delegated regulatory power, has to comply with competition law rules.<sup>[100]</sup> When there is delegation, the main question is whether the delegated activity can be considered state action, thus subject to the state action defence, or can be qualified as private action, subject to competition law rules. The applicability of article 81 and 82 can only be excluded if the association is a public authority and does not exercise economic activity.<sup>[101]</sup> Such a development has broadened the scope of economic activity and has widened the definition of undertaking and associations of undertakings.<sup>[102]</sup> Article 10 in conjunction with Articles 81 and 82 of EC Treaty limits delegability of rule making powers, including drafting of SFC, to private organisations by States and other rule making public authorities.<sup>[103]</sup> When the principles set out in the delegating Act violate competition law, national competition authorities and Courts can dis-apply the delegating Act and scrutinise the activity of the delegate.<sup>[104]</sup> The crucial question is the level of discretion the delegatee enjoys when exercising the delegated power to define SCF. The

higher the level of the discretion in setting tariffs or determining other potentially anticompetitive clauses the more likely the scrutiny of competition law.

In sum: when competition law is not applicable alternative control can be exercised under the four freedoms.<sup>[105]</sup> Regulation by hybrids can be scrutinized according to the subject matter in relation to the different principles and if it amounts to an obstacle the regulation can be voided. It is well known that different principles apply to freedom of goods, services and capitals. In the former the distinction between public and private entities still plays an important role, although the application of Article 28 of the Treaty has, arguably, been applied effectively to private organisations, while Article 56 may also be found to have the same effect.<sup>[106]</sup> In relation to freedom of services and establishment, the applicability to private organisations has been admitted explicitly by the ECJ.<sup>[107]</sup> A full account of the control over private regulation under the four freedoms is however beyond the scope of this essay.

#### 7. *Distinguishing self-regulatory arrangements in competition law*

When competition is deemed applicable to self-regulatory arrangements, then agreements, decisions of undertakings and concerted practices are scrutinized to verify whether they are, in fact, anticompetitive.

The Commission considers contractual terms and SCF as an agreement or decision of undertakings within Article 81 § 1.<sup>[108]</sup> The ECJ confirms such a view.<sup>[109]</sup> Within agreements, not only binding contracts between different categories of firms but also unilateral acts (i.e. codes of conduct) enacted by firms of the same sector can be scrutinized.<sup>[110]</sup> These unilateral acts may have effects on third parties regardless of their formal consent. However, recently greater attention has been paid to effective consent in relation to agreements between producers and distributors.<sup>[111]</sup>

Agreements are generally made among firms.<sup>[112]</sup> But agreements concerning unfair contract terms can take place among undertakings and consumers, therein endorsing the dual-stakeholder pattern. The participation in the agreement of a consumer association or its consent does not however alter the applicable test. In the absence of a direct precedent on this specific point,<sup>[113]</sup> we can reach the conclusion that, according to current interpretation, collectively negotiated agreements would be subject to the same scrutiny as unilateral acts unless this negotiation reflects public interest concerns that may trigger exemption (or even downright exclusion from the scope of Article 81 altogether).<sup>[114]</sup>

The problem of standardisation is well known. To the extent that SCF are defined by associations or groups of firms they have to meet the competition threshold. How far should firms go in standardising contract terms so as to maintain a sufficient level of competition?<sup>[115]</sup> Economic theory has provided useful insights on the degree and the content of standardisation compatible with competition law.<sup>[116]</sup> National authorities apply this standard to some extent.

As to the organizational model, both the constitution of an association and its operations may be scrutinized under competition law. When SR operates through an organizational model, the scrutiny mainly concerns the decisions by associations of undertakings. The very constitution of a trade association has been qualified both as a decision and as an agreement.<sup>[117]</sup> The Commission also considers recommendations concerning the adoption of SCF to be decisions of associations of undertakings under Article 81 § 1.<sup>[118]</sup>

The boundaries between agreements and decisions of associations of undertakings are not well defined but, since the consequences do not greatly differ for the purpose of application of Article 81, I will not focus on this distinction.<sup>[119]</sup> One distinction that may be quite relevant is that between conduct scrutinised under Article 81 and conduct scrutinised under Article 82. For example, Article 82 is of little help when one deals with price-fixing (or fixing of other trade terms) as such, as that article looks at whether the prices or conditions - howsoever determined - are abusive.<sup>[120]</sup> Similarly, Article 81 may be less useful than Article 82 when one deals with conduct that consists of simple discrimination between categories of consumers, with no adverse impact on the process of competition.<sup>[121]</sup> In the latter scenario, an argument could, perhaps, be made to the effect that Article 82 scrutiny of such conduct may approach the fairness standard adopted under Directive 93/13.

Under article 81 the crucial points concern the nature of the decision and its effects, in relation to the members of the association and third parties. It is relevant whether these decisions are binding or non-binding on the members, and whether they are price-related, directly or indirectly, or not.<sup>[122]</sup>

Generally, associations define SCF to be used both by their members among themselves, and with third parties, other firms in case of BtoB transactions, or consumers in relation to BtoC transactions.

If these recommendations are binding they tend to be considered almost *per se* unlawful, particularly when they define prices or

determine contractual clauses relevant for price determination or when they offer absolute territorial protection to distributors.<sup>[123]</sup>

Non binding yet price-related recommendations concerning contract clauses are scrutinised under article 81; if they affect competition, they are generally found to be unlawful.<sup>[124]</sup>

Binding but non-price related decisions are generally considered less strictly.<sup>[125]</sup> The category more likely to be held compatible with competition law is that of non binding and non price-related SCF.<sup>[126]</sup>

Thus the test for binding and non binding recommendations tends to be different, the former stricter, the latter lighter,<sup>[127]</sup> not least due to the significant reduction in the evidentiary burden effectively borne by the competition authority in the former case. It is clear, however, that non-binding decisions and agreements can be unlawful under Article 81.<sup>[128]</sup> Thus, the position with regard to Article 81 may be summarised as in the following table:

Table 4

	Price-related	Not-price related
Binding recommendations	Almost always unlawful	Depends
Not binding recommendations	Often unlawful	Generally lawful

National competition law authorities have developed different criteria concerning the test of compatibility of SCF recommended by associations with competition laws.

What is the relationship between the scrutiny of standard forms concerned with competition law and that of administrative or judicial authorities concerned with fairness in contract law? To what extent is the evaluation of the anticompetitive nature of agreements or decisions affected by considerations of fairness? Do competition and contract law overlap in this respect?

Contract fairness in standard contract terms affects how standardisation can occur more than what can be standardised. In relation to the selection of what can be standardised it has been held that time and method of delivery of goods should be left to individual agreements.<sup>[129]</sup> Fairness affects primarily modes of standardisation. A standardised contract clause may be allowed or forbidden according to its fairness i.e. depending whether it creates an unbalance of rights and obligations and violates the good faith principle (Article 3, Directive 93/13 EC).<sup>[130]</sup>

It is very rare that fairness, as defined by directive 93/13 and national laws, is explicitly mentioned by competition authorities, but there are important signs that often the scrutiny concerning the anticompetitive nature of standard contract may be influenced by implicit fairness considerations.<sup>[131]</sup>

Firstly, Regulation 358/2003, where exemption is conditional upon the absence of a significant imbalance between rights and obligations arising from the contract.<sup>[132]</sup> The language reflects that of Dir. 93/13. Many of the listed clauses, whose presence would not allow exemption, seem to be inspired more by fairness conditions than by anticompetitive effects.<sup>[133]</sup> This is so, to a large extent, due to the fact that one of the four requirements for exemption under Article 81 § 3 is “a fair share” being given to consumers. Clauses which are directly prejudicial to consumer interests may, therefore, preclude the Commission from finding that a restriction of competition is offset by countervailing improvements for consumers.

Secondly case-law at ECJ level and national level consider fairness aspects; even if no explicit references to fairness occur, often the same clauses considered unfair are objectionable from a competition law perspective.<sup>[134]</sup>

An open question concerns the influence of the institutional framework on the degree of overlap between competition and contract law. While functionally distinct, these two limits can certainly influence each other. We can distinguish between the different timing of control in competition and contract law. Ex ante competition control is exceptional and more so after Regulation 1/2003.<sup>[135]</sup> It normally occurs only when informally the Commission or a national authority is asked to give an opinion on the SCF. When only ex ante competition law control was available because the individual MS had chosen judicial ex post control and rejected ex ante administrative control in contract law it may have happened that the Competition authorities were influenced also by fairness consideration. On the contrary, when two different institutions control ex ante the potential anticompetitive nature and the potential unfairness, it is more likely that the two tests are kept separate and independent. Now that ex ante control has been abolished no institutional overlap can occur. Therefore competition law and contract law control can bring about different results if the substantive tests concerning anti-competitiveness and fairness are kept functionally separate though coordinated.

### III. STANDARD SETTING, SELF-REGULATION AND EUROPEAN CONTRACT LAW: SOME PRELIMINARY CONCLUSIONS

The space of private autonomy, occupied by collective entities that define SCF and more in general rules concerning firms' and consumers' conducts, is wide both at European and national level. It tends to be broader in regulated sectors.

Two different sources of self-regulation have been distinguished in relation to European Contract Law: one is concerned with general contract law the other with SCF. We have recalled the distinction between purely private self-regulation, delegated private regulation and co-regulation.<sup>[136]</sup>

Different forms of private regulation operate within each sector. The influence of self-regulation on contract law making is relevant in financial markets but also significant in telecom, media, and, to a lesser extent, in energy, gas and transport, except for the environmental aspects.<sup>[137]</sup> In regulated markets the use of co-regulation is higher than in unregulated markets where pure self-regulation is more relevant, and direct or indirect participation of IRAs or governmental actors is relatively frequent in the definition of SCF, thereby determining co-regulatory arrangements.

Currently, the differences between purely privately negotiated agreements among associations of undertakings and agreements simply favoured, promoted or required by the law is significant. In this field the legitimacy of regulated self-regulation is much higher than that of purely privately negotiated self-regulation. However further research, in particular empirical research, is needed to verify whether standard contracts, produced by pure self-regulation, differ extensively from those produced within a regime of regulated self-regulation or co-regulation.

There is no specific regime concerning self-regulation at European level. It would be important to produce at least general guidelines, given the divergences existing at MS level.<sup>[138]</sup>

The contribution of SR to European Contract Law is mainly related to enabling rules. Trade and consumer associations define standard contract terms and other rules within the space left by the European or the national legislator either by deviating from legislative default rules or by specifying and integrating them. There is some role for specifications of mandatory rules and general clauses such as good faith or public policy.<sup>[139]</sup> In the first hypothesis SR can substitute enabling rules, in the second it integrates mandatory rules or general principles.



The relationship between co-regulation and European Contract Law is potentially different. Co-regulation, being generally based on a legislative act, allows changes of mandatory rules by private organizations to the extent permitted by the statute. It may empower private organizations with limited law making power. Unlike national systems, where co-regulation can affect the mandatory nature of a contract rule by transforming it into an enabling one, the European legislation in contract law has so far not used this approach extensively.<sup>[140]</sup>

We have seen that different self-regulatory models are used to concur to the creation of European Contract Law: contractual and organizational.<sup>[141]</sup> In terms of its effectiveness the relevant distinction is between unilateral and negotiated formation of contract law. Unilateral definition of rules should be subject to stricter control to prevent abusive exercise of private regulatory power. However, according to Directive 93/13, while individually negotiated contracts are subject to a different regime, collectively negotiated SCF are usually treated as unilaterally enacted standard forms in relation to the fairness control, therefore subject to the principles stated in the directive. Fairness control over SCF ensures that self-regulation is directed at enhancing freedom of choice and therefore freedom of contracts of consumers.<sup>[142]</sup>

Competition law contributes to define the limits and constraints of the use of self-regulation. The benefits of self-regulation are particularly high in relation to contract standardization. Furthermore it can favour the integration of European market by coordinating undertakings operating in different national markets willing to widen their field of activity. Competition law limits the scope of self-regulation in relation to the creation of SCF. The competition control used to differentiate very strongly the test for applicability of Article 81 between pure self-regulation and delegated private regulation, qualifying the latter state actions and subjecting them to the state action defence. The reasons for such a disparity are far from clear, especially when delegation of self-regulation is attributed unilaterally only to one category as it is the case in many services supplied by professionals. Intuitively unlike purely private self-regulation co-regulation and delegated self-regulation can pursue public interests goals that can be balanced with the costs of reducing competition.

The influence of co-regulation and delegated SR on contract law in this are a is quite significant at MS level, but the degree of services' recipients protection from abusive exercise of private regulatory power is relatively low. The difference with the development of contract law, associated with the use of private regulation in securities and more in general in financial markets, is highly significant but difficult to justify. Recent developments in the E



European case law show that stricter tests will be applied to delegation in order to broaden the domain of competition law control to drafting SCF.<sup>[143]</sup>

Limitations are less relevant in relation to codes of conducts, where the nature of the framework rules is less likely to reduce competition among undertakings.

These limits are not in opposition to the rationale of using SR to create a European Contract Law. On the contrary they are consistent with a concept of freedom of contract based on the principle of private autonomy even if collectively exercised. Competition law is aimed at enhancing or preserving the space of contractual freedom of parties with lower market power. It only prevents abusive standardisation that reduces contractual and in particular consumers' choices and therefore would constrain freedom of contract.

Ensuring freedom of contract constitutes the main objective of both fairness control and competition control. In this respect they should be seen as functional complements more than as alternatives expressing conflicting values.

A coordinated system of SCF provided sector by sector can reduce undertakings and consumers' search costs without decreasing competition. General guidelines at EU level should be provided to define SCF at European level in BtoB and BtoC transactions.

In conclusion: rule-making in contract by private organizations is already very relevant at European level. This activity is subject to different types of scrutiny: the first is that of contract law, in particular the fairness control required by the unfair contract term directive. The second is provided by competition law. The limits on standardisation are quite relevant and formally they do not overlap with those of contract law because they pursue complementary goals.

The functional distinction between the two bodies of law operate as a double mechanism to allocate freedom of contract between organizations and individuals in order to preserve fairness within contractual relationships and competition within the market.

#### **IV. SOME (MODEST) PROPOSALS**

State monopolies on rule-making of European contract law show significant weaknesses. If they ever existed certainly they have today

disappeared. The necessity to complement the role of the States as rule makers with that of private, non necessarily market, actors, is emerging in the field of contract law in relation to the formation of the Common frame of reference (CFR).

In this contribution I have argued that democratically legitimated private organizations, both consumers and trade associations, currently have and in the future may play an even more important role as producers of European Contract Law rules. However private rule-making organizations differ quite substantially. Most represent private interest groups, others, still a minority, are independent organizations that produce contract terms and forms as part of their cultural mission. Some of them sell contract forms together with other services other provide them as public goods making them available for free. These distinctions should be considered both in designing the governance system related to European Contract Law and in regulating the boundaries between self and co-regulation.<sup>[144]</sup> Promotion of co-regulation should favour the birth and consolidation of independent regulatory private organizations without penalising current for profit organizations. The governance of these organizations and their accountability has overarching importance to ensure their legitimacy.

Contract rule makers can complement mandatory rules and general principles, enacted at EU level, by specifying them and substitute enabling rules when they do not fit with specific needs of their members and are compatible with general interests. The activity of private rule-making, both in the form of pure self-regulation and in that of co-regulation and delegated private regulation, is and should be limited by both competition law and contract law. Competition law defines what can be standardised, and what ought to be left to individual contracting parties. Standardisation has to be incomplete and does not have to define prices directly, and to some extent, even indirectly to be compatible with competition law principles. Contract law focuses on how standardisation should occur to preserve fairness.

As the essay demonstrated these limits do not contradict the general principles of European Contract Law, in particular freedom of contract. On the contrary they ensure that private rule-making operates to achieve the enhancement of freedom of contract and freedom of choices for consumers and small and medium enterprises. Competition law provides legitimacy together with democratic governance principle concerning the rule making function of these organizations. A regulatory framework should prevent private organizations exercising rule making from externalising costs on third parties to the extent that competition law does

not cure the problem.

While taken separately rule-making and monitoring, self-regulation seem to be quite effective, when burdened with multiple tasks and in particular with sanctioning their own members private organizations show some significant flaws. Compliance and enforcement has been one of the major weaknesses of the self-regulatory system.

New principles, emphasising liability to monitor and to enforce these rules have been introduced at national and European level in relation to State institutions. Stringent obligations on private organizations whose compliance is to be monitored by public authorities may warrant better results. New co-regulatory arrangements have to be introduced if private regulation is to gain a significant role in European Contract Law. Pure self-regulation may not warrant sufficient effectiveness.

The institutional design currently in place needs thus to be improved.

First the necessity to separate rule making and monitoring. When private organizations that complement public rule-making (state or international) also exercise monitoring powers some devices must be introduced like those provided by separation of powers and judicial review to avoid conflict of interest. Otherwise the organizations responsible for rule-making would coincide with those responsible for monitoring compliance with their own rules. Capture may be a risk and it has to be contrasted with adequate institutional devices. In this context it is very important to distinguish between single, dual and multi-stakeholder contractual arrangements and organizations. The higher the number of participants with conflicting divergent interests the lower the probability of conflict of interest. Or at least the lower the probability that such conflict will remain hidden.

On the side of contract law, the role of trade and consumer associations should be explicitly recognised and regulated at EU level but only through general principles. Even leaving in place the current significant differences among national models, where national legal systems adopt either more market oriented self-regulatory arrangements or more co-regulatory instruments, the function of private organizations can be further promoted as a concurring agent of harmonisation of European law. This is particularly relevant in heavily regulated market such as securities, banking, energy and telecom, where the dialogue with national regulators and European Committees is a necessary condition of ECL development.

On the side of competition law, the rationales for the differences

concerning the tests to scrutinize these agreements or decisions of undertakings have to be clarified. Two areas appear particularly problematic:

- 1) the differences between pure and delegated self-regulatory arrangements which affect the applicability of competition law and its effects;
- 2) the conditions for granting exemptions related to consumer interest protection and to public interest protection.

Private organizations have to change their cultural and organizational clothes as well. If they want to become democratically legitimated actors of Europeanisation of private law, they clearly have to operate in a coordinated dimension and to revise their internal governance rules. While it is appropriate that a process of coordination and integration among private organizations takes place, it would be useful that a certain degree of pluralism is preserved so that different legal cultures can continue to exist and some degree of competition takes place. This should occur at national but more importantly at transnational level. It is important that the networks of consumer organizations overcome national boundaries. They should have a transnational dimension and represent competing legal cultures. Their legal status as well as some general principles concerning their governance structure should be re-defined accordingly.

The role of self-regulation in the process of the creation of ECL is relevant but substantial changes at the institutional level are needed to improve the quality of its contribution. A challenge for European scholars and institutions is in front of us.

---

## REFERENCES

\* This paper was presented at the SECOLA conference in Prague, in June 2005. It has benefited from several comments. Thanks to H. Collins, S. Grundman, N. Reich and S. Whittaker for useful comments made to that presentation. I am particular thankful to Hans Micklitz, Mark Patterson and Heike Schweitzer for comments made on a later version. Thanks to Federica Casarosa, Barbara Gabor, Karstens Hoppe, Bjorn Lundqvist and Veljko Milutinovic for research assistance. Responsibility is my own.

[1] On the relationship between self-regulation and contract law see H. COLLINS, *Regulating contracts* (Oxford: OUP, 1999).

[2] An example in this area is provided by the activity of the International chamber of commerce which provides terms for international commercial contracts: The Uniform Customs and practice for documentary credits (UCP) and Incoterms (international commerce terms).

[3] BtoB refers to business to business relationships operating on equal arms. Btob, instead, refers to relationship between firms that operate in an asymmetric context

be it asymmetric market power or asymmetric information or caused by other factors.

[4] In securities the rulebooks developed by Stock exchanges, particularly Euronext. See *infra* note 141.

[5] On the role of private organisations in producing SCF within a governance perspective see F. CAFAGGI, 'New modes of governance in EPL' in F. CAFAGGI and H. MUIR WATT, *The making of European Private Law. Governance Design* (working title), forthcoming, EE, 2007

[6] Examples at a European level are: model forms of contracts (Agency, Distributors abroad, Consortium Agreement and International Technology License Agreement) and general conditions of contracts developed by the European Engineering Industries Association (Orgalime) available at <http://www.orgalime.org/publications/forms.htm> and <http://www.orgalime.org/publications/conditions.htm> (last visited March 18, 2007); standardised energy contracts developed by the European Federation of Energy Traders available at <http://www.efet.org/Default.asp?Menu=5> (last visited March 18, 2007); the European Master Agreement (EMA) sponsored by the European Banking Federation (FBE) in cooperation with the European Savings Banks Group and the European Association of Cooperative Banks; The SEPA (Single Euro Payments Area) Cards Framework developed by the European Payments Council available at [http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework\\_027\\_05\\_Version2%2000.pdf](http://www.europeanpaymentscouncil.eu/documents/SEPA%20Cardsframework_027_05_Version2%2000.pdf) (last visited March 18, 2007); Code of Conduct for EONIA SWAP INDEX prepared by the Euribor FBE available at <http://www.eoniaswap.org/Content/Default.asp?PageID=143> (last visited March 18, 2007); the Euribor Code of Conduct drawn up by the European Banking Federation (FBE), the Financial Markets Association (ACI), the European Savings Banks Group and the European Association of Cooperative Banks available at [http://www.euribor.org/html/content/euribor\\_code.html](http://www.euribor.org/html/content/euribor_code.html) (last visited March 18, 2007); codes of conduct (Code towards consumers and Code towards direct sellers) adopted by the Federation of European Direct Selling Associations available at <http://www.fedsa.be/main.html> (last visited March 18, 2007); Code of Conduct for European lawyers adopted by the Council of Bars and Law Societies of Europe (CCBE) and national codes of conduct available at [http://www.ccbe.org/en/documents/code\\_deonto.htm](http://www.ccbe.org/en/documents/code_deonto.htm) (last visited March 18, 2007).

Examples at national level: Allgemeine Geschäftsbedingungen der privaten Banken und andere Klauselwerke (General contract terms and clauses of private banks) prepared by the Bundesverband Deutscher Banken (Association of German Banks) available at <http://www.bankenverband.de/index.asp?channel=101758&art=936> (last visited March 18, 2007); Codice di Autodisciplina (Code of conduct) adopted by the Associazione Bancaria Italiana (Italian Banking Association) available at [http://www.abi.it/doc/home/conoscereBanche/sistemaItaliano/sistemaBancario/doc/tmp986312354513\\_3Codice\\_di\\_autodisciplinaz.pdf](http://www.abi.it/doc/home/conoscereBanche/sistemaItaliano/sistemaBancario/doc/tmp986312354513_3Codice_di_autodisciplinaz.pdf) (last visited March 18, 2007); Banking Code (March 2005) – Setting standards for banks, building societies and other banking service providers adopted by the British Bankers' Association available at <http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=347> (last visited March 18, 2007); Zasady Dobrej Praktyki Bankowej (Code of Best Banking Practice) adopted by the Związek Banków Polskich (Chamber of Polish Banks) available at <http://www.zbp.pl/site.php?s=NGQ3ZTBkNzIxMDc4> (last visited March 18, 2007).

[7] See below text and footnote 86 the Reiff case and the following jurisprudence.

[8] See Green Paper on the Review of the Consumer Acquis, Brussels 08.02.2007 COM (2006) Final.

[9] Concerning the relationship between the use of self-regulation, Standard Terms and Conditions and competition law, the Commission explicitly acknowledge the limits associated with competition law:

“The Commission does not intend at this stage to publish separate guidelines relating to the development and use of STC. It has already pointed out that it generally takes a positive approach towards agreements that promote economic interpenetration in the common market and encourage the development of new markets and improved supply conditions. Although agreements on the development or use of EU-wide STC will therefore generally be looked upon positively, in certain cases agreements or concerted practices to use STC may be incompatible with the competition rules”. See *European Contract Law and the revision of the acquis: the way forward*, Brussels, 11.10.2004 COM (2004) 651 final (hereinafter *ECL* and the revision of the acquis), p. 7.

[10] For an historical account until contemporary times see F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, Mulino, 2005, p.93 ff.

[11] See the Communication from the Commission to the European Parliament and the Council – A more coherent European Contract Law, an Action Plan, COM (2003), 68, final, part. 81-88. See also *ECL* and the revision of the acquis: “The second measure sought to promote the development by private parties of Standard Terms and Conditions (STC) for EU wide use rather than just in one single legal order.”, cit., supra note 10, p. 6.

See on these questions D. STAUDENMAYER, ‘European Contract Law-what does it mean and what does not mean?’, in S. VOGENAUER and S.WEATHERILL, *The harmonization of contract law*, Hart, 2006, p. 235 ff.; H. COLLINS, ‘The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone’, *ERCL*, 2006, 2, 213.

[12] See U. BERNITZ, ‘The Commission’s Communication and standard contract terms’, in S. VOGENAUER and S. WEATHERILL, *The Harmonisation of European Contract Law*, cit., supra note 12, pp. 185-ff, part. 189.

[13] See on information intermediaries S. GRUNDMANN, W. KERBER, ‘Information Intermediaries and party autonomy – The example of securities and insurance markets’, in S. GRUNDMANN, W. KERBER, S. WEATHERILL, *Party autonomy and the role of information in the internal market*, Berlin, Walter de Gruyter, 2001, p. 267.

[14] See for example in the sports domain the regulations enacted by FIFA concerning mandatory licensing of agents for football players.

[15] See *ECL* and the revision of the acquis: “the content of STC is for market participants to determine and decision whether to use STC is also one for economic operators. The Commission only intends to act as a facilitator and an “honest broker” i.e. bringing interested parties without interfering with substances.”, supra note 10, p. 6

[16] See E. HONDIUS, ‘Self-regulation in consumer matters at European level’, in F. CAFAGGI (ed.), *Reframing self-regulation in European private law*, The Hague, Kluwer, 2006, pp. 237 ff.

[17] See for example Art 21 and 22, Universal service directive 2002/22. In particular, Article 22 imposes on national regulatory authorities the obligation to ensure that undertakings ‘publish comparable, adequate and up-to-date information for end-users on the quality of their services’. However, national regulatory authorities can



use different organizational models to ensure such achievement, among which certainly self-regulatory arrangements.

[18] A relatively structured regime of co-regulation in consumer law has been introduced in the UK with section 8 of the Enterprise Act, where the Office of Fair Trading has been given the power to approve and withdraw approval of Consumer Codes. See on the issue G. HOWELLS and S. WEATHERILL, *Consumer protection law*, 2nd ed. Aldershot, Ashgate, 2005, p. 586 ff.

[19] See S. GRUNDMANN et al., *Party autonomy*, *supra* note 14.

[20] This level of complexity is not quite captured by the Green Paper on the review of the consumer *acquis* which on the one suggests the move to a more principle-based legislation and on the other seems to favour a move towards total harmonisation. See *Green paper on consumer acquis*, *supra* note 9, p. 6 and 10

[21] See the description of S. GRUNDMANN, 'The Optional European Code on the Basis of the *Acquis Communautaire*—Starting Point and Trends', 10 *European Law Journal* (2004) 698.

[22] For a general and relevant scholarly contribution on these questions see H. Collins, *Regulating contracts*, *supra* note 2.

[23] For example in Sweden the Consumer Agency headed by the Consumer Ombudsman has been very active in negotiating standard contracts with the business community, *infra* note 38.

[24] European Central Bank, *Guideline of The European Central Bank of 21 December 2006 on the management of the foreign reserve assets of the European Central Bank by the national central banks and the legal documentation for operations involving such assets* (ECB/2006/28), OJ 2007/C 17/02.

[25] See Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ [2005] L149/22. On the relationship between the directive and consumer contract laws at European and national level, see recital 15. It should be underlined that the directive should in principle not apply to contract law. While it provides relevant examples of the use of self-regulation in the area of consumer law I will not examine the directive and its implementation given the focus on self-regulation and European contract law.

[26] On the Proposal see the contributions in H. COLLINS (ed.) *The forthcoming Ec Directive on unfair commercial practices*, The Hague, Kluwer international, 2004; G. HOWELLS, H. MICKLITZ, T. WILHELMSSON, *European Trading Law*, Aldershot, Ashgate, 2006

[27] See art 6.2 (b), i and ii, Dir Directive 2005/29, *supra* note 26.

[28] Adjustments may be required in the area of *causa/cause/consideration*, and in that of remedies, where sanctions for breach should not be focused on damages but on specific performance (i.e. to enforce the regulatory obligations) and the typical contractual sanctions can be combined with reputational ones. See F. CAFAGGI, *Regulatory contracts, Codes of conducts, reasonable reliance and third parties*, unpublished manuscript.

[29] The implications of this alternative are clear. If the consumer is allowed to bring a legal action on the ground of the regulatory contract she can claim damages even in case of void contracts and pre-contractual unlawful conduct breaching obligations determined in the code of conduct. Otherwise she will only be able to sue on the grounds of a valid contract and therefore will have no contractual remedy in case of breach of regulatory obligations by the firm when the contract is void.

[30] See F. CAFAGGI, *Regulatory contracts*, *cit.*, *supra* note 29.



[31] For example the management systems built around international framework agreement concerning corporate social responsibility. See F. CAFAGGI, *Regulatory contracts*, cit., supra note 29.

[32] See F. CAFAGGI, *The regulatory function of customs and usages in European Contract Law*, unpublished manuscript.

[33] See F. CAFAGGI, 'Rethinking Self-regulation', in F. CAFAGGI, *Reframing self-regulation*, cit., supra note 17.

[34] A recent example concerns German legislation see EG-Verbraucherschutz-Durchsetzungsgesetz 20.12.2006 implementing Regulation 2006/2004. See in part. Article 1 § 7 *Beauftragung dritter*. In relation to Sweden, infra note 40.

[35] For example a clear relation between the use of expertise and co-regulation is expressed in the European Commission, *European Governance - A White Paper*, Brussels, 25.7.2001, COM(2001) 428 final: "Co-regulation combines binding legislative and regulatory action with actions taken by the actors most concerned, drawing on their practical expertise. The result is wider ownership of the policies in question by involving those most affected by implementing rules in their preparation and enforcement. This often achieves better compliance."

[36] A recent example concerning delegation to a 'framework contract' to be signed by trade and consumer associations draws from the Italian experience. D.L 223/2006 (Decreto Bersani), Article 7, n. 5, 6 where it is stated:

"5. L'Associazione bancaria italiana e le associazioni dei consumatori rappresentative a livello nazionale, ai sensi dell'articolo 137 del Codice del consumo di cui al decreto legislativo 6 settembre 2005, n. 206, definiscono entro tre mesi dalla data di entrata in vigore del presente decreto, le regole generali di riconduzione ad equità dei contratti di mutuo in essere mediante in particolare la determinazione della misura massima dell'importo della penale dovuta per il caso di estinzione anticipata e parziale del mutuo. 6. In caso di mancato raggiungimento dell'accordo di cui al comma 5, la misura della penale idonea alla riconduzione di equità è stabilita dalla Banca d'Italia e costituisce norma imperativa ai sensi dell'Article 1419, secondo comma, del codice civile ai fini della rinegoziazione dei contratti di mutuo in essere." The legislator delegates to private organisation the definition of a procedure to renegotiate checking account contracts and defines last resort solution if the agreement does not take place within three months, empowering the public regulator.

[37] For example in Sweden the Consumer Agency headed by the Consumer Ombudsman enters into contracts with trade associations in various fields, for instance on standard contracts and on marketing rules. Much of the work of implementing consumer policy is founded on results achieved through these agreements with the business community. For examples of these agreements (in Swedish) see the website of the Consumer Ombudsman <http://www.konsumentverket.se/mallar/sv/artikel.asp?lngArticleID=315&lngCategoryID=854>.

In Germany The only agreement sometimes referred to as such and involving government representatives is the "Vergabe- und Vertragsordnung für Bauleistungen Teil B (VOB/B)" (Awarding and Contracting Code for Construction Services). It is sometimes argued that the different State agencies involved in its negotiation do actually not only represent state interest, but also private homeowners/builders. For a critique of this viewpoint see H.-W. MICKLITZ, 'Die Richtlinie 93/13/EWG des Rates der Europäischen Gemeinschaften vom 5.4.1993 über missbräuchliche Klauseln in Verbraucherverträgen und ihre Bedeutung für die VOB Teil B', available

at [http://www.vzbv.de/start/index.php?page=themen&bereichs\\_id=2&themen\\_id=55&dok\\_id=290&search\\_1=vob&search\\_2=&hiliting=yes](http://www.vzbv.de/start/index.php?page=themen&bereichs_id=2&themen_id=55&dok_id=290&search_1=vob&search_2=&hiliting=yes) (last visited July 7, 2006).

[38] The regulatory contract has a double identity. On the one hand, it is a contract in relation to the parties who signed, binding them in their relationship with other parties. On the other, it can be defined as a unilateral act towards external parties, or as a contract of adhesion, depending on its features.

[39] See F. CAFAGGI, Private organizations and transnational contract law, unpublished manuscript.

[40] See F. CAFAGGI, Private organizations, cit., supra note 40.

[41] These different forms reflect a balance between interests protected by competition law and other public interests, different from those related to purely private entities. The anticompetitive nature of specific contract clauses may be disregarded if the overall purpose of standardised contract terms, or that of the code of conduct, is consumer protection or public interest protection, (as it would be the case for certain environmental agreements). Often these conflicts concern EU competition law and national public interest, thus they can be articulated as vertical conflicts; however it may happen that they relate to different EU rules (competition and environment, competition and consumer protection) even if they take place at national level, in the latter case we can speak of horizontal conflicts. The distinction between vertical and horizontal conflicts reflects different balancing tests to decide between competition policy and other interests.

[42] See E. HONDIUS, 'Self-regulation in consumer matters', cit., supra note 17, p. 237 ff.; J. CALAIS AULOY and F. STEINMEZ, *Droit de la consommation*, 6<sup>e</sup> ed, *Precis*, Dalloz, 2003.

[43] On this question see A. STONE SWEET, 'The new lex mercatoria and transnational governance', 13 *Journal of European environmental policy* (2006), 627 ff. and U. BERNITZ, 'The Commission's Communication', cit., supra note 13, p. 191.

[44] For firms, contract standardisation may generate product standardisation thereby producing economies of scale and scope, and reduction of production costs. The effects are quite different if contracts are related to products or to services. In the latter case, when the contract is the product itself, as it is the case for banking, securities or insurance, standardisation of contracts and products coincide and are likely to reduce competition among firms to a higher degree. For consumers, contracts' standardisation reduces consumers' research and learning costs. There might also be a functional link between standardisation and transparency, as a normative requirement. Market transparency may in fact require a certain level of contract standardisation to ensure comparability. Sometimes standardisation is a precondition for the creation and the efficient functioning of a market. Secondly, contracts' standardisation may reduce switching costs. Switching costs operate in relation to repeat contractual relationships. When switching costs are high, consumers may be locked in. When they are low consumers' ability to choose and move is enhanced. However depending on the context standardization may also increase switching costs and constitute the primary achievement of the drafter. The nature of switching costs may affect the interpretation of the standardisation and contribute to decide whether or not is anticompetitive. Switching costs may be exogenous or endogenous (produced by the firms to lock consumers in). Endogenous switching costs tend to be anticompetitive and may influence the evaluation concerning compliance with competition law. An illustration of the benefits of standardisation is provided by recital 14 of Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty

to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ [2003] L 53/8 'Standard policy conditions or standard individual clauses and standard models illustrating of a life assurance policy can produce benefits. For example, they can bring efficiency gains for insurers; they can facilitate market entry by small and inexperienced insurers; they can help insurers to meet legal obligations; and they can be used by consumer organizations as a benchmark to compare insurance policies offered by different insurers'. See more specifically Art 5, Condition for exemption, and Art 6, Agreements not covered by the exemption.

[45] See M. GRILLO and M. POLO, 'La standardizzazione dei contratti bancari con particolare riferimento alle Norme bancarie uniformi', in *Cooperazione e credito* (1997) 475. 'La sola condizione che deve essere soddisfatta affinché la standardizzazione possa essere compatibile con un equilibrio non collusivo è che essa non sia completa'.

[46] It should be pointed out again that contracts' differentiation in services contracts implies product differentiation.

[47] There are cases from Sweden, where the Competition Authority has scrutinized standard agreements negotiated and entered into between different Trade Associations and the the Swedish National Board for Consumer Policies (headed by the Consumer Ombudsman). These agreements are consumer friendly. However, at least on one occasion the Competition Authority declared anticompetitive an agreement negotiated and entered into by the Consumer Ombudsman, see Case Dnr. 1788/93 Sveriges Trähusfabrikers Riksförbund (A Case concerning individual exemption of an agreement under the equivalent of Article 81 (3)). See also Case Dnr. 1837/93 Sparbankerna and Case Dnr. 1867/93 Bankföreningen regarding standard agreements drafted by Trade organizations or co-operations after consultation with both the Swedish Financial Supervisory Board and the Swedish National Board for Consumer Policies and scrutinized by the Swedish Competition Authority.

See also, N. AVERITT and R. LANDE, 'Consumer sovereignty: A unified Theory of Antitrust and Consumer Protection Law', 65 *Antitrust L.J.* 713 (1996); F. GOMEZ, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics perspective', InDret Working Paper, 2003, available at [www.indret.com](http://www.indret.com); F. GOMEZ, 'European Contract Law and Economic Welfare: A View from Law and Economics', InDret working paper, 2007, available at [www.indret.com](http://www.indret.com).

[48] Often, however, abusive standardisation is considered anticompetitive. It should always be kept in mind that the abusive nature of contract clauses is the effect and not the cause of the anticompetitive nature of the agreements.

[49] On the debatable rationale see S. WEATHERILL, *Consumer law and policy*, Cheltenham, Edward Elgar, 2005, p. 118

[50] See ECJ, C-240/98 to 244/98 Oceano Grupo Editorial SA/Rocio Marciano Quintero, [2000] ECR I-4941, par. 24: "where a jurisdiction clause is included without being individually negotiated in a contract between a consumer and a seller or supplier within the meaning of the Directive and where it confers exclusive jurisdiction on a court in the territorial jurisdiction in which the seller or the supplier has his principal place of business, it must be regarded as unfair within the meaning of article 3 of the directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties rights and obligations arising under the contract, to the detriment of the consumer."

[51] See EC Consumer law compendium - Comparative analysis (edited by H. SCHULTE -NOLKE, in collaboration with C. TWIGG-FLESSNER and M.

EBBERS), december 12th 2006 available at [http://www.eu-consumer-law.org/study\\_en.cfm](http://www.eu-consumer-law.org/study_en.cfm), part p.324-415

[52] See ECJ, C-237/02, *Freiburger Kommunalbauten and Hofstetter*, [2004] ECR I-3403, par. 19 and 21. Par. 19 “in referring to concepts of good faith and significant imbalance between the rights and the obligations of the parties, Article 3 of the Directive merely defines in a general way the factors that render unfair a contractual term that has not been individually negotiated” and par. 21 “As to the question whether a particular term is, or is not, unfair, Article 4 of the directive provides that the answer should be reached taking into account the nature of the goods and services for which the contract was concluded and by referring at the time of conclusion of the contract to all the circumstances attending the conclusion of the contract. It should be pointed out in that respect that the consequences of the term under the law applicable to the contract must also be taken into account. This requires that consideration be given to the national law.”

[53] The ECJ has held that national courts can assess of its own motion whether the contractual term is unfair. See ECJ, C-168/05 *Elisa Maria Mostaza Claro v. Centro Movil Milenium*, [2006], OJ C 326, 30.12.2006; and also N. REICH, ‘More clarity after “Claro?”’, *ERCL*, 2007, 1, 41.

[54] See below text and footnotes.

[55] See below the conclusions par. IV.

[56] See Green paper on consumer acquis, cit., supra note 9.

[57] See Green Paper on consumer acquis, supra note 9, par. 4.4. p. 18

[58] See Green Paper on consumer acquis, supra note 9, par. 4.6, p. 19

[59] See Green Paper on consumer acquis, supra note 9, par. 4.3 p. 17. On the role of general clauses and standards in European contract law see S. GRUNDMANN and D. MAZEAUD, (eds.), *General Clauses and standards in European Contract Law: comparative law, EC law and contract law codification*, The Hague, Kluwer Law International, 2006.

[60] See A. ALBOR LORENS, ‘Consumer Law, Competition law and the Europeanization of private law’, in F. CAFAGGI, *Reframing self-regulation*, cit., supra note 17, p. 245 ff.; T. WILHELMSSON, ‘Cooperation and competition regarding standard contract terms in consumer contracts’, 17 *European Business Law Review*(2006) 49; J. Stuyck, ‘EC Competition law after modernisation: More than ever in the interest of consumers’, *Journal of Consumer Policy* [2005] 1; G. HOWELLS and S. WEATHERILL, cit., supra note 19, p. 517 ff.; N. REICH, ‘The “Courage” doctrine: encouraging or discouraging compensation for antitrust injuries?’, 42 *Common Market Law Review* (2005) 35.

[61] These questions are addressed in the Green paper on Damages actions for breach of EC antitrust rules, Brussels, 19.12.2005, COM(2005) 672 final.

Recent ECJ case law has further specified the rule defined in C-453/99, *Courage v. Crehan*, [2001] ECR I-6297, stating that : ‘Article 81 must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, when there is a causal relationship between the latter and the harm suffered, claim compensation for harm. In the absence of Community rules governing the matter, it is for the domestic legal system of each member state to prescribe the detailed rules governing the exercise of that right’. Then the Court points out what MS have to specify the concept of causal relationship, the identification of the competent courts and the rules of civil procedure, the limitation period, the extent of damages and in particular punitive damages. See ECJ, C-295/04, *Manfredi v. Lloyd Adriatico and others*, 13 July 2006, (nir).

[62] The answer to this question may very well depend on the functional approach to consumer law. It is important to underline the two-way relationship existing between consumer and competition law. Competition law presupposes that market failures, particularly asymmetric information, have already been addressed through administrative regulation or consumer contract law. Does Consumer law presuppose a competitive market? In case it does not do its features change if the market is monopolistic or competitive?. Many devices, for example rules on information, would be deprived of their most important functions, ensuring freedom of choice, in a non-competitive market. Market forms affect substantially the function and the structure of consumer law. This variable should be explicit and different rules allowed according to the structure of the market.

[63] See E. HONDIUS, 'Self-regulation in consumer matters', cit., supra note 17, pp. 237-ff, part. 239.

[64] See supra note 38 and also J. HELLNER, 'The Consumer's Access to Justice in Sweden', *RabelZ* (1976) 727 ff.; see also A. BAKARDJIEVA ENGELBREKT, *Fair trading law in flux?: national legacies, institutional choice and the process of Europeanisation*, PhD thesis 2003, Stockholm University, 312.

[65] See F. CAFAGGI, 'Rethinking self-regulation', cit., supra note 34.

[66] I will particularly concentrate on contract standardisation but refer to many other forms of private regulations that private bodies engage. For example the imposition of mandatory licensing by private regulators examined under a competition law perspective by European Courts. See CFI, T-193/02 *Piau v. Commission* paragraphs 100 and 101. Para 101 states : " The actual principle of the license , which is required by FIFA and is a condition for carrying on the occupation of players' agent, constitutes a barrier to access to that economic activity and therefore necessarily affects competition. It can therefore be accepted only in so far as the conditions set out in Article 81(3) EC are satisfied with the result that the amended regulations might enjoy an exemption on the basis of this provision if it were established that they contribute to promoting economic progress, allow consumers a fair share of the resulting benefit , do not impose restrictions which are not indispensable to the attainment of these objectives, and do not eliminate competition."

[67] See in particular Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ [2001] C3/2.

[68] In the insurance sector see Reg 358/2003, 27 february 2003 and before Reg 1534/91 on the application of Article 81.3 to certain categories of agreements, decisions and concerted practices in the insurance sector, OJ 1991 L143/1. On this question see T. WILHELMSSON, 'Cooperation and competition', cit., supra note 61, 63 ff.

[69] It is true that suppliers of professional services are considered undertakings and therefore subject to competition law, nonetheless the application of the test to self-regulatory arrangements concerning products is different from that related to services produced by professionals. According to the case law of ECJ the proper practice of the profession may require regulations that produce anticompetitive effects. See ECJ, C-309/99 *Wouters* [2002] ECR I-1577, § 110. For a wider examination see Communication from the Commission, Report on Competition in professional services, Brussels, 9.2.2004, COM (2004) 83 final.

[70] Some specificities are however significant. See in the sector of insurance the block exemption regulation 358/2003, cit., supra note 69.

[71] Within this frame I shall consider not only standard forms but also codes of conducts and governing rules of trade associations that can affect drafting of



standard contract terms employed by members in their contractual relationships. The constitution of a trade association, its governing rules have been considered decisions of associations of undertakings for the purpose of the application of Article 81. See Commission Decision in *Aspa*, JO [1970] L148; and *Nuovo Cegam* Commission Decision 30 March 1984, OJ [1984] L99.

[72] See the tables 1 and 2 above.

[73] On the relationships between competition and contract law a lively debate has developed recently: see R. PARDOLESI, 'Il contratto e il diritto della concorrenza', in G. Gitti (ed.) *L'autonomia privata e le autorità indipendenti*, Bologna, Il Mulino, 2006, 159 ff.; M. MAUGERI, *Abuso di dipendenza economica e autonomia privata*, Milano, Giuffrè, 2003; G. VETTORI, 'Contratto e concorrenza', in G. Vettori (ed.), *Concorrenza e mercato. Le tutele civili delle imprese e dei consumatori*, Padova, Cedam, 2005, 1.

[74] The organizational model from a private law perspective can employ different forms beyond association, such as foundations, companies, cooperatives.

[75] For a broader examination see F. CAFAGGI, 'Rethinking self-regulation', cit., supra note 34.

[76] According to the case law the fact that an association with regulatory functions consist of members other than only representatives of the industry is taken into account in assessment of whether competition law rules will apply to the activity of the association or not.

[77] Such was the situation in ECJ, C-94 and C-202/04, *Cipolla*, judgment of 5 December 2006 (nir), where, in connection to the joint fixing of out-of-court legal fee levels by the Italian Bar and Ministry of Justice, it was submitted (and accepted by the ECJ) that Article 49 could be used to hold a practice lawful under Article 81 unlawful: see paras 54-70 of the Judgment.

[78] This was evident from the earliest case law of the ECJ on competition. In ECJ, C-56 and 58/64, *Consten and Grundig v. Commission*, [1966] ECR Eng. Spec. Ed. 299, the Court stated, at p. 340, "an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental object[ives] of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between states, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [81(1)] is designed to pursue this aim"

[79] See, e.g. ECJ, C-281/98, *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-4319 (Article 39-free movement of workers) and ECJ, *Wouters*, cit., supra note 70 (Article 49-freedom to provide services). See P. Craig and G. de Burca, *EU law: Text, Cases and Materials*, 3rd ed., Oxford, OUP, 2003, p. 771

[80] For Article 28 and the free movement of goods, see the following footnote. Article 56 (free movement of capital) definitely has "vertical" direct effect, at least since ECJ, C-163, 165 and 250/94, *Sanz de Lera* [1995] ECR I-4821. In ECJ, C-464/98, *Stefan*[2001] ECR I-173, the Court ruled, albeit indirectly, on the lawfulness of an individual mortgage, in the context of finding a national law contrary to Article 56. Arguing in favour of horizontal direct effect for this provision: P. Craig and G. De Búrca, *EU law*, cit., supra note 80, p. 682; less directly: P. Usher, *The Law of Money and Financial Services in the European Community*, Oxford, OUP, 1994, p. 27.

[81] Article 28 has been applied in many intellectual property cases, wherein the ECJ did not allow the IPR holder to use his IPR to restrict the free movement in the Community of goods that were previously lawfully marketed in

a Member State (“exhaustion of rights doctrine”). See, e.g. ECJ, C-15/74, *Centrafarm* [1974] ECR 1147. In such cases, national law, in the form of a public act, provides the right for the IPR holder to restrict free movement. What the Court condemned, however, was the exercise of such a right, as a private act. Similarly, in cases such ECJ, C-266/87, *R v. Pharmaceutical Society, ex parte API* [1989] ECR 1295, associations that are private in their composition have been subject to Article 28 on the basis of having some public law powers.

[82] See ECJ, C-185/91, *Bundesanstalt für den Güterfernverkehr v. Gebrüder Reiff GmbH and Co. KG*, [1993] ECR I-5801, par. 24 : “It must be therefore be stated that in reply to the question submitted that Article 3(f) the second paragraph of article 5 and article 85 of EEC Treaty do not preclude rules of a Member State which provide that tariffs for the long distance transport of goods by road are to be fixed by tariff board and are to be made compulsory for all economic agents, after approval by the public authorities if the member of those boards, although chosen by the public authorities on a proposal from the relevant trades sectors, are not representatives of the latter called on to negotiate and to conclude an agreement on prices but are independent experts called on to fix the tariffs on the basis of considerations of public interest and if the public authorities do not abandon their prerogatives but in particular ensure that the boards fix the tariffs by reference to considerations of public interest and, if necessary substitute their decision for that of the board.”

Compare with ECJ, C-35/96 *Commission v. Italy* [1998] ECR I-3851 § 60.

[83] See ECJ, C-35/99, *Criminal Proceedings Against Manuele Arduino* [2002] ECR I-1529 para 36-37, 38-39

[84] For a notable (and somewhat controversial) recent case, see ECJ, *Arduino*, cit., supra note 84, where the Court of Justice found that the practice, used by the Italian Bar, of fixing attorney’s fees in decisions, which were binding (to a large extent) on national courts when awarding legal costs, is not caught by Article 81(i), predominantly because the tariffs, once decided by the Bar, had to be approved by the Minister for Justice who, in turn, had to consult the Interministerial Committee on Prices and the Council of State. The Opinion of Advocate General Léger in that case is highly insightful for, although he reaches effectively the same conclusion as the Court, his approach is more subtle, as he places great emphasis on effective control by the Member State of the common pricing scheme.

[85] This is also explicit in the reasoning of the Advocate General in the case cited previously.

[86] For a taxonomy see F. CAFAGGI, ‘Rethinking self-regulation’, cit., supra note 34.

[87] On this question see J. SZOBOSZLAI, ‘Delegation of State regulatory powers to private parties- Towards and active supervision test’, 29 *World competition* (2006) 73; F. CASTILLO DE LA TORRE, ‘State action defence in competition law’, 28 *World Competition* (2005) 407; J. TEMPLE LANG, ‘National measures restricting competition and national authorities under article 10 EC’, 29 *European Law Review* (2004) 397; H. SCHEPEL, ‘Delegation of regulatory powers to private parties under EC competition law : towards a procedural public interest test’, 39 *Common Market Law Review* (2002) 31-51.

[88] For example the non-profit or for profit nature of the organization can be a relevant feature to qualify the regulatory activity of the association but can not be decisive. A functional analysis concerning the goals and nature of standardization is always needed.

[89] In relation to professional bodies the Report on Competition in professional services, cit., supra note 70, summarised the current law in the following way:



“5.1.2 Self-regulation as a decision of an association of undertakings.

§ 69 A professional body acts as an association of undertakings for the purpose of Article 81 when it is regulating the economic behaviour of the members of the profession. This is true even where professionals with employee status are admitted, since professional bodies normally and predominantly represent independent members of the profession.

§ 70 It makes no difference that some professional bodies have public law status or have certain public interest tasks to perform or allege they act in the public interest

Para 71 A body regulating professional conduct is however not an association of undertakings if it is composed of a majority of representatives of public authorities and it is required to observe pre-defined public interest criteria. Rules adopted by a professional body can only be regarded as State measures, if the State has defined the public interest criteria and the essential principles with which the rules must comply and if the state retained its power to adopt decisions in the last resort.”

[90] ECJ, Joined Cases C-209/78 to 215/78 and C-218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125, par. 87 and 88; and ECJ, Joined Cases C-96/82 to 102/82, C-104/82, C-105/82, C-108/82 and C-110/82 *IAZ and Others v Commission* [1983] ECR 3369, par. 19 and 20.

[91] See ECJ, *Wouters*, cit., supra note 70, par. 63.

[92] A further distinction can be drawn between private rule making that has only internal effects and private rule making that has external effects. In relation to sport associations a difference between freedom of internal organisation and private rule making with external effects has been made (case *Bosman*, par., 81 and case *Deliege*, par. 47).

[93] The role of this distinction is to prevent application of competition law in cases where the regulatory body is acting in the public interest and not in the interest of the industry.

[94] It is unlikely to be the case, depending on the exact composition of the board. See ECJ, Joined Cases C-180/98 to C-184/98, *Pavlov and others*, [2000] ECR I-6451, par. 87; ECJ, C-96/94 *Centro Servizi Spediporto* [1995] ECR I-2883, para 23.

[95] See e.g. ECJ, *Wouters*, cit., supra note 70. In its recent judgment in ECJ, C-519/04, *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991, the ECJ was faced with a claim by two Olympic swimmers, found guilty of doping by the International Swimming Association (FINA) to the effect that the permitted levels of illicit substances were fixed by the International Olympic Committee (IOC) at a deliberately low level for anticompetitive purposes. Overruling the relevant part of the previous judgment of the Court of First Instance (CFI), the ECJ found that the restrictions imposed by disciplinary sports rules must be limited to what is necessary to ensure the proper conduct of the competitive sport. In doing so, it rejected the idea, endorsed previously by the CFI, that the disciplinary rules in sport can be more-or-less automatically excluded from the scope of the competition rules and opted, instead, in favour of a case-by-case analysis. See par. 45-48 of the Judgment.

[96] See e.g. AG opinion, *Wouters*, [2002] ECR I-1577, at para 77.

[97] European Courts have also addressed the more general question concerning the legitimacy of private rule making power and the boundaries to be drawn between public and private regulation. For a narrow perspective see CFI, *Piau*, cit., supranote 67, par. 77-78: “The very principle of regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sport associations by a private law body, like FIFA, which has not been delegated any such power by a public authority, cannot from the outset be regarded as compatible with Community law, in particular with regard to respect for

civil and economic liberties. In principle such regulation which constitutes policing of economic activities and touches on fundamental freedoms, falls within the competence of the public authorities.”

[98] The general proposition was laid down by the ECJ in C-13/77, *INNO v. ATAB* [1977] ECR 2115. For the present purposes, there are two questions: (1) whether the rule-making power can be delegated and (2) how it can be delegated without violating competition law. As to the first question a preliminary issue is when there is delegation. In this framework both *ex ante* delegation and *ex post* approval are considered. If there is delegation the question is whether it is lawful or unlawful. Unlawful delegation can constitute a violation of the duty of loyal and sincere cooperation between EU and MS. See C-267/86 *Pascal Van Eycke v. ASPA NV*, [1988] ECR 4769 ff., part 16. “It must be pointed out ... that articles 85 and 86 of the Treaty are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held, however, that articles 85 and 86 of the Treaty in conjunction with article 5 require the member states not to introduce or maintain in force measures even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member state were to require or favour the adoption of agreements, decisions or concerted practices contrary to article 85 or to reinforce their effects or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere” (*italics of the Author*).

[99] See ECJ, *Van Eycke*, cit. supra note 99, par. 16, and following case law. For a Swedish case where the Swedish Competition Authority scrutinized standard agreements negotiated between the Swedish National Board for Consumer Policies (headed by the Consumer Ombudsman) and Trade Associations, see e.g. Case *Sparbankerna*, Case *Sveriges Trähusfabrikers Riksförbund*, and Case *Branchföreningen Svenska Värmepumpföreningen*, cit., supra note 48.

[100] See ECJ, C-250/2003, *Mauri*, Order of the Court, 17 february 2005. *Mauri* has reduced the availability of State action defence.

[101] See ECJ, *Wouters*, cit., supra note 70, par. 56.

[102] See ECJ, *Bundesanstalt*, cit., supra note 83.

[103] See ECJ, *Van Eycke*, cit., supra note 99.

[104] See ECJ, C-198/01 *Consorzio Industrie fiammiferi (CIF)*, 9th September 2003, ECR I, and C-250/2003, par. 50 and ff., and ECJ, *Mauri*, cit., supra note 101. On the subject *J. Szoboszlai*, ‘Delegation of State regulatory powers’, cit., supra note 88, p. 73 ff. part. 79

[105] In terms of public bodies, the ECJ has explicitly stated, in ECJ, *INNO*, cit., supra note 99, at par. 35: “A national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with Articles [28] and [29], which prohibit quantitative restrictions on imports and exports and all measures having equivalent effect.”

Equally, the possibility of concurrent and alternative application of Articles 49 and 81 was allowed by the Court in ECJ, *Wouters*, cit., supra note 70, and more recently in ECJ, *Cipolla*, cit., supra note 78, esp. par. 58-70.

[106] It is not clear yet whether the Court would apply Art 56 to strike down a “purely private” act, i.e. whether it would allow avoidance and/or other remedies in the absence of a question concerning the validity of a public act.

[107] ECJ, *Wouters*, cit., supra note 70.

[108] See *Putz v. Kawasaki motors (UK) Ltd* OJ [1979] L 16/9 [1979] 1 CMLR 448; *Sandoz* OJ [1987] L 222/28 [1989] 4 CMLR 628 upheld on appeal; ECJ, C-2777/87 *Sandoz Prodotti Farmaceutici SPA v. Commission* [1990] ECR I-45.

[109] ECJ, *Sandoz*, cit., supra note 109.

[110] The distinction between what has or has not been accepted by distributors may be vital in these cases. Contrast, for example ECJ, *Sandoz*, cit., supra note 109, with the more recent *Bayer* case. In the latter case (Case IV/34.279/F3 - ADALAT, OJ [1996] L201/1, recitals. 189-199, 211 and Article 1 of the Decision), the Commission found that the practice, engaged in by subsidiaries of Bayer in France and Spain, of restricting supplies to wholesalers in areas where parallel exports to the UK may occur, is a restrictive agreement within the meaning of Article 81.1. Both the CFI (T-41/96 [2000] ECR II-3383) and the ECJ (C-2 and C-3/01, *Bundesverband der Arzneimittel-Importeure EV and the Commission v. Bayer A6*, [2004] ECR I-23), rejected the Commission's interpretation, not least because the restriction of supplies by the Bayer subsidiaries was not beneficial for the wholesalers nor was it explicitly endorsed by them. For a comment on the case, with the relevant history of the concept of agreements, see C. BROWN, 'Bayer v. Commission-the ECJ Agrees', 25 ECLR (2004) 386. It will be remembered, of course that, notwithstanding the difficulties encountered when trying to prove the existence of an agreement, when a producer is dominant, the same or similar conduct vis-à-vis its retailers may be scrutinised under Article 82: Cases No. IV/34.073, IV/34.395 and IV/35.436 - *Van den Bergh Foods Limited*, OJ [1998] L 246/1, upheld in CFI, T-65/98, *Van den Bergh Foods Ltd v Commission*, [2003] ECR II-4653).

[111] P. FATTORI e M. TODINO, *La disciplina della concorrenza in Italia*, Bologna, 2004, p. 55-56 and the caselaw cited in the previous note.

[112] Within this category we can distinguish between agreements among firms belonging to the same association and agreements among firms belonging to different associations. Equally, it must be noted that Community competition law uses the term "undertaking", which includes "every entity engaged in an economic activity": ECJ, C-41/90, *Höfner and Elser v. Macroton GmbH* [1991] ECR I-1979, § 21. Thus, it may also include individuals, as was the case, for example, in *Reuter/BASF* [1976] OJ L254/40, where the Commission examined an agreement between an inventor and the company which bought up his patents.

[113] Although there have been notable cases concerning groups of purchasers, such as ECJ, C-250/92, *Gøttrup-Klim e.a. Grovwareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641, where an association of farmers was formed for the purpose of purchasing collectively (and at lower prices) certain types of farming equipment.

[114] REIMS II OJ [1999] L275/17. ECJ, *Gøttrup-Klim*, cit., supra note 114, was a case where the application of Article 81 was excluded altogether, due, essentially, to the fact that the collective purchasing association exercised countervailing buying power against the manufacturers of the relevant products. For an extensive discussion of so-called "public policy" cases, see G. MONTI, 'Article 81 and Public Policy', 39 *Common Market Law Review* (2002), 1057.

[115] T. Wilhelmsson claims that there is an interest of consumers to promote business cooperation in order to enable ombudsmen and consumer associations to negotiate contract terms with business. It follows that it would be in consumers' interest to reduce the level of competition. See T. WILHELMSSON, 'Cooperation and competition', cit., supra note 61, p. 58 ff. It is unclear however why coordination among business, instrumental to negotiations, should necessarily reduce competition. A high level of negotiation can be perfectly compatible with

competitive markets to the extent that the goal of negotiation is to exclude unfair terms and make firms compete about fair terms.

[116] See M. GRILLO and M. POLO, 'La standardizzazione dei contratti bancari', cit., supra note 46.

[117] See Commission Decision, Nuovo CEGAM, cit., supra note 72. Also, according to Whish: "It has been held that the constitution of a trade association is itself a decision, as well as regulations governing the operation of an association. An agreement entered into by an association might also be a decision. A recommendation made by an association has been held to amount to a decision and it has been clearly established that the fact that the recommendation is not binding upon its members does not prevent the application of article 81 (1)...Regulations made by a trade association may amount to a decision within the meaning of Article 81(1)". R. WHISH, *Competition Law*, 5th ed., London, Lexis Nexis, 2003, p. 97-98.

[118] See, e.g. Publishers' Association (Net Book Agreements), OJ [1989] L22/12.

[119] Compare for example ASPA with Nuovo Cegam, cit., supra note 72. In the former, the constitution of an association was qualified as a decision, while in the latter it was qualified as an agreement. See ECJ, C-123/83, *BNIC v. Clair* [1985] ECR 391, § 20, "an agreement made by two groups of traders, such as the wine growers and dealers must be regarded as an agreement between undertakings or associations of undertakings. The fact that those groups meet within an organization such as the board does not remove their agreement from the scope of Article [81] of the Treaty". Equally, the distinction between agreements and concerted practices is of no consequence for the lawfulness of a given line of conduct: see n. 87 above. This lends further support to the conclusion that the classification of conduct under one of the three types envisaged under Article 81(1) is of little or no legal effect.

[120] For example, under Article 82(a), by "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". Price-fixing can be caught by Article 82 when it is used to damage the competitors of the dominant undertaking(s).

[121] For example, in 1998 World Cup, OJ [2000] L5/55, the Commission found that the French Organisation Committee, formed by the French Football Association for the purposes of distributing tickets to the 1998 World Cup, had abused its dominant position by making it excessively difficult for consumers who are not French residents to buy tickets. Contrary to the submissions of the Committee, the Commission found that there can be an abuse even in the absence of an effect on the structure of competition in the relevant market. See recitals 99-100 to the decision.

[122] Proofs of these criteria may be found in Commission Regulation (EC) 358/2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector ("the Insurance Block Exemption"), whereby standard policy conditions may not be exempted when they are binding and create a significance imbalance between rights and obligations. According to recital 15, "standard policy conditions must not lead either to the standardisation of products or to the creation of a significant imbalance between the rights and obligations arising from the contract. Accordingly, the exemption should only apply to standard policy conditions on condition that they are not binding, and expressly mention that participating undertakings are free to offer different policy conditions to their customers. Moreover standard policy conditions may not contain any systematic exclusion of specific types of risk without providing for the express possibility of including that cover by agreement and may not provide

for the contractual relationship with the policy holder to be maintained for an excessive period or go beyond the initial object of the policy. This is without prejudices to obligations arising from community or national law to include certain risks in certain policies.”

[123] See ECJ, *BNIC*, cit., supra note 120, par. 22: “for the purpose of article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, an agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders on the market in question, is intended to distort competition in the market.” In a similar vein, see ECJ, C-234/83, *SA Binon & Cie v. SA Agence et Messageries de la Presse* [1985] ECR 2015, § 44. In vertical restraints cases, the (often subtle) distinction between recommended resale prices on the one hand—which are lawful—and recommendations that are *de facto* binding on resellers on the other—which constitute a restriction of competition by object and must, therefore, be individually examined under Article 81(3), remains of vital importance. See Commission Notice: Guidelines on Vertical Restraints, OJ [2000] C291/1, points 47 and 48. In terms of fixing conditions of trade other than the direct fixing of prices, however, the application of Article 81(1) becomes somewhat more complex: see ECJ, joined cases C-215/96 and C-216/96, *Bagnasco v. BNP and Carige* [1999] ECR I-00135, where the Court stated: “standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility to change interest rate at any time by reason of changes occurring in the money market, and to do so by means of notice displayed on their premises or in such a manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of article 85(1) of the Treaty”, par. 37. See also CFI, *Piau*, cit., supra note 67, par. 93 examining a regulation enacted by FIFA concerning agents and players where the standard contract form between the two should include a clause that states that 5% of the players’ salary would be due if parties do not reach an agreement: “the provisions on the content of the contract between the agent and the player under which the contract in writing must set out the criteria and details of the agent’s remuneration and cannot have a term longer than two years although that term is renewable do not reveal any interference with competition. The limitation of the duration of contracts to two years which does not preclude the renewal of the commitment, seems likely to encourage the fluidity of the market and, as a result, competition”. Finally, it must be noted that agreements to fix vital parameters of trade, such as the right of one undertaking to associate itself with another, may fall outside the scope of Article 81 altogether, if the purpose of the restriction is justified by an imperative public policy concern, such as the need to ensure the proper functioning of the legal profession in a given Member State. See ECJ, *Wouters*, cit., supra note 70. Equally, it could be argued that even vertical price fixing (resale price maintenance) may fall outside of the scope of Article 81(1), if its purpose is to protect culture, within the meaning of Article 151(4) of the Treaty. See Council Resolution of 8 February 1999 on fixed book prices in homogeneous linguistic areas OJ [1999] C42/2 and V. Emmerich, ‘The Law on the National Book Price Maintenance’, 2 *European Business Organization Law Review* (2001) 553; and G. Monti, ‘Article 81 and Public Policy’, cit., supra note 115. For Swedish case law see *infra* note 38.

[124] ECJ, *IAZ*, cit., supra note 91, par. 20: “Article [81(1)] of the treaty applies also to associations of undertakings insofar as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to



suppress. It is clear particularly from the latter judgement that a recommendation, even if it has no binding effect, cannot escape article [81 (1)] where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.” See also FENEX, [1996] OJ L181/28, where recommended tariffs were viewed in their wider context of co-ordinating market conduct, not least pricing conduct. In either case, however, some degree of compliance by the members of the association was found, in the sense that the recommendations were not ignored. How much compliance exactly is required in order to find a restriction within the meaning of Article 81 § 1 can be a very tricky question, as was evidenced in the Bayer case (n. 76 above), as well the seminal judgment of the ECJ in C-89, C-104 and C-114/85, *Ahlström Oy v. Commission (Woodpulp)* [1988] ECR 5193.

[125] This is due to the fact that restrictions on price form part of the set of restrictions by object or “hardcore restraints”, which trigger the automatic application of Article 81 § 1—provided, of course, there is an appreciable effect on interstate trade. The other restrictions are, in the case of horizontal agreements, restrictions of output and the sharing of markets/customers and, in the case of vertical restrictions, an absolute restriction of parallel trade. Any conduct falling outside of the hardcore set must be assessed in the light of its effects on the relevant market. See Communication from the Commission—Notice, Guidelines on the application of Article 81(3) of the Treaty, OJ [2004] C101/97, point 23; Commission Notice, Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ [2001] C3/2, points 18-20; Guidelines on Vertical Restraints, cit., supra note 124, points 46-47.

[126] The prime example of this phenomenon may be found in Recital 14 and Articles 1(1)(c) and 5 of the Insurance Block Exemption, cit., supra note 123. Standard policy conditions in insurance contracts are exempt under that Regulation, under the condition that it must be explicitly provided that undertakings are not in any way obliged to adopt them.

In Sweden, the Swedish Competition Authority has on a number of occasions stated that non-binding standard contract not encompassing stipulation regarding price is compatible with the Swedish Competition Act, see e.g. Case *Branchföreningen Svenska Värmepumpföreningen* and Case *Sveriges Trähusfabrikers Riksförbund*, cit., supra note 48.

[127] P. FATTORI e M. TODINO, *La disciplina della concorrenza*, cit., supra note 112. Citando C. Dec. Fedetab 20.7.1978, OJ 1978 L. 224/29, Carte da parati in Belgio Comm. Dec. 23.7.1974, OJ 1974, L. 237/3.

Formally speaking, the ECJ and the Commission make no distinction between “agreements” and “concerted practices” under Art 81 in terms of whether a given line of conduct is lawful or not. It is possible, in fact, to classify the same conduct under either heading, as was the case in CFI, T-1/89, *Rhone-Poulenc v. Commission*, [1991] ECR II-867. Such an interpretation is supported by the very wording of Art 81, which speaks of agreements or concerted practices, without making a distinction as to their respective unlawfulness. Equally, agreements themselves do not need to be contracts. They can be in the form of so-called “gentlemen’s agreements”, as was established early on in ECJ, C-41/69 *ACF Chemiefarma v. Commission* [1970] ECR 661. Nonetheless, more recent case law tends to indicate that concerted practices may be more difficult to prove, as they require a certain conduct to follow the joint intentions of the parties. See A. JONES and B. SUFRIN, *EC Competition Law*, 2nd ed., Oxford, OUP, 2004, p. 151-154. Accordingly, it is, de facto, much easier to prove and condemn an

agreement if it is binding under the law. In such cases, the regulator need not look further to find the requisite market conduct, as the parties have agreed to be obliged to act in an anticompetitive manner. Importantly, in economic terms, once the competition authority finds the existence of a binding agreement, it is impossible for the parties to argue that there was so-called “tacit collusion”, i.e. a situation where their market conduct is aligned by the very nature of the market in question and not by an explicit concurrence of wills aimed at restricting competition (“explicit collusion”). On the distinction between tacit and explicit collusion and its implications for competition policy, see, generally, M. MOTTA, *Competition Policy: Theory and Practice* Cambridge, Cambridge University Press, 2004, Ch.

4.

[128] See ECJ, IAZ, cit., supra note 91, par. 20-21: “Article [81 (1)] of the Treaty applies also to associations of undertakings in so far as their won activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgement that a recommendation even if it has no binding effect, cannot escape article [81(1)] where compliance with the recommendation by undertakings to which it is addressed has an appreciable influence on competition in the market in question.

In the light of that case law it must be emphasized, as the commission has pertinently stated, that the recommendation made by Anseau under the agreement to the effect that its member undertakings were to take account of the terms and the purpose of the agreement and were to inform consumers thereof, in fact produced a situation in which the water supply undertakings in the built-up areas of Brussels, Antwerp and Ghent carried out checks on consumers premises to determine machines connected to the water supply system were provided with a conformity label. Those recommendations therefore determined the conduct of a large number of Anseau’s members and consequently exerted an appreciable influence on competition.”

The non binding recommendation is illegal to the extent that actually produces effects on market’s participants behaviour. If that influence was only potential because no evidence of behaviour exists would that be still enough to consider it unlawful? Article 81 covers agreements, decisions and concerted practices, the object or effect of which is to distort competition. Therefore, even cases where no actual effect has been achieved the mere purpose of the decision might breach this rule, if the agreement restricts competition by its object. See the text in notes 126 and 128.

[129] For example in England the decisions of OFT. On this point see H. MICKLITZ, *The politics of judicial cooperation, The politics of judicial cooperation in the EU*, Cambridge: CUP, 2005, p. 394.

[130] See O. Troiano, ‘Buona fede e contratti standard: riflessioni sull’impiego della clausola generale nel diritto privato comunitario’, *Contratti*, 2/2006, p. 191, where it is affirmed that the national courts evaluating the relationship between the principle of good faith and the existence of an unbalance of rights and obligations provide three possibile solutions: “Un primo gruppo di sentenze decide sulla vessatorietà di una clausola senza nemmeno menzionare nel loro testo il principio di buona fede. Queste sentenze decidono la fattispecie controversa applicando il test del significativo squilibrio. Un secondo gruppo di sentenze richiama inizialmente in motivazione il principio della buona fede ed il criterio del significativo squilibrio, ma, quando poi si passa a ragionare sulla fattispecie, l’iter logico seguito dal giudice si sviluppa tutto sul criterio del significativo squilibrio e l’iniziale richiamo alla buona fede si perde per strada. Infine, un terzo gruppo di sentenze fa riferimento all’elenco



delle clausole grigie per giudicare vessatorie quelle ivi contemplate e considera (talvolta) il solo criterio del significativo squilibrio, ma non la buona fede.”

Moreover, in the EC Consumer Law Compendium, cit., *supra* note 52, p. 366, the Authors affirm that “the relationship of the principle of good faith to the criterion of “imbalance” remains unclear. The wording of the Directive suggests that a clause is unfair only if it causes an imbalance and this imbalance is furthermore contrary to the principle of good faith. Following this reading, a clause can therefore cause an imbalance without at the same time being contrary to good faith. Others however assume that any clause which generates a significant imbalance is always (automatically) contrary to the principle of good faith. It is ultimately worth considering whether the criteria “significant imbalance” and “good faith” are to be understood as alternatives in the sense that the two criteria operate independently of one another, so that a clause is unfair if it results in a significant imbalance, or if it is contrary to the requirement of good faith. In view of these multifarious interpretation possibilities it is not surprising that the member states have constructed their general clauses very differently.”

[131] One rare exemption would be a Swedish case from 1993 where the Competition Authority did not make a distinction between abuse as stipulated in the equivalent to Article 82 and the contractual stipulation of unfair. See Case Drn. 760/94 Ånge Elverk, a case concerning Abuse of Dominance.

[132] See recital 15, Reg 358/2003, cit., *supra* note 69.

[133] See for example, Reg. 358/2003, cit., *supra* note 69, at Art 6 Agreements not covered by the exemption; Article 6 § 1 (e) allow the insurer to modify the term of the policy without the express consent of the policy holder; Article 6 § 1 (f) impose on the policy holder in the non life insurance sector a contract period of more than three years. Certainly these clauses can also have an anticompetitive effect but they sound more related to fairness consideration.

[134] See, for example, the Commission’s decision in Zanussi, OJ [1978] L322/36, where it was found that, by drafting the manufacturer’s warranty in such a way that the consumer could only seek servicing from a dealer who imported the appliance into his own Member State, the manufacturer had violated Article 81. The concurrence between unfairness and competition is even more explicit under Article 82. The question is about the meaning attributed to unfairness, given the explicit reference made in Art 82(a) to unfair purchase and selling prices and to unfair trading conditions.

[135] Under Article 1 of the Regulation, the whole of Article 81 (including its third paragraph) is applicable “no prior decision to that effect being required”. Thus, formal *ex ante* scrutiny under Article 81, found in the old regulation-Council Regulation (EEC) 17/62, First Regulation implementing Articles 85 and 86 of the Treaty, OJ Eng. Spec. Ed. [1959-1962] 87 was abolished. Informal guidance may still be sought from the Commission in cases raising new issues: see Recital 38 to the Regulation and Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters)[2004]C101/6. In terms of remaining *ex ante* scrutiny, one example is still found, at the time of writing, under Italian competition law: Law Number 287 of 10 October 1990 (as amended)-the text of the law is available at the web site of the Autorità Garante della concorrenza e del mercato: [www.agcm.it](http://www.agcm.it). There is a notification/exemption procedure, set out in Articles 4 and 13 of the law. And it applies to scrutiny under Italian competition law. The notification/exemption system could prove problematic in cases where both Italian and Community competition law are applicable, as Regulation 1/2003 obliges

national competition authorities and courts to apply Community law concurrently in such cases: see Article 3 of the regulation.

[136] See above par. B.

[137] An interesting example in area of financial markets is provided by Stock exchanges. Stock exchanges are private regulators that exercise rule making powers in relation to listed companies. Within the European framework there are different ways in which the stock exchanges can act as self regulators. Firstly, they can regulate the way in which they are governed and managed. This is mainly done by the articles of association of the stock exchange. However they often elaborate other sets of rules complementing the articles of association or the legal provisions and which are devoted to regulate in more detail specific aspects of the internal governance. Some examples are the rules of conduct of the personnel, personal dealing rules, whistleblower policies (see for example, the scheme established by Euronext: <http://www.euronext.com/editorial/wide/editorial-2002-EN.html>, or the dispositions of the Corporate Governance Code of the Italian Stock Exchange: <http://www.borsaitaliana.it/chisiamo/ufficiostampa/comunicatistampa/2006/codiceautodisciplina.en.pdf.htm>).

Apart from the governance regulation, the stock exchanges also regulate, in a different degree according to the jurisdiction, the markets they operate. In this sense we can distinguish different instruments of regulation whose purpose is to regulate the relations of the stock exchange with its members, the listed firms and the investors. They internally establish the requisites to become a member of the exchange, how to be listed on it... (For example in the case of the Madrid Stock Exchange in relation to the conditions to become a member of the Madrid stock exchange <http://www.bolsamadrid.es/ing/contenido.asp?menu=1&enlace=/ing/miembros/Becomingamember.pdf>).

Sometimes, when the stock market is operated by different merged stock exchanges, a holding company establishes a common set of rules which must be observed by each of the stock exchanges under that operating structure (see for example the Euronext Rulebook: <http://www.euronext.com/fic/000/019/401/194016.pdf>).

In some cases the stock exchange complements this self regulation by the voluntary adoption of a given corporate governance code already existing which the listed firms operating in the exchange shall follow (this is the case of the London Stock Exchange with the adoption of the City Code on Corporate Governance: [http://www.fsa.gov.uk/pubs/ukla/lr\\_comcode2003.pdf](http://www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf)). Finally,

another way in which the Stock Exchanges can regulate the markets is by establishing standard contract terms. This is very common in the derivatives markets, in which the stock exchange regulates the terms of the relation between the member of the market and the investor aiming to buy or sell a future or and option (an example of these type of contracts for the Spanish Derivatives Market: [www.meff.com/docs/Contrato.doc](http://www.meff.com/docs/Contrato.doc)). For an overview see F. CAFAGGI, Rethinking self-regulation, cit., supra note 17.

[138] On these questions see F. CAFAGGI, Reframing self-regulation, cit., supra note 17.

[139] On the role of good faith in European standard form contract law, see H. MICKLITZ, The politics of judicial cooperation, cit., supra note 130. More in general on general clauses and standards see S. GRUNDMAN and D. MAZEAUD, General Clauses and standards, cit., supra note 60, part p.141 ff.

[140] Within the Unfair contract term directive there is some sign that collectively negotiated agreements may affect the nature of the unfairness control though specific reference was intentionally made only to individually negotiated agreement.

See the examples in the national legal system concerning tenancy law, F. CAFAGGI, 'Tenancy law and European Contract Law', comparative report in the framework of the Tenancy law Project, European University Institute, available at <http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/tenancyLaw.shtml> (last visit 28 September 2006).

[141] See above par. III.

[142] But see on these questions T. WILHELMSSON, 'Cooperation and competition', cit., supra note 61.

[143] See ECJ, Arduino, cit., supra note 84, and ECJ, CIF, cit., supra note 105.

[144] On these questions see F. CAFAGGI, 'New modes of governance' , cit., supra note 6.

# THE 'WAR ON TERROR' AND THE UNITED KINGDOM'S CONSTITUTION

Mark Elliott\*

*That its “unwritten” nature makes the United Kingdom’s constitution extremely flexible is a truism if not a cliché. It is, nevertheless, a phenomenon that has never been more clearly evident than in the last ten years. No exaggeration is entailed in the statement that the British constitution has, during that period, undergone a truly dramatic period of change, including the devolution of legislative and administrative power and the reform of judicial and related institutions. However, most important, for present purposes, is the Human Rights Act 1998, which gives effect in national law to certain parts of the European Convention on Human Rights. This is the backdrop against which this paper considers the legal dimensions of the “war on terror” being waged by the British government – most notably its (now-abandoned) policy of indefinitely detaining suspected foreign terrorists without charge or trial. This is a useful context in which to seek to understand the implications of the HRA and to consider a broader discourse about the nature of the modern British constitution and the place of human rights within it.*

## I. INTRODUCTION

That its “unwritten”<sup>[1]</sup> nature makes the United Kingdom’s constitution extremely flexible is a truism if not a cliché. It is, nevertheless, a phenomenon that has never been more clearly evident than in the last ten years. No exaggeration is entailed in the statement that the British constitution has, during that period, undergone a truly dramatic period of change,<sup>[2]</sup> including the devolution of legislative and administrative power<sup>[3]</sup> and the reform of judicial and related institutions.<sup>[4]</sup> However, most important, for present purposes, is the Human Rights Act 1998,<sup>[5]</sup> which gives effect in national law to certain parts of the European Convention on Human Rights. This is the backdrop against which this paper considers the legal dimensions of the “war on terror” being waged by the British government – most notably its (now-abandoned) policy of indefinitely detaining suspected foreign terrorists without charge or trial. This is a useful context in which to seek to understand the implications of the HRA and to consider a broader discourse about the nature of the modern British constitution and the place of human rights within it.

## II. HUMAN RIGHTS AND PARLIAMENTARY SOVEREIGNTY

Orthodox accounts of the British constitution ascribe a central role to the doctrine of parliamentary sovereignty. As Dicey –the Victorian jurist whose work dominated this field for much of the last century and remains influential– put it, parliamentary sovereignty entails that Parliament possesses “the right to make or unmake any law whatever”, so that “no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”.<sup>[6]</sup> On this view, the limits on Parliament’s capacity to enact legislation are political, not legal; there is no possibility of judicial review of legislation. As a result, no norms exist which are legally immune from parliamentary interference or displacement; nothing, in a legal sense, is sacrosanct. Of course, the United Kingdom is not a despotic state in which fundamental freedoms of speech, association, religion, assembly, and so on are non-existent. However, within the traditional account of the UK constitution, this is so because the legislature –influenced, no doubt, by a combination of practical politics and the normative appeal of basic rights– has not chosen to abrogate such freedoms.<sup>[7]</sup>

To an extent, the notion of parliamentary sovereignty –and the associated absence of human rights as legally– or constitutionally–guaranteed absolutes – is a function of the unwritten nature of the British constitution. In the absence of a constitutional text ascribing power to, and limiting the power of, the legislative branch, parliamentary sovereignty fills the void. Of course, the latter does not ineluctably follow from the absence of the former: it would, after all, be possible for judges to hold that the unwritten constitution contained restrictions on legislative power,<sup>[8]</sup> just as judges elsewhere have discovered implied limits in written constitutions.<sup>[9]</sup> However, limitation of legislative power by reference to (unwritten) constitutional norms is not a step which has (yet) been taken in the UK – in part, no doubt, because judges are acutely aware that the legitimacy of judicial review of legislation would be open to question absent a constitutional text on which to fall back.<sup>[10]</sup> Of course, the existence of such a text does not necessarily render judicial review of legislation –in terms of its existence and scope– uncontroversial,<sup>[11]</sup> but it may, arguably if not unambiguously, provide an imprimatur for constitutional review.

The British HRA provides no such imprimatur. Detailed accounts of the Act can be found elsewhere;<sup>[12]</sup> here, it suffices to outline certain of its key operational provisions, all of which proceed on the basis that human rights protection has to be reconciled with the sovereignty principle. This was made clear by the Government’s White Paper on human rights, which stated that “the courts should not have the power to set aside primary legislation [...] on the ground of incompatibility with the Convention. This

conclusion arises from the importance which the Government attaches to parliamentary sovereignty”.<sup>[13]</sup> The centrepiece of the Act, therefore, is section 3, subsection (1) of which provides that, “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Where this is impossible, section 4 permits certain courts to issue a declaration of incompatibility. However, this “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given”,<sup>[14]</sup> such that the court must go on to apply the law to the parties to the case, notwithstanding its inconsistency with ECHR norms. The legal consequence of a declaration under section 4 is that it makes possible the use of an expedited procedure, provided for by section 10, for amending incompatible legislation. However, whether any amendment should be made is ultimately a political question: a declaration of incompatibility does not legally require the incompatible law to be changed. Moreover, the HRA is not entrenched:<sup>[15]</sup> Parliament is legally capable of amending or repealing it at will.

This may appear to constitute a relatively weak regime for the protection of fundamental rights. The existence and scope of such rights ultimately remain contingent upon the acquiescence of the political branches; judges remain constitutionally unable to disapply or strike down Acts of Parliament which are irreconcilable with the ECHR.<sup>[16]</sup> However, such an assessment of the status of human rights within the contemporary British constitution would be unduly pessimistic.

The courts have, at least in some cases, shown themselves willing to adopt a bold view of their interpretative powers under section 3.<sup>[17]</sup> The need for declarations of incompatibility has therefore been obviated in a number of cases, which have instead been disposed of by a creative interpretation of the domestic legislation so as to render it compatible with relevant ECHR rights.<sup>[18]</sup> The lengths to which it is desirable and legitimate for courts to go in this regard remains a contentious issue, and has generated a lively literature.<sup>[19]</sup>

The focus of this paper, however, is on a more general set of concerns regarding the status of human rights norms within the UK constitution today. Using the specific example of counter-terrorism measures – a context in which fidelity to human rights finds itself, for obvious reasons, under particular pressure – it will be argued that notwithstanding the theoretical capacity of Parliament to override basic norms, it is increasingly difficult for this to occur in practice. In this sense, it will be contended that recent experience implies the enhanced status and security of fundamental rights in Britain today – albeit that the position in which



the UK now finds itself (and the position which it ascribes to fundamental rights) differs in important respects from that which would obtain under an entrenched constitutional bill of rights.

These issues are elaborated in the remainder of this paper by reference to three (connected) sets of events: first, the UK Parliament's legislative response to the 9/11 attacks in the United States; second, the courts' scrutiny (pursuant to the HRA) of that legislation; and, third, the political and legislative response to the judges' views concerning the compatibility of the legislation with human rights standards.

### **III. DETENTION WITHOUT TRIAL: THE 2001 ACT**

The terrorist attacks in the United States on 11 September 2001 provoked a swift legislative response from the United Kingdom Parliament. The Anti-terrorism, Crime and Security Act 2001<sup>[20]</sup> is a wide-ranging piece of legislation covering matters as diverse as terrorist property, nuclear and aviation security, and police powers. Of specific present concern, however, is Part 4 of the Act, which established a regime for the indefinite detention of terrorist suspects without charge or trial.

Under section 21(1) of the ACSA, the Home Secretary -a member of the executive- was empowered to issue a certificate in respect of any person whose presence in the UK he reasonably believed to be a risk to national security, and whom he reasonably suspected of being a terrorist. The combined effect of sections 22 and 23 was that certificated individuals who could not be deported -e.g. because there existed a risk of torture in the destination state rendering deportation contrary to Article 3 ECHR-<sup>[21]</sup> could instead be detained under certain immigration powers (applicable only to foreign nationals). Although it was theoretically possible for such detainees voluntarily to leave the UK, thus leading their "prison" to be described as one having only "three walls", this possibility was in fact largely illusory, continued detention generally being a more attractive option than the prospect of torture. It was possible to appeal against certification to the Special Immigration Appeals Commission,<sup>[22]</sup> a judicial body established by statute<sup>[23]</sup> and able to deal with evidence considered too sensitive<sup>[24]</sup> to be revealed to the appellant or his legal advisors<sup>[25]</sup> (and which would not, therefore, be admissible in criminal proceedings).

SIAC could cancel a certificate if it considered that there were no reasonable grounds justifying the Secretary of State's suspicion that the individual concerned was an international terrorist or his belief that the individual's presence in the UK posed a risk to national security. Here,



however, our concern is with the human rights implications of the detention powers generally, rather than with their exercise in specific cases. Of central relevance to this inquiry is Article 5 ECHR, which provides that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be deprived of his liberty” except in certain defined circumstances. It is clear that none of those exceptions applied to the persons detained under the 2001 Act. On one level, therefore, the enactment of the detention without trial regime appears to evidence the willingness of the legislature to disregard adherence to human rights standards in the face of a perceived threat to national security – a conclusion that undermines the assertion made above concerning the enhanced status and security of fundamental rights in the UK today. However, there is a different –and, for two reasons, it is submitted, better– interpretation of these events.

First, the regime enacted in the 2001 Act was premised on the fact that Article 3 of the Convention is non-derogable.<sup>[26]</sup> The Act was, in effect, a device designed to deal with the absolute prohibition on breaching individuals’ Article 3 rights not to be tortured or subjected to inhuman or degrading treatment –meaning that such individuals could not be deported to countries where they faced a real risk of such treatment<sup>[27]</sup> while at the same time addressing the difficulties inherent in prosecuting suspected terrorists, bearing in mind that the evidence against them may be inadmissible in criminal proceedings<sup>[28]</sup> and that, in any event, the disclosure of such evidence may prejudice the state’s intelligence-gathering operation. It is significant in itself that Article 3 was, in this way, accepted as a limiting factor around which any legislative scheme had to be designed.

Secondly, although Parliament was willing to sanction a regime of detention without trial that was plainly inconsistent with Article 5 ECHR, this does not indicate that the Convention was simply ignored in this respect. Rather, the UK invoked<sup>[29]</sup> Article 15, which provides that, “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided such measures are not inconsistent with its other obligations under international law”. Such derogation is possible in respect of Article 5 (but not Article 3),<sup>[30]</sup> and the UK sought to take advantage of that possibility, the thinking being that Part 4 of the 2001 Act could be justified as a necessary derogation under Article 15.

Clearly, it is difficult to portray the decision to enact the detention without trial provisions as a ringing endorsement of the UK’s full-blooded commitment to respect for human rights, and that is not the argument

which is being advanced here. Rather, it is simply noted that the events described above provide (admittedly anecdotal) evidence that legislators, faced with what they perceived to be a real crisis in the wake of 9/11, were nonetheless prepared to treat the ECHR as a brake on their legislative freedom. Although this may seem a modest conclusion, its significance becomes greater when set in the context of a constitution in which the notion of unlimited legislative power is deeply entrenched through attachment to the doctrine of parliamentary sovereignty, as outlined above.

#### **IV. THE JUDICIAL RESPONSE: THE BELMARSH CASE**

Notwithstanding the government's belief that the 2001 Act was compatible with the ECHR (in the sense of being a justifiable derogation under Article 15), the individuals against whom it was invoked unsurprisingly sought to challenge their detention in the courts. Although there was a successful appeal to SIAC against an individual certification decision,<sup>[31]</sup> it is the legal challenges to the detention regime itself that are of present concern. Since that regime was enshrined in an Act of Parliament, it could not, of course, be struck down. Instead, in the Belmarsh Case,<sup>[32]</sup> the detainees sought a declaration of incompatibility, arguing that the conditions for derogation laid down in Article 15 were not satisfied, such that Article 5 remained an operative Convention right – with which their detention was undoubtedly incompatible. The central question for the courts, therefore, was whether the Article 15 conditions were met. In a landmark ruling, a specially-constituted House of Lords<sup>[33]</sup> held that Article 15 was not satisfied, and that the detention without trial regime was incompatible with Article 5 ECHR,<sup>[34]</sup> as well as Article 14. The reasoning which led the court to this conclusion provides an important insight into the level of scrutiny for compliance with human rights norms that judges are willing to undertake following the entry into force of the HRA, and it will therefore be helpful to examine the decision in some detail.

Their Lordships first had to address the requirement that there be a “war or other public emergency threatening the life of the nation” – and the logically prior question of their own competence to scrutinize such a matter. At first instance, SIAC had reached the view that the evidence advanced by the Secretary of State was capable of justifying the conclusion that such an emergency existed<sup>[35]</sup> – a view that was not upset on appeal to the Court of Appeal.<sup>[36]</sup> In the House of Lords, eight of the nine judges agreed that the view that a public emergency existed was not one they should overturn. Lord Bingham (in the majority) noted that it is the practice of the European Court of Human Rights to extend a ‘margin of appreciation’ to states in Article 15 cases, thereby reducing the intensity of

its review of states' decisions.<sup>[37]</sup> Such judicial "deference" was considered by his Lordship to be normatively desirable in the present context: deciding whether there was a public emergency "involved making a factual prediction of what various people around the world might or might not do, and when (if at all) they might do it, and what the consequences might be if they did".<sup>[38]</sup> This, said Lord Bingham, called for an exercise of judgment which the political branches were better-equipped than the judges to make. Such deference is consistent with the usual approach of British courts to matters of national security:<sup>[39]</sup> traditionally, when the executive claims that a particular course of action is justified because national security is in play, while the courts have insisted upon evidence to establish that national security is indeed in issue,<sup>[40]</sup> they have often<sup>[41]</sup> in fact required little more than evidence that a relevant political actor considered national security to be at stake.<sup>[42]</sup>

It is noteworthy, therefore, that although Lord Bingham was not alone in endorsing a highly deferential approach to the public emergency question,<sup>[43]</sup> some of the judges appeared to take a more robust stance. For instance, while Lord Scott accepted that "the judiciary must in general defer to the executive's assessment of what constitutes a threat to national security or to 'the life of the nation'", he indicated that such deference should not be blindly extended, irrespective of the likely quality of such executive assessments. To this end, he drew attention to the fact that a prominent part of the executive's recent track-record in this area consists of the "faulty intelligence assessments on the basis of which United Kingdom forces were sent to take part, and are still taking part, in the hostilities in Iraq".<sup>[44]</sup> As a result, he had "very great doubt whether the 'public emergency' is one that justifies the description of 'threatening the life of the nation'", although he was, ultimately, willing to give the executive "the benefit of the doubt". Lord Hope, too, was prepared to concede that there was a public emergency but, like Lord Scott, was willing to look critically at the executive's claims. This led him to conclude while a "public emergency" existed, it was "constituted by the threat that [terrorist] attacks will be carried out" in the future; although that was sufficient to amount to a "current state of emergency", it was an emergency "on a different level [...] from that which would undoubtedly ensue if the threats were ever to materialise".<sup>[45]</sup> The practical import of Lord Hope's critical approach to the public emergency question lies in its impact upon his subsequent analysis of the question -to which we shall turn shortly- whether detention without trial was strictly necessary: as his Lordship put it, "One cannot say what the exigencies of the situation require without having clearly in mind what it is that constitutes the emergency".<sup>[46]</sup>

Meanwhile, only one judge, Lord Hoffmann, considered that there was no “public emergency threatening the life of the nation”. While he accepted that there was a real possibility of terrorist attacks on the UK, the key question was “whether such a threat is a threat to the life of the nation”.<sup>[47]</sup> His Lordship considered that the “nation”, in Article 15, is to be regarded as “a social organism”, the “life” of which is not “coterminous with the lives of its people”.<sup>[48]</sup> Hence, said Lord Hoffmann, “Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community”<sup>[49]</sup> (a conclusion that seemed to assume particular resilience in the case of the UK).<sup>[50]</sup> Instead, he said, “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these”.<sup>[51]</sup> Although the foregoing account may be taken to indicate that Lord Hoffmann’s dissent was informed simply by his view of the text of Article 15, that does not represent the whole picture. Central to his reasoning was the view that it is appropriate for a court to evaluate for itself the nature and scale of the threat to public safety posed by international terrorism. Absent from his speech is the language (and spirit) of “deference” which, as we have seen, affected (to varying degrees) the other judges’ views on this point: far from deferring to the executive, Lord Hoffmann said of the public emergency question that “we, as a United Kingdom court, have to decide the matter for ourselves”.<sup>[52]</sup> This view represents a radical break with tradition, going beyond the approach of the other judges and, as we shall see shortly, contrasting sharply with views expressed by Lord Hoffmann himself only three years earlier.

The eight judges who were prepared to accept the existence of a public emergency (or at least to accept that others were entitled to have formed such a view) then had to consider whether the detention without trial regime was a “strictly necessary” response. Although, as explained above,<sup>[53]</sup> British courts have traditionally insisted upon some evidence to justify executive claims that national security is at stake (albeit that they have tended to be very easily satisfied in this respect), judicial scrutiny has generally all but evaporated in relation to the question whether national security justifies some course of action. For example, whether national security concerns could justify, in the context of a deportation decision, departing from the fundamental requirement of natural justice that an individual should be informed of the case against him<sup>[54]</sup> was held to be a question exclusively for the executive: such information did not need to be released, according to Lord Denning MR, “[s]ave to the extent that the Home Secretary thinks safe”.<sup>[55]</sup> Similarly, it was held at the highest judicial level that whether national security could justify

changes to the employment conditions of public servants in what would otherwise have been a procedurally unfair manner was “par excellence a non-justiciable question” raising matters “upon which [the executive], and not the courts of justice, must have the last word”.<sup>[56]</sup> This doctrine of judicial deference -if not abdication- in the face of such national security questions was recently perpetuated by the House of Lords in the *Rehman* case, a challenge to the Home Secretary’s determination that an individual should be deported on national security grounds.<sup>[57]</sup> In a decision which heavily circumscribed the judiciary’s role in scrutinising such decisions, Lord Steyn observed that it is “self-evidently right that national courts must give great weight to the views of the executive on matters of national security”.<sup>[58]</sup> Meanwhile, Lord Hoffmann considered that “whether something is ‘in the interests’ of national security is not a question of law’: rather, it is ‘a matter of judgment and policy’ which is not ‘for judicial decision’”.<sup>[59]</sup> He added that the events of 9/11 underlined the need for judicial deference in this sphere, bearing in mind considerations of institutional competence (the executive, noted his Lordship, “has access to special information and expertise in these matters”) and democracy (since the potentially serious consequences of national security decisions demanded a “legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process”).<sup>[60]</sup>

Why these putative inhibitions upon the judicial process were not considered insuperable in *Belmarsh* is a matter Lord Hoffmann (surprisingly) did not address in that case.<sup>[61]</sup> That point aside, however, the real significance of *Belmarsh* lies in the approach of the other seven judges in the majority<sup>[62]</sup> to the “justification question” – viz whether national security justified detention without trial (or, to put it in Article 15 terms, whether the derogation from Article 5 was ‘strictly required by the exigencies of the situation’). Rather than characterising this as a matter lying in the exclusive domain of the executive, the majority<sup>[63]</sup> subjected the government’s justifications for detention without trial to close scrutiny, and found them wanting. Three aspects of their Lordships’ reasoning should be noted.

First, and perhaps most significantly, the detention regime, as we have seen, applied only to foreign nationals and not to British citizens posing an equivalent threat; all of the majority judges who addressed the justification question agreed that this was fatal to the scheme’s necessity for Article 15 purposes. For example, Baroness Hale observed that, “The conclusion has to be that it is not necessary to lock up the nationals. Other ways must have been found to contain the threat which they present. And if it is not necessary to lock up the nationals it cannot be necessary to lock up the

foreigners. It is not strictly required by the exigencies of the situation".<sup>[64]</sup> Secondly, as we have already seen, the suspected terrorists were detained in what has been called a "prison with three walls". Although (for reasons explained above) exploiting this was generally an unattractive option for the detainees, one of them was able to go to France – and did so. Again, this raised serious doubts as to the necessity of the detention regime: as Baroness Hale put it, "What sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately"?<sup>[65]</sup> Thirdly, some of the judges noted that the government had not established the inadequacy of other measures –e.g., electronic tagging, limiting access to the internet and other means of communication, and so on– which would have been less restrictive of the suspects' liberty.<sup>[66]</sup> This also cast doubt on whether wholesale deprivation of liberty was strictly necessary. The purported derogation was therefore quashed, and a declaration issued to the effect that section 23 of the ACSA was incompatible with Article 5 ECHR.<sup>[67]</sup>

This decision evidences heightened judicial willingness to scrutinise –the national security context notwithstanding– whether there has been a breach of rights. The significance of this is considerable, given received wisdom in British public law and the debate which the enactment of the HRA stimulated. Orthodoxy long held that courts in the UK could not, with propriety, set aside administrative decisions<sup>[68]</sup> on substantive (as opposed to procedural) grounds save where they were aberrant or totally "unreasonable"<sup>[69]</sup> – a doctrine of judicial self-restraint which, as explained above, bit with particular force when national security was at stake. The extent to which the HRA frees British courts from these shackles by encouraging the use of the more intensive "proportionality" test favoured by the European Court of Human Rights has been the subject of considerable controversy, with courts and commentators expressing diverse views as to how much "deference" should be attached to the policy views of the executive and legislature by courts charged with determining whether a given measure breaches an ECHR right.<sup>[70]</sup>

Although one case cannot be expected to lay this debate to rest, *Belmarsh* is highly significant in this regard for two reasons. First, short shrift is given to the stock argument that judges should defer to political decision-makers on "democratic grounds". Lord Bingham considered that the HRA itself "gives the courts a very specific, wholly democratic, mandate"<sup>[71]</sup> to scrutinise measures impacting upon human rights, and endorsed one commentator's view that the Act charges the courts with the task of "delineating the boundaries of a rights-based democracy".<sup>[72]</sup> Secondly, *Belmarsh* addresses the vexed notion of



“relative institutional competence”. This idea was invoked by the judges (admittedly with varying degrees of enthusiasm) to justify judicial deference to executive assessments of whether there was a public emergency for Article 15 purposes. However, it cut much less ice in relation to the justification question: here, the majority rightly thought themselves perfectly able to identify the flaws in the legislative scheme by recognising that the “prison with three walls” argument and the non-detention of British terrorist suspects seriously undermined the government’s contention that detention of certain foreign nationals was ‘strictly required’. The significance of this lies in the willingness of the majority to adopt a nuanced approach, whereby judicial deference to the executive or legislature is not set at a uniform level for a given case, but instead varies from issue to issue, depending on (inter alia) the institutional ability of the court to evaluate the justifications advanced by the political branch. This approach – urged by certain commentators in the human rights<sup>[73]</sup> and analogous<sup>[74]</sup> fields – is to be welcomed. It represents a more sophisticated view of deference, a maturing of the jurisprudence as the HRA becomes an established feature of the constitutional landscape, and an appropriate degree of robustness of judicial oversight.<sup>[75]</sup>

## V. AFTER BELMARSH

The response to the Belmarsh Case is as intriguing as the decision itself, and sheds further light on the status of human rights today in the UK. In this section, we sketch the legislative response to Belmarsh, and then consider what broader lessons may be drawn from this part of the story.

Legislators responded promptly to the House of Lords’ ruling by repealing the detention without trial regime and replacing it with the Prevention of Terrorism Act 2005.<sup>[76]</sup> The passage of that legislation through Parliament was extraordinary. Time was of the essence because, under section 29 of the ACSA, the detention without trial provisions could remain in force only if renewed annually by an order approved by resolution of both legislative chambers: if the detainees were not to be released unconditionally – a step which, according to the government, would have had dire consequences for national security – then new legislation had to be in place before the old provisions lapsed on 14 March 2005.<sup>[77]</sup> Against this background, a Bill was introduced into the House of Commons on 22 February and approved six days later; however, it met with fierce opposition in the House of Lords.<sup>[78]</sup> Peers were alarmed by the proposal to allow the Home Secretary to subject terrorist suspects (irrespective of nationality) to ‘control orders’ having a potentially far-reaching impact upon their liberty. Of particular concern were the



standard of proof applying to decisions to impose control orders, the extent to which -and the stage at which- the judiciary should be involved in the making or reviewing of such decisions, and the duration for which the legislation should remain in force. A stand-off ensued between the House of Lords and the government-dominated House of Commons, the former's amendments repeatedly being undone by the latter.<sup>[79]</sup> Eventually, following an all-night sitting, a compromise was found, and the legislation entered into force on 11 March, just in time to allow control orders to be imposed on those who had been detained under the 2001 Act.

The new Act allows the Home Secretary to make a control order against an individual if he "has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity" and "considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual".<sup>[80]</sup> The Home Secretary must<sup>[81]</sup> obtain the permission of the court<sup>[82]</sup> before making such an order (except in urgent cases,<sup>[83]</sup> which must instead be considered by a court within seven days of the making of the order).<sup>[84]</sup> It is also possible for individuals to appeal against decisions taken by the Home Secretary to renew or modify a control order, and against his refusal to revoke or modify such an order.<sup>[85]</sup>

Following the enactment of the PTA, the derogation from Article 5 ECHR mentioned above was rescinded,<sup>[86]</sup> since it was anticipated by the government that, for the time being, control orders would not restrict the liberty (or other rights) of individuals to an extent that is incompatible with the Convention. However, it is clear that the power conferred by the Act to impose control orders is wide enough to include restrictions on liberty -e.g., house arrest-<sup>[87]</sup> that would be inconsistent with Article 5. If the government wishes to permit the imposition of such control orders, a fresh derogation will need to be entered; moreover, the Act specifically provides that control orders which, pursuant to such a derogation, impose restrictions on the individual that are incompatible with Article 5 may only be imposed by a court. Such an order may remain in force only if the court is (*inter alia*) "satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity" and "considers that the imposition of obligations on the controlled person is necessary for purposes connected with protecting members of the public from a risk of terrorism".<sup>[88]</sup> All proceedings under the PTA take place under special court rules which provide, *inter alia*, for sensitive "closed material" to be withheld from the individual concerned and his legal representatives, and for his interests to be represented, where necessary, by a security-cleared "special advocate".<sup>[89]</sup>

It is clear enough that the aim of the PTA was to permit a high level of control and monitoring of suspected terrorists without falling foul of the ECHR. No attempt has yet been made to derogate from the ECHR so as to permit the deprivation of liberty – a step which would no doubt be challenged on Article 15 grounds. For the time-being, the government is restricting itself to the making of non-derogating control orders – that is, control orders that must be compatible with the ECHR – but is finding that Article 5 prevents it from going as far as it would like in terms of restricting the movement, conduct and so on of suspects. In two recent cases, control orders were quashed by the courts because they were held to impose such onerous conditions as to amount to a deprivation of liberty under Article 5.<sup>[90]</sup>

For present purposes, however, the very fact that the 2001 provisions were repealed and replaced with the PTA control order regime is, in itself, significant. As explained above, British courts are not constitutionally able to strike down Acts of Parliament that are incompatible with the ECHR, so – as Lord Scott put it in *Belmarsh* – the “import of [a declaration of incompatibility under the HRA] is political not legal”.<sup>[91]</sup> As a matter of domestic law, legislators are free to ignore the courts’ finding that existing legislation is incompatible with human rights standards, but it is clear that politicians did not actually feel able to do so, and that the *Belmarsh* judgment played an important part in bringing moral – if not legal<sup>[92]</sup> – pressure to bear on the political branches. Following *Belmarsh*, the then Home Secretary said that he “accept[ed] the Law Lords’ declaration of incompatibility” and their “judgment that new legislative measures must apply equally to nationals as well as to non-nationals”,<sup>[93]</sup> and later stated that the new bill was “designed to meet the Law Lords’ criticism that the previous legislation was both disproportionate and discriminatory”.<sup>[94]</sup> What this episode suggests is that, notwithstanding the absence of a strike-down power, the HRA is to some extent capable of curbing the worst excesses of majoritarianism even where the rights of an acutely unpopular minority – such as suspected terrorists – are at stake.<sup>[95]</sup> The very fact that courts now have jurisdiction to pronounce on the compatibility of legislation with human rights norms brings new – and, it seems, considerable – pressure to bear on the political branches,<sup>[96]</sup> making it more difficult for legislation that is incompatible with fundamental rights to be kept on the statute book.<sup>[97]</sup>

But this brings us to our final point – that, as a matter of domestic law, it is not impossible for such legislation to be enacted or kept in force. The HRA notwithstanding, the UK has not (yet) turned its back on traditional doctrine. The sovereignty of Parliament remains the established

orthodoxy; and so it seems that respect for human rights -and for the courts' human rights jurisdiction itself- endures only so long as politics and politicians permit. Of course, this is not to say that Parliament therefore enjoys a completely free hand, and can readily abrogate basic freedoms. Ultimately, however, the limitations which are liable to prevent or deter such legislative excesses are not straightforwardly legal; rather, they consist in such factors as public opinion and the (considerable) pressure that can be brought to bear by a vigilant media.<sup>[98]</sup> Yet, if the political will can be mustered, there is no domestic legal prohibition on the enactment (or maintenance in force) of legislation which is flatly inconsistent with the fundamental rights;<sup>[99]</sup> nor is there anything, as a matter of domestic law, to prevent Parliament from amending or repealing the HRA itself. Indeed, such possibilities have been explicitly countenanced recently by politicians. It is reported that the Prime Minister, Tony Blair, considered limiting the courts' human rights jurisdiction following an embarrassing defeat in an asylum case.<sup>[100]</sup> More recently, and most notably, Blair suggested, in the wake of the terrorist attacks in London on 7 July 2005, that he would consider seeking the amendment of the HRA if it proved to be an inhibition to the effective prosecution of the war on terror.<sup>[101]</sup> Such comments serve as an important reminder that, under the UK's present constitutional arrangements, even in their recently-modified form, the jurisdiction of British courts to review executive and legislative action for compatibility with human rights norms ultimately remains vulnerable to majority rule.

Of course, this is so only if the orthodox doctrine of parliamentary sovereignty, described above, continues to hold sway. It is worth noting, by way of conclusion, that that traditional view finds itself increasingly open to question today, both academically and curially. British membership of the European Union is part of the reason for this, bearing in mind the doctrine of the primacy of EU law,<sup>[102]</sup> but so too is the UK's status as a party to international treaties like the ECHR. In light of the resulting international obligations to accord respect to basic rights, the view that Parliament enjoys legally unbridled power as a matter of domestic law can appear unreal or notional. As a result of these (and other) considerations, commentators have for some time questioned whether the doctrine of parliamentary sovereignty remains pertinent today; more generally, they have asked whether the ascription of unrestricted power to a legislative body is consonant with the UK's status as a modern liberal democracy.<sup>[103]</sup> That such questions can be asked, and the veracity of the doctrine doubted, is possible because the concept of parliamentary sovereignty is itself an uncertain one. Although representing the received view of the British constitution, the nature and scope of the doctrine of parliamentary sovereignty has always been open to some doubt. Since the

legislative authority of the UK Parliament does not derive from a constitutional text, it has been argued that the sovereignty of Parliament is primarily a “political fact” which emerged due to the willingness of the courts to recognise and enforce Acts of Parliament.<sup>[104]</sup> In result, parliamentary sovereignty is effectively a function of the relationship between the judiciary and the legislature – a product of the courts’ willingness to recognise Parliament’s enactments as the law. On this view, it follows that the supremacy of Parliament is, in some sense, contingent on the ongoing acquiescence of the judiciary.

The extent to which it would be legitimate for courts to withdraw their recognition of parliamentary enactments as valid laws – by, for example, refusing to enforce legislation which offends basic principles of constitutionalism – is a controversial issue. It divides commentators,<sup>[105]</sup> and this is not the place to rehearse that debate. However, it is worth noting that fidelity to the traditional view that Parliament’s authority is unlimited, and that the judiciary is impotent to curtail even fundamental infractions of the rule of law and constitutional standards, finds itself under greater pressure today than ever before. It is particularly noteworthy that this pressure now emanates not only from the law journals but from the law reports too, with some senior judges openly questioning the traditional view.

The most significant example of this phenomenon is supplied by the recent decision of the House of Lords in *Jackson*.<sup>[106]</sup> Although the question whether Parliament is fully sovereign in the traditional sense did not directly fall for determination in that case, it is highly significant that three of the judges who nevertheless chose to address it reached conclusions markedly at odds with orthodoxy. Lord Steyn thought that, as a matter of “logic: and “[s]trict legalism”, Parliament could enact ‘oppressive and wholly undemocratic legislation’, for instance “abolish[ing] judicial review of flagrant abuse of [executive] power”<sup>[107]</sup> (or, presumably, indefinitely detaining suspected terrorists without charge or trial). Yet his Lordship ultimately doubted the correctness of the traditional analysis which ascribes unlimited power to the legislative branch. It was premised on a “pure and absolute” conception of parliamentary sovereignty which, he said, was “out of place” in modern Britain. He went on to argue that the supremacy of Parliament depends on judicial recognition of it: the judges, he claimed, “created this principle”, and could equally be the authors of its demise. If Parliament were to assert an extravagant power by, for example, seeking to remove judicial review, the courts “may have to consider whether this is a constitutional fundamental which even a sovereign Parliament [...] cannot abolish”.<sup>[108]</sup> Lord Hope expressed similarly striking views, opining that

“parliamentary sovereignty is no longer, if it ever was, absolute”<sup>[109]</sup> and Baroness Hale thought it possible that the courts may reject an attempt by Parliament to “subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny”.<sup>[110]</sup>

The significance of these remarks should not be underestimated. Although certain academics<sup>[111]</sup> and -extra-curially- judges<sup>[112]</sup> have for some time openly questioned whether it is sensible or meaningful to ascribe unfettered power to a legislative body in a modern, liberal democracy, it is noteworthy that such sentiments are now finding expression in the UK’s highest court. This at least raises the possibility that the security of fundamental rights in the UK may, in time, be ultimately vouchsafed not by the political process, but by judicial vindication of hitherto unarticulated restrictions on legislative power contained within the UK’s constitutional order.

## VI. CONCLUSIONS

The “war on terror” provides a useful context in which to evaluate the extent to which human rights enjoy legal security in the UK today, following the changes to the British constitution -most notably the enactment of the HRA- mentioned at the beginning of this paper. In this context, one might expect to find fidelity to human rights standards under greatest pressure, given the potential gravity and scale of the threat posed by terrorism, and judicial review at its most deferential, bearing in mind both the fact that national security is at stake and the traditional approach of British courts to that subject area.

The main contention of this paper is that a picture emerges from events post-9/11, in particular from the enactment and fate of the detention without trial regime, which suggests that human rights norms are more deeply embedded -and therefore harder to displace- than might at first be assumed. Although the HRA does not legally place interference with fundamental rights beyond the capacity of the legislature, it is tolerably clear that the Act has instituted important changes in the broader environment within which adjudication occurs, legislation is enacted and politics conducted. While, therefore, the implications of a declaration of incompatibility under the HRA remain political, not legal, those implications should not be underestimated. Given the right political conditions, it is clear that a powerful judicial condemnation of rights-infringing legislation will bring considerable -sometimes irresistible- pressure to bear on legislators to amend or repeal the relevant provisions. In this way, the HRA affords the opportunity for healthy tension between the judicial and legislative branches. As the Lord Chief Justice of England

and Wales recently put it, “the Human Rights Act has unquestionably circumscribed both the legislative and the executive action that would otherwise have been the response to the outbreak of global terrorism that we have seen over the last decade”.<sup>[113]</sup>

It is not, however, difficult to envisage particular sets of circumstances – the immediate aftermath of a terrorist attack being an obvious example – in which the public and political mood is such that it would be quite possible for legislators to resist any pressure emanating from a judicial declaration of incompatibility. In this sense, therefore, the status of human rights in the UK today is ultimately vouchsafed by – and so contingent upon – politics rather than law, a position intimately bound up with the notion of parliamentary sovereignty. While that view of the constitution holds sway, everything – including respect for fundamental rights – exists in the shadow of the will of the majority (in Parliament). The fact that that view is itself now being questioned at the highest judicial level is perhaps the most graphic illustration of the extent to which the tectonic plates of the UK constitution are moving. This sense that the ground is shifting – that old orthodoxies are finding themselves under increasing pressure, amid uncertainty about what may fill the resulting vacuum – was reflected by Laws LJ in the *Roth* case. He argued that “[i]n its present state of evolution, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy”.<sup>[114]</sup> As this statement acknowledges, it is too soon to consign the notion of parliamentary sovereignty to history, but it seems clear that constitutional thinkers – judges as well as commentators – are increasingly willing to countenance the emergence of constitutional restrictions on the legislative authority of the UK Parliament.

In many situations, as in *Belmarsh* itself, the HRA will continue to act as a safety valve, allowing courts to pronounce on the human rights implications of legislation – and, in turn, shaping if not directing the response of legislators. But this will not inevitably be so, particularly if politicians ever succumb to the temptation to amend the HRA, removing or curtailing the courts’ jurisdiction thereunder. Indeed, we have already seen that this has been countenanced in the specific context of the war on terror. Should such a situation arise, judges will be called on to choose between fidelity to legislative intention and enforcement of deeper constitutional norms. Of course, even in states with written constitutions, the assertion by the judiciary of powers of constitutional review can prove controversial; British courts are no doubt mindful of the fact that this would be doubly so in the absence of a written constitution. Intriguingly, however, there are now at least tentative signs that some judges, at least, are prepared to contemplate the assertion of such powers.



---

REFERENCES

\* Senior Lecturer in Law and Assistant Director, Centre for Public Law, University of Cambridge. This article draws on, and in some places reproduces parts of, papers first published by Oxford University Press in the *International Journal of Constitutional Law*: M.C. ELLIOTT, "Detention without Trial and the 'War on Terror'", *International Journal of Constitutional Law*, 2006, No 4, pp. 553-566; M.C. ELLIOTT, "The UK Parliament: Bicameralism, Sovereignty and the Unwritten Constitution", *International Journal of Constitutional Law*, 2007, No 5, pp. 1-10. I am grateful to Simon Atrill, David Feldman, Brigid Hadfield, Ian Loveland, Amanda Perreau-Saussine and Iain Steele for their comments drafts of those papers. I am also indebted to Rory Brown, Angus Johnston and James Nickel for their advice and comments on this paper. I remain responsible, however, for the opinions expressed and for any errors.

[1] The British constitution is "unwritten" in the sense that no constitutional text with special legal status exists. The sort of rules which would, in many countries, be part of the Constitution, are instead found in a variety of other sources, such as legislation, judicial decisions and constitutional conventions (established practices).

[2] See, eg, V. BOGDANOR, "Our New Constitution", *Law Quarterly Review*, 2004, pp. 242-262.

[3] Scotland Act 1998; Northern Ireland Act 1998; Government of Wales Acts 1998-2006.

[4] Constitutional Reform Act 2005.

[5] Hereinafter 'HRA'.

[6] A.V. DICEY, *An Introduction to the Study of the Law of the Constitution*, 10th ed, London, Macmillan, 1959, p. 10.

[7] See, e.g., A.V. DICEY, *Law of the Constitution*, *supra* note 6, p. 271; Court of Appeal for England and Wales, *Wheeler v. Leicester City Council*, 13 Dec. 1984, 1985 AC 1054, p. 1065, per Browne-Wilkinson LJ.

[8] See, e.g., J. LAWS, "Law and Democracy", *Public Law*, 1995, pp. 72-93; H. WOOLF, "Droit Public – English Style", *Public Law*, 1995, pp. 57-71.

[9] See, e.g., the decision of the High Court of Australia, *Australian Capital Television Pty Ltd v. Commonwealth*, 1992, 177 CLR 106, holding that the Australian Constitution contains implied an right of freedom of political communication which limits legislative power.

[10] That is not to say that such objections are necessarily insuperable. For discussion, see, J. LAWS, *Law and Democracy*, *supra* note 8; J. LAWS, "The Constitution: Morals and Rights", *Public Law*, 1996, pp. 622-635.

[11] As experience in the United States, in the wake of *United States Supreme Court, Marbury v. Madison*, 24 Feb. 1803, 5 US 137, demonstrates.

[12] See, e.g., S. GROSZ, J. BEATSON AND P. DUFFY, *Human rights: the 1998 Act and the European Convention*, London, Sweet & Maxwell, 2000.

[13] Cm 3782, *Rights Brought Home: The Human Rights Bill*, London, 1997, p. 10.

[14] HRA, Section 4(6)(a).

[15] In orthodox constitutional theory, it is impossible for legislation to be entrenched. Cf *Administrative Court, Thoburn v. Sunderland City Council*, 18 Feb. 2002, EWHC 195, 2003 QB 151.



[16] British judges are, however, able to disapply primary legislation which is incompatible with the law of the European Communities (see *House of Lords, Regina v. Secretary of State for Transport, ex parte Factortame Ltd* (No 2), [1991] 1 AC 603). This means that where national legislation purports to implement or derogate from EC law, it may be disapplied to the extent of any inconsistency with EC fundamental rights norms (see, e.g., E.C.J., Case 260/89, *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, 1991, ECR-I, 2925). The fundamental rights recognised by the EC legal order are drawn from a variety of sources, including the ECHR: see E.C.J., Case 44/79, *Hauer v. Land Rheinland-Pfalz*, 1979, ECR, 3727, § 15.

[17] See, e.g., *House of Lords, Ghaidan v. Godin-Mendoza*, 21 June 2004, UKHL 30, 2 AC 557.

[18] Only 14 declarations of incompatibility (excluding those overturned on appeal) have been made thus far under the Act. See *Declarations of incompatibility made under section 4 of the Human Rights Act 1998*, London, Department for Constitutional Affairs, 2006, <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf>

[19] See, *inter alios*, A. KAVANAGH, "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998", *Oxford Journal of Legal Studies*, 2006, pp. 179-206; A. KAVANAGH, "Statutory Interpretation and Human Rights after Anderson: A More Contextual Approach", *Public Law*, 2004, pp. 537-545; D. NICOL, "Statutory Interpretation and Human Rights after Anderson", *Public Law*, 2004, pp. 274-282; G. MARSHALL, "The Lynchpin of Parliamentary Intention: Lost, Stolen, or Startled?", *Public Law*, 2003, pp. 236-248; T. ALLAN, "Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective", *Current Legal Problems*, 2006, pp. 27-50.

[20] Hereinafter 'ACSA'.

[21] E.C.H.R., *Chahal v. UK*, 15 Nov. 1996, 23 EHRR 413.

[22] Hereinafter 'SIAC'.

[23] *Special Immigration Appeals Commission Act 1997*.

[24] E.g., because its disclosure may reveal sources, placing them, and future intelligence-gathering, in jeopardy.

[25] Instead, security-cleared 'special advocates' could argue on behalf of appellants in relation to such 'closed evidence'.

[26] *European Convention of Human Rights*, Article 15 § 2.

[27] See *supra*, note 21.

[28] Current UK law generally renders intercept evidence inadmissible in court proceedings (see *Regulation of Investigatory Powers Act 2000*), a position recently endorsed by a government review (see <http://security.homeoffice.gov.uk/ripa/interception/use-interception/use-interception-review/>). The ban on the use of such evidence has been strongly criticised. See, e.g., *Privy Counsellor Review Committee, Anti-terrorism, Crime and Security Act 2001 Review: Report*, London, The Stationary Office, 2003, pp. 57-58.

[29] See SI 2001/3644, *The Human Rights Act 1998 (Designated Derogation) Order 2001*.

[30] *European Convention on Human Rights*, Article 15 § 2.

[31] *Special Immigration Appeals Commission, M v. Secretary of State for the Home Department*, 8 Mar. 2004, unreported (upheld by the Court of

Appeal, *M v. Secretary of State for the Home Department*, 18 Mar. 2004, EWCA Civ 324, 2 All ER 863.

[32] So-called after the prison in which the claimants were detained. See *House of Lords, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 16 Dec. 2004, UKHL 56, 2005 2 AC 68.

[33] The House of Lords, in its judicial capacity, is the court of final appeal for all civil and non-Scottish criminal matters in the UK, although the recently-enacted (but as yet unactivated) Constitutional Reform Act 2005 provides for the transfer of its judicial functions to a new Supreme Court.

[34] In addition, the administrative order required under the HRA scheme to effect derogation was quashed. The House of Lords went further than the first instance decision (*Special Immigration Appeals Commission, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 30 July 2002, HRLR 45), which found incompatibility on Article 14 grounds only, and reversed the Court of Appeal (*Court of Appeal, A v. Secretary of State for the Home Department, X v. Secretary of State for the Home Department*, 25 Oct. 2002, EWCA Civ 1502, 2004 QB 335), which found no incompatibility at all.

[35] *Supra*, note 34.

[36] *Supra*, note 34.

[37] See, e.g., E.C.H.R., *Lawless v. Ireland* (No 3), 1 Jul. 1961, 1 EHRR 15; E.C.H.R., *Ireland v. UK*, 18 Jan. 1978, 2 EHRR 25; E.C.H.R., *Brannigan and McBride v. UK*, 26 May 1993, 17 EHRR 539.

[38] *Supra*, note 32, § 9.

[39] See, e.g., K. EWING, "The Futility of the Human Rights Act", *Public Law*, 2004, pp. 829-852.

[40] See, e.g., Privy Council, *The Zamora*, 7 Apr. 1916, 2 AC 77, pp. 106-107.

[41] See, e.g., House of Lords, *Council of Civil Service Unions v. Minister for the Civil Service*, 22 Nov. 1984, 1985 AC 374.

[42] For further comment on the approach to the "public emergency" question in *Belmarsh*, see T.R. HICKMAN, "Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism", *Modern Law Review*, 2005, pp. 655-668.

[43] E.g. Baroness Hale, *supra* note 32, § 226, did 'not feel qualified' to disagree with SIAC's conclusion on this point.

[44] *Supra*, note 32, § 154. These intelligence failings (on which see HC898, *Review of Intelligence on Weapons of Mass Destruction*, London, 2004) remain a highly contentious political matter in the UK (and elsewhere: see, e.g., Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Report to the President of the United States Washington DC, 2005).

[45] *Supra*, note 32, § 119.

[46] *Ibid.*, § 116.

[47] *Ibid.*, § 95.

[48] *Ibid.*, § 91.

[49] *Ibid.*, § 96.

[50] *Ibid.*, § 95; "There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom".

[51] *Ibid.*, § 97.

[52] *Ibid.*, § 92.

[53] At text to notes 40 and 41.

[54] See, e.g., House of Lords, *Regina v. Secretary of State for the Home Department, ex parte Doody*, *Regina v. Secretary of State for the Home Department, ex parte Pegg*, *Regina v. Secretary of State for the Home Department, ex parte Pierson*, *Regina v. Secretary of State for the Home Department, ex parte Smart*, 24 Jun. 1993, 1994 1 AC 531, p. 560, per Lord Mustill.

[55] Court of Appeal, *Regina v. Secretary of State for Home Affairs, ex parte Hosenball*, 29 Mar. 1977, 1 WLR 766, p. 782 (emphasis added).

[56] House of Lords, *Council of Civil Service Unions v. Minister for the Civil Service*, 22 Nov. 1984, 1985 AC 374, p. 412, per Lord Diplock.

[57] House of Lords, *Secretary of State for the Home Department v. Rehman*, 11 Oct. 2001, UKHL 47, 2003 1 AC 153.

[58] *Ibid.*, § 31.

[59] *Ibid.*, § 50.

[60] *Ibid.*, § 62.

[61] Although of course the language of Article 15 (which was relevant in *Belmarsh* but not *Rehman*) does appear to call for particularly rigorous scrutiny.

[62] Only Lord Walker declared himself satisfied as to the strict necessity of the detention without trial regime.

[63] With the exception of Lord Hoffmann, who did not need to address the “justification question”.

[64] *Supra*, note 32, § 231.

[65] *Ibid.*, § 230.

[66] See, e.g., Lord Bingham (*ibid.*, § 35); Lord Scott (*ibid.*, § 155).

[67] The declaration further stated that section 23 was incompatible with Article 14 ECHR, which provides that the “enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground”, including “national origin”. Such a declaration had been granted at first instance, but SIAC’s decision on this point (*supra*, note 34) was overturned by the Court of Appeal (*supra*, note 34), which held that section 23 was an immigration measure and that differential treatment on grounds of nationality was therefore objectively justified. The majority in the House of Lords disagreed, holding that section 23 was essentially a security measure, and that, in such a context, differential treatment on grounds of nationality could not be objectively justified.

[68] Outside the special context of matters relating to EU law, judicial review of legislation was simply not in issue prior to the conferral upon the courts, via section 4 HRA, of jurisdiction to issue declarations of incompatibility.

[69] See, classically, Court of Appeal, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, 10 Nov. 1947, 1948 1 KB 223.

[70] The case law and literature are already immense. For recent contributions, see Court of Appeal, *International Transport Roth GmbH v. Secretary of State for the Home Department*, 22 Feb. 2002, EWCA Civ 158, 2003 QB 728; House of Lords, *Regina (on the application of ProLife Alliance) v. British Broadcasting Corporation*, *Regina (on the application of Quintavalle) v. British Broadcasting Corporation*, 15 May 2003, 2003 UKHL 23, 2004 1 AC 185; J. JOWELL, “Judicial Deference: Servility, Civility or Institutional Capacity?”, *Public Law*, 2003, pp. 592–601; M. HUNT, “Sovereignty’s Blight: Why Contemporary Public Law needs the Concept of ‘Due Deference’” in N. BAMFORTH AND P. LEYLAND, *Public Law in a Multi-Layered Constitution*, Oxford, Hart Publishing, 2003, pp. 337–370; J.

RIVERS, "Proportionality and Variable Intensity of Review", *Cambridge Law Journal*, 2006, pp. 174-207.

[71] *Supra*, note 32, § 42.

[72] J. JOWELL, "Judicial Deference", *supra* note 70, p. 597.

[73] E.g. M. HUNT, "Sovereignty's Blight", *supra* note 70.

[74] E.g. B. HARRIS, "Judicial Review, Justiciability and the Prerogative of Mercy", *Cambridge Law Journal*, 2003, pp. 631-660.

[75] It must, however, be recalled that this case arose in the specific context of Article 15, the language of which, as noted above, seems to call for especially rigorous scrutiny.

[76] Hereinafter 'PTA'.

[77] See Statutory Instrument 2004/751, *Anti-Terrorism, Crime and Security Act 2001 (Continuance in force of sections 21 to 23) Order 2004*.

[78] In its legislative, rather than judicial, capacity.

[79] The approval of both Houses (as well as the assent of the Monarch) is generally required in order for a Bill to become an Act of Parliament.

[80] PTA, section 2(1). The expression 'terrorism-related activity' is defined by section 1(9).

[81] Except in relation to control orders made before 14 March 2005 against individuals who, at the time of the making of the order, were certificated individuals under ACSA, section 21.

[82] PTA, section 3(1)(a).

[83] *Ibid.*, section 3(1)(b).

[84] *Ibid.*, section 3(4).

[85] *Ibid.*, section 10.

[86] See Statutory Instrument, 2005/1071, *The Human Rights Act 1998 (Amendment) Order 2005*.

[87] Which is clearly contemplated by section 1(5).

[88] PTA, section 4(7).

[89] See Statutory Instrument, 2005/656, *The Civil Procedure (Amendment No 2) Rules 2005*, inserting a new Part 76 into the *Civil Procedure Rules 1998*. It was argued, ultimately without success, in *Court of Appeal, Secretary of State for the Home Department v. MB*, 1 Aug. 2006, EWCA Civ 1140, 3 WLR 839, that the procedural regime under the 2005 Act was incompatible with Article 6 § 1 ECHR.

[90] *Court of Appeal, Secretary of State for the Home Department v. JJ and others*, 1 Aug. 2006, EWCA Civ 1141, 3 WLR 866; *Queen's Bench Division (Administrative Court), Secretary of State for the Home Department v. E*, 16 Feb. 2007, EWHC 233 (Admin). For an overview of current control orders in force, and the restrictions imposed thereby, see A. CARLILE, *Second Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, London, Home Office, 2007, pp. 3-5.

[91] *Supra*, note 32, § 142.

[92] While, as a matter of domestic law, a declaration of incompatibility does not compel amendment of the legislation, litigants who obtain such a declaration but no subsequent legislative redress are highly likely to pursue their claim before the European Court of Human Rights. State parties to the ECHR are obliged to abide by the judgments of the Strasbourg Court (Article 46) and to "secure to everyone within their jurisdiction" the Convention rights (Article 1). Thus, while the HRA creates no domestic law obligation to amend legislation, such a declaration anticipates, or at least points towards the possibility of, an international obligation to do so.

[93] C. CLARKE, HC Deb, Hansard, 26 Jan. 2005, col. 306.

[94] C. CLARKE, HC Deb, Hansard, 22 Feb. 2005, col. 151.

[95] Cf D. NICOL, "Law and Politics after the Human Rights Act", Public Law, 2006, pp. 722-751, at p. 741. He characterises the PTA regime as a "drastic, indeed unprecedented, curtailment of liberty, replacing the threat of Belmarsh incarceration for a minority with the threat of house arrest for everybody". Two brief points may be made in response. First, whether or not one approves of the regime laid down by the PTA, it is important to my argument that it was prompted by Belmarsh and its contours shaped by the government's understanding of the ECHR. Secondly, as pointed out above (see note 90 and accompanying text), the ECHR, in particular Article 5, constrains the restrictions which can be imposed through control orders. Even if a derogation were entered under Article 15, so as to enable the making of "derogating control orders" entailing deprivation of liberty contrary to Article 5, whether the derogation conditions in Article 15 were met would be subject to judicial review.

[96] As noted above, *supra* note 18, 14 declarations of incompatibility (excluding those overturned on appeal) have thus far been made under the HRA. In ten of those cases, the incompatible law has been repealed or amended; the government is considering how to respond to two others; one is subject to a pending appeal; and in the final case, it is envisaged that new legislation will be enacted as part of a wider package of reforms in the relevant area.

[97] D. NICOL, "Law and Politics", *supra* note 95, p. 745, argues that politicians should not feel thus constrained by judicial declarations of incompatibility; Parliament should consider itself free to "assert its own interpretation of human rights". This follows, in Nicol's view, because of the "contested political values at play in rights adjudication". However, it is worth remembering that, as Nicol acknowledges (*ibid.*, p. 729), the "political sanction" of a declaration of incompatibility "melds into a legal one", given the international law implications if the Strasbourg Court finds a breach of the ECHR (see further *supra* note 92). It follows that even if Nicol's view concerning the nature of rights is accepted in theory, the reality is that, at least for the time being, the prevailing legal regime -of which the HRA and ECHR are constituent elements- significantly constrains politicians' freedom of action, and involves an important realignment of political and judicial power that is at odds with orthodox, bald accounts of parliamentary sovereignty.

[98] See further A.V. DICEY, *Law of the Constitution*, *supra* note 6, Ch. 1, on "external limits" to parliamentary sovereignty.

[99] Although if Parliament wishes legislation to be interpreted incompatibly with fundamental rights, it has to make its intention very clear indeed, bearing in mind the way in which courts have viewed their duty, under section 3 of the HRA, to interpret legislation consistently with the ECHR where possible: see, e.g., House of Lords, *Ghaidan v. Godin-Mendoza*, 21 June 2004, UKHL 30, 2 AC 557. Making its intention to abrogate fundamental rights sufficiently clear will often (but perhaps not inevitably) be a politically difficult step for Parliament to take.

[100] The Daily Telegraph, 20 Feb. 2003.

[101] T. BLAIR, speaking at the monthly Downing Street press conference, 5 Aug. 2005 (<http://www.pm.gov.uk/output/Page8041.asp>).

[102] On the implications of this doctrine vis-à-vis parliamentary sovereignty, see House of Lords, *Regina v. Secretary of State for Transport, ex parte Factortame Ltd (No 2)*, 11 Oct. 1990, 1991 1 AC 603; Queen's Bench Division

(Administrative Court), *Thoburn v. Sunderland City Council*, 18 Feb. 2002, EWHC 195, 2003 QB 151.

[103] See, e.g., T. ALLAN, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford, Oxford University Press, 1993, and T. ALLAN, *Constitutional Justice: A Liberal Theory of the Rule of Law*, Oxford, Oxford University Press, 2001.

[104] H.W.R. WADE, "The Basis of Legal Sovereignty", *Cambridge Law Journal*, 1955, pp. 172-197, at p. 189.

[105] E.g. compare T. ALLAN, *Constitutional Justice*, supra note 103, Ch. 7, and J. GOLDSWORTHY, *The Sovereignty of Parliament*, Oxford, Oxford University Press, 1999, Ch. 10.

[106] House of Lords, *Regina (on the application of Jackson) v. Attorney General*, 13 Oct. 2005, UKHL 56, 2006 1 AC 262.

[107] *Ibid.*, p. 102. This example was well-chosen: the government attempted to introduce legislation in 2003 preventing judicial review of certain asylum and immigration decisions, but ultimately stepped back from this proposal in light of pressure from politicians and judges. See A. LE SUEUR, "Three Strikes and It's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision Making", *Public Law*, 2004, pp. 225-233.

[108] Supra note 106, § 102.

[109] *Ibid.*, § 104.

[110] *Ibid.*, § 159.

[111] See supra, note 103.

[112] See supra, note 8.

[113] N. PHILLIPS, "Terrorism and Human Rights", University of Hertfordshire Law Lecture, 19 Oct. 2006, available at [www.judiciary.gov.uk/publications\\_media/speeches/2006/sp191006.htm](http://www.judiciary.gov.uk/publications_media/speeches/2006/sp191006.htm)

[114] Court of Appeal, *International Transport Roth GmbH v. Secretary of State for the Home Department*, 22 Feb. 2002, EWCA Civ 158, 2003 QB 728, § 71.



# DUE PROCESS RIGHTS AND TERRORIST EMERGENCIES

James W. Nickel\*

*This essay discusses the grounds for due process rights (DPRs) and the permissibility of suspending them during terrorist and other emergencies. The two topics are profitably treated together because DPRs—along with freedoms of movement, expression, and political participation—are often suspended or restricted when national emergencies occur. Although I present a strong case for DPRs as human rights, this justification does not settle their priority during emergency situations. That issue raises additional questions, and I discuss some of them. The overall thrust of the essay is to defend the importance of respecting DPRs during troubled times. The penultimate section discusses DPRs in the context of the “war on terror” in the United States.*

## I. DUE PROCESS RIGHTS AND THEIR GROUNDS

### 1. *Due process rights defined*

DPRs are legal protections against a variety of familiar abuses occurring during the arrest, interrogation, trial, sentencing, and punishment of suspected criminals.<sup>[1]</sup> In this paragraph I describe a representative set of DPRs. At the time of arrest and interrogation DPRs require access to counsel and forbid police violence, summary punishments, and torture. During detention prior to trial DPRs insist upon an indictment hearing, consideration of release on bail, and the right to demand that one’s detention be justified before an impartial judge (habeas corpus). Those accused of crimes have a right to a trial without excessive delay, and if the case goes to trial the proceedings must be fair and open, and the accused must enjoy the presumption of innocence, the right against self-incrimination, and a right to the assistance of counsel. The accused has a right to know the evidence against him or her, and there can be no conviction without a valid criminal statute that is not retroactive. At the sentencing stage DPRs dictate that sentences not be grossly disproportional to the severity of the crime. Finally, there is the right to appeal one’s conviction to a higher court.

DPRs are responses to the fact that tyrants throughout history have used the institutions, personnel, and sanctions of the criminal law as means of imposing their arbitrary and unjust rule. They throw their enemies and political opponents into jail, have them executed, or take away their property. The authors of historic and contemporary bills of rights were well aware of these dangers and accordingly gave DPRs a prominent place. For example, the Magna Carta included provisions such as:



“38. No bailiff for the future shall, upon his own unsupported complaint, put anyone to his ‘law’, without credible witnesses brought for this purpose”.

“39. No freemen shall be taken or imprisoned or [...] exiled or in any way destroyed [...] except by the lawful judgment of his peers or by the law of the land”.<sup>3</sup>

The United States Bill of Rights devotes more space to DPRs than to any other family of rights. Of the original ten amendments to the Constitution, five of them (4-8) deal with due process. For example, the Sixth Amendment prescribes:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed [...] to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense”.<sup>4</sup>

DPRs also play a prominent role in contemporary human rights declarations and treaties. For example, the United Nations’ International Covenant on Civil and Political Rights (ICCPR) sets out DPRs in articles 6-15. Article 9.4 (habeas corpus) is representative:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that [the] court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful”.<sup>5</sup>

If a criminal case is prosecuted and no plea bargain is reached, subsequent review will occur in a trial. The criminal trial is an organized inquiry—one could also say “ritual”—which involves assembling needed participants, systematically collecting and presenting evidence, considering the arguments for and against the defendant's guilt, and judging appropriate penalties. The deliberate pace of a trial allows passions to cool and greater objectivity to emerge. The judge, who serves both as master of ceremonies and as interpreter of the law, is charged with impartial application of both law and evidence.<sup>6</sup> And lawyers are present to argue on behalf of their respective clients’ claims or defenses.

## 2. *The justification of due process rights*

DPRs protect both life and liberty against threats from government.<sup>7</sup> Suppose that we have been persuaded by the arguments in Thomas Hobbes's *Leviathan* (1660)<sup>8</sup> that without a strong government to protect us against the predations of our neighbors it will be impossible to have adequate

levels of order and productivity and that consequently we will have a poor chance of avoiding a miserable life and early death. Greedy or hungry neighbors who will raid, kill, steal, dispossess, kidnap, and rape pose what I call the First Problem of Insecurity. To protect ourselves from them we create government and legal protections of personal security, liberty, and possessions. We enact criminal laws, create courts and jails, and proceed to convict and punish offenders. We thereby solve -or at least ameliorate- the First Problem. The system of law and government is dangerous, however, and we still have reason to be fearful, but now our fear is of the government's predations, corruption, and ineptitude. This is the Second Problem of Insecurity.

As suggested above, a common worry about governments is that they will throw us in jail or execute us because some official suspects us of committing a crime, wants to neutralize us as a political opponent, finds us troublesome, or wants our property. In response to this worry we come up with the idea of not permitting the government to impose serious punishments without justifying a person's punishment before an impartial and independent tri-bunal. Law is the remedy -or at least a key part of it- to both problems of insecurity. Just as we imposed law and its potential sanctions on our-selves and our neighbors to solve the First Problem, we now impose legal restrictions on our government to solve the Second Problem. Both projects are difficult and may never be fully successful. Still, DPRs give us important protections for our lives, liberty, and property.<sup>9</sup> Like the criminal law itself they protect our security. But instead of protecting us against private criminals they protect us against government.

DPRs protect us not only directly when we are personally accused of crimes, but also indirectly by serving as checks on govern-mental power. They make less available tempting but tyrannical (or just heavy-handed) ways of governing, and thereby promote good government. They make tyrannical ways of governing less available by making criminal procedure more transparent. Public trials give citizens a view of how the criminal justice system is working. Oppression, if it is occurring, is more likely to be open to public view. An attractive feature of trials by jury is that they bring randomly selected members of the public into the criminal justice system as participants, and test legal judgments against their consciences and common sense. Democratic practices, and the rights to campaign, protest, and vote that go with them, make trans-parency more valuable and DPRs more stable.

One way that DPRs protect people's liberty is by requir-ing legal justification for incarceration - a justification that shows that the accused person violated a law that was already in existence and knowable at the time the alleged criminal offense occurred. For example, when the police and many ordinary citizens

dislike the recreational activities of certain teenagers, or the door-to-door witnessing of certain religious groups, the police may harass such people by arresting them for minor or imaginary offences and then beating them up during or after arrest. DPRs protect such people by making conviction of a criminal offense more difficult; they prescribe a fair trial in which it is shown that the person violated a valid law. Further, by opening arrest, interrogation, abuse, and detention to judicial and public scrutiny they help make it risky for police to use unauthorized violence.

Habeas corpus serves as a check on the executive by the judiciary, because it compels the executive branch to explain and defend its actions. As Justice Jackson of the United States Supreme Court once put it:

“[e]xecutive imprisonment has been considered oppressive and lawless [...] no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint”.<sup>12</sup>

Fairness considerations play a central role in justifying DPRs - and in supporting the idea that all citizens and residents should have such rights. These considerations require governments to avoid forms of unfairness so severe that they are matters of ruinous injustice to their victims. The severity of unfair treatment depends on the degree of unfairness, its duration and frequency, whether or not malicious intent is present, and the amount of harm or degradation that the unfairness causes. In the area of criminal justice fairness imposes three broad standards. First, there must be a system of fair and rational procedures for determining criminal guilt. Second, this system must produce in most cases results that are substantively fair. With the system in operation, people will rarely be punished when they in fact lack criminal guilt, and punishments will seldom be grossly disproportionate to the degree of wrongdoing. Finally, fairness requires that the protections of the system, such as lawyers and impartial trials, be available to all those within it who are in jeopardy of extended detention and criminal punishment - whether or not they are citizens. The claim against severely unfair treatment plays a large role in supporting the universality of DPRs.

Neither structural improvements in legal regimes, self-help, nor charitable assistance will eliminate the possibility of unjust trials in criminal proceedings. Individuals frequently lack the competence to secure just treatment within a complex legal system. High priority legal guarantees that can be invoked by the defendant are needed to protect people against the dangers imposed by the coercive powers of criminal justice systems.

The costs of implementing a general right to a fair trial are substantial. Providing those accused of crimes with impartial trials involves an expensive infrastructure of courts, judges, lawyers, record-keepers, and buildings. But most countries successfully bear these costs. And the burdens imposed on jurors and witnesses can be limited and distributed so as to avoid severe unfairness.

DPRs may seem to be negative rights, ones that merely call for their addressees to refrain from certain actions. But in fact they are more like positive rights, ones that require their addressees to provide a service to the rightholders. In my view they are best classified as conditionally positive. They say that if the government plans to punish someone then it must give that person various procedural protections and legal services along with the opportunity to have a trial. The if-clause of this conditional is sure to be continuously satisfied because governments need to threaten and carry out punishments in order to govern, and thus governments will have duties to provide due process services in many cases. From a practical point of view DPRs impose unavoidable duties to provide, just like positive rights. Ask government officials whether the system of courts and trials is a discretionary expenditure and they will laugh at you. DPRs use governments to provide expensive legal services that require large, fragile, and expensive bureaucracies and infrastructures.

## **II. NATIONAL EMERGENCIES**

National emergencies are times of extreme crisis in the life of a country. They typically result from wars, threats of attack, rebellions, terrorist attacks, famines, epidemics of disease, major industrial accidents, and natural disasters such as floods and earthquakes. During national emergencies exceptional measures are sometimes warranted in all or part of the country because the problems are immense, resources and personnel are severely strained, and it is imperative to take the most effective actions. Emergencies sometimes lead governments to declare a state of emergency or invoke martial law. When a state of emergency is in effect regionally or nationally, governments often claim and get legal authorization to restrict civil liberties, rule by decree, and conduct searches without judicial oversight. We think of emergencies as temporary, as bounded on both sides by times that are normal. But sometimes emergencies endure for a long time and the measures adopted during emergency rule become the standard political and legal practices of the country.

Emergencies differ in regard to the harshness of the measures their management is thought to demand. These might range from temporary curfews and restrictions on movement, to declaration of a state of siege and imposing martial law, to full-blown military occupation and pacification. During emergencies it is common for restrictions of rights to fall on freedom of movement and residence,

freedom of assembly, freedom of expression and protest, democratic rights, and DPRs. The most severe emergencies are ones in which most parts of the country have high levels of physical devastation, loss of life, loss of home and livelihood, economic crisis, and institutional breakdown. Imminent invasion or attack may also create an emergency.

In a serious national emergency such as an armed foreign invasion or an extended series of terrorist attacks, governments have the responsibility of minimizing damage to people and property, stopping the invasion or attacks, restoring security and services, and repairing the damage. In order to do these things, certain emergency powers are sometimes justified. First, governments may need powers to control the location and movement of people, to move them from the most dangerous areas and into areas where security and rudimentary services such as food, shelter, and medical care can be provided. Accordingly, rights to freedom of movement and to choice of residence are often restricted during serious emergencies. Second, governments need powers to reestablish rudimentary services. Doing this may involve commandeering public and private buildings and supplies to feed, house, or care for people, and conscription, particularly of those with special skills, to assist in the provision of these services. Thus rights to property and against forced labor may need to be restricted during emergencies. Third, governments need powers to reestablish security. In a natural disaster this may be mainly a matter of preventing looting. In a war, insurrection, or terrorist onslaught it may also involve preparing defenses against additional attacks. People who are believed to be dangerous may be detained in circumstances where it is impossible to file charges, collect evidence, or hold hearings quickly. Thus DPRs may be qualified or hearings and trials postponed.

Because of the dangers that national emergencies pose to fundamental rights and freedoms it is important that national constitutions and international human rights treaties provide guidance as to what governments may and may not do during such periods. Fortunately, three major international treaties -the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR), and the ICCPR- undertook this difficult task. They permit the suspension of most rights during severe national emergencies if the suspension is genuinely necessary, but hold that a few extremely important rights are immune to suspension. Article 15 of the ECHR gives a representative formulation:

“In time of war or other public emergency threatening the life of the nation any [country that has ratified the Convention] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation [...]. No derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3

[right against torture and degrading treatment], 4 (paragraph 1) [right against slavery and servitude] and 7 [right against ex post facto laws] shall be made under this provision”.<sup>13</sup>

This clause makes several especially important rights immune to suspension while permitting the remaining rights to be set aside only as far and for as long as is indispensable, or at least highly useful, to managing the emergency. Further, other countries that are parties to the treaty must be informed of any suspensions. According to the three treaties, most human rights -including DPRs, personal liberties, and democratic rights- may be suspended in national emergencies when the country's security and survival commands it.<sup>14</sup> If there are compelling goals of security and survival that a country cannot reasonably hope to reach without suspending some right, then its suspension is permissible as long as it is not on the short list of rights whose suspension is forbidden in all circumstances. Still, the requirement that derogation be “strictly required by the exigencies of the situation” recognizes the normative strength of human rights by requiring that what is on the other side of the scale is the security and survival of the country during a period of great danger. Article 27 of the ACHR requires a “war, public danger, or other emergency” that is sufficiently large to threaten a country’s “independence or security”.<sup>15</sup> The ECHR requires a time of war or other public emergency threatening the life of the nation.

Many scholars and human rights bodies have advocated adding DPRs to the list of rights that are immune to suspension during emergencies.<sup>16</sup> Both the Inter-American Court of Human Rights and the United Nations Human Rights Committee (established under the ICCPR) have made substantial efforts in their interpretations and rulings to give DPRs more protected status during emergencies.

The approach to emergencies found in the three treaties uses a simple emergency versus non-emergency approach. I think that this simple dichotomy is dangerous and believe that we will be better able to think clearly about human rights during emergencies if we work with four categories instead of just two. I distinguish normal times, troubled times, severe emergencies, and supreme emergencies. I present these four categories as ideal types, recognizing that reality is often messier than neat categories suggest. It would be worthwhile -though difficult- to work up and defend a detailed normative view of what measures are permissible during the three types of non-normal times, but here those measures are only sketched. The norm that there should be no suspensions of rights except those “strictly required by the exigencies of the situation” applies to all four categories.

Normal times are periods when a country is not facing severe and exceptional problems. The problems that do exist are perennial problems such as crime,

unemployment, inflation, inequality, prejudice, and political discontent, and these problems are not at crisis levels. Further, no major emergencies are occurring in the home territory, although there may be floods, hurricanes, recessions, and crime waves. The country may be involved in small-scale wars and peacekeeping operations in other countries, but it is not experiencing major war or insurrection at home. The United States, for example, was in normal times during the year 1999. The war in Yugoslavia and the NATO action in Kosovo were having little domestic effect, and the U.S. had not yet experienced the 2000 attack on the USS Cole or the September 2001 attacks on New York and Washington DC. During normal times human rights fully apply. The situation has no special exigencies that make imperative the restriction of basic rights.

Second, there are troubled times. In such a period the country is experiencing the problems of normal times plus engaging in a war outside of the homeland, experiencing occasional terrorist attacks (victims in the dozens or hundreds), suffering domestic unrest, or trying to recover from a major natural disaster or industrial accident. Large natural disasters such as Hurricane Katrina may create troubled times through their political and economic impacts. Wholesale suspensions of rights are not appropriate during troubled times, but temporary curfews and restrictions of movement may be necessary for short periods in disaster areas. Security may need to be increased in a wide range of areas.

Third, there are severe emergencies. These involve a major war in the national territory, armed rebellion, or regular and severe terrorist attacks. ECHR Article 15 speaks of a “war or other public emergency threatening the life of the nation”. This language is not very helpful, although the references to war and to a threat to the country’s life suggest that the situation should be one that is very serious; that the level of danger and damage is on a par with the level that occurs during a serious war. There are several conditions that create an emergency or make an emergency severe. These include: (1) The threat or damage is enormous: actual or potential damage to the country’s residents and institutions is very severe, including large-scale loss of life; (2) the danger or damage is not confined to a few small areas but rather is widespread (if not literally everywhere) within the country; (3) the threat or damage to the country’s economic life and the provision of essential services is large; and (4) the ordinary operation of law enforcement and border protection agencies is not sufficient to stop the danger and damage.<sup>17</sup> To these conditions we should add the principle that if an emergency is caused by a threat rather than an actual occurrence, the threat must, on a careful and reasonable judgment, be deemed to be highly likely rather than merely possible. The boundary between troubled times and severe emergencies is extremely important legally and politically, and these conditions attempt to sketch that boundary. In severe emergencies derogable rights may be restricted or even suspended wholesale if this is strictly necessary, but non-



derogable rights may not.

Fourth and finally, there are supreme emergencies (or “extremely severe emergencies”) which literally threaten the survival of the country as independent and whole.<sup>18</sup> A major war or insurrection is occurring in the homeland, causing widespread death and devastation. In many areas political and economic institutions are not functioning, or are functioning at low levels. The economic and institutional strain is enormous, and there is a serious risk that the war or insurrection will end in disastrous defeat. Britain, for example, was in a supreme emergency during the worst years of World War II. Since supreme emergencies raise the prospect of severe restrictions of many important human rights, as well as deliberate violations of the law of war, it is imperative to attempt to define carefully what supreme emergencies are and to specify what they permit. A lively debate on this subject is currently underway among philosophers and political theorists.<sup>19</sup>

If we use the four categories suggested above to classify countries such as France, Spain, the United Kingdom, and the United States which experienced terrorist attacks between 2001 and 2006, the most plausible view is that although actual and threatened terrorist attacks put these countries into severe emergencies for brief periods they subsequently experienced troubled times rather than severe and extended national emergencies.<sup>20</sup> I recognize, of course, that in late 2001 it was not foreseeable that terrorist attacks would not continue to occur regularly in the United States, and we do not know what the future holds. Still, when no severe emergency exists these countries are not permitted under the three treaties to suspend DPRs. Human rights standards apply without restrictions during normal and troubled times. Recognizing the category of troubled times aids the maintenance of critical attitudes about how long severe emergencies endure.

### **III. DETENTION WITHOUT TRIAL IN THE WAR ON TERROR**

This section addresses the justifiability of setting aside DPRs as part of a government’s struggle against terrorism. The following section discusses detention without trial in the United States.

A perplexing dimension of terrorist and wartime emergencies is that they generate detainees such as suspected terrorists who are captured by military forces or special operations units rather than by ordinary domestic law enforcement agencies. Such detainees do not necessarily fall into the systems ordinarily used for suspected criminals, and it may be difficult as well to classify them as prisoners of war since terrorists are not considered to be engaged in lawful warfare. Captured enemy soldiers who were engaged in lawful warfare are

not ordinarily considered to be criminals. But terrorists do not wear uniforms or bear their arms openly, and for this reason are sometimes described as “unlawful combatants.”

Under international law it is permissible to detain captured enemy soldiers without trial. For instance, the Geneva Conventions permit prisoners of war to be held without trial until the end of hostilities in order to incapacitate them and prevent their return to the war effort. Still, these prisoners are entitled to some sort of administrative review of the grounds for their imprisonment. The grounds for permitting the detention without trial of enemy soldiers during wartime include the costs and difficulties of conducting trials for thousands of prisoners, the fact that captives are not generally accused of crimes, and the temporary nature of the detention. If detained combatants are charged with crimes rather than simply being held until the end of hostilities, they must in most circumstances be given a trial or court martial with full due process protections. The Geneva Convention allows a “great degree of flexibility in trying individuals captured during armed conflicts; its requirements are general ones, crafted to accommodate a wide variety of legal systems; but requirements they are nonetheless”.<sup>21</sup> Those suspected of being unlawful combatants are required by the Geneva Conventions to be treated as prisoners of war until their status has been decided by a “competent tribunal”.<sup>22</sup>

The issue to be discussed here is not about combatants captured in a war zone outside of the national territory. Such persons normally fall under the provisions of the Geneva Conventions. The issue is rather whether human rights permit the holding without trial of persons suspected of terrorism but captured nowhere near a war zone. After the 9/11 attacks, the United States held without trial a number of suspected terrorists who had been apprehended domestically. An example is Jose Padilla, who was born in Brooklyn to a Puerto Rican family. Padilla is a convert to Islam who traveled to Egypt, Saudi Arabia, Afghanistan, Pakistan, and Iraq. Upon return to the U.S. in 2002, Padilla was arrested at the Chicago airport and initially held as a material witness. Suspected of planning to detonate a “dirty bomb” in the U.S., he was subsequently designated an enemy combatant and imprisoned without indictment or trial in a military brig in South Carolina. Padilla’s case is discussed in greater detail in Section IV.

Detention without trial of fighters apprehended in a war zone raises in many cases serious questions of fairness, but it does not pose much threat of undermining the domestic system of DPRs.<sup>23</sup> A case like Padilla’s, however, posed such a threat since he is a citizen arrested within the national territory. The danger in democratic countries is not that the whole system of trials and DPRs will be abandoned. It is rather the opening of a second track with few or no procedural guarantees that is dedicated to people thought to pose threats to

national security. Perhaps the worst possible outcome is that government agents will conduct a “dirty war” on targeted groups of citizens and residents.

A special national security track may start with an irregular arrest, operate largely out of the public view, and involve disappearances and secret prisons. In this track the forms of interrogation used may often be severe enough to border on or be torture, and individuals may be held incommunicado without habeas corpus, other forms of judicial scrutiny, and a guarantee of a speedy trial. It is the emergence and institutionalization of this sort of system that undermines the rule of law and poses a major threat to the security of citizens and residents.

In situations where government officials believe that a detained person is seriously dangerous but doubt that they have the evidence needed for a conviction they may find very attractive the possibility of holding the person for an extended period without trial. Detention without trial permits incapacitating a person without having to bring him or her to trial and thereby risking acquittal and release.

Detention without trial is often justified as a kind of quarantine, a way of keeping dangerous people from doing harm. It might be argued that when we impose what amounts to house arrest on a person who has been discovered to have a contagious and dangerous disease we do not think a trial is necessary. If a statute prescribes quarantine for infectious bearers of certain diseases, and if a physician has determined that a person has one of the diseases and is infectious, then the health department can order and super-vise the person's quarantine. No procedural guarantees are provided.

More analogous to detention without trial of a suspected terrorist for a long time would be the practice of sending lepers to remote and isolated leper colonies. (This practice is now largely abandoned because leprosy -Hansen's disease- is less contagious than once thought and can be treated with antibiotics.) Quarantine in a leper colony is such a long and large deprivation of liberty that if there were a significant possibility of mistakes in the diagnosis of leprosy, some form of review of decisions to send people to leper colonies would be appropriate. If a person is being subjected to long-term detention or quarantine, and if there is a significant level of false positives in selection for the kind of detention or quarantine in question, then some sort of process involving second-party review of the case for detention or quarantine must be available.

#### 1. *The three options argument*

When suspected terrorists are arrested they are sometimes held without being charged because the detaining authorities do not yet have good enough evidence to justify their detention before a judge. The government does not want the

suspected terrorists to be released for fear they will then have the chance to carry out their plots. Since most human rights are not absolute, and since personal security is itself an important ground for some human rights, we cannot simply dismiss the possibility of using detention without trial. An argument for detention without trial, which I call the “Three Options Argument”, relies on four premises.

Premise one asserts that following his arrest, a suspected terrorist can be treated in only three ways: (1) released; (2) brought to trial; or (3) detained without trial for an extended period.

Premise two asserts that the first option (releasing the suspect) is unacceptably risky. If the government is right in believing that the suspect is involved in terrorist activities, releasing him risks severe harm to public safety as the person returns to terrorism.

Premise three is that the second option (bringing the suspect to trial) is also unacceptably risky. The cases in question are ones where the government believes its evidence may well be insufficient to convict at trial. Thus, a criminal prosecution may well result in the suspect’s release, risking severe harm to the country as the person returns to terrorist activities. And even if the person is convicted of something, it will often be on minor charges, such as immigration violations, and thus impose only a short period of detention. Bringing the suspect to trial may also risk revealing the government’s undercover agents and other sources of intelligence. Further, if torture or near-torture was used in interrogating the suspect or witnesses, allowing them to participate in a trial risks embarrassing the government by exposing that fact.

Premise four is that the third option carries no comparable risks. Detaining the person without trial for an extended period eliminates any risk that he will return to terrorist activities.

If there are only three options, and if the first two are unacceptably risky while the third is not, then the third is the best option. The argument concludes that long-term detention without trial is the best option for protecting society against suspected terrorists when it is doubtful whether the evidence available will support conviction of serious charges at trial.

An objection to this argument is that the first premise is false because there are more than three options. One additional option is reducing or eliminating the need for detention without trial by making it easier for the government to convict those suspected of terrorism when it brings them to trial. This could be accomplished by making it easier for law enforcement officers to engage in effective surveillance. Another way of doing this is passing special terrorism laws

which make it easier to convict people of engaging in a terrorist conspiracy or belonging to a terrorist organization. There could also be special tribunals for those accused of terrorism in which some due process protections are not available. The United States Supreme Court allowed that “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict; hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding”. It also allowed that “once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus should shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria”.<sup>24</sup> A different approach attempts to make detention without trial less objectionable by using milder methods of control such as house arrest and electronic bracelets. These measures may be useful in some cases, but none of them makes the problem go away entirely.

An objection to premise two is that the dangers in releasing suspected terrorists are the same ones we face when we release criminals suspected of being dangerous because we have failed to convict them at trial. If the three options argument were sound, it would undermine due process protections for all people who are thought likely to commit major crimes if they are released. For this worry to have special force in the case of suspected terrorists we have to be persuaded that the damage they are likely to do if released is far greater than that done by ordinary criminals whom we fail to convict at trial. This seems far from obvious. First, upon release they will surely be subjected to heavy police surveillance both in order to protect society and in hopes that they will lead police to other members of terrorist networks. The likelihood of surveillance will also lead other terrorists to stay away from them. Second, after release they will not be trusted by other terrorists because of the worry that in order to gain their freedom they have switched sides and become informers.

Another objection to this argument rebuts premise four by holding that detention without trial also has great risks to the public's safety. It poses the danger of undermining the protections against government abuses that DPRs provide. Abandoning due process protections puts at risk protections that are valuable to us all. Grave risks to people's security are generated when we create, for those accused of being dangerous to national security, a special track in which most due process protections are unavailable. If this objection is correct then none of the three options is good for the public's safety.

A final objection is that what we do cannot be decided entirely on the basis of public safety. The severity of unfairness also has to be considered. Long-term detention without trial has the features of summary punishment. It greatly

increases the risk of incarcerating people who are neither dangerous nor guilty of crimes. Estimating how dangerous a person is turns out to be extremely difficult.

## 2. *The priority shift argument*

Another argument for detention without trial is the "Priority Shift Argument". Its key idea is that in severe emergencies people downgrade the importance of liberty and fairness. Emergency conditions can be bad enough that reasonable people, at least temporarily, shift their priorities in the direction of greater concern for security - a concern for saving one's life and health. If this shift occurs in the priorities of rational people, then an impartial legislator could reasonably be guided by it in deciding which rights are immune to suspension.

Does the Priority Shift Argument help justify long-term detention without trial of suspected terrorists in severe emergencies? One reason for doubting that it does is that the shift does not occur, I believe, in regard to fairness in the distribution of the most important goods. The down-grading of fairness-based rights is not rational when a person's most important interests are at stake. This is why the three treaties forbid capital punishment without full due process.<sup>25</sup> For another example, in a severe natural disaster citizens will be very concerned that greatly needed government assistance is provided to people and neighborhoods in ways that are fair. Thus concern for fair distribution of the measures that protect people against severe government abuses of the criminal justice system may survive the Priority Shift.

A related reason to believe that DPRs will survive the Priority Shift is that they are themselves protections of security. Recall that one major justification for DPRs given above was in terms of security of life, liberty, and property against abuses by government. Thus the trade-off is security versus security, not just security versus fairness. Recall also that one of the objections to the Three Options Argument above was that the third option, long-term detention without trial, threatened public security by undermining historically hard-won due process protections.

Still, ordinary citizens may not much fear being suspected of terrorism. Some of them say that they will not be troubled if the government decides to restrict or suspend the DPRs of suspected terrorists. Law-abiding citizens find it hard to believe that they could be mistaken for criminals, much less for terrorists. Thus they cannot see that protecting the due process and other rights of accused terrorists does much to protect the security of ordinary people. The security argument for DPRs leaves them cold. This coldness applies particularly to non-citizen detainees, but it applies as well to citizen detainees who seem to have been involved in terrorism. This outlook is a great practical barrier to the maintenance of DPRs during emergencies and troubled times. Its roots are not

necessarily egoism, a concern only for oneself. More commonly they are a matter of limited sympathies, a willingness to dismiss the claims of people who seem threatening or alien. One response to this worry is to try to persuade ordinary citizens that the risks of mistakes in the detention and prosecution of terrorists are real, that those mistakes have severely bad consequences, and that some ordinary law-abiding citizens are vulnerable to those risks. The best means of persuasion here may take the form of plausible stories that illustrate how various sorts of people would be at risk if governments could detain and punish without providing trials and procedural protections. But such attempts at persuasion also need to invoke fairness, to remind people that one of the most important reasons for having DPRs is to avoid severe unfairness.<sup>26</sup>

#### **IV. DUE PROCESS AND THE WAR ON TERROR IN THE USA**

This section addresses issues discussed abstractly in the previous sections by discussing detention without trial in the United States during the “War on Terror.”

##### *1. Conceptualizing the problem of terrorism*

After suffering a surprise attack, such as the one that occurred in the United States on 11 September 2001, a government must appraise the situation, analyze the nature and actions of its enemies, and diagnose the problems leading to and resulting from the attack. When many problems are identified, each will provide a partial view of the situation and how to respond to it. After the 9/11 attacks the U.S. government identified many specific problems including the real possibility of further terrorist attacks, poor control of its borders and immigration, flawed airport security, insufficient intelligence about its enemies and their capacities, and possible terrorist cells among students and immigrants from Muslim countries.<sup>27</sup>

These specific diagnoses did not preclude, however, an overall view of the situation. The Bush Administration’s overall view was that the U.S. was in (1) a severe emergency situation involving (2) a substantial and extended war. Severe emergency is the generic category and war is the specific type of emergency. Immediately after the attacks, President Bush met with the National Security Council stressing that the U.S. “was at war with a new and different kind of enemy,” and that terrorism needed to be eliminated because it was a threat to “our way of life”.<sup>28</sup> The 9/11 attacks might have been viewed as crimes, or as a one-shot act of retaliation by Islamic radicals, but the U.S. government ultimately came to perceive the situation as a war of extended duration rather than a short-term national emergency.<sup>29</sup> When the U.S. went to war in Afghanistan in late 2001 the idea of a war on terror ceased to be a mere metaphor since real war was being waged against the Taliban



and the Al-Qaeda operatives the Taliban hosted. After the U.S. invaded Iraq in 2003 no one could deny that the country was in a serious war. For a long time, however, Osama bin Laden and Al-Qaeda were the main targets. The war on Al-Qaeda was an unusual kind of war - the enemy was a religious and political movement rather than another state. The length of the war and the possibility of attacks on the U.S. it might involve were completely unforeseeable. The wars in Afghanistan and Iraq were occurring thousands of miles from U.S. territory, however, and by 2003 life in the U.S. began to normalize.

Especially in their early stages, emergencies transfer power to the executive branch. The President is capable of acting quickly to improve security, block further attacks, and improve intelligence. After the 9/11 attacks, Congress, the courts, and the public gave President George W. Bush and his administration a lot of latitude for a long time as they took aggressive steps to combat terrorism at home and abroad. Although terrorist attacks did not recur in the U.S. homeland during the period 2002-2006, the wars in Afghanistan and Iraq, along with terrorist attacks in Europe and Asia, contributed to the plausibility of the claim that the U.S. was in a severe terrorist emergency and gave the CIA and special operations forces an ongoing mandate for action.

## 2. *U.S. detainees in the war on terror*

The War on Terror raises many legal issues including border security and immigration policy; warrantless electronic surveillance, interrogation techniques and the use of torture; racial profiling; and the role of the Geneva Conventions in dealing with terrorists. My concern here continues to be restricted to issues of detention without trial. One of the Bush administration's responses to the 2001 terrorist attacks on New York and Washington was to adopt a policy of detaining suspected terrorists for extended periods without trial and other due process protections when doing so was thought necessary to gaining useful information or incapacitating suspected terrorists (recall the Three Options Argument). Many detainees were denied access to counsel, habeas corpus, and the right to a fair trial. The Bush administration did not at any point seek Congressional suspension of habeas corpus as permitted by Article 2 of the Constitution. This suspension clause says that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it".<sup>30</sup> Further, the administration did not declare an emergency under Article 4 of the ICCPR (to which it is a party).

Shortly after the 9/11 attacks the Justice Department undertook the investigation and prevention of domestic terrorism by arresting, interrogating, and in many cases deporting people -most of them Muslim men- thought to have ties to or information about terrorism. Approximately 1,200 people were ultimately detained by this program. Since extended detentions for investigative purposes

are not permitted under U.S. law, most detentions were imposed either by the Immigration and Naturalization Service or under laws permitting the detention of material witnesses. The vast majority of those detained were arrested by the Immigration and Naturalization Service on immigration law warrants. Many of these people were denied bail and were deported after interrogation. Other detainees were held as material witnesses, since that allowed the government to hold them for an extended period without filing charges. While few if any of the people detained under this Justice Department program were later indicted for terrorist crimes, many were deported for minor immigration violations. Both Human Rights Watch and the Justice Department Inspector General later issued reports detailing the abuses detainees were subjected to, such as “prolonged detention without charge, denial of access to release on bond, interference with the right to counsel, and unduly harsh conditions of confinement”.<sup>31</sup>

The Supreme Court decided one of the first cases after 9/11 involving alien detainees in *Rasul v. Bush*.<sup>32</sup> Individuals being held for over two years at the Guantanamo Bay Naval Base in Cuba, without ever being charged or given access a trial, petitioned for habeas in 2004. The prisoners who brought the case were all captured abroad. Because the U.S. “exercises plenary and exclusive jurisdiction” over Guantanamo, the Court held “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority” under the habeas statute.<sup>33</sup> Additionally, since they were being held in “federal custody” for an extended period of time without being afforded any formal DPRs, they had the right to challenge the legality of their detention.<sup>34</sup> Detentions of citizens also occurred. Jose Padilla was arrested in the U.S. after returning from a trip to the Middle East. As noted earlier, Padilla is a U.S. citizen who converted to Islam. He was suspected of planning to detonate a ‘dirty bomb’ in the U.S., and after being arrested in May 2002 at Chicago’s O’Hare International Airport, he was held without trial as an enemy combatant in a military jail in South Carolina. In 2005 Padilla was finally indicted on charges of conspiring to wage and support international terrorism.<sup>35</sup> On August 21, 2006, U.S. District Judge Marcia Cooke dismissed the terror count, holding that the indictment “is multiplicitous when it charges a single offense multiple times, in separate counts”. Padilla's trial in civilian criminal proceedings is currently underway.<sup>36</sup> In Padilla’s case the justice system seems to have worked -slowly, and after much litigation- to get Padilla a civilian trial.

In April 2006 the Supreme Court, in a 6-3 vote, declined to reconsider Padilla’s case given that he had been transferred out of the military system shortly before his case was to be considered by the Supreme Court. Justice Ruth Ginsburg dissented from the refusal to reconsider:

“This case, here for the second time, raises a question ‘of profound importance to the Nation’ [...]. Does the President have authority to imprison inde

finitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an ‘enemy combatant’? It is a question the Court heard, and should have decided, two years ago [...]. Nothing the Government has as yet done purports to retract the assertion of Executive power Padilla protests. Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed and defended”.<sup>37</sup>

Justice Anthony Kennedy’s opinion, disagreeing with Justice Ginsburg and concurring with the majority, noted that consideration of what rights Padilla “might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings”. Justice Kennedy’s opinion went on to suggest that the Court was standing by watchfully to take up those issues “if the necessity arises”. This may have been intended as a warning to the Bush administration that it would not tolerate evasive tactics.<sup>38</sup> Justice Kennedy also acknowledged that “Padilla’s claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts”.<sup>39</sup>

Another citizen detainee is Yaser Hamdi. Unlike Padilla, Hamdi was captured on the battlefield. He was initially captured in Afghanistan by Northern Alliance forces and then turned over to the U.S. military. Hamdi was first held at Guantanamo,<sup>40</sup> but in April 2002 was transferred to a Navy brig in the U.S. when his U.S. citizenship was discovered. Although Hamdi had been raised in Saudi Arabia, he was born in Louisiana and hence is a U.S. citizen. The government contended that Hamdi was an enemy combatant and that as such he could be held indefinitely without being informed of the charges against him, access to counsel, or access to an impartial tribunal. In *Hamdi v. Rumsfeld*, the Supreme Court ruled in 2004 that “citizen-detainees” like Hamdi were entitled to due process and should be given a meaningful opportunity before a neutral decisionmaker to contest their classification as enemy combatants.<sup>41</sup>

In the five years following the 9/11 attacks the Bush Administration often acted in ways that violated DPRs and the important values that support them. Soon after 9/11, when the country invaded Afghanistan in October of 2001 and went to war with Iraq in March of 2003, it may have been plausible to think that extended detentions without trial were sometimes necessary in order to gain information about terrorist activities and to incapacitate suspected terrorists when the government was not confident it could convict them at trial. But even during that period the Bush Administration did not seek specific legislation authorizing and providing regular judicial scrutiny of extended detentions of citizens and residents suspected of engaging in or supporting terrorism. It took

advantage of the immigration system and material witness laws to hold people for extended interrogation. It used an offshore facility (Guantanamo) and secret prisons to prevent public and judicial scrutiny of its detentions and interrogations of suspected terrorists arrested in other countries. And it failed to offer apologies and compensation to people who were mistakenly held for extended periods and subjected to very harsh interrogation and treatment. In 2003–2006, when the U.S. was in troubled times rather than a severe emergency, the Bush administration continued to insist on using measures domestically that went far beyond those “strictly required by the exigencies of the situation”.

In the latter half of 2006, the Bush administration introduced the Military Commission Act of 2006 (MCA) regarding the suspension of habeas corpus and other DPRs. This legislation was enacted on October 17, 2006, and contains worrisome provisions. It permits use of evidence obtained through cruel, inhuman, or degrading treatment, but bans evidence acquired through torture; it shifts the burden of disproving hearsay evidence onto defendants with limited discovery rights; it denies defendants access to classified evidence; it permits the death penalty for crimes that resulted in the death of another; and it expands the definition of “unlawful enemy combatant” to include anyone “who has purposefully and materially supported hostilities against the United States or its co-belligerents”.<sup>42</sup>

The constitutionality of the habeas provision of the MCA was upheld by the U.S. Court of Appeals for the District of Columbia on February 20, 2007 in *Boumediene v. Bush* (consolidated detainee cases).<sup>43</sup> The Court concluded that the MCA strips the federal courts of jurisdiction over habeas petitions brought by alien enemy combatants and dismissed the case. It remains to be seen if the constitutionality of the MCA will be taken up by the Supreme Court.

## V. CONCLUSION

There are very strong reasons for upholding DPRs during times of trouble and emergency. Underlying values of security and fairness remain relevant and important during such times. Creating a special arrest and detention track without most DPRs for suspected terrorists is extremely dangerous to people's security and to the universality of protections for due process.

---

## REFERENCES

- [1] On due process outside of criminal law see J.L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, 1985.  
 3 King John at Runnymede, Magna Carta, 1215, §§ 38 and 39, <http://www.britannia.com/history/magna2.html>

4 U.S. CONST. Amendment VI, § 1.

5 International Covenant on Civil and Political Rights, Art. 9 § 4, <http://www.ohchr.org/english/law/ccpr.htm>

6 See A. DUFF, TRIALS AND PUNISHMENTS, 1986; D. WEISSBRODT and R. WOLFRUM, THE RIGHT TO A FAIR TRIAL, 1977.

7 On the justification of rights by appeal to life and liberty and avoiding severe unfairness and cruelty, see J. NICKEL, MAKING SENSE OF HUMAN RIGHTS, 2nd ed., 2006, pp. 53-91.

8 T. HOBBS, LEVIATHAN, Touchstone, 1997.

9 See, e.g., Hamdi v. Rumsfeld 542 U.S. 507, 529, 2004. Justice O'Connor wrote that Hamdi's "private interest [...] affected by the official action [...] is the most elemental of liberty interests - the interest in being free from physical detention by one's own government".

12 Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 218-19, 1953, J. JACKSON, Dissenting Opinion; noting that "courts will not deny hearing an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates".

13 European Convention on Human Rights, Art. 15, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

14 The statement that the three treaties make DPRs subject to suspension should be qualified by noting that the right to life in these treaties is formulated so as to require that capital punishment be imposed "pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime". The effect of this clause is to forbid summary executions. It also suggests an attractive principle, namely that DPRs are most imperative when the most fundamental interests and rights are at stake.

15 Inter-American Convention on Human Rights, Art. 27, <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>

16 See J. ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW, Oxford, 1992.

17 See E.C.H.R., Greek Case, 18 Nov. 1969; Lawless v. Ireland, 1961. See also O. GROSS and F. NI AOLAÍN, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", HUMAN RIGHTS QUARTERLY, 2001, pp. 625-649.

18 On the idea of a supreme emergency, see M. Walzer, JUST AND UNJUST WARS, Basic Books, 1977; J. RAWLS, THE LAW OF PEOPLES, Harvard, 1999.

19 See D. STATMAN, "Supreme Emergencies Revisited", and bibliography, ETHICS, 2006.

20 See, e.g., B. ACKERMAN, "The Emergency Constitution", YALE L.J., 2004. Ackerman states "[u]ndoubtedly, there are times when a political society is struggling for its very survival. But my central thesis is that we are not living in one of these times. Terrorism - as exemplified by the attack on the Twin Towers- does not raise an existential threat, at least in the consolidated democracies of the West".

21 Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2006.

22 See 1949 Geneva Conventions III-IV, <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

23 Full criminal DPRs may not extend to all detainees. When a person is in custody as an "enemy combatant" the government may argue that the prisoner has not been detained for a "criminal proceeding" as defined under the Fifth and Sixth Amendments. Therefore, these prisoners are not afforded the same DPRs as a prisoner in custody for criminal prosecution. But the Supreme Court has said that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest



the factual basis for that detention before a neutral decisionmaker”. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509, 2004.

24 *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34, 2004.

25 See, e.g., International Covenant on Civil and Political Rights, Art. 6, <http://www.ohchr.org/english/law/ccpr.htm> Article 6.2 states “[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court”. See also, Inter-American Convention of Human Rights, Art. 4, <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>, in which Article 4, sections 2-6 provide “[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court [...]. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence”.

26 See R. DWORKIN, “Terror and the Attack on Civil Liberties”, NEW YORK REVIEW OF BOOKS, Vol. 50, 2003, [http://www.nybooks.com/articles/article-preview?article\\_id=16738](http://www.nybooks.com/articles/article-preview?article_id=16738); J. WALDRON, “Security and Liberty: The Image of Balance” JOURNAL OF POLITICAL PHILOSOPHY, 2003, pp. 191-210; D. LUBAN, “Eight Fallacies about Liberty and Security”, in R. WILSON, HUMAN RIGHTS IN THE WAR ON TERRORISM, Cambridge, 2005, pp. 243-245.

27 The 9/11 Commission Report found that before 9/11 the Department of Defense was never fully engaged in countering Al-Qaeda. The Immigration and Naturalization Service (INS) never entirely focused on terrorism, and instead was dealing more with criminal aliens and backlogged naturalization applications. The Federal Aviation Administration (FAA) was unprepared for the 9/11 attacks because there had been no domestic hijacking in the past decade, and explosives rather than other weapons were seen as deadlier and more probable. See NATIONAL COMMISSION ON TERRORIST ATTACK UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT, W.W. Norton & Co., 2004.

28 G.W. BUSH, “Remarks by the President in Photo Opportunity with the National Security Team”, 12 Sept. 2001, <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html>

29 See K. LANE SCHEPPELE, “Law in a Time of Emergency: States of Exception and the Temptations of 9/11”, U.P.A.J.CONST.L., 2004.

30 U.S. CONST., Art. I, § 9.2.

31 U.S. Department of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks”, <http://www.usdoj.gov/oig/special/0306/index.htm>. See also, Human Rights Watch, “U.S. Supreme Court Should Review and Reject Secret Detentions”, 30 Sept. 2003, <http://hrw.org/english/docs/2003/09/30/usdom6409.htm>; American Civil Liberties Union, “Internal Justice Department Report Details 9/11 Detainees' Plight; Arab, Muslim, South Asian Immigrants Languished in Detention for Months”, 2 June 2003, <http://www.aclu.org/safefree/general/17241prs20030602.html>

32 *Rasul v. Bush*, 542 U.S. 466, 2004.

33 *Id.*, 561.

34 *Rasul*, 542 U.S., 483-484.

35 See K. ARENA, T. FRIEDEN and P. HIRSCHKORN, "Terror Suspect Padilla Charged", CNN.COM, 22 Nov. 2005, <http://www.cnn.com/2005/LAW/11/22/padilla.case/index.html>

36 "Judge Drops Padilla Terror Charge", CNN.COM, 21 Aug. 2006, <http://www.cnn.com/2006/LAW/08/21/padilla.charge/index.html>

37 Padilla v. Hanft, 126 S.Ct. 1649, 2006, J. GINSBURG, Dissenting Opinion. Padilla's first case before the Supreme Court was Rumsfeld v. Padilla, 542 U.S. 426, 2004.

38 See J.M. FREIMAN, "Padilla's Real Message: The Grace Period is Over", JURIST, 4 Apr. 2006, <http://jurist.law.pitt.edu/forumy/2006/04/padillas-real-message-grace-period-is.php>

39 Padilla, 126 S.Ct., 1649, J. KENNEDY, Concurring Opinion.

40 Many people suspected of terrorism, or believed to have information about terrorists, were captured by American forces in Afghanistan and Iraq and by special operations forces. The Bush administration generally treated these detainees as enemy combatants and hence as falling under extrajudicial procedures for handling prisoners during war, but not generally as falling under the Geneva Convention and the protections it provides to prisoners of war. Because the administration viewed the entire world as a terrorist battlefield, it tended not to discriminate between suspected terrorists captured in Afghanistan or Iraq and those captured outside of any active war zone. As a way of holding and interrogating such detainees with lessened public scrutiny and with less danger of effective legal challenges the Bush administration established in 2002 the Guantanamo Bay detainment camp at its Navy base in Cuba. As of 2007, several hundred detainees are still held in Guantanamo. Some of these people will be brought to trial, but others are likely to continue to be held without trial. In September 2006 the Bush Administration revealed that it had operated a program of secret prisons overseas, and that it was transferring people from those prisons to Guantanamo. See Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2004; Military Commissions Act, 2006, Pub.L. No 109-366, 120 Stat. 2600, 17 Oct. 2006.

41 Hamdi v. Rumsfeld, 542 U.S. 507, 2004.

42 See Military Commissions Act, 2006, Pub.L. No 109-366, 120 Stat. 2600, 17 Oct. 2006. See also, Human Rights Watch, "Q & A: Military Commissions Act of 2006", Oct. 2006, <http://hrw.org/backgrounders/usa/qna1006/usqna1006web.pdf>; describing the issues and changes associated with the Act and the pertinent problems that arise. The legislation also amended habeas so that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination"; 120 Stat., 2636.

43 No. 05-5062, 2007 U.S. App. LEXIS 3682 at \*1, 20 Feb. 2007.



## LEGAL SOCIALISATION: FROM COMPLIANCE TO FAMILIARISATION THROUGH PERMEATION

Chantal Kourilsky - Augeven\*

*“Believing, with Max Weber, that man is an animal suspended in webs of significance he himself has spun, I take culture to be those webs” (C. GEERTZ).* [1]

*“Law, here, there, anywhere, is part of a distinctive way of imagining the real” (C. GEERTZ).* [2]

The study of legal socialisation phenomena -i.e., following the development of representations and attitudes towards the law in childhood and adolescence- corresponds to the desire to shed light on the attitudes of adults by understanding their genesis. “By considering only adults”, Jean Piaget wrote, “we perceive only mechanisms which are already formed, whereas by following childhood development, we reach to the formation of those mechanisms, and formation alone is explicative”. [3]

However, long before the emergence of an interest in the origins of behaviour towards law, research conducted by legal sociologists in Europe had focussed on these attitudes in general. What was its subject? This was more than providing snapshots of ‘ordinary’ adults’ opinions about law and justice. In a more general and more ambitious perspective, it aimed at understanding how law ‘operates’ within a given society; how it achieves -or does not achieve- one of its objectives as assigned by politics; i.e., the regulation of social relations in particular via norms aimed at governing individual behaviour.

In Europe, the answer to “how to do it?” came first from jurists and legal sociologists. The drastic maxim “every person is expected to know the law” as an answer to *de facto* ignorance matches a process of thought which was partially that of the first European studies on the attitudes of non-lawyer adults towards law. These studies focussed on legal knowledge as much as on the opinions on law, like/as in the framework of the European project Knowledge and Opinion about Law. One of the initial hypotheses was indeed that knowledge of the law is conducive to compliance. This hypothesis was proved incorrect in the case of young offenders who are more aware of criminal laws than many spontaneously law abiding citizens. But legal sociologists were overly aware of the multiple aspects of law to limit their research to attitudes towards law and criminal justice. Multiple pieces of research concerning a number of situations coming under civil law followed.

Did this concern the effectiveness of legal rules? Jean Carbonnier, in his time, had provided lawyers and politicians with an ironic answer to the frustrating question of the effectiveness of legal rules: it would only be possible to summarise law as a body of mandatory rules of injunctions and prohibitions (the transgression of which triggers punishment) within a Durkheimian sociological understanding of law “en termes dramatiques de commandement et d’obéissance”.<sup>[4]</sup> In fact law, notably in civil and administrative law, which both cover a considerable part of every day life, often contains a series of “purely optional” rules granting individuals simple faculties which they would be free to exercise. How can we address the effectiveness of an optional rule? A similar argument was to be raised a dozen years later in the US, again by a legal sociologist - Lawrence M. Friedman.<sup>[5]</sup> According to him, the conception of law underlying psychologist June L. Tapp’s work in the new field of legal socialisation (as she had named it),<sup>[6]</sup> was too restrictive because it was limited solely to rules of authority. In the case of legal rules providing rights or possibilities of action to individuals, it is more appropriate to speak of use, non-use or misuse of the rule rather than compliance with it.

What then does the legal socialisation of the individual consist of? Here I must first specify which disciplines are called upon to study socialisation, since the first American pieces of research on legal socialisation were preceded by a quantity of research on specific aspects of socialisation such as political socialisation and moral socialisation.

## **I. THE INDIVIDUAL’S SOCIALISATION FROM THE PERSPECTIVE OF PSYCHOLOGY, SOCIOLOGY AND ANTHROPOLOGY**

Research on the socialisation of the individual, the way humans become social beings by interacting with others from birth onwards, implies an interrogation into society’s own future. Mentioned according to an increasing intensity, with the issue of socialisation, would not only be at a stake the future of an individual, the manner in which he will integrate within the society he was born in, but also the cohesion, the coherence, the renewal and the continued existence or very survival of this society.

Researches on the phenomena of individuals’ socialisation have been developed in three disciplines: psychology, anthropology and sociology. They respond to these concerns, especially in their more recent developments, by describing in a different but complementary manner the necessary interactions between the individual and society. Psychologists, who operate at the level of the individual, emphasize the construction of the personality<sup>[7]</sup> or identity of the subject.<sup>[8]</sup> But this growth cannot occur independently from the interaction between the subject and his social environment, whether his family, peers or other groups to which he belongs. From the opposite perspective, most

anthropologists start with a specific culture, considered as an entity formed by a group of people who share “ways of thinking, feeling and acting”, values and behavioural norms. These common values and norms are then internalised by new generations and ensure the cohesion and continuance of the community. Like anthropologists, sociologists view the object of study from the perspective of society as a whole, but perceive socialisation more strongly in terms of the transmission of behavioural norms and models by persons and institutions. They tend to assign to them, for functional purposes, the role of socialisation agents. Socialisation of subjects is also considered in terms of learning of social roles or attainment of social skills.[\[9\]](#)

In fact these three approaches tend to combine into two schools of thought. The first gives pre-eminence to the subject’s viewpoint, but can only consider its development in relation to the interactions with the culture and society in which he is immersed. The second gives pre-eminence to society or culture as a whole, but can only apprehend subjects’ modalities of adaptation or participation in this society by looking at modalities of individual development.

An interactional conception of socialisation phenomena thus prevails in current research: norms, values and behavioural models (*savoir-faire*, *savoir-dire*, *savoir-penser*) are transmitted to the child-subject or the socialised subject by different agents (family, school, peer group, relational network). However, contrary to what initial sociological research suggested (i.e., socialisation was a systematic conditioning through education),[\[10\]](#) children are far from passive in assimilating what they are transmitted and actively participate in their own socialisation. Certainly they adapt to the demands, pressures and constraints of their environment, but they influence this environment to bring it closer to their own expectations. Children go through successive phases of learning norms, values and behavioural models. They thus develop, by internalising them, the *savoir-dire*, *savoir-penser* and *savoir-faire*, which are necessary in order to become really integrated and recognised as a member of these groups. But this internalisation is not automatic, nor its outcome an “identical reproduction” of what was transmitted.[\[11\]](#) It indeed requires from children a process of personal appropriation. This leads, by reinterpretation or, in the words of Piaget, by assimilation and adaptation,[\[12\]](#) to the making of their own system of representations of themselves, of others and of the world, as well as of their own system of norms, values and practices. Their personal and social identity is elaborated in the course of this process.[\[13\]](#)

Construction of personal identity and of social identity are intimately linked in the course of childhood and adolescence.[\[14\]](#) From a psychological viewpoint, the system of norms and values of the subject and his system of representations of the world certainly constitute a unique combination of the knowledge and values transmitted by the groups to which he belongs, as he has made them his

own, appropriated and reinterpreted them, giving them his own imprint. Amongst the groups to which he belongs (the family, the social group within which the family belongs, the group of peers from school or neighbourhood, age and gender groups, to mention only a few), family has a particular status: it is the group to which an individual belongs from birth and within which they develop their personal identity, by identifying with particular people from his immediate surroundings.<sup>[15]</sup>

However, from a sociological viewpoint, the family is the group through which the subject internalises the values of his social environment and starts to develop his own social identity. The child may be capable or incapable of articulating what these values are, what the components of this social identity are, especially if these values remain implicit within the family discourse, but he knows, or feels more or less distinctly (as he learns it progressively), what he is allowed to do, what he must do or what he is expected to think, say or do as a child, elder or younger child, within his family, in relation to his parents or whoever member of his family, in whatever situation.

He also progressively learns, from conversations he has heard or situations he has witnessed, what the rights and possible courses of action of adults are, in every day tasks. In his presence, adults carry out these activities or discuss them and the difficulties encountered in their relationships with certain persons, authorities or institutions. From their accounts, the child can also more or less quickly situate the social characteristics of his parents (blue-collars, shopkeepers or executives; of foreign descent or from another region than their place of residence) and connect the rights, difficulties and courses of actions connected to these characteristics, according to his parents' value judgements.

The child's own contacts with the outside world, in particular his experience in the school context, contribute to defining more precisely his own specificity and differences in relation to individuals who belong to other groups. He then learns to characterise more or less clearly the values of his social environment in relation to those of others, and to define his social identity, which we may say pervades his personal identity. But insofar as these elements are valued within his family, sharpened by the outside world as factors of differentiation and conflict, the child ceases to take them for granted and perceives them as social characteristics which apply to him and his family. Social identity is defined by characterisation and differentiation.

## **II. THE FIRST US STUDIES ON LEGAL SOCIALISATION: THE VIEWPOINT OF SOCIETY**

How does one go about studying the individual's socialisation in the area of law? One could follow the approach of the psychologist Joseph Adelson<sup>[16]</sup> who used

cognitive psychology in his research on political socialisation, in particular on the sense of community. His research shows the development of individual reasoning from childhood to adolescence. As the subject grows, he progressively masters hypothetico-deductive thinking, thus, his approach evolves from a concrete, personalist, 'egocentric' one, perceiving people and institutions as personal relationships, to a more abstract and socio-centric approach, which takes into account past, present and future social objectives and compares the interests of society with his own. Adelson did not formulate any value judgements on the development of the subject's thinking. He merely specifies that only the age variable is determinative (13-14 years is generally the transition point from one type of reasoning to the other) and that other variables such as IQ and gender play no significant role. It is the viewpoint of the subject that is predominant. The importance of the 13-14 years old period was subsequently confirmed by French research carried out by Annick Percheron on political socialisation from childhood to adulthood and then by my own research on legal socialisation.<sup>[17]</sup>

The first pieces of American research on legal socialisation are very different. They define the concept of legal socialisation, but while they do observe individuals' development, they apply a value judgement in accordance with objectives pursued not by individuals but by society. Certainly, this research is framed in a specific political context, where the American conservatives were particularly concerned by the wave of anti-establishment challenges sweeping through universities either on the basis of civil rights or the Vietnam war. These first pieces of research followed previous international research on the socialisation of children to systems of compliance,<sup>[18]</sup> developed by psychologist June L. Tapp, and focus on the mechanisms which, according to her, contribute to the integration of individuals in society.

The definition of legal socialisation, and, in particular, of socialisation itself, reflects this concern. According to June L. Tapp, "compliance to laws and respect for authority is variously called socialization, internalization of norms, conformity to rules, identification, moral internalization, and conscience formation. Regardless of nomenclature, psychologists have attended to the problem of compliant behaviour as an aspect of socialisation research, crucial to the maintenance of the social system. Essentially socialisation is the process whereby members of a society learn its norms and acquire its values and behaviour patterns".

Socialisation and legal socialisation are therefore barely distinguishable, since legal norms are considered as extensions of social norms in what June Tapp calls "legal continuity", provided that social norms enjoy "authoritative validity". The only nuance is that "the term 'legal socialization' delineates that aspect of the socialisation process dealing with the emergence of legal attitudes and behaviours;<sup>[19]</sup> e.g., the internalisation of legal norms, the issues surrounding

compliance to rules and laws, the learning of deviant and compliant modes... Legal socialization covers both the 'positive' and 'negative' sides of learning, specifically for the institution of law and generally for any human rule system which holds an authoritative validity. Whether the term 'law', 'norm' or 'rule' is employed, all convey some obligation to obey and none is conceived without the possibility of disobedience".[20]

It is worth noting that the use of the term 'legal' to characterise socialisation shows that legal socialisation is, in neutral terms, both a socialisation in the law field in general and a socialisation in relation to compliance with law or in relation to legally acceptable behaviour – even though researchers deny that this conformity implicitly lacks of critical thinking. However, Lawrence M. Friedman, as mentioned above, highlights that by privileging the notion of 'obedience' or compliance with law, early research on legal socialisation reduced legal discipline to laws, rectius to exclusively imperative laws. Such laws would contain only direct orders to act in a certain manner under the threat of punishment, or prohibitions, whose violation would trigger a sanction. Another, rather ambitious, approach concerning how to achieve effective legal rules applied in specific policy frameworks, is to understand how law is transmitted to younger generations and how they are supposed to interiorise it. The social point of view nevertheless predominates: particular importance is given to "learning modes of deviance and compliance" in relation to social and legal norms. While this process does not exclude conflicts or critical thinking by the subject, compliance with rules and laws means "successful socialisation", whereas the opposite behaviour signals the failure of the socialisation process.

What does interiorising the law, legal rules and norms mean?

Concerning this issue, June L. Tapp elaborated a "cognitive theory of legal development", inspired by levels of moral development defined by psychologist Lawrence Kohlberg, who systematised Jean Piaget's hypotheses on the formation of moral judgement.[21] At the pre-conventional level, children develop an attitude based on punishment or compliance to rules. These mandatory rules, which define prohibitions, are perceived as emanating from the authority of adults which is unconditionally correct as its objective is being the protection from danger. At the conventional level, laws and rules become more prescriptive than prohibitive, designed to avoid disorder and chaos. The subject complies either because of interpersonal conformity, so as to obtain approval from others, either because of social conformity, so as to preserve the social structure. At the post-conventional level, the system of laws and rules is perceived in a much more flexible manner. The application of principles of morality and justice are the main factors which would determine the compliance by individuals with the rules. Moreover, as these are based on the consensus of the social community, they may be modified or even infringed, if they are



perceived as unjust.

Beside the critique coming from legal sociology against the American implicit assumption in legal socialisation that legal norms are only those imperative ones, Carol Gilligan raised other critiques within the American psychology milieu. She was sceptical about the universal reach of Kohlbergs' theory on levels of developments and in particular on the validity of the observation that the girls under scrutiny do not go beyond the conventional stage of reasoning, that is the stage of interpersonal conformity or social conformity. Carol Gilligan firstly regrets that Lawrence Kohlberg, whom she worked with, repeated the Freudian mistake by elaborating his theory on the basis of results obtained from a male-only sample.<sup>[22]</sup> Secondly, she demonstrated that the phenomenon of girls "stopping" at the conventional stage is linked to the fact that modes of socialisation are differentiated by gender. According to her, while boys are conditioned by independence, which drives their thinking in terms of individual rights, even at the price of conflict (post conventional stage); girls are conditioned by an ethical solicitude which leads them to avoid conflict and maintaining links within the group (conventional stage of interpersonal conformity).

### **III. A DIFFERENT CONCEPTION OF LEGAL SOCIALISATION: THE INDIVIDUAL POINT OF VIEW**

In his work on what he defines as interpretive anthropology, Clifford Geertz, adds to the quotation of Max Weber, that if "man is an animal suspended in webs of significance he himself has spun", <sup>[23]</sup> then these webs of significance constitute culture. Later, in an essay on law and anthropology, he wrote that law, "here, there, anywhere, is part of a distinctive way of imagining the real".<sup>[24]</sup> Hence, any comparative research proceeds into an exercise in intercultural translation.

In my opinion, his approach appears decisive in order to understand how, in different cultures, law, taking into account its nebulous components and underpinning values, is an object of appropriation for the individual members of the cultural system concerned. Why appropriation? Because this notion, taken from cognitive psychology, goes further than simple knowledge or the image underlying individual or collective representations. According to Piaget, true knowledge can only be acquired if the individual appropriates what he perceives of the surrounding world – which we may call information or knowledge relating to this world. This requires the individual (1) to make an ex-ante exercise in reinterpretation, in relation to the codes of understanding that he has interiorised during his education, (2) in order to give his personal meaning to information, (3) so that he operates a double investment, affective and cognitive, to transform this information into knowledge; Annick Percheron defines this "acknowledgment of personal responsibility".



For the past twenty years, I have devoted my research to the significance given by members of different cultures to law and its diverse elements. This research was carried out in collaboration with researchers, from the cultures concerned, in the fields of sociology, legal sociology and psycho-sociology.

This implies a specific conception of legal socialisation that, first and foremost, does not adopt the social point of view which judges the 'success' of socialisation in terms of realisation of assigned social objectives. It instead adopts the individual point of view to shed light on the "imaginary conception of reality", within the culture the individual is embedded in, and within this reality, his "imaginary understanding of the law".

Children face the diversity of law in their everyday life, either because they hear about law, either because they are themselves involved in or witness the application of law. Partially legal socialisation is based on the inculcation, albeit informal, of concepts relating to law, justice and traditional figures of authority, in relation to the notions of allowed and forbidden within the family, school or media language. But every day life comes under the 'grid' provided by law and by the set of legal categories used in common language. Rather than by inculcation, the child gets accustomed to the activities these legal categories designate by familiarisation through impregnation, absorbing the images these categories evoke and the associated values. This learning process requires the appropriation of the external world which itself requires language as obligatory mediator. Activities, values, emotions are organised in individual representations around the terms used in the mother tongue. How then can I define my understanding of legal socialisation?

(1) The pre-eminence previously given to the transmission processes of values, norms and behavioural models should be renounced in favour of a definition of legal socialisation during childhood and adolescence, from the perspective of the subject playing an active part. This is "un processus d'appropriation, c'est-à-dire d'assimilation progressive et de réorganisation par le sujet, dans son propre univers de représentations et de savoirs, des éléments du droit qui régit sa société (normes, institutions, relations dans lesquelles elles interviennent, statut des sujets et valeurs qui les investissent)".[25]

But not all elements of law enjoy the same degree of "social visibility". Surveys show a strong tendency of subjects to perceive law and justice exclusively as imperative and repressive. Not that civil or administrative aspects are ignored, but these are often assimilated with know-how, uses or practices of every day life. Therefore, "explicit legal socialisation", which covers socially obvious aspects of law, consciously identified with what he calls law, should be distinguished from "implicit legal socialisation" which regulates every day situations that the subject

does not associate with law, due to their familiarity in every day life.

Three other elements of legal socialisation must be taken into account:

(2) Law must be considered as a fundamental part of the culture the subject belongs to, as Clifford Geertz expresses it, as part of this “distinctive way of imagining the real”. But is this the culture of the relevant society or of the family, social and local culture? The phenomena of “legal acculturation of the subject” must be distinguished from the phenomena of “legal acculturation by the subject”.

(3) The subject acquires the common knowledge of the dominant legal culture in his society by what I call “legal acculturation of the subject”. The acquiring of shared knowledge, the existence of common social representations regarding laws and institutions, the relationship between state and citizens, their formation in the course of national history and the common values they appeal to, provide the individuals within a given culture a “common language” with common meanings, which allows these individuals to communicate and recognise each other through “shared implicit obviousness”.

(4) In parallel occurs the “acculturation by the subject” concerning different objects of the common legal culture, because he recreates them through reinterpretation so as they make sense in relation to his own culture; i.e., the culture acquired in his family and social environment. Again, they will be “shared implicit obviousness” between the members of this local and family culture. It will be deeper than the obviousness acquired during the “legal acculturation of the subject”. The latter may, in every day life, serve opportunities of communication, marking what should be said or not, in order to be considered a reliable member of the relevant community – the school community, for example, regarding the age group which is concerned in many of our surveys.<sup>[26]</sup>

The legal sociologist may indeed be tempted to call ‘vulgar law’ the law as practised by the ordinary man on the street,<sup>[27]</sup> who in good faith believes it to be truly ‘the law’, when such practises are only related to law as practised by professionals in a limited and unsystematic way. According to Jean Carbonnier, the formation of vulgar law is a constant in sociology. He defines it as “the tendency of laymen to constitute a sort of inferior law by combining autonomous practises with elements borrowed from the legal ordering operated by the state”. Carbonnier underlines that this “infra-legal zone” is of considerable importance in quantitative terms. What the legal sociologist is submitting to a value judgment is quite apparent. It is the gap between the law in force and the representations or practises of non-lawyers, their subconscious misrepresentations of the rules in force. But this perspective, centred on the existence of positive legal rules, is eventually the perspective of a lawyer trying to assess the effectiveness of a legal norm by reference to how accurately it is known.

However, from the preferred anthropological perspective,<sup>[28]</sup> one must mention a necessary condition for the diffusion to individual members of a given culture of law as elaborated within that culture, and for the reception of this law by them. I call this condition ‘appropriation’ of the law by individuals. For law to ‘function’ in society, fulfil its role as an implicit or explicit reference and as rule of the game in the relevant culture, individuals must appropriate it, it must become ‘their’ law. The paradox of this appropriation which makes law the property of individuals and allows it to function within society, is that it presupposes a transformation operated by personal reinterpretation, the key to appropriation.

The “legal acculturation of the subject” would thus occur thanks to the transmission by school (or other channels conveying of the common culture), integrating the historical experience assimilated by national culture and fundamental concepts and values of the national legal heritage (in particular regarding the state, the citizen, law or justice) while the subject would himself proceed to the “acculturation of these concepts” in light of the codes of interpretation of reality acquired within his close environment in order to integrate them within his own system of representations.

The issue was analysed in depth in relation to adults and the notion of rights by Genevan psychologists of the Piagetian school of cognitive psychology.<sup>[29]</sup> Regarding the issue of individual access to justice, they highlight that individuals gather their information from expert sources. But the transformation of expert knowledge in to ordinary knowledge supposes the transformation of informative thinking into representative thinking. Representative thinking is characterised by rules and content that differ from informative thinking because it is elaborated in different contexts. The issue is not to produce knowledge, as in scientific thinking, but to use knowledge, and in this process, knowledge changes. While individual representations are largely pervaded by legal texts, they are structured according to principles which rely on social norms.

Regarding the acquiring of knowledge, A. Clemence and W. Doise describe the process in a detailed fashion which complements my remarks about appropriation: many legal notions are circulated in everyday conversations but are necessarily simplified and separated from their specific context. Through the media, encounters and conversations, individuals access specialised information to which they assign a meaning to make it operational in their every day life. The process of objectivising notions that are often abstract and general into concrete notions is accompanied by the rooting of this new information in common knowledge. Such a socio-cognitive dynamic leads to a very different representation from the theory of reference as shared by specialists. The latter do not refrain from highlighting this difference and attribute it to the

misunderstandings of ordinary people.

The process can be analysed as follows: non-lawyers rebuild their own code by borrowing disparate elements from official texts, which they complement with elements gathered during their exchanges of information on the matter.

American sociologists Susan S. Silbey and Patricia Ewick formulate the problem of legal acculturation of the subject and of acculturation of the law by subjects in a different manner.<sup>[30]</sup> According to them, while a basic 'kit' of knowledge is available to all in the relevant culture, not all individuals enjoy the same means to analyse and use this knowledge. And "while individual consciousness expresses common conceptions, these meanings and their interpretation are not perfect reproductions of a pre-existing model. The implementation of these collective conceptions varies, as it is shaped and located at local level. It supposes some improvisation and inventiveness, but also implies appropriation and reproduction".

What criteria can characterise socialisation as 'legal' as opposed to general socialisation? The question is a difficult one. Images of law and images of the world are indeed built simultaneously by a child or an adolescent and fuel each other: both are generated in relation to events that personally affect the subject or have been related to him. Images of law and justice cannot be understood without reference to representations developed by the subject in relation to the fundamental notions of authority, fault, punishment, freedom or equality.

So, must socialisation be explicit, conscious, in order to exist?

No. Firstly, this would be tantamount to saying that the system of representations and attitudes of the subject could only concern the nucleus, the socially visible and obvious elements of the legal system: Laws (especially in their imperative manifestations), Law and Justice. Even then, the subject may erroneously attribute to law or laws what is not part of them, because legislative reform has occurred in the relevant area: this has been established as a fact on several occasions in opinion surveys of adult populations.

Secondly, "implicit" or "subconscious" legal socialisation -whereby the subject does not realise it is a matter of law, but thinks it is only ordinary practice- seems as effective as the first type of socialisation. It can be observed for example that even when the subject believes certain personal areas such as family or property to be far removed from the grasp of law, he nevertheless integrates within the relevant representations the element consecrated by law.

At this point, it may be objected that family and property, like many other areas of every day life, each constitute a distinct "integral social phenomenon"

regulated by non-legal social norms, from which law has merely borrowed and sanctioned the content; that the researcher may be misled in considering as legal socialisation a phenomenon that belongs to general socialisation.

Attempting to isolate the effect or part played by a specific legal norm in individual representations -as well as in behaviours- certainly constitutes a challenge. It is only rarely possible to characterise a legal norm by its exclusive content since, precisely, legal norms frequently sanction the content of a pre-existing social norm by systematising it and making it applicable to all situations within the relevant category.<sup>[31]</sup> But it seems absurd to exclude from the field of legal socialisation all legal norms overlapping with other social norms.

On the contrary, it seems that it is precisely this inter-normativity that confers law its particular strength and ability to penetrate mentalities. By sanctioning as a general rule a type of behaviour regulated by another social norm, the law raises this behaviour to the status of a model. But the authority of this model remains largely conveyed by other norms which act as driver belts. This can be seen, in relation to family, from the result of the Franco-Russian research of 1993. If the purpose of law is truly to regulate social relations, whether it achieves this purpose with the assistance of other norms is of not particular relevance.

Hence my stance in relation to the concepts I use in my research.

Firstly, regarding my surveys and enquiries in western industrialised societies, which belong to systems of written law, I choose to mention the relationship between the individual and a legal order emanating from the state, bearing in mind that the effect of the legal order is often mediated by other norms and social practices.

Secondly, I prefer to refer to normative pluralism rather than to legal pluralism, in the absence of an empirical and operational criterion that would allow the identification of a plurality of systems, arbitrarily called legal within the subject's representations.

Thirdly, I do not consider it possible to mention what June L. Tapp called a 'legal continuity' between all the systems of norms based on "authoritative validity".

Fourthly, because in my research on legal socialisation on childhood and adolescence I have studied images and representations being formed, rather than behaviours, I will not refer, as Susan S. Silbey and Patricia Ewick do,<sup>[32]</sup> to a 'legality' constructed by individuals in their daily use of what they understand as being law. Certainly children and adolescents are prompt in asserting they "have the right" to do such and such a thing, especially in France where that expression is part of common language, and are equally prompt in using what they believe are

‘rules’ or games circumventing the rules. But the time of life under consideration is that of a progressive entering of the individual into law (Jean Carbonnier referred to a the progressive juridicisation of the individual) which precedes the entering into adulthood “for real”, if such a thing as an adult age exists.<sup>[33]</sup>

Finally, my initial education as a lawyer invited me to put to the test the pertinence of legal categories using empirical research based on an approach and methods borrowed from social sciences. Moreover, these seem to be the only ones able to address the question of the symbolic value of the behavioural models enshrined in the law. The approach of American legal anthropologists such as David M. Engel and Frank W. Munger,<sup>[34]</sup> -authors of a remarkable study on the way disabled subjects judge, in the context of their professional situation, whether the rights they are granted by legislation such as the 1991 Americans with Disabilities Act are appropriate, and consequently use or ignore these rights- doubly confirms my approach. Not only are law and rights themselves objects of the representations, attitudes and behaviours of disabled subjects, but these representations and behaviours find their origin in their experience of childhood and adolescence.

#### 1. *Specific research methods to observe the emergence of images of law*

The desire to observe, within the formation of representations of the world during childhood and adolescence, the emergence of those representations of law, in a way dictated the use of specific research methods. It indeed became apparent that the succession of structured questions used for adult or adolescent populations in previous research seemed to signal a general direction to the respondents and allowed them to guess the expected answer.

A method borrowed from psychoanalysis and already used in a modified form in social psychology and in French research on political socialisation was chosen: the method of spontaneous verbal associations to a series of keywords used in legal terminology and in everyday life, under limited time constraints.

The primary objective was to have a means of knowing, in the subject’s mind, the content of concepts theoretically considered clear or univocal, such as laws, law and justice, which have so far been considered to form the nucleus of legal socialisation. If one was to follow the development of these notions with age, as postulated by Kohlbergian theory, and taken up by June L. Trapp,<sup>[35]</sup> one had to know what they meant for the subjects of the enquiry, what they associated them to, what thoughts they spontaneously provoked. No doubt these associations vary with national cultures, history and political systems. But they should also vary within a single culture according to projections and negative or positive expectations of adolescents as determined by their age, gender, social and local backgrounds. Secondly, the same approach had to be followed in relation to concepts, designated figures or structures of authority such as the



state and administration, mayors, judges, lawyers and members of the police force, in order to try to determine the role they were attributed by individuals. Finally, the areas pertaining to the most familiar aspects of every day life, family and property -where rules of law are the least visible because they are closely interwoven with other social rules- had to be investigated, in order to find out when and in what form individual representations of law emerged.

Already used in France,[\[36\]](#) albeit less systematically, for research on political socialisation, the spontaneous associations method is one of the methods which better allow distinguishing the 'images' around which 'representations' are organised. Even when individual representations significantly borrow from dominant social representations, they rely, in the subject's psyche, on images which have often become subconscious by adulthood but which keep influencing representations. It seems the power of images formed during childhood and adulthood ensures their lasting nature and sometimes explains the rigidity of the representations organised around them.

The spontaneous association method has been doubled with a selective association method, whereby the subjects of the survey were asked to associate their choice with one or more notion-values (law, laws, justice, responsibility, freedom, equality, solidarity, authority, security, discipline) and a series of concepts encountered on a daily basis.[\[37\]](#)

## 2. *Development or acculturation?*

The intercultural comparisons between the results gathered from French, Polish, Russian and Hungarian adolescents did not show any conclusive evidence of the 'development', in the Kohlbergian sense, of universal conceptions of law and justice. However, age appeared to be a decisive variable in the legal acculturation of the subject, in the manner he apprehends the common legal categories that will allow him to communicate with his peers. In this respect 'development' with age seemed the most appropriate to 'separate' the members of different national cultures.

For example while French, Russian, Polish and Hungarian 11-12 year-olds shared, for most of them, 'universal' conceptions of law as essentially imperative, of the right as freedom to act, of the citizen as being "everyone" or "someone like you and me", of the state as simply a country, the cultural divide -and consequently the acculturation of the subjects- became apparent at the age of 13-14. From this age "shared obvious assumptions" settled within the culture concerned. Paradoxically at this age adolescents are also appropriating the world by reconstructing it with their own concepts. But these concepts are those that were transmitted by various channels of common legal culture. And they are appropriated with such belief that the 13-14 year olds can be described as having become the "model students of legal socialisation" by giving a maximum of



“answers with legal connotation” even for terms having both an ordinary and a legal meaning.

In France, it appeared the law loses its imperative character with the subject's aging, and becomes, consensually, a “rule of the social game” designed to facilitate social interaction: individual rights are asserted and systematically associated with freedoms while law, as a subject, is the discipline of judges and lawyers. To be a citizen of a country it is enough to live there, a sort of citizenship of residence, related to a loose conception of *ius soli*. Finally, the state is associated with a legitimate political power supervised by law. In Eastern European countries, the law, in the 1990s, was still under a Soviet-type of political influence, and far from receding with the aging of the subject, its imperative and repressive character increased, while, paradoxically, rights were increasingly vindicated, even though objective law acquired the imperative character. In Poland, the state was stripped of political power and reduced to a territory and a cultural community, or, like in Russia, was denied any responsibilities.

Strangely, in relation to citizenship, a divide appeared between subjects from states with a population of diverse origins, such as France and Russia, and countries such as Poland and Hungary, which historically have experienced both being broken up and occupied by foreign troops. The former countries showed an extensive conception of *ius soli* and attributed citizenship to all their residents, while the latter favoured a conception of citizenship closer to *ius sanguinis*, whereby only residents of Polish or Hungarian descent could avail themselves of national citizenship.

In accordance with Adelson's findings, the 16-18 years old age group only refined and strengthened these conceptions, showing a variable tendency to cultural and political conformism in middle classes, the challenging of established order occurring mainly in older male age groups in Poland, France and Russia. In this respect, it was observed that the impact of social class variables differed in different cultures, and that the social geography of such challenges to legal norms, justice and institutions varied in different countries. In Poland and in Russia, 16-18 years old belonging to the intelligentsia taught virtues to the state, providing answers with strong moral overtones; in contrast, the working classes, whose social legitimacy was dramatically declining along with that of the communist party, were the most aggressive in their accusations of corruption. In France, however, working classes subjects adhered to more ‘moral’ conceptions of the role of the law and to a largely economic analysis, while boys from privileged backgrounds sought to show both their knowledge of institutional mechanisms and that they were not fooled by their apparent virtue.

#### **IV. THE EFFECT OF THE TIME VARIABLE ON REPRESENTATIONS OF LAW**

## IN DIFFERENT CULTURES

As mentioned earlier, part of the complexity in researching legal socialisation is due to the process by which representations of the law are constructed. These are generated together with events which personally affect the subject or which have been recounted to him, images of the law and images of the world are constructed simultaneously and fuel each other in childhood and adolescence. Within law (*lato sensu*) itself, images of the law, of law and of justice cannot be understood without the assistance of the representations developed by the subject in relation to the fundamental notions of authority, fault, punishment, freedom and equality. A second factor contributing to the complexity of the task, previously underlined in research on political socialisation,<sup>[38]</sup> is that legal socialisation occurs both in a spatial dimension and in a time dimension. What the child and later the adolescent interiorise (and which will remain deeply ingrained, even subconsciously, in adult representations) is the image he forms of law at a particular moment in time, in relation to information acquired directly or indirectly, in a particular social context and within a particular society. It should also be added that legal socialisation is situated in time in two respects, since information received by the subject is conditioned by dominant social representations, which in turn are not only impregnated by a particular given culture but also often impressed by the previous experiences of adults who give a specific interpretation of the information while transmitting it.

If law is an integrating part of culture (i.e., a distinctive way of imagining the real, to paraphrase Clifford Geertz once more), representations of law progressively produce what some call the legal consciousness of the individual, that is to say amongst other things the manner in which individuals belonging to this culture perceive or imagine, in a double refraction of reality, the manner in which law imagines reality.

It might have been thought, in line with a simplified and static understanding of culture, that culture and consequently representations of law or the legal consciousness developed by individuals within that culture were homogeneous and stable. Law would respond only belatedly to social changes and culture would constitute, to use a musical analogy, the bass background music, reassuring individuals by ensuring the continuity of the tune and its rhythm, and hence its ability to be identifiable by individuals belonging to that culture. In relation to law and individual representations of law, it would thus be possible to talk of the law of the French, of the Russians, of the Poles or of the Hungarians.

However, because it is alive, no culture can be static. Law may be static in successive stages, the duration of which may lead to an impression of stability.

Relatively stable, but belatedly changing, is law homogeneous? One may think so

if one adopts the perspective of Sirius, made harmonious by distance, and neglects the concrete approach of lawyers and legal sociologists who analyse the content and functioning of law and underline the diversity amongst its various branches.

Finally, to move from law itself to the perception of law by individuals, it seems difficult to believe in a homogenous representation of law or legal consciousness, since different aspects of law, which regulate different aspects of social reality (criminal acts, rights and freedoms or property for example), draw upon individual's different emotions or motivations to act.

Two different evolutions in time of a so-called 'French model' or a 'Russian model' of legal socialisation will be considered.<sup>[39]</sup> Regarding the former, the evolutions shown by two surveys carried out in France in 1987 and 1993 respectively will be considered. Regarding the latter, which will be defined in terms of its own coherence and in terms of differences from the French model, evolutions will be inferred from the surveys carried out in 1993 (at the same time as the second French survey) and in 2000.

#### 1. *Evolution in time of the 'French model' of legal socialisation*

The analysis of responses to the French survey of 1987 highlighted the extreme fertility in adolescent's representations of the republican tradition of rights and freedom of citizens against the state. During adolescence, the State is increasingly identified to political power and less so with a community. The notion of duty was largely ignored, and adolescents favoured the notion of obligation only, in so far as it took the form of 'responsibilities' which could be freely assumed.

As in surveys of adult populations, law was mainly perceived in its most socially visible form, namely an imperative norm stipulating injunctions and prohibitions accompanied by punishments (on the model of criminal law, tax law, or the highway code). The corollary was the perception of judges as criminal judges. The reasons for this can be seen even in a democratic state: two external reasons (extreme publicity in the media on the one hand, the inflation of the notion of respect for the law in political discourse on the other), and two psychological reasons (sense of security provided to individuals by a type of law which represents order, and acceptance of a 'fatherly' type of law assigning individuals the limits of their field of possible actions).<sup>[40]</sup> However this circle of constraints was well accepted because, increasingly with age, it came to be considered a consensual body of rules of the social game. The notion of rule, far from being confused with a moral or religious rule, was (increasingly with age) assimilated with the law, to which it was strongly associated.

Challenges to the establishment, mainly emanating from boys from privileged backgrounds or middle classes, focussed on elements of the system symbolising

authority and its figures: authority itself, in all its forms (parental, professorial, public), public administration and tax administration, the whole body of civil servants and especially members of the police force, who were severely taunted but nevertheless perceived as reassuring; and finally lawyers who, while symbolising the rights of the defence, contrasted only feebly in terms of honesty with agents of the state providing the public services of policing and justice.

In addition the 1987 data showed the fertility of a more general model of “control of emotions”<sup>[41]</sup> which prompts objectification in the style of responses. This model seemed differentiated by social classes, and contrasted what resembled “the confidence and easy desecration of students from a bourgeoisie background” with “the realism of students from popular backgrounds”.<sup>[42]</sup> Apparently more pressing for boys, this model implied that the higher their social background, the more their answers move away from affective or moral considerations. In fact answers with affective or moral overtones were essentially from working class backgrounds and girls.

In 1993, this differentiation of answers by social background and gender had considerably diminished, in particular with respect to judgements based on moral considerations expressed in Manichean terms of good and evil. This decline could be seen in respondents from working class backgrounds as well as in girls, the only category where they existed in 1987. Did everyone feel compelled, in order to integrate and be socially recognised, to adopt the new dominant and imperative model of “being relaxed”, an avatar of Elias’ “distancing” or of Bourdieu’s “desecrating ease”?

But this model required, in order to look ‘intelligent’, not to be ‘fooled’ by ostentatiously displayed ideals in particular where these called upon morality in the negative form of condemnation and creating a feeling of guilt. In this regard, French teenagers refused to condemn young offenders. The analysis of the associations to the terms ‘fault’, ‘offence’ and ‘punishment’ was quite demonstrative. The concept of fault was considered hypocritical, as it designated no more than an act disapproved of by society. Adolescent vocabulary favoured the term ‘mistakes’ which, as everyone knows, are only human. The systematic over-emphasising of evil character, which used to attach to persevering mistakes, had disappeared. The subjects of the survey identified with anyone committing a fault, trivialised into an error, rejected morality, which was perceived as formal and imposed by any authority engaged in producing rules. Taking this line of reasoning a step further, they barely formulated any negative judgements on offences at all. The offence, however severe, was objectified into a simple infringement of the rules. In parallel, punishment was totally rejected, characterised as a form of vengeance or injustice, and in the best of cases as an ineffective method or as a psychological mistake.

This generalised attitude of tolerance in respect to fault and of intolerance with respect to sanctions, which represented an important change in contrast to 1987, seemed largely disconnected from the dominant attitude in respect of judges. While the condemnation of the notions of fault and offence has strongly diminished, judges and justice were, at the same time, associated with the performance of positive social functions (ensuring justice, guaranteeing social peace, rights, and equality before the law). The criticism of law and the legal system confidently aired by young upper and middle class boys in 1989 had significantly reduced. It may be that criticism had become as superfluous as demystified morality. Logically, the role of civil justice was better perceived, and law and legal institutions were evaluated twice as positively as in the previous study 6 years before. The same could be said of the sanctuary structure provided by family. However, the attention of adolescents peaked in relation to Citizens and Solidarity.

Spontaneous associations with the notions of right equality and freedom showed an increased 'legalistic' awareness: 54% (as opposed to 42% in 1987) of responses on freedom (equal freedom to act, constitutional principle, guaranteeing human rights, freedom of thought and freedom of expression) showed legal overtones, and similarly 62% (as opposed to 34% 1987) in relation to equality (equal rights, constitutional principle, non-discrimination, equality before the law and the legal institutions).

A similar phenomenon is revealed in Russia by comparing the results of the 1993 survey with those of the 2000 survey.

## 2. *Evolution in time of the 'Russian model' of legal socialisation*

In order to analyse the status of law in individual representations in Russia, two factors which have contributed to minimising the status of law and rights in Russian culture must be taken into account. One is the soviet legal system, which gave priority to politics, resorted mainly to repressive laws and reduced to a minimum the circle of individual rights. Another is a more ancient Russian cultural tradition that valued morality above law, extended family rules into the social sphere and seemed to reject excessive regulation of human relations as well as abstract rules such as the rule of law. This 'rejection of law',<sup>[43]</sup> as some authors have called it, has been analysed in relation to the profound influence of the Orthodox religion, which privileges affective values over action values. However, the hierarchy of the Orthodox Church did not abstain from siding with the powers that were "masters of the law": this guilt provoking formulation brought an awakening of consciences by fixing the moral norm of truth, a notion which arose again in the Stalin period in particular in family law, which was the most rigorous in Europe by 1944.

a. The results of the 1993 study in Russia

The results of the study carried out in Russia in 1993 firstly show, as in France, the influence of history and of the spreading of a specific notion of law. While in France the predominant image of the law is one which, despite its imperative and constraining character, simply considers law as a rule to be respected or complied with because it facilitates social interactions, in Russia one finds the quasi omnipresence in individual representations of a repressive element which above all should not be transgressed. The play on words on transgression -the Russian term *prestuplenie*, which is the exact translation of the French term 'transgression', has the double meaning of crime<sup>[44]</sup> in common language and criminal offence in legal language- gives rise to a representation of the law focussed on criminal law, invested with the power to delineate good and evil. Hence the strong moral condemnation which attached to offences in the majority of Russian answers extended to delinquents, excluded from daily life and placed into a world of abnormality ("people with no conscience" who have committed "monstrous acts").

In parallel, the guilt attached to the notion of fault, a notion rejected or obliterated in France, seemed fully accepted in Russia. While in France fault was objectified into a mistake or a simple infringement of rules which anyone could potentially commit, in Russia fault never seemed detached from the person to whom it had caused harm. One was considered 'guilty' in relation to someone and this fault generated 'remorse', 'repentance' and/or a 'desire to fix things', as if the severance from another or from the community generated by fault was the worst of all evils, and as if only reconciliation or reintegration could put an end to the isolation of the individual.

As in the two French surveys of 1987 and 1993 and in the 1987 Polish survey, if there was indeed any 'development' with age, it consisted of interiorising or appropriating this cultural model present in educational practices within both schools and families. In contrast to the French model, a positive evaluation of punishment, which helps the guilty "realise the meaning of his fault" and "sets him along the right path", increased with age until it reached 40% of answers in the 16-18 years old age group. Transferred to the criminal plane, such an evaluation of fault and punishment did not carry any challenges to law and repressive justice, since any punishment was justified ("a just judge is a severe judge"), the only accusation being aimed at possible cases of corruption.

The counterpart to such a specialised conception of law as "not to be transgressed" was that law did not seem fit for regulating social interactions in daily life. In order to avoid transgressing the law and going beyond the limit, it is indeed better to avoid the law or keep at a safe distance. While in France the notion of rules was, increasingly with age, associated with law, in Russia this association decreased, rules being considered mostly informal rules governing the

different circles within which the individual was included – family, friends or work environment.

The distance from the French model of an increased legalistic perception of reality with age was further stretched in relation to the notions of freedom and equality. As in Poland, the very notion of equality was undermined by its ‘confiscation’ by official slogans, which seemed to reflect only the situation of the most privileged within the communist system. Half as many Russian adolescents as French adolescents (35% and 62% respectively) perceived the concept of equality as having legal significance, while twice as many (60% and 27% respectively) adhered to the humanist principle according to which all human beings are valued equally. While in France the concept of citizenship was the most associated with equality, through selective value associations, in Russia it was most associated with family.

As for freedom, the majority of Russian adolescents associated its image with total and absolute freedom, excluding any form of dependence, in short a fantasy of freedom that has no corresponding embodiment on a social plane. Contrary to French adolescents, only 28% (54% in France) of Russian adolescents thought of a legal regulation of freedoms and they rarely thought that freedom could be limited by the freedom of others.

There were thus two opposite models in Russia and in France. For French adolescents fault was negated, thus ignoring others, and reduced to a simple violation of rules emanating from whatever authority; freedom was socialised and considered from a legalistic perspective to “end where freedom of others begins”. For Russian adolescents fault implied harm caused to another and generated repentance and remorse; freedom was anarchic and totally obliterated others, and was closer to a poetic (*volja* in Russian) notion of freedom than to a socialised freedom (*svoboda*). But it seemed that both notions of freedom were intimately linked to a specific notion of power. For French adolescents, power was essentially a legitimate political power which acknowledged the supremacy of law to regulate its activities, and was in principle respectful of public freedoms. For Russian adolescents, power was conceived as an “enormous force” infiltrating all aspects of social life, which did not acknowledge any form of control and excluded the supremacy of law.

The value of family therefore appeared to be a haven, much more so than in France, where the status of citizen, and along with it social and political life, were highly regarded in adolescent representations. The importance of family, presented in the cliché form of a place of absolute happiness and safety, from which all conflicts are excluded, was not without ambiguity. Amongst all the selective associations available it was divorce that most incarnated freedom for Russian adolescents. One may recall that following the October Revolution



in Russia, divorce had been the first legalised freedom in Russia.

b. Breaks in the 'Russian model' in 2000

The most striking breaks over time occurred in the representations that seemed the most anchored, since the 1917 October Revolution, in the legal consciousness of the Russians interviewed in the 1993 and 2000 surveys.<sup>[45]</sup> One such break occurred in what might be called the Russian conception of repressiveness (fault and punishment), another in the conception of freedom, which far from remaining absolute (to be unconditional or not to be), gets socialised by taking into consideration the freedom of the other.

*A break in the sense of repressiveness and guilt*

In the 1993 Russian model, the prevalence of repressiveness in the representation of law, a legacy of the Soviet legislative tradition, which during its entire history favoured criminal sanctions, was backed by a remarkable prevalence of repressiveness in moral conscience. In this constellation of repression/guilt, fault, conceived as harm caused to another, was an expression of the primacy in Russian culture of interpersonal relations over relations to the rule,<sup>[46]</sup> and sanctions were considered the only means of making the author realise the importance of his action. The social mechanism could be understood thus: the relation to fault, as harm caused to another and generating guilt and/or remedies, and the relation to punishment, as the only means of making the person at fault aware of their bad action, resulted in two by-products, the hyper-legitimacy of the most severe criminal sanction, and, beyond that, a strong intolerance towards offenders, considered abnormal and conscienceless.

A break is apparent in 2000 in relation to this cultural model. Certainly law remained imperative and even repressive in individual representations, both conforming to the traditional image of law in Russia and perceived as reassuring in the face of current criminal activities. But Russians now also consider law as granting rights and possibilities of action to individuals. Moreover (as in the conceptions developed by the French subjects of the 1993 survey) law is considered by a significant proportion of the Russian subjects as a sort of rule of the game necessary for the functioning of society. And while -or despite- importance given to the institutions applying criminal law does not diminish with age, positive evaluation of the law is the expression of a desire to be protected against criminality.

In parallel judges are still mainly considered according to their role in criminal law, but, in contrast to 1993, their civil jurisdiction is also perceived for the first time. An almost mythical image in 1993, embodying the rigour of justice, by 2000 the judge is perceived in a less passionate and more realistic manner as embodying

law, and is recognised as fulfilling positive social functions (maintaining social order, equality, and protection of individual rights). Associations with the word 'offence' also suggest a significant reduction in the number of moral condemnations of the offending act, in favour of it being characterised in terms of an act subjected to justice and criminal punishment. Finally the mythical image of criminals (abnormal beings deprived of a conscience) has also disappeared in favour of a questioning of their feelings or motivations.

The break, in relation to the normative and institutional aspect of representations within individual conscience, consists in a double phenomenon of increasingly legalistic answers and a reduction in answers implying a moral judgement; or, in other words, in the development of the field of legal consciousness and the reduction of the field of moral consciousness.

What about the representations of Fault and Punishment that gave an underlying repressive basis to representations of legal norms and justice? The status of punishment has strongly evolved in representations where it was of crucial importance. Positive evaluations of punishment drop dramatically from 40% to 7% in the older subjects and totally disappear in the younger subjects. Even adults, most of whom would have been expected to have interiorised the repressive model, question the practice of punishment in Russian society. In particular, in the 18 to 30 years old group, answers express strong doubts (as in France in 1993) as to the appropriateness of punishment in general, its adequacy in relation to the act committed and the motivations of the person inflicting the punishment. Characterised as 'unjust' or 'inhumane', punishment is, as in France in 1993, likened to "vengeance" or an "irresponsible act driven by anger".

However, the reduction of the repressive field of moral consciousness seems to reach only weakly into the field of guilt, according to the spontaneous associations with the term "fault". The concept is certainly perceived more legalistically than in 1993, as it associated by 40% of the young (as opposed to 14% in 1993) to the transgression of a rule or law, and more specifically to the transgression of criminal law. Anecdotally, it also appears that the number of moralising associations with 'fault' in terms of 'remorse' has significantly declined. However, given the iconoclast challenges of cult authors such as Dostoevsky, one may ask whether the term is not simply out of fashion. Hence the issue might be a change of vocabulary rather than the evolution of the cultural model of guilt, since the decline of remorse is correlated with an strong increase in clearly less romantic answers of the "feeling guilty" type, the proportion of which varies between 23 and 34% (guilt peaking at the key age of legal socialisation; i.e., 13 to 14 years old).

However, a subtle nuance distinguished current answers from those given in 1993: the number of answers associating fault with harm caused to another (to be

guilty towards someone) has considerably diminished (4% amongst 11-14 year-olds and 7% amongst 16-18 year-olds, as opposed to 40% and 14% respectively in 1993). Could this difference indicate a weakening, from childhood onwards and in family and school education, of the instillation of a strong bond between members of a community?

It may seem strange to mention a psychological link between the members of a community in relation to fault. This observation was nevertheless suggested to French and Russian researchers by the contrast between associations with fault in France in 1993, which were exclusively formulated in impersonal terms of transgression of a rule, and similar associations in Russia in 1993 which were mainly conceived in terms of guilt towards another or harm caused to others. This allowed the identification of a constant element of the Russian cultural model consolidated by the soviet model (because it was operational in relation to its objectives) in such a manner that it was still operating in the early 1990's.<sup>[47]</sup> Educational models unquestionably changed in 2000 more than the affective pressures of families – or we can at least assume so. These respective influences must be strong enough for certain Russian answers to use irony to challenge the use of guilt as a weapon, in particular against women, still largely practised in current Russian society. Whatever the case may be, in 1993 excessive guilt implied excessive responsibility. Finally, in the redistribution of values associated with fault, the excessive imposing of responsibility was brought into proportion by the legalistic approach to fault, and by its inclusion in the legal process. In the 1993 survey, fault was associated twice as much with Responsibility as with law by three-quarters of the 16-18 year-olds; it is now associated on an equal standing with the law and with responsibility as well as with justice to a lesser extent.

Does this break operated by the phenomenon of increased legalistic perception in turn create an even more important break by weakening the sense of others so characteristic of Russian culture? It seems not; it may even reinforce it, as is suggested by the obvious changes in relation to freedom which will be considered below.

#### *The increased legalistic and socialised sense of freedom and equality*

In 1993, two contradictory trends underlined the French and Russian answers in relation to how others were taken into account by individuals. In Russia, there was a sharp contrast between the notion of fault, always linked to others, and the notion of Freedom totally oblivious of the others. In France, the individual, unaware of others in relation to the notion of fault, as it was exclusively linked with rules (and probably implicitly to the Authority stipulating the rule), became aware of others again in relation to a conception of freedom which respected the freedoms of others: our freedom ends where freedom of others begins. In 2000, a turning point occurred in Russia.

While Russian subjects always combine moral consciousness of personal guilt with a feeling of responsibility towards the victims of their faulty conduct, they also develop a true legal conscience of others, through the notion of rights and freedoms. The notion of individual rights is better interiorised whether in considering one's self or others as individuals and citizens. And the Russian conception of freedom meets the French conception of freedom tempered by equality, a freedom which takes into account others and their rights.

The perception of rights and freedoms has also significantly broadened since 1993. Young subjects characterise as human rights not only the "right to life", which they insisted upon already in 1993, but also and repeatedly what they call "the right to choose", which they assimilate with "choice of life" (which meets the free choice of one's private life) and "being one's self". The vindication of personal freedom, always present, is accompanied by a much more active vindication of civic freedoms. The most important of these civic freedoms is freedom of opinion, also formulated in terms of freedom of thought, speech and religion, freedom of the press, and obviously in terms of the right to vote, which generated little interest in 1993. The necessary respect for certain limits protecting one's self and others is mentioned in various manners: necessary respect for others, duties towards others in consideration of freedoms. This is an important qualitative change since 1993, as at that time rights and duties were essentially in relation to the state.

The notion of equality too has been significantly socialised and perceived in a legalistic manner. In 1993, while French adolescents gave precedence to the legal instruments of equality, Russian adolescents were much more receptive to the importance of social equality (equal chances in equal amounts) and of the moral value of equality ("all men are equal"). The change is obvious in Russia as currently more than 80% of 16-18 year-olds (as opposed to 55% seven years before) mention the legal aspect of equality, as if they had discovered the purpose of the legal protection of equality. Moreover a theorisation of equality as a social value appears in their answers: tolerance and social harmony as a basis for democracy.

*Towards a reluctant reconciliation of citizens with state and power?*

In 1993, which seems to have been a period of crisis of the representations of the state (coup of August 1991, dismembering of the USSR, declaration of the independence of Russia, Elstin's coup against Parliament), answers were rather of an emotional nature and the state was massively associated with the haven-like notion of 'country' (answers which could be found to such an extent only amongst the younger French subjects). The notion of 'state' seemed devoid of political power, and while it was associated with law, it never was associated with democratic mechanisms. In this sense several answers referred to the absence of a

state.

It seems the answers obtained in 2000 show a reconstruction of the notion of state, ambivalently linked to several notions. Firstly, the state is much more often associated with a community of citizens linked by a common culture, common traditions and a common language (such associations have doubled in the space of seven years). A sort of rebalancing between state and citizens appears in the associations between these two notions and responsibility as a value. An insignificant relationship between an almost irresponsible state and citizens stripped of any responsibilities (15% of such associations amongst 16-18 year-olds) had developed by 2000 into a situation in which citizens and the state are equally responsible (over 50% of such associations amongst adults as well as children).

Moreover, the state is now assimilated with political power. This is not unambiguous, as the state is now exclusively embodied by the President whose prestige increases to the detriment of the image of government. The image of political power seems restored under the double sign of authority of law and centralisation. But what law is it? Subjects often mention the Russian proverb according to which "Law is like the draw bar of the plough, it goes the way it is pointed to" (i.e., by power).<sup>[48]</sup> Answers which in 1993 exposed the "absence of a state" have almost disappeared and the state is starting to be invested with classic social values (social justice, equality, protection, security, democracy and protection of freedoms).

Associations with the term 'power' confirm this progressive legitimisation: firstly, by the personalisation of power, new generations associating power with the President; but also, and quite ambiguously in light of the above, by taking into account democratic mechanisms such as the functioning of legislative power, largely ignored seven years before (let us remember the 1993 survey was conducted in February, 6 months before Elstin's use of force against the Douma's opposition). However, the ambivalence of the reconstruction of representations of the state and of power around the President comes with two new and worrying elements: the frequent mentioning of "the power of a single man" and the considerable increase in the space of seven years of answers mentioning the "power of money" and the "power of connections", both of which are embodied by these new social phenomena, oligarchs.

## **V. CONCLUSION**

To summarise my experience in researching legal socialisation, I firstly reached the conclusion that, in order to better understand representations and behaviours of adults in relation to law and rights, their origin in childhood and adolescence are of relevance. This conclusion is reinforced by the findings of several of my European and American colleagues (Adelson and Engel & Munger in the U.S.,

Vari-Szilagyi in Hungary, Arutiunyan and Zdravomyslova in Russia and Percheron in France, for example).

Secondly, it is more appropriate to use qualitative methods. The methodology used combined spontaneous associations with selective associations of terms belonging to both common language and legal vocabulary, in order to explore the content of the concepts used in the survey questionnaire. In research on the legal consciousness of adults in the US, this method is now replaced by the “life stories” methodology. Here the subjects tell their daily experiences *inter alia* in relation to law.

However, while Clifford Geertz is correct in suggesting that any comparative legal exercise is an exercise in “intercultural translation”,<sup>[49]</sup> a remark which *a fortiori* also applies to individuals’ representations of the law, it is possible to obtain certain results from quantitative methods in the form of standard questionnaires. These have some virtues,<sup>[50]</sup> but also substantial drawbacks,<sup>[51]</sup> not least that the answers given by individuals from different cultures to the questions imagined by researchers does not allow the understanding of the subject’s interpretation of the concepts used in the questions.

Ideally the advantages of each method should be combined. This was attempted in the European project *Toward a New Russia: Changing Images and Uses of Law among Ordinary People*.<sup>[52]</sup> Here, in relation to adults, the comparison of the results of the 1993 and 2000 studies on representations of law in Russia amongst so-called “ordinary” people (as opposed to lawyers) is combined with the results of two complementary questionnaires and interviews used in 2001 and 2002 in relation to uses of law by individuals in their daily life, in two economically and culturally contrasted locations: Moscow and Ivanovo.

Combining the various factors influencing legal socialisation requires a significant amount of data. By focussing on images and uses of law in relation to work and rights and freedoms, it was possible to analyse the variations of the local context (Moscow and Ivanovo) on legal socialisation by gender: data from the 1993 study (spontaneous and selective associations in Moscow), the 2000 study (spontaneous and selective associations in Moscow and Ivanovo), the 2001 study (questionnaire-based study in both locations) and 2002 (study based on in-depth interviews). <sup>[53]</sup>

Researching socialisation in relation to such a diversified object as law indeed supposes considering a whole glistening palette of representations, emotions and knowledge regarding social interactions covered by a certain branch of law as well as the status of law, individuals and values in each discipline involved.

Far from me the idea of casting aside approaches to the “core nucleus” of the legal system (the law and imperative norms) which was initially considered its essence even in the first pieces of research on legal socialisation. I believe this nucleus, from the perspective of legal conscience as well as from the perspective of the processes of legal socialisation leading up to it, is an “archaic nucleus” rooted in a feeling of guilt formed early into childhood. The archaic conception of Law is of a body of prohibitions and injunctions, the transgression of which triggers punishment. Recall that at a primary stage of legal socialisation, law and justice are considered only in their criminal aspect, the judicial system chastising disobedience to an injunction or the transgression of a prohibition, while the transgressor, carrying in him the guilt or the awareness of his own fault, engages in a process where ‘crime’ generates ‘punishment’. One can recognise Piaget’s first definition of law and justice as the initial stage of moral judgement, and later redefined by Lawrence Kohlberg and June L. Tapp as the “pre-conventional” stage of moral and political conscience. At this stage, punishment is perceived as just since it chastises the transgression of prohibitions and injunctions stipulated by a just authority whose only concern is to avoid danger to its subjects.

However, it is difficult to argue that this constitutes only a primary or childhood stage of legal socialisation. On the one hand, it constitutes the essential level to which any criminal legislation appeals. On the other hand, we know that individual representations which express a systematically repressive conception of law and justice often reflect a repressive legislative policy or, in broader terms, a repercussion of an authoritarian political system.<sup>[54]</sup> In both cases the subject, constantly submitted to the control of authority and to many criminal provisions systematically used at legislative level, is in no situation to develop a relation of equality or reciprocity in relation to other members of the community; nor is he even in a position to develop a certain autonomy in relation to the law.

With regard to the elements of Law which are the object of social representations, we are therefore dealing with two types or relations, the geometry of which varies: vertical relations between individuals on the one hand, and the norm of authority, the figures and structures of the authority of the legal system on the other; and horizontal contract-type relations between partners located at a similar level.

---

## REFERENCES

\* Director of Research at the Centre national de la recherche scientifique (CNRS) France; Editor in Chief of the journal *Droit et Cultures*. English translation by Tobias McKenney and Rory S. Brown, in collaboration with Ounia N. Doukouré, PhD candidates, European University Institute, Florence, Italy.



- [1] C. GEERTZ, "Thick Description: Toward an Interpretive Theory of Culture", in *The Interpretation of Cultures*, New York, Basic Books, 1973, p. 5.
- [2] C. GEERTZ, "Local Knowledge: Fact and Law in Comparative Perspective", in *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983, p. 184.
- [3] J. PIAGET, *Epistémologie des sciences de l'homme*, Paris, Gallimard, 1972, p. 139.
- A. PERCHERON, *L'univers politique des enfants*, Paris, FNSP/Armand Colin, 1974, p. 39.
- [4] J. CARBONNIER, "Effectivité et ineffectivité de la règle de droit", *L'Année Sociologique*, 1957-1958, pp. 3-17.
- [5] L.M. FRIEDMAN, "The Idea of Right as a Social and Legal Concept", *Journal of Social Issues*, 1971, No 27/2, pp. 189-198.
- [6] J.L. TAPP, "Socialization, the Law, and Society: Reflections", *Journal of Social Issues*, 1971, No 27/2, pp. 4-5.
- [7] P. MALRIEU et al., "La formation de la personnalité", in H. GRATIOT-ALPHANDÉRY and R. ZAZZO, *Traité de psychologie de l'enfant*, Vol. V, Paris, PUF, 1973.
- [8] E. ERIKSON, *Enfance et société*, Neuchâtel-Paris, Delachaux et Niestlé, 1982.
- [9] D.E. GOSLIN, *Handbook of Socialization Theory and Research*, Chicago, Rand McNally, 1969.
- [10] E. DURKHEIM, *Education et sociologie*, Paris, PUF, 1922/1985.
- [11] A. PERCHERON, "La socialisation politique: Défense et illustration", in M. GRAWITZ and J. LECA, *Traité de science politique*, Vol. III, Paris, PUF, 1985.
- [12] The subject tends to incorporate things and people within his own activities, that he assimilates the outside world to the structures he has built himself. But he also tends to adjust these structures according to transformations imposed by the arrival of new elements and hence he tends to adapt them with outside objects. What Piaget calls adaptation to reality encompasses the balance of assimilations and adaptations. See, in particular: J. PIAGET, "Le développement mental de l'enfant", in *Six études de psychologie*, Paris, Denoël/Gonthier, 1964.
- [13] A. PERCHERON, "La socialisation politique: Défense et illustration", o.c.
- [14] C. KOURILSKY-AUGEVEN, "Qu'est-ce que la socialisation juridique?", in C. KOURILSKY-AUGEVEN, M. ARUTIUNYAN and O. ZDRAVOMYSLOVA, *Socialisation juridique et modèle culture: L'image du droit en Russie et en France*, Paris, LGDJ, 1996, p. 19.
- [15] P. MALRIEU et al., "La formation de la personnalité", o.c.
- [16] J. ADELSON and R.P. O'NEIL, "Growth of Political Ideas in Adolescence: The Sense of Community", *Journal of Personality and Social Psychology*, 1966, No 4/3, pp. 295-306.
- [17] A. PERCHERON, "La socialisation politique: Défense et illustration", o.c.
- [18] R. D. HESS and J.L. TAPP, *Authority, Rules and Aggression: A Cross-National Study of the Socialization of Children into Compliance Systems*, Vol. I, Washington (D.C.), Department of Health, Education and Welfare, 1969.
- [19] The term 'legal' implies the double meaning of "of a legal nature" and "complying with law".
- [20] J.L. TAPP, "Socialization, the Law, and Society: Reflections", o.c., pp. 4-5.
- [21] J. PIAGET, *Le jugement moral chez l'enfant*, Paris, PUF, 1978.
- [22] C. GILLIGAN, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge, Harvard University Press, 1982.
- [23] C. GEERTZ, "Thick Description: Toward an Interpretive Theory of Culture", o.c.
- [24] C. GEERTZ, "Local Knowledge: Fact and Law in Comparative Perspective", o.c.

- [25] C. KOURILSKY-AUGEVEN, "Socialisation juridique et modèle culturel", in C. KOURILSKY-AUGEVEN, *Socialisation juridique et conscience du droit*, Paris, LGDJ, p. 17.
- [26] *Ibid.*, p. 17.
- [27] J. CARBONNIER reminds us, in his textbook on *Sociologie juridique*, that for German roman law lawyers "Vulgärrecht" was a mixture of local traditions and roman law, whether classic or imperial, in a more or less degenerated or deformed form which in the Low Empire applied in provinces, at least within popular classes", Paris, PUF, Quadrige, 1994, pp. 370-ff.
- [28] C. KOURILSKY-AUGEVEN, "Significations et résonances des concepts juridiques au sein d'une culture unilingue", *Droit et Cultures*, 2002, No 44/2, pp. 95-105.
- [29] A. CLÉMENTCE and W. DOISE, "La représentation sociale de la justice: Une approche des droits dans la pensée cognitive", *L'Année Sociologique*, 1995, pp. 371-400.
- [30] S.S. SILBEY and P. EWICK, "Devant la loi: La construction sociale du juridique", in C. KOURILSKY-AUGEVEN, *Socialisation juridique et conscience du droit*, o.c., pp. 33-56.
- [31] J. CARBONNIER, "Les phénomènes d'internormativité", *European Yearbook in Law and Sociology*, 1977, pp. 42-53.
- [32] S.S. SILBEY and P. EWICK, "Devant la loi: La construction sociale du juridique", o.c.
- [33] A. MALRAUX quotes, in *Antimémoires*, the answer of the priest to whom he had asked what the practice of the confessional had taught him about the human soul: "La vérité, c'est qu'il n'y a pas de grandes personnes"; Paris, Gallimard, 1972, p. 10.
- [34] D.M. ENGEL and F.W. MUNGER, *Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities*, Chicago, University of Chicago Press, 2003.
- [35] J.L. TAPP and L. KOHLBERG, "Developing Senses of Law and Legal Justice", *Journal of Social Issues*, 1971, No 27/2, pp. 65-91.
- [36] A. PERCHERON, *L'univers politique des enfants*, o.c.
- [37] In most research carried out in France, Poland, Russia or Hungary, the concepts used in the selective associations method concerned the status of subjects (whether adults, citizens), structures (state, administration, courts) and figures of authority (judges, policemen and women, lawyers, mayors), fundamental legal concepts (laws, the law, obligations, rules, contracts) and private and family life (family, divorce, allowance, tax, property).
- [38] A. PERCHERON, *L'univers politique des enfants*, o.c.
- [39] C. KOURILSKY-AUGEVEN, O. ZDRAVOMYSLOVA and M. ARUTIUNYAN, "Modèle français et modèle russe de socialisation juridique: La construction des attitudes à l'égard du droit avant l'âge adulte", *Revue d'Etudes Comparatives Est-Ouest*, 1994, No 25/3, pp. 37-131.
- [40] C. KOURILSKY-AUGEVEN, "Le rôle du pénal dans la vision du monde juridique évident: Dominance ou omniprésence", in C. KOURILSKY-AUGEVEN et al., *Socialisation juridique et modèle culturel: L'image du droit en Russie et en France*, o.c., pp. 53-54.
- [41] N. ELIAS, *La civilisation des mœurs*, Paris, Calman-Lévy, 1973.
- [42] P. BOURDIEU and J.-C. PASSERON, *La reproduction: Eléments pour une théorie du système d'enseignement*, Paris, Editions de Minuit, 1970.
- [43] W. WEIDLÉ, *La Russie absente et présente*, Paris, Gallimard, 1949.
- [44] This is the term used by Dostoevsky in *Crime and Punishment*. As Russian legal vocabulary re-uses common vocabulary, in Russian criminal law the title would mean "Offence and Sentence".

- [45] In June 2000 and February 1993 adolescents belonging to three age groups were questioned: 11-12 year-olds, 13-14 year-olds and 16-18 year-olds from families from different social backgrounds (sorted according to the parents' profession: intellectual professions and executives, employees and intermediate professions, workers, lower ranked employees and shopkeepers). The sample questioned in 2000 also includes a reference population of adults.
- [46] C. KOURILSKY, "Modèle culturel russe et évolution de la régulation normative de la famille", *Droit et Cultures*, 1989, No 18, pp. 7-38.
- [47] In Russian rural society, at the end of the 19th century, the decisions of the community assemblies had to be reached unanimously, and 'dissidents' were excluded until they made good and asked for reintegration. This model was taken up by the soviet regime, in the form of constant interference of party assemblies into professional and private life, and a call for self-criticism before final exclusion or reintegration. This was also apparent in educational practices in the form of public excuses to the school community.
- [48] P. MANSON, "Law Is a Tiller, It Goes Where It's Turned: Russian Attitudes Toward Power and Law", *Droit et Cultures*, 2004, Special Issue, pp. 53-77.
- [49] C. GEERTZ, "Local Knowledge: Fact and Law in Comparative Perspective", o.c., p. 232.
- [50] C. KOURILSKY-AUGEVEN, "Legal Consciousness, Social Anxiety and Cultural Models: Europe v. the USA", 1998, [www.reds.msh-paris.fr/publications/collvir/kourilski/kourilski](http://www.reds.msh-paris.fr/publications/collvir/kourilski/kourilski)
- [51] A. SAJO, "Imaginary Westernization of Legal Representations: Lessons from a Comparative Survey", 1998, [www.reds.msh-paris.fr/publications/collvir/kourilski/sajo](http://www.reds.msh-paris.fr/publications/collvir/kourilski/sajo)
- [52] Project INTAS 99-01157, "Toward a New Russia? Changing Images and Uses of Law among Ordinary People", was financed from May 2000 to November 2002 by the International Association for the Promotion of Cooperation with Scientists from the New Independent States of the Former Soviet Union. Coordinated by C. Kourilsky-Augeven, the team included Swedish sociologists from Göteborg University (P. Manson and O. Shmulyar-Gréen) and two Russian teams headed by O. Zdravomyslova-Stoyunina and M. Arutiunyan.
- [53] C. KOURILSKY-AUGEVEN, "Gender, Local Context and Legal Socialization: Women in Moscow and Ivanovo", *Droit et Cultures*, 2004, Special Issue, pp. 189-207.
- [54] I. JAKUBOWSKA-BRANICKA, "Expectations Regarding Law and the Emerging Concept of Legality in the Process of Democratic Transformation", [www.reds.msh-paris.fr/publications/collvir/kourilski/jakubowska-branicka](http://www.reds.msh-paris.fr/publications/collvir/kourilski/jakubowska-branicka).

# LEGAL PLURALISM, PLURALITY OF LAWS, AND LEGAL PRACTICES: THEORIES, CRITIQUES, AND PRAXIOLOGICAL RE-SPECIFICATION

Baudouin Dupret\*

*Legal pluralism has become a major theme in socio-legal studies. However, under this very broad denomination, one can identify many different trends which share little but the very basic idea that law is much more than state law. Despite their eclectic character, these many conceptions of legal pluralism also share some common fundamental premises concerning the nature of law, its function, and its relationship with its cultural milieu. This contribution aims at critically addressing these premises and at suggesting some re-specification of the question of law, its plural sources, and the many practices that enfold in relationship with it. In its spirit, this re-specification can be characterised as realistic and praxiological.*

*Indeed, I shall argue that it is at best useless and at worst wrong to start from a label like “legal pluralism” so as to describe something which is presumed to be an instance of such label. My contention here is that law is what people consider as law, nothing more nothing less, and that occurrences of legal plurality are limited to these situations where people explicitly orient themselves to the fragmented spectrum of law. Instead of looking at the hypothetical pluralistic model of law which something like, e.g., Egyptian law, would be an instance of, the task of social scientists is, rather, to describe the situations, the mechanisms and the processes through which people orient to something legal which they identify as pluralistic. This position is grounded on a principle of indifference, by which one seeks to avoid normative and evaluative engagements: the focus is put on the description of practices, not on their evaluation. Moreover, this position is based on the refusal of any ironic standpoint, i.e. the denial that social scientists occupy any kind of overhanging position vis-à-vis the social, by which they would be entitled to “reveal” to “self-deceived people” the truth which is concealed from them because of their “lack of critical distance”, “ignorance” and/or “bad faith”.*

*In a first section, I shall briefly describe the main trends in the field of legal pluralism, from its historical scientific background to its more recent theories. In a second section, I formulate some of the major criticisms which can be addressed to the postulates sustaining these many versions of legal pluralism. These critical stances vis-à-vis the legal pluralistic study of law articulate around three main questions, i.e. the definitional problem, the functionalist premises, and the culturalist conception which undermine existing theories. I shall argue, in the third section, that realism is a possible remedy to these flaws. However, these are best addressed through what I call a praxiological re-specification of the whole issue of legal pluralism, which I shall illustrate through the study of Egyptian cases. In conclusion, I shall formulate some remarks on praxiology as a way to fill the “missing-what” of classical socio-legal studies.*

## I. PEOPLE’S LAW AND STATE-LAW: OLD DISPUTE AND CURRENT TRENDS

### 1. *The many layers of social control*

Reactions to dogmatic conceptions of law are as old as social sciences. According to Durkheim, law is a social phenomenon, which reflects all the essential varieties of social solidarity. Building on Durkheim's legacy, Marcel Mauss formulated the idea that, within a society, there can be many legal systems interacting with each other. However, it is Bronislaw Malinowski who first gave a definition of law that strongly associates it with the notion of social control. According to Malinowski, law should be defined "by function and not by form".<sup>[1]</sup> There are many societies who lack any centralised institution enforcing the law, but there is no society which is deprived from these rules which "are felt and regarded as the obligations of one person and the rightful claims of another".<sup>[2]</sup> His reasoning operates in the following way: (1) the function of law is to maintain social order; (2) social order can be found in regularised patterns of actual behaviour; (3) the complex of social obligations constitutes the binding mechanism maintaining social order; (4) legal norms are norms abstracted from actual patterns of behaviour and law is identical with social control.<sup>[3]</sup> Accordingly, law is as plural as social life itself, of which it represents the rules which are "too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency".<sup>[4]</sup>

The contribution of Eugene Ehrlich is central to the concept of legal pluralism. This Austrian sociologist developed the theory of "living law" in reaction to the ideology of an exclusively state-centred law. Considering that law is mainly independent from the state, Ehrlich proposes what he calls a "scientific conception of law", which is concerned by the rules of conduct. Accordingly, he states that "it is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision".<sup>[5]</sup> Like Malinowski, Ehrlich considers that law is fundamentally a question of social order, which is to be found everywhere, "ordering and upholding every human association".<sup>[6]</sup> It is from these associations, from these instances which produce norms of social control, that law emerges. In other words, law is synonymous with normativity.<sup>[7]</sup>

Georges Gurvitch's theory deserves a particular mention, since it develops an unquestionably pluralistic approach to law.<sup>[8]</sup> According to Gurvitch, there is historically no fundamental unitary principle in law. State centralism is the achievement of specific historical and political conditions. He identifies three main types of law, which are differently hierarchised in every society: state-law (claiming to monopolise legal activities), inter-individual or inter-group law (bringing together exchanging individuals or groups), and social law (bringing together individuals so as to constitute a collective entity). The latter is clearly non-statist, since it corresponds to the multiplicity of legal systems which social



law generates. Gurvitch makes also an important distinction between the plurality of the sources of law and legal pluralism.<sup>[9]</sup> Gurvitch's theory did not receive very much attention. This may be attributed to different reasons, among which his vague, fanciful, complex and abstract language, on the one hand, and the fact that "his concept of 'social law' challenged and disturbed the traditional juristic notion of law which was founded on a state-centralistic ideology".<sup>[10]</sup>

## 2. *Law and the many social fields*

The seventies and the eighties witnessed the blossoming of a more fully integrated attempt to deal with law from a social perspective denying the state its monopoly on, and even its mastering of, the production of law. In his radicalism, John Griffiths' article "What Is Legal Pluralism"<sup>[11]</sup> might prove instrumental for describing the basic tenets of this new trend. Moreover, it remains a seminal contribution in the field.<sup>[12]</sup> Griffiths first identifies his main enemy: legal centralism, the law of which "is an exclusive, systematic and unified hierarchical ordering of normative propositions, which can be looked at either from the top downwards as depending on a sovereign command (Bodin, 1576; Hobbes, 1651; Austin, 1832) or from the bottom upwards as deriving their validity from ever more general layers of norms until one reaches some ultimate norm(s)" (Kelsen, 1949; Hart, 1961).<sup>[13]</sup> Claiming that legal centralism is an ideology, he charges many social scientists with having confused a normative stance and a descriptive one. According to him, law does not exist where the heralds of legal centralism have claimed it to be: legal centralism would be "a myth, an ideal, a claim, an illusion",<sup>[14]</sup> whereas legal pluralism would be the fact. Griffiths then proceeds to the distinction between what he calls weak and strong definitions of legal pluralism. The former refers to legal systems in which the sovereign commands or validates or recognises different bodies of law for different groups in the population; if it is a weak conception of legal pluralism, it is however mainly a (weak) conception of legal centralism, for it gives the central state the ultimate power to acknowledge or refuse the existence of such different bodies of law. The strong definition of legal pluralism, on the other hand, is the one which is, according to Griffiths, directly concerned with "an empirical state of affairs in society",<sup>[15]</sup> not with mere ideology. It is to the yardstick of such distinction between weak and strong definitions that Griffiths evaluates existing descriptive conceptions of legal pluralism. Griffiths concludes by giving his definition of law and legal pluralism. As to law, it is the self-regulation of every social field - law becomes therefore synonymous with social control; with regard to legal pluralism, it becomes the legal organisation of society, which is "congruent with its social organisation".<sup>[16]</sup>

Sally Falk Moore has been unanimously applauded among legal pluralists for having provided the appropriate locus of law in socio-legal research. She claims that "the social structure" is composed of many "semi-autonomous social fields", the definition and boundaries of which are not given by their organisation, but

“by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them”.<sup>[17]</sup> Three characteristics of Moore’s concept can explain the appeal it exercised: first, she presents these fields as the fundamental unit of social control, which is directly connected to behavioural norms of conduct; second, every individual may simultaneously belong to many social fields, which accounts for social complexity;<sup>[18]</sup> third, a social field is autonomous, i.e. it can resist the penetration of external norms, but never totally, its capacity of resistance being function of the degree of independence of its members vis-à-vis itself and of its force of resistance to norms originating in other fields. It should be noted, however, that Moore does not use the word “law” when describing the rules and norms which are generated by semi-autonomous social fields.<sup>[19]</sup>

Jacques Vanderlinden contributed a reappraisal of his former conception of legal pluralism, which had been targeted by Griffiths.<sup>[20]</sup> Vanderlinden’s position is interesting in that it identifies some of the reasons that pushed lawyers to adhere to a certain conception of legal pluralism. First, he reacts against a continental, civilistic way to consider law. Against some legal theorists, who has a very restrictive understanding of the concept of rule, Vanderlinden advocates the taking into consideration of normative practices. Second, he considers law as one regulating system among others (etiquette, morality, fashion, etc.), which is however distinctive because of its hegemonic ambition. It means that, contrary to Griffiths, Vanderlinden does not deny the specificity of state law and does not assimilate it to mere social control. Third, he states that society as such is plural, meaning that pluralistic normative orderings cannot be evaluated to the yardstick of a monistic societal conception. Finally, Vanderlinden advocates an approach to the phenomenon of legal pluralism from the perspective of the normative practices of individuals embedded within social networks and individually shopping in these many normative fora. Paradoxically, Vanderlinden, who at the beginning of his demonstration recognises a certain specificity of law, ends with the statement that individuals, because of their belonging to many social networks, are subjected to many legal systems.<sup>[21]</sup>

Many scholars, like Vanderlinden,<sup>[22]</sup> made the assumption that, because of the existing gap between legal practices and formal textual legal provisions, there is a plurality of laws. Instead of seeing in these practices the sad effect of the inefficiency of law, it should be read, following these authors, as the positive manifestation of their conformity to other legal orderings.<sup>[23]</sup> According to some of these scholars, these alternative legal orderings are totally independent from state law, whereas, according to others, the state remains the gravity point of these practices. However, all converge in challenging the legitimacy of state law. Today, the classical theme of conflict resolution seems to constitute the focal point of this program. This interest in the anthropology of conflict may be traced back to American legal realism and Llewellyn’s “trouble case



method”, [24] and more recently to Laura Nader and Harry Todd’s *Disputing Process*[25] and Simon Roberts’ *Order and Dispute*. [26]

### 3. *Plural legal pluralism: Culturalism, post-modernism, autopoiesis*

According to Brian Tamanaha, “since there are many competing versions of what is meant by ‘law’, the assertion that law exists in plurality leaves us with a plurality of legal pluralisms”. [27] Besides Griffith’s and Moore’s influential conceptions of legal pluralism, there exist other approaches worth mentioning.

Massaji Chiba’s theory of non-official laws stays a little apart from the different orientations described above. The main endeavour of this Japanese scholar is “less to develop or clarify a definition of legal pluralism than to develop or clarify the features of certain instances of legal pluralism”. [28] Instead of simply opposing state law and people’s law, Chiba identifies many legal levels: official law, i.e. “the legal system authorised by the legitimate authority of a country”; [29] unofficial law, i.e. “the legal system which is not officially authorised by the official authorities, but authorised in practice by the general consensus of a certain circle of people” [30] - and having a distinctive influence upon the effectiveness of the official law; legal postulates, i.e. “the system of values and ideals specifically relevant to both official and unofficial law in founding and orienting the latter”. [31] These three levels are not organised according to a rigid and permanent hierarchy, but differ from one society to another. For instance, Eastern societies would be characterised by their reliance on unofficial law, whereas Western ones would be mainly state-centred. Besides these legal levels, Chiba identifies three dichotomies of law: official law vs. unofficial law, legal rules vs. legal postulates, and indigenous law vs. transplanted law. [32] It is in the combination of these many levels and dichotomies that the law of each individual country could be analyzed. This analytical scheme serves “to advance social sciences of non-Western law with respect to the alleged cultural lag or legal pluralism”. [33]

With the emergence of the “concept” of post-modernity, scholars oriented their research in legal pluralism toward a new definition. Boaventura de Sousa Santos is the main representative of this trend that seeks to forge a post-modern conception of law based on the notions of legal pluralism and interlegality, that is, “encompassing both the social constructions of normative orders and the human experiencing of them”. [34] Santos states: “legal pluralism is the key concept in a post-modern view of law. Not the legal pluralism of traditional legal anthropology in which the different legal orders are conceived as separate entities coexisting in the same political space, but rather the conception of different legal spaces superimposed, interpenetrated, and mixed in our minds as much as in our legal actions”. [35] Between these multiple networks of legal orders, there is continuous porosity. People’s life “is constituted by an intersection of different legal orders, that is, by interlegality”. [36] So as to make

sense of these legally plural contexts, people need a “new common legal sense”, which would aim “at trivializing our daily encounters with the laws so that their meaning becomes clear to the untrained law user”.<sup>[37]</sup> Drawing a metaphorical comparison with geographical cartography, Santos describes how this “polycentric legal world” represents and transforms reality through a set of conventions. It claims to provide the methodological clues and theoretical propositions explaining how different legalities are constructed, enforced and experienced, within and beyond the intra-state level of conflicting legalities.<sup>[38]</sup> Santos acknowledges that, under his definition, there is a great variety of legal orders. However, he focuses on what he calls “six structural clusters of social relations in capitalist societies integrating the world system”:<sup>[39]</sup> domestic law (norms and dispute settlements resulting from social relations in the household), production law (resulting from labour relations), exchange law (resulting from merchant relations), community law (resulting from group identities), state law, and systemic law (“the legal form of the worldplace”), these very broadly defined legal clusters potentially and partly overlapping each other.

Although it seems very marginal in the general framework of the systemic theory of law, it must be noted that Gunther Teubner proposed his own theory of legal pluralism. There are three main assumptions in Teubner’s theory of law as an autopoietic system (a system self-sustainable and closed on itself): law, as an autonomous epistemological subject, constructs its own social reality; law, as a communicational process, produces human actors as semantic artefacts; because of the simultaneity of its dependence and independence vis-à-vis other social discourses, modern law permanently balances between positions of cognitive autonomy and heteronomy.<sup>[40]</sup> On such basis, Teubner criticises the “classical approach” to legal pluralism for its inability to properly define law. This is due to the absence of proper distinction between law and other kinds of normativities and to the attribution to law of a single function, while various functions are identifiable. Then, he defines legal pluralism “as a multiplicity of diverse communicative processes that observe social action under the binary code of legal / illegal”.<sup>[41]</sup> This binary code of legal/illegal is constituted as the discriminating factor, which allows excluding “purely economic calculations” as well as “sheer pressures of power and merely conventional or moral norms, transactional patterns or organisational routines”.<sup>[42]</sup> This binary code is not peculiar to state law, but “it creates instead the imagery of a heterarchy of diverse legal discourses”.<sup>[43]</sup> Finally, it serves many functions, including inter alia, “social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls”.<sup>[44]</sup>

## II. CRITIQUES

According to Merry, Moore’s concept of semi-autonomous social field remains

“the most enduring, generalisable, and widely-used conception of plural legal order”.<sup>[45]</sup> Such statement reveals how little criticism has been addressed to the concept and the propositions associated to it.<sup>[46]</sup> It also reflects the increasing support the radical theory of legal pluralism received. Nowadays, legal anthropology, the sociology of law and legal theory must pay it tribute. Nevertheless, critiques which may be addressed are many. In the following section, I shall organise these critiques around what can appear as the three main fundamental flaws undermining existing legal pluralistic theories: its definitional problem, its functionalist nature, and its holistic essentialist culturalism.

#### 1. *Definitional deadlock*

Griffiths explicitly identifies the ideology of legal centralism as what legal pluralism set out to challenge. While the state portrays itself as sole lawmaker, legal pluralism highlights the multitude of partially autonomous and self-regulating social fields also producing legal rules. However, there is a strong case for moving away from the present dichotomisation of the analysis of the phenomenon of law between state law and legal pluralism.

Brian Tamanaha reveals some of the many weaknesses in the reasoning of the proponents of legal pluralism, among which the “conclusion that all forms of social control are law”.<sup>[47]</sup> As Merry puts it, “calling all forms of ordering that are not state law by the name law confounds the analysis”.<sup>[48]</sup> The problem can be attributed to the confusion between descriptive and non-descriptive concepts. Law belongs to the latter, at least in the sense that it was never constituted as a tool in the hand of sociologists for describing social reality. When they establish law as a synonymous with social norms, legal pluralists create an ambiguity, since they use a word which has some commonsense meaning so as to perform an analytical task which runs contrary to this meaning. In other words, what is the analytical utility of using the word “law” so as to describe what common sense would never associate with law (good manners, etc.), especially if this alleged concept either does not carry anything which makes it distinct from other less connoted words (like norm) or surreptitiously carries the distinctive characters of what it is supposed to be contrary to?

Tamanaha goes further and states that, “lived norms are qualitatively different from norms recognised and applied by legal institutions because the latter involves ‘positivising’ the norms, that is, the norms become ‘legal’ norms when they are recognised as such by legal actors”.<sup>[49]</sup> Contrary to what I claimed in another article,<sup>[50]</sup> this critique is most sound, though the dividing line is not so much between lived norms and positivised norms but between law as recognised and referred to by people -whoever they are- and other moralities and normativities as recognised and referred to by people - whoever they are.<sup>[51]</sup> In other words, law is not an analytical concept, but only what people claim that law is, this type of position allowing denying the relevance of a question that a

hundred years of legal sociology and anthropology have been unable to settle - the question of the boundaries of juridicity. The existence of law is evidenced only by its self-affirmation or, rather, by its identification as such by people. This does not preclude the study of normativity in general, on the contrary, but it seriously challenges the possibility to conduct it under the auspices of a non-descriptive (“legal”) ideology (“pluralism”).<sup>[52]</sup> It is non-descriptive, in the sense that it has used the legal vocabulary to describe general normativity and general normativity completely to dilute law (as it is referred to by people in general). It is ideological, in the sense that legal pluralism, whereas it militates for the recognition of all diffused normativities, ignores the fact that there is no possibility of recognizing any normativity as law without an authority having the right to say what is right and the capacity to interpret it as law, meaning that militancy against state law would necessarily mean militancy in favour of any such other authority.

## 2. *Functionalism*

This definitional problem of legal pluralism is related to the fundamental assumption that lies behind its construction. Law is considered as the concept that expresses the social function of ordering which is performed by social institutions. Tamanaha, Malinowski, Parsons and Luhmann are the main representatives of the functionalist theory in the study of law.<sup>[53]</sup> Basically, these authors share the idea that: (1) law has a role and a nature; (2) these role and nature are determined a priori by their social function; (3) this function is to maintain order in society. Even in its most sophisticated versions, legal pluralists assume this legal function: “The normative orders of legal pluralism always produce normative expectations [...] and they may serve many functions”.<sup>[54]</sup>

As shown by Searle, among others, functionalism is necessarily associated with intentionality: the heart does not have the function to pump blood, except if there was an intentional agent that created it so as to pump blood; on the other hand, artificial hearts have indeed the function to pump blood. “Whenever the function of X is to Y, X and Y are parts of a system where the system is in part defined by purposes, goals, and values generally. This is why there are functions of policemen and professors but no function of human as such - unless we think of human as part of some larger system where their function is, e.g., to serve God”.<sup>[55]</sup> Accordingly, whereas law, when conceived as an institution created so as to regulate human relations, might be given a social function, law, when it is understood as emanating from the social, might hardly be given such a function. Otherwise, it would mean as a consequence that societies would be credited from scratch (from before their existing as societies) with a collective consciousness, which in turn would result in their creating the institutions necessary to their functioning, i.e. they would have created themselves. In other words, functional analysis can only operate if law is considered as the product of an intentional agency.

Yet, some legal pluralists consider law as the product of an intentional agency. This is the case with Teubner, for whom the multiple orders of legal pluralism exclude “merely social conventions and moral norms”, recharacterized by their common organizing “on the binary code legal/illegal,” and “may serve many functions: social control, conflict regulation, reaffirmation of expectations, social regulation, coordination of behaviour or the disciplining of bodies and souls”.<sup>[56]</sup> However, this “legalistic” version of legal pluralism is only a partial solution to the problem of functionalism. Indeed, when considering that law is multi-functional or even dysfunctional, it still assumes that legal institutions have been created so as systematically to perform one function or another. This leaves no room for their being non-functional. Moreover, these systems are, according to Teubner, autopoietic, i.e. they are radically autonomous subsystems which communicationally produce and reproduce their components within the system (the system is operationally closed).<sup>[57]</sup> The remaining question is: Has law been intentionally created so as independently to perform social functions? This is historically and empirically dubious. Obviously, parts of law were crafted so as to perform functions (though they never succeeded in being totally efficient in performing them). Clearly as well, other parts of law were not conceived in such a way. If there are many legal constructors, there was never any Creator of the Concept of Law, although such an intention remains necessary for the sake of functional analysis.

### 3. *Essentialist culturalism*

Legal pluralism has also often proved very essentialist and culturalist. Generally with the best intentions, some legal pluralists promoted concepts like “folk law,” “indigenous law,” “native law,” “imported law,” “transplanted law,” “state law,” “official law,” “unofficial law,” “primitive law,” etc.. Besides the huge definitional problems associated with the term “law,” it mainly assumes that there is something like a “true” law, which is the reflection of an “authentic” society whose main cultural characters are translated into rules of conduct. Actually, this kind of “nativist” interpretation is not worth any close examination. It offers a very naïve picture of law which is far from being supported by substantial empirical evidence. The so-called “indigenous” or “native” law has often never existed but in the heads of these scholars, though it is constituted as the yardstick to which the scope of legal “acculturation” is evaluated.

Much more interesting is Clifford Geertz’s interpretive theory. This is not the proper place to discuss it. Suffice to say that he conceives of law as a cultural code of meanings for interpreting the world: “Law’ here, there, or anywhere, is part of a distinctive manner of imagining the real”.<sup>[58]</sup> In this hermeneutic project, “words are keys to understanding the social institutions and cultural formulations that surround them and give them meaning”.<sup>[59]</sup> Geertz gives the example of the Arabic word “haqq”, which is supposed to come from a specific moral world and to connect to a distinctive legal sensibility.<sup>[60]</sup> This word would carry along

with it all the specific meanings which are co-substantial with something which is called “Islamic law.” In plural situations, i.e. situations where many cultural systems are described as interacting (for instance Egypt, where modern law is commonly presented as co-existing with Islamic law and customary law), law would produce a “polyglot discourse”.<sup>[61]</sup> In that sense, pluralism would only be the juxtaposition of many cultural and legal histories.

However, culturalism fundamentally conceives of law in holistic terms, that is, as one of the many reverberations of a larger explaining principle: culture.<sup>[62]</sup> Yet, this cultural unity is not deduced from empirical observations, but assumed from the beginning. This is how Rosen proceeds when, starting from the small Moroccan town of Sefrou, he ends his journey with the anthropology of justice in Islam.<sup>[63]</sup> Moreover, he considers that Middle Eastern culture, which Moroccan culture is supposed to epitomise, can itself be caught by one “key metaphor”, one ‘central analogy’: “it is an image of the bazaar market-place writ large in social relations, of negotiated agreements extending from the realm of the public forum into those domains -of family, history, and cosmology- where they might not most immediately be expected to reside”.<sup>[64]</sup> This kind of approach carries a strong flavour of genetic essentialism, according to which societies -and the laws that characterise them- carry along with them throughout history the same basic tenets, which historical incidents would only superficially scratch. Also, it seems that cultural interpretivists are much more interested in the “why” question than in the “how”, although attention given to the latter would have enabled them to consider that law is not necessarily and integrally part of culture and that culture is not a set of permanent pre-existing assumptions but something which is permanently produced, reproduced, negotiated, and oriented to by members of various social settings.

### III. RE-SPECIFICATIONS

This third section reviews some of the possible remedies and shifts in focus which might help the reconsideration of the plural nature of law. A few years ago, I supported the idea of forsaking the use of the words “law” and “legal” for analytical purposes. To the question of the sociological boundaries of juridicity, I answered that the question is devoid of sociological relevance.<sup>[65]</sup> From a distance, I would say that social scientists have no means sociologically to define law outside what people say law is, with the consequence that any study of law should basically look at what people do and say when practicing what they call law.

#### I. *Realism*

From an epistemological standpoint, the problem of definition is fundamental. The real danger of speaking of “law” when dealing with all forms of norms is, first, to equate them with something which people consider as totally different. Second,



it is to take a product of political theory (state law) for a sociological tool (legal pluralism). Third, it is to assume a functional definition of some general social mechanisms (social control), whereas non-intentional phenomena cannot be given any social function. Instead of elevating law to the rank of an analytical instrument, I would suggest to go back to the observation of social practices and to consider, in the broad field of the many normativities, that law is what people refer to as law.

This is what advocates Tamanaha, according to whom “the project to devise a scientific concept of law was based upon the misguided belief that law comprises a fundamental category. [...] Law is whatever we attach the label law to. It is a term conventionally applied to a variety of multifaceted, multifunctional phenomena”.<sup>[66]</sup> In other words, “what law is, is determined by the people in the social arena through their own common usages, not in advance by the social scientist or theorist”.<sup>[67]</sup> Accordingly, a situation of legal pluralism would exist “whenever more than one kind of ‘law’ is recognised through the social practices of a group in a given social arena”.<sup>[68]</sup> Tamanaha argues that, whereas legal pluralism states that the word law applies to the many manifestations of a single basic phenomenon, conversely his approach would assume that the same label law applies to many different phenomena.

Tamanaha claims that his approach conveys many advantages. Besides the fact that, first, it overcomes the inability to distinguish legal norms from social norms, second, it provides practicable criteria for distinguishing between a legal rule-system and normative pluralisms. Third, it urges that all these forms of law-recognised-as-such in one specific social arena “be studied in their specific manifestation, and in their relations with other kinds of law in that social arena, and as they compare to general categories of kinds of law or manifestations of law in other social arenas”.<sup>[69]</sup> Fourth, this approach does not lose, through its elaboration, what made the force of the legal pluralistic appeal, i.e. that there are forms of law which are not or only loosely connected to the state. By so doing, this approach would be successful, according to Tamanaha, precisely where legal pluralism has failed, that is, in providing a descriptive non-ideological theory of the plural nature of law. “Indeed, one merit of this approach -what makes it non-essentialist- is that it is entirely free of presuppositions about law (beyond the negative one that it has no essence). Everything is left open to empirical investigation, and category construction and analysis following such investigation. Another significant merit [is that] it directs an equally sharp-eyed, unsentimental view at all manifestations and kinds of law”.<sup>[70]</sup> In sum, conducting research in legal pluralism is to look at situations where there is a plurality of kinds of law, law being understood as what people conventionally refer to as law.

## 2. *Praxiology*

In this last section, it will be argued that, even though Tamanaha’s approach



greatly better the sociological study of law, it still suffers from some flaws which can be mitigated by the deepening of his insights and by the adoption of a praxiological approach to legal phenomena.

The main problem with Tamanaha's conception of law comes from his attempt to root it in the combination of behaviourism and interpretivism, a combination which is deemed to overcome some of the classical caveats of legal sociology and anthropology and to come out in his realistic socio-legal theory. However, as mentioned above, one of the difficulties of interpretivism is related to its culturalist essentialist standpoint. It is not to say that such perspective has no scientific value, but it points to the fact that it reproduces some of the deficiencies it is supposed to eliminate. Among other things, it maintains one of these dualities which muddy contemporary sociological theorizing, that is, the duality opposing activities and meanings. Instead of considering that this opposition constitutes the main problem to be solved in order to succeed in theorizing, I suggest that it is the propensity to theorizing itself which should be questioned. In other words, the inquiry "into the comprehensibility of society, into the ways in which social life can be understood and described when seen from within by members" should be substituted to the theoretical elaboration of "a specific mode of comprehending society, a theoretical framework within which a substantive conception of society is to be construed".<sup>[71]</sup> It is definitely not Geertz's interpretivist culturalism -not to say Rosen's- that will promote such an inquiry, for he assumes the constraint of a pre-existing cultural order to which people conform, the task of the social scientist being to discover the keyword that epitomises it, not to look at practices from which to infer people's orientation to the many constraints of the local settings in which they (inter)act. On the contrary, a praxiological approach requires using "the criteria that participants have for determining the salient features of interactional episodes",<sup>[72]</sup> and this does not provide an interpretation of people's conducts. "Rather, analysis is based on, and made valid by, the participants' own orientations, characterisations, and exhibited understandings".<sup>[73]</sup> In other words, while the opposition between meaning and behaviour "requires its solution by means [...] which are external to the orderliness observable in the sites of everyday activity," e.g. social structures, local cultures, schemes of behaviour, etc., the praxiological re-specification I advocate considers "the problem of social order' as completely internal to those sites".<sup>[74]</sup> It also means that it is not so much "why" questions -which form the basis of interpretivism- which should draw the attention of legal sociology, but "what" and "how" questions - "what is involved in doing this or that?"; "how does X manage to do Y"?

Another major problem arises from the slippery character of definitional endeavours. Although Tamanaha succeeds in escaping legal pluralism's definitional caveat, mainly by his characterizing law as what people refer to as law,

it does not make him immune from falling into the pit of other definitional enigma. For instance, when advocating the restriction of the use of the word “legal” to state law<sup>[75]</sup> or when ascribing to certain legal systems a particular characterisation (e.g., theocracy in Iran),<sup>[76]</sup> he substitutes his external overhanging scholarly vision to people’s production of and orientation to an identifiable, understandable, and practicable law, which does not necessarily attend to these statist or theocratic characters. There are other places where one can find this ambivalence when it is stated, on the one hand, that law is what people refer to as law and when it is assumed, on the other hand, that people use the label law so as to refer to what are often quite different phenomena. In other words, whereas Tamanaha rightly criticises legal pluralism for its over-inclusiveness, i.e. its including phenomena most people would not consider to be law, and its under-inclusiveness, i.e. its excluding phenomena many would consider to be law,<sup>[77]</sup> he queers the pitch by underestimating people’s practical and context-sensitive understanding of the word “law” or its equivalents. Thus, people do not loosely use one same word so as to refer to different phenomena; they specifically use one word to refer to some specific phenomenon to the production and intelligibility of which they orient in the local and temporal context in which they interact. The same word might be used to refer to another phenomenon in another context or in another sequence, but this is a question which must be empirically answered through the close examination of each interactional occurrence taking place in every specific setting. This runs against the interpretivist notion of the legal polyglot discourse. In that sense the notion of legal pluralism does not exist as a sociological question unless people, participants, or members orient to it as such. In other words, the question of legal pluralism does not arise from scholars looking at the social world from outside, but it becomes a topic in its own right when it comes out from people’s practices that they orient to a situation of co-existing, conflating and/or conflicting multiple laws.

Finally, with regard to the questions that the realistic approach to legal phenomena might raise, my contention is that they are better solved by adopting a praxiological perspective. The first question concerns the identity of the people whose practices qualify a phenomenon as law. While the realistic theory answers that it is any social group, the praxiological would rather say that there is no such question unless or until people call into question the authority of someone or something having identified a phenomenon as law. The question only emerges from practical, local, punctual circumstances. Before, it is a question of a philosophical and political nature, not a practical and sociological one. To the question of how many people are necessary to view a phenomenon as law for this phenomenon to qualify as such, it is answered that “a minimum threshold to qualify is if sufficient people with sufficient conviction consider something to be ‘law’, and act pursuant to this belief, in ways that have an influence in the social arena”.<sup>[78]</sup> This answer suffers from its giving to whatever external authority the

task subsequently to determine how people, conviction and influence rate so as to be considered as sufficient, whereas it would be said in a praxiological perspective that no answer can be given a priori, since it is from people's practices that the qualification of something as law will be recognised as such (and thus will remained unnoticed) or will not be recognised as such (and thus will be noticed and become accountable). It is also said that a third question would address the risk of a proliferation of kinds of law in the social arena. Tamanaha's answer is that such a profusion of kinds of law will seldom occur in practice. To the same question, the praxiological answer would be that it is not up to social scientists to decide by the means of concepts whether there are too many or too few kinds of law, but it is an empirical phenomenon which must be attended to through a close scrutiny of people's practices. Moreover, since activities in legal settings are characterised, as human activities in general, by the general orientation to the production of intelligibility, coordination and order, it would be rather surprising to observe such an anarchical proliferation of laws without observable attempts to reduce it. The last question addresses the authority which is granted by conventionalism to social actors to give rise to new kinds of law. The realistic answer stresses that law as a social institution is necessarily produced by social actors and that recognizing these actors' authority only threatens social and legal theorists' authority. This holds true in a praxiological perspective. Moreover, it should be said that it is not up to legal sociologists and anthropologists to determine whether or not granting social actors the authority to give rise to new laws. What social sciences only can do is to observe and describe how actual people in actual settings orient to the production of a phenomenon which they call law.

### 3. *What is legal pluralism in a praxiological perspective?*

To illustrate the heuristic gains of the praxiological re-specification, I shall briefly present three cases concerning the issue of customary marriage in the Egyptian context. It should contribute to the strengthening of my contention according to which the theories of legal pluralism have little heuristic capacity in the explanation of the law, whose pluralistic character must not be determined by some external criterion, but only when it belongs explicitly to the relevancies of situated practices.

In Egypt, a series of laws organise personal status, i.e., the regulations concerning marriage, divorce, affiliation, and inheritance. The law always encouraged the contracting of formal marriages registered by a notary whose authority is officially acknowledged. However, marriages satisfying minimal conditions, i.e., being established in a contractual form and testified to by two witnesses, are deemed legitimate. Nevertheless, contrary to official marriages registered by the notary, this type of marriage is not demurrable and cannot be invoked by the wife in front of law courts. Until the Law No 1 of the year 2000, no claim concerning marriage could be heard by the courts unless it was

supported by an official marriage document. The Law No 1 of the year 2000 introduces a very important change with that respect: any written document can be used to prove the existence of the customary marriage whose dissolution is requested of the judge. This type of marriage that does not fulfil the official registration requirement but is still legitimate is commonly called *zawâg ‘urfi*, which means literally “customary marriage”. According to the theory of legal pluralism, the mere use of this word testifies to the existence of a multitude of legal orders among which people navigate and engage into forum-shopping. However, it must be stressed that this “customary marriage” is explicitly recognised by the law (even though restrictively) and oriented to as legal by the people. In no way does it constitute an alternative or parallel legal order. Whereas it is used in order to preclude some of the consequences of officially registered marriages, it is also explicitly practiced so as to grant a legal status to sexual intercourse and to some of the practices associated to it and otherwise blameable (e.g., cohabitating, procreating legitimate children, etc.). In this case, the theories of legal pluralism, far from providing us with the means to properly describe the situation, contribute, through the foregrounding of a pluralistic situation to which people do not orient themselves, to the prevailing confusion.

In April 2000, the press heard about a case investigated by the Public Prosecutor, which involved two men who had contracted a customary marriage. The investigation transcripts show that it was the case of a computer store owner who had induced a young man working in his store to have homosexual intercourse under the threat of divulging marriage-like documents which were signed by the latter. The young man eventually complained at the police station and the police and then the Prosecution investigated the facts, which were subsequently characterised as indecent assault under duress. The press, the parties, the Public Prosecutor, indeed, everybody referred to a “contract of declaration and mutual engagement”. It was implicitly or explicitly argued that the two men had contracted a kind of “customary marriage”. According to the theories of legal pluralism, this would testify to the existence of a plurality of social fields (e.g., homosexuals, the police, the state, the press, etc.), each one being endowed with and generating its own normative values and rules, i.e., producing its own law and having a law mirroring its social norms. However, this is particularly confusing, since it is obvious from the case that there is no legal plurality but only legal practices, i.e., practices oriented toward an object of reference identified by the people as law, be it for interpreting it, implementing it, bypassing it, emptying it of its substance, contesting it, or whatever else. So-called “customary law” is centred on the law-organised practices of marriage contracting. It is oriented toward the creation of mutual rights and obligations by the signing of a written document. It follows the lines of “customary marriage”, despite the malicious intent of one of the two parties. It does not reflect the existence of parallel systems of law; it only reveals the law-centred organisation of a whole range of (private) practices. It is not only the state legal system that “digests” the

social so as to give to the facts that are brought to its attention a characterisation that makes them legally relevant and open to the ascription of legal consequences, but it is also the so-called many social fields that take state law as their focal point. [79]

Also in 2000 the press reported that two young men were found dead in the countryside nearby the town of Aswân, in Upper Egypt. Their bodies were showing that the two boys had been executed. In accordance with the law and the procedures organizing the profession, the police opened a file and transferred it to the Public Prosecution, which had to conduct the investigation. However, for lack of evidence upon which to build the case, it was soon considered a matter closed. Parallel to the official story of the case the press reported that the boys had actually sexual relationships and had entered a kind of customary marriage. As their families found the situation unacceptable, they asked for the convening of a customary assembly that was required to adjudicate on this case. It is said that the assembly convened and issued a ruling condemning the two boys to the death penalty. This little story explicitly reflects on the existence of parallel systems of justice that function autonomously, independent of one another, despite the possibility that their respective path comes across each other at a certain point. There is, on the one hand, the state justice system, represented by the police and the Public Prosecution, whose functioning necessitates the opening of a file and a procedure as soon as some criminal act is discovered. Technically speaking, this system cannot enter into any negotiation with alternative justice systems without jeopardizing its claim to exclusive legitimate authority. Practically, it is often confronted with certain types of crimes which are known by its professionals as falling outside the scope of its jurisdiction. Policemen as well as prosecutors are very much aware of the existence of so-called Arab councils following “local traditions,” issuing rulings and covering what appears to state law as criminal liability beyond a collectively enforced solidarity (which results mainly in the unavailability of witnesses testifying to, and evidences substantiating, the crime and its individual author). On the other hand, there is a “customary” legal system which people identify as such, to which they orient and which issues rulings of its own [80] on a large number of matters. This justice system, which runs parallel to the official system, can borrow many of its features from the latter (form of the procedures, explicit references to substantial provisions of positive law, written rulings, etc.). However, it clearly stands on its own two feet and neither depends nor is centred on the existence of state law. In other words, it constitutes an instance of a plural legal order. In this case, *urf* (custom) does constitute law, insofar as social actors give it such a quality. It can therefore be called customary law and become the object of customary legal practices.

In sum, the three cases briefly exposed seemingly constitute instances of legal pluralism (weak or strong in Griffiths’ terminology). However, if we closely

examine the fine-grained detail of these cases and especially the ways in which people orient to these supposedly many laws and norms, we get a much better picture of what law is and what it is not for these people. We also get a much better understanding of its plural sources and the non-pluralistic ways of its implementation, of the many places where laws interfere with each other and the very few places where they remain totally autonomous. Last but not least, norms, laws and legal practices cease to be confounded. Any set of norms is not necessarily law and law is no more diluted in the all-encompassing and opaque category of “social control”. Many practices can be characterised as legal practices, not as parallel social, normative or legal fields. Legal practices are these practices that develop around an object of reference identified by the people as law (and it can be state law, customary law or any other law recognised as such). In other words, a legal practice is that, which is done in such a way because of the existence of a referent law and which would not be so done in its absence.

#### **IV. CONCLUSION**

In their analysis of the plural nature of law, the proponents of legal pluralism largely miss the phenomenon they seek to study. Most practicalities, contingencies, background expectations, situational constraints and orientations of people engaged in legal activities are erased for the benefit of the production of a retrospective account of cases that are supposed to have the demonstrative capacity to prove the validity of the legal pluralistic model. It does not mean that, through the reading of these authors, we do not learn a lot, but only that we did not learn what we wanted to know, that there was a kind of “missing-what” in this approach to law. This missing-what was the phenomenon of practicing a law identified as plural. In other words, by looking for legal pluralism in the dynamics of history or in the structure of societies, research had lost the phenomenon of the law itself. The analysis is acutely grounded in concepts (codification, social control, modernisation, globalisation, etc.), categories (Islamic law, indigenous law, imported law, customary law, etc.) and theories (systemic, structural, realist, behavioural, etc.), but, by so doing, it probably misses an essential part of its object, perhaps even the core of its topic, i.e., actually practicing the law and orienting to its possible plural nature. In sum, legal pluralism was used as a resource for explaining larger issues, like change, power, domination, equality; however, the law itself was forgotten as a topic in its own right.

Praxiology seeks to substitute to the building of grand model theories the close investigation of actual data reflecting the ways (methods) in which people (the members of any social group) make sense of, orient to, and practice their daily world. Following Stephen Hester and Peter Eglin, we can identify four principles that characterise a praxiological approach.<sup>[81]</sup> First, the attention to the “the production and recognition apparatus”<sup>[82]</sup> of action, i.e. the means used to produce an action in a way that allows it to be understood by others. Second, the

injunction to “treat social facts as interactional accomplishments”.[83] Social facts, in this sense, are not givens but ongoing social productions of people engaged in courses of mutually constituted actions within mutually constituted self-organizing settings. Third, rather than predefining social phenomena or employing people’s meanings as resources for explanation, praxiology seeks to describe what participants in particular settings are oriented to and how these features enter into their perceptions, actions and accounts. People’s “meanings” become topics of inquiry in their own right rather than resources for mapping out sociological relevance. Four, people, i.e. social actors, are rule-using, not rule-determined creatures. It means that, in the course of their actions, they eventually orient to bodies of rules. However, their actions cannot be depicted as rule-governed. As a whole, praxiological studies involve a radically non-mentalist approach, where, by non-mentalist, it is meant that processes related to mind, thought, emotions and the like cannot be reduced to mere neuronal firings nor relegated to any inaccessible inner self, but must be radically “sociologised”.[84] If methodology is about rigour, the rigour of praxiological analysis has to be found in its capacity to reproduce the features of the phenomena it observes and not in its assuming about these phenomena anything specific in advance of investigating them.[85]

Praxiological research is sensitive to the question of categories. Instead of falling into the trap of analytic de-contextualisation, with all that it means in terms of mentalistic notions like “false consciousness,” “latent functions,” “subconscious processes,” “incorporation,” and the like, praxiological analysis argues that “the specificity of sense of a given social action is discernible by members and analysts alike only in situ”.[86] The goal of this praxiological re-specification of the study of law we advocate is not to identify how far legal practices deviate from an ideal model or a formal rule but to describe the modalities of production and reproduction, the intelligibility and the understanding, the structuring and the public character, of law and the many legal activities. Instead of assuming the existence of cultural, racial, sexual, psychological or social variables, praxiological research focuses on how activities organise themselves and on how people orient themselves to these activity structures, which they read in a largely unproblematic way. If we are to take law seriously, it is, nevertheless, neither the law of abstract rules nor the law of principles independent of the context in which they are utilised nor the law as identified with social control nor the law of dichotomies (e.g., imported v. indigenous, state v. people) imposed by scholars notwithstanding people’s actual practices; rather, it is the law of people involved in the daily practice of law, i.e. the law made of the practice of legal rules, of their interpretive principles, and of their eventual identification as plural.

---

## REFERENCES



\* Professor at the Université de Louvaine (Belgium) and researcher at the CNRS/ISP (Cachan). His research focuses on the sociological study of the Law within the context of contemporary Arabic societies.

[1] B. MALINOWSKI, 'Introduction' in H.I. HOGGIN, *Law and Order in Polynesia*, New York, Harcourt, Brace and Company, 1934, p. xiii.

[2] B. MALINOWSKI, *Crime and Custom In Savage Society*, London, Routledge, 1926, p. 55.

[3] B. TAMAHA, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory Of Law*, Oxford, Clarendon Press, 1997, p. 104.

[4] *Ibid.*, p. 68.

[5] E. EHRLICH, *Fundamental Principles of the Sociology of Law*, transl. W. MOLL, Cambridge, Harvard University Press, p. 24.

[6] *Ibid.*, p. 25.

[7] Although American legal realism was also concerned with the idea of plurality in the development of legal systems, K.N. LLEWELLYN and E.A. HOEBEL, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941. It is much more to the Dutch Adat Law School that legal pluralism was indebted, at least in its anthropological dimension, On the Adat Law School, see K. VON BENDA-BECKMANN and F. STRIJBOOSCH, *Anthropology of Law in the Netherlands*, Dordrecht, Foris Publications, 1986. Also, C. GEERTZ, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983, at Ch. 8. As soon as 1901, Van Vollenhoven (C. VAN VOLLENHOVEN, *Het Adatrecht van Nederlandsche Indië*, Leyden, 1918, 1931, 1933) stated that associative sub-groups which compose societies produce their own law. He was followed by a whole set of Dutch researchers who achieved the collection and description of many legal practices -adat is a word of Arabic origin which designates in South-East Asia local practices as opposed to state-law and Islamic law- in the field of inheritance, marriage, land law, etc. After the independences, they were followed by indigenous scholars who furthered the study of local customs, though often idealizing their properties. Among these scholars, M. KOESNOE, *Introduction into Indonesian Adat Law*, Nimeigen, 1971.

[8] G. GURVITCH, *L'idée du droit social*, Paris, 1932; *L'expérience juridique et la philosophie du droit*, Paris, 1935.

[9] N. ROULAND, *Anthropologie juridique*, Paris, PUF, 1988.

[10] R. BANAKAR, 'Integrating Reciprocal Perspectives. On Georges Gurvitch's Sociology of Law', Oñati Prize Essay in Sociology of Law, Oñati/Internet, 2000. One can consider that L. Pospisil's conception of "legal levels" does not stand far away from Gurvitch's concept of social law. According to Pospisil, societies are never fully integrated. On the contrary, society is a mosaic of subgroups that belong to certain types with different memberships, composition, and degree of inclusiveness, every such subgroup largely owing its existence "to a legal system that is its own and that regulates the behavior of its members", L. POSPISIL, *Anthropology of Law: A Comparative Theory*, New York, Harper & Row, 1971.

[11] J. GRIFFITHS, 'What Is Legal Pluralism', *Journal of Legal Pluralism*, No 24, pp. 1-55.

[12] Although other contributions are certainly as important as Griffiths'. See, for instance, M. GALANTER, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law", *Journal of Legal Pluralism and Unofficial Law*, No 19. As a whole, Griffiths' approach to legal pluralism is mainly represented in the Commission on Folk-Law and Legal Pluralism and in the *Journal of Legal Pluralism and Unofficial Law*, in which the influential presence of Dutch scholarship must be stressed. Among other

prominent representatives of this “school”, we might mention Gordon Woodman, Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Fons Strijbosch.

[13] J. GRIFFITHS, *o.c.*, p. 3.

[14] *Ibid.*, p. 4.

[15] *Ibid.*, p. 8.

[16] *Ibid.*, p. 38.

[17] S.F. MOORE, *Law as Process : An Anthropological Approach*, London, Henley and Boston, Routledge & Kegan Paul, 1978, p. 57.

[18] The semi-autonomous social field “can generate rules and customs and symbols internally, but [...] is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance”, S.F. MOORE, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’, *Law & Society Review*, Vol. 7, p. 720.

[19] The concept of polycentricity of law was also developed by scholars in the Nordic European countries. It refers to a category of instances of legal pluralism, which are described as the use of sources of law in different sectors of the state administration. The principal hypothesis is that different authorities frequently use different sources of law or use the same sources with different orders of priority between them. It aims at supplementing Sally Falk Moore’s picture of the semi-autonomous social fields inside the apparatus of the State itself, cf. G. WOODMAN, “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism”, *Journal of Legal Pluralism and Unofficial Law*, No 42.

[20] J. VANDERLINDEN, ‘Return to Legal Pluralism: Twenty Years Later’, *Journal of Legal Pluralism and Unofficial Law*, 1989, pp. 149-157.

[21] J. VANDERLINDEN, ‘Vers une nouvelle conception du pluralisme juridique’, *Revue de la Recherche Juridique – Droit Prospectif*, Vol. XVIII, No 53, pp. 575-583.

[22] A.J. ARNAUD, *Le droit trahi par la sociologie*, Paris, Librairie Générale de Droit et de Jurisprudence, 1998; J.G. BELLEY, *Le contrat, entre droit, économie et société*, Québec, Les éditions Yvon Blais, 1998; J.F. PERRIN, *Sociologie empirique du droit*, Bâle, Helbing & Lichtenhahn, 1997.

[23] E. SERVERIN, *Sociologie du droit*, Paris, La Découverte, 2000. The following paragraph is directly borrowed from this book.

[24] K.N. LLEWELLYN and E.A. HOEBEL, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*, Norman, University of Oklahoma Press, 1941.

[25] L. NADER and H. TODD, *The Disputing Process: Law in Ten Societies*, New York, Columbia University Press, 1978.

[26] S. ROBERTS, *Order and Dispute: An Introduction to Legal Anthropology*, Harmondsworth, Penguin Books, 1979. Also, J. COMAROFF and S. ROBERTS, *Rules and Processes: The Cultural Logic of Dispute in an African Context*, Chicago, University of Chicago Press, 1981. Recently, Marie-Claire Foblets edited a special issue of the *Journal of Legal Pluralism* on the theme of “popular justice”: M.C. FOBLETS, “Popular Justice: Conflict Resolution within Communities”, *Journal of Legal Pluralism and Unofficial Law*, No 36, 1996.

[27] B.Z. TAMANAHA, “A Non-Essentialist Version of Legal Pluralism”, *Journal of Law and Society*, 2000, Vol. 27, No 2, pp. 296-321, at p. 297.

[28] G. WOODMAN, “Ideological Combat and Social Observation”, *o.c.*

[29] M. CHIBA, “Three Dichotomies of Law in Pluralism: An Analytical Scheme of Legal Culture”, *Tokai Law Review*, 1987, pp. 1-11, at p. 173.

- [30] Ibid.
- [31] Ibid.
- [32] M. CHIBA, "Three Dichotomies of Law in Pluralism", o.c., pp. 177-179.
- [33] M. CHIBA, "Introduction", in M. CHIBA, *Sociology of Law in Non-Western Countries*, Oñati, Oñati International Institute for the Sociology of Law, 1993, p. 13.
- [34] A. GUEVARA-GIL, J. THOME, "Notes on Legal Pluralism", *Beyond Law*, 1992, No 5, pp. 75-102, at p. 87.
- [35] B.S. SANTOS, "Law: A Map of Misreading. Toward a Postmodern Conception of Law", *Journal of Law and Society*, 1989, pp. 279-302, at pp. 297-298.
- [36] Ibid., p. 298.
- [37] Ibid., p. 302.
- [38] A. GUEVARA and J. THOME, o.c., p. 91.
- [39] B.S. SANTOS, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York, Routledge, 1995, p. 429.
- [40] G. TEUBNER, "Pour une épistémologie constructiviste du droit", *Annales ESC*, 199, pp. 1149-1169, at p. 1150.
- [41] G. TEUBNER, "The Two Faces of Janus: Rethinking Legal Pluralism", *Cardozo Law Review*, 1992, pp. 1443-62, at p. 14.
- [42] Ibid.
- [43] Ibid.
- [44] G. TEUBNER, "The Two Faces of Janus: Rethinking Legal Pluralism", o.c., p. 15.
- [45] S.E. MERRY, o.c., p. 878.
- [46] G. WOODMAN, 'Ideological Combat and Social Observation: Recent Debate About Legal Pluralism', *Journal of Legal Pluralism*, 1998.
- [47] B.Z. TAMANAHA, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", *Journal of Law and Society*, 1993, pp. 192-217, at p. 193.
- [48] S.E. MERRY, "Legal Pluralism", o.c., p. 878.
- [49] B.Z. TAMANAHA, "The Folly of the 'Social Scientific' Concept of Legal Pluralism", o.c., p. 208.
- [50] B. DUPRET, "Legal Pluralism, Normative Plurality, and the Arab World", in B. DUPRET, M. BERGER, L. AL-ZWAINI, *Legal Pluralism in the Arab World*, The Hague, Kluwer Law International, 1999.
- [51] See *infra*, section 4.
- [52] This is why I proposed to substitute the notion of "normative plurality.", B. DUPRET, "Legal Pluralism, Normative Plurality, and the Arab World", o.c.
- [53] B. TAMAMAHA, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, Oxford, Clarendon Press, 1997, p. 106.
- [54] G. TEUBNER, "The Two Faces of Janus", o.c., p. 15.
- [55] J.R. SEARLE, *The Construction of Social Reality*, London, Penguin Books, 1995, p. 19.
- [56] G. TEUBNER, "The Two Faces of Janus", o.c., p. 15.
- [57] For an excellent and concise summary, see K. BÄLZ, "Shari'a and Qanun in Egyptian Law: A Systems Theory Approach to Legal Pluralism", *Yearbook of Islamic and Middle Eastern Law*, 1995, pp. 37-53, at pp. 40-42.
- [58] C. GEERTZ, *Local Knowledge: Further Essays in Interpretive Anthropology*, New York, Basic Books, 1983, p. 184.
- [59] S.E. MERRY, "Legal Pluralism", o.c., p. 886.
- [60] C. GEERTZ, *Local Knowledge*, o.c., p. 185.
- [61] Ibid., p. 226.
- [62] Lawrence Rosen describes it as "a set of orientations which gains its very life by reverberating through numerous analytically separable domains so as to appear immanent in

all of them” and as “commonsense assumptions about features that cross-cut virtually all domains of law and life - assumptions about human nature, particular kinds of relationships, the ‘meaning’ of given acts”; L. ROSEN, “Legal Pluralism and Cultural Unity in Morocco”, in B. DUPRET, M. BERGER and L. AL-ZWAINI, o.c., p. 90.

[63] L. ROSEN, *The Anthropology of Justice: Law as Culture in Islamic Society*, Cambridge, Cambridge University Press, 1989.

[64] *Ibid.*, p. 11.

[65] B. DUPRET, “Legal Pluralism, Normative Plurality, and the Arab World”, in B. DUPRET, M. BERGER and L. AL-ZWAINI, o.c., p. 30.

[66] B.Z. TAMANAHA, *Realistic Socio-Legal Theory*, o.c., p. 128.

[67] B.Z. TAMANAHA, “A Non-Essentialist Version of Legal Pluralism”, o.c., p. 314.

[68] *Ibid.*, p. 315.

[69] *Ibid.*, p. 318.

[70] *Ibid.*, pp. 318-319.

[71] W. SHARROCK and R. WATSON, “Autonomy among social theories: The incarnation of social structures”, in G. FIELDING, *Actions and Structures*, London, Sage Publications, 1988, p. 59.

[72] D.W. MAYNARD, *Inside Plea Bargaining: The Language of Negotiation*, New York, Plenum, 1984, p. 19.

[73] *Ibid.*

[74] W. SHARROCK and G. BUTTON, “The social actor: social action in real time”, in G. BUTTON, *Ethnomethodology and the Human Sciences*, Cambridge, Cambridge University Press, 1991, p. 141.

[75] B.Z. TAMANAHA, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism”, o.c., p. 212. In a personal communication Tamanaha told me however that this was said in the context of his argument against the attempt to devise a “social scientific” concept of law. He adds: “Once I more fully developed my positive approach to legal pluralism (what I call a conventionalist approach), I would no longer make the assertion that ‘legal’ should be limited to state law”.

[76] B.Z. TAMANAHA, “A Non-Essentialist Version of Legal Pluralism”, o.c., p. 318.

[77] *Ibid.*, p. 315.

[78] *Ibid.*, p. 319.

[79] This case by no way reflects any common phenomenon in Egypt. Gay customary marriage is a concept rather unimaginable in this society, even within the homosexual community itself. However, it must be stressed that this case is not used for its capacity to represent some general pattern in the evolution of Egyptian society, but for the practical purpose of demonstrating people’s orientation to state law even in the most peculiar circumstances.

[80] On Arab councils and customary law in Upper Egypt, see H.K. NIELSEN, “Négociation et écriture : à propos du droit coutumier en Egypte”, *Egypte-Monde arabe*, No 34, pp. 155-165 and S. BEN NEFISSA, “The Haqq al-Arab: Conflict Resolution and Distinctive Features of Legal Pluralism in Contemporary Egypt”, in B. DUPRET, M. BERGER and L. AL-ZWAINI, o.c. See also H.K. NIELSEN in this volume.

[81] S. HESTER and P. EGLIN, *A Sociology Of Crime*, London, Routledge, 1992, pp. 14-17.

[82] H. GARFINKEL and H. SACKS, “On Formal Structures Of Practical Actions”, in J.C. MCKINNEY and E.A. TIRYAKIAN, *Theoretical Sociology*, New York, Appleton Century Crofts, 1970.

[83] M. POLLNER, “Mundane Reasoning”, *Philosophy of the Social Sciences*, 1974, pp. 35-54.

[84] J.C.F. COULTER, *Mind In Action*, Atlantic Highlands, NJ, Humanities Press International, 1989; R. WATSON, "Ethnomethodology, Consciousness and Self", *Journal of Consciousness Studies*, 1998, pp. 202-223.

[85] D. BENSON and J. HUGHES, "Method: Evidence and inference-evidence and inference for ethnomethodology", in G. BUTTON, *Ethnomethodology and the Human Sciences*, Cambridge, Cambridge University Press, 1991, pp. 128-129.

[86] R. WATSON, "Ethnomethodology, Consciousness and Self", o.c., p. 215

# WEDDING A CRITICAL LEGAL PLURALISM TO THE LAWS OF CLOSE PERSONAL ADULT RELATIONSHIPS

Roderick A. Macdonald\* and Thomas McMorrow\*\*

*Among private lawyers trained in Western European or Western European-derived legal traditions there is broad consensus about the central features of law. This consensus crystallizes around the features that distinguish law from other normative systems (exogenous criteria of identification), and around the features that distinguish Western European law from other legal orders (endogenous criteria of identification). This paper presents alternatives to both orthodoxies: it adopts a legal pluralist conception of normativity itself, rejecting the tenets of monism, centralism, positivism and prescriptivism that together define conventional conceptions of law's domain (law's sites); and it adopts a legal pluralist conception of legal normativity in particular, rejecting both institutionalization and formalization as litmus tests for identifying legal rules (law's modes). As a ground for exploring the legal pluralist heresy we have chosen a central concept of private law – marriage. Consistently with critical legal pluralist methodology, which emphasizes heterogeneity, flux and dissonance in the normative lives of human agents and which is especially attuned to trajectories of internormativity, we organize this inquiry around (and in counterpoint to) the liturgical form of the Roman Catholic wedding ceremony. Ultimately what is heresy in one normative order may be apostasy in another; and what is apostasy in one may be revelation in a third. In a legal pluralist cosmology, eschatological questions are always present and must always be subject to attornment because they can themselves never be finally decided.*

Entrance chant:[1]

From so much loving and journeying, books emerge.  
And if they don't contain kisses or landscapes,  
if they don't contain a man with his hands full,  
if they don't contain a woman in every drop ,  
hunger, desire, anger, roads,  
they are no use as a shield or as a bell:  
they have no eyes, and won't be able to open them,  
they have the sound of dead precepts.[2]

## I. GREETING[3]

In the Name of the Father, the Son and the Holy Spirit

Is legal pluralism,[4] and in particular what may be characterized as a critical (or radical) legal pluralism[5] merely an interesting scholarly hypothesis about law, or may it actually inform the way we apprehend, understand, interpret and engage with legal normativity today?



This is the root question we address in this article. We explore the implications of adopting a critical legal pluralist conception of law for interrogating how different legalities purport to govern close personal adult relationships.[6] The decision to structure inquiry into these relationships roughly along the lines of (although also in counterpoint to) a Roman Catholic wedding ceremony has several rationales.[7] It reminds us that various normative orders have always been in competition to define the form, substance and finalities of marriage. It signals that even a canonical set of rituals can be emptied of their content and co-opted for other purposes. It instantiates the porosity of different legal orders and the internormative trajectories, patterns and practices of close personal adult relationships in contemporary multi-lingual, multi-cultural, multi-religious and multi-ethnic societies. And it reminds us that one of the supposed secular foundational institutions of private law -the procreating family- may be both less secular and less foundational than imagined.

The choice of a rite in an institutionalized and episcopal religion as organizational frame[8] underscores the particularity of how human beings interact with each other and with the world around them. Even a religious tradition as strongly hierarchical as Roman Catholicism with its long established body of canon law and catechism acknowledges individual conscience as final referent for matters of personal conviction. Our individual experiences of life presuppose the operative presence of our own human agency. Pablo Neruda's insight about books of poetry applies equally to accounts of religion and more importantly, accounts of law. If they "don't contain a man with his hands full / if they don't contain a woman in every drop" then "they have no eyes, and won't be able to open them, / they have the sound of dead precepts". Hence, two central premises of this essay: the vitality and relevance of any conception of law hinges on its capacity to reveal the complex dimensions of law's interaction with human agency; and the premises, the context and the memory of any normative order are never fixed. A normative order is simply one among many hypotheses by which human beings engage in conversations -projected across particular places and through time- about interpersonal relationships. [9]

Neruda's poem serves as an Entrance Chant (or Processional Hymn) preceding this Greeting. In the next following Penitential Rite, we call for renunciation of the four tenets of contemporary legal orthodoxy and the confession of intellectual idolatry. Through the Opening Prayer, we seek to clarify our methodological approach. During the Liturgy of the Word, we will explain the entailments of a critical legal pluralism, both as concerns competing conceptions of normativity (law's sites) and competing conception of legal normativity (law's modes). Next comes the Rite of Marriage itself, where we will argue for dissolution (by nullity rather than divorce) of the current matrimonial bond between the law of secular states as it relates to close personal adult relationships,



and the law of Christian religions. In the Liturgy of the Eucharist we deploy a critical legal pluralist methodology to emphasize heterogeneity, flux and dissonance in our normative lives and, in doing so, to contemplate how human agency overcomes and transcends the subservience of legal subjectivity. The Final Blessing constitutes an invitation to, rather than a conclusion of, a meditation on the eschatological questions raised by legal pluralism. The remaining portion of Neruda's *Ars Magnetica* serves as the closing, Recessional Hymn.

## II. PENITENTIAL RITE<sup>[10]</sup>

Matthew 7: 1 - "Do not judge, and you will not be judged".<sup>[11]</sup>

How easy it is to live in a world where we need not question either belief or behaviour. Solace (and sin) lies in denying personal responsibility for our commitments and, more tragically, in denying that these are commitments rather than facts.

### 1. *Confession*

Traditional conceptions of law within the legal academy and professional practice relieve us from the burden of justifying our faith. There is no faith; law simply is. The first step to penitence is to recognize and confess our enslavement to a false necessity. Law is a label we attach to a set of human phenomena; before we apply the word law, there are just data in the world – and even the conception of the "big, blooming, buzzing confusion"<sup>[12]</sup> of experience as data implies a human intellectual endeavour. Through our labeling we construct the phenomena, the data, and the confusion as "law" rather than as something else.

The everyday articles of faith that sustain such false necessity act together like a filter on the conceptual category of law, letting in a certain colour or shape of experience while keeping out all the rest.<sup>[13]</sup> The core exclusionary beliefs of legal orthodoxy reflect an incontestable apostolic credo and, like the Gospels, are four. First, monism: the belief in the unity of normative activity. Second, centralism: the belief in the law and state as co-terminus. Third, positivism: the belief that a hard *ex ante* criterion may be propounded for distinguishing between that which is, and that which is not, law. Finally, prescriptivism: the belief that law is a social fact existing outside and apart from those whose conduct it claims to regulate.<sup>[14]</sup>

### 2. *Penitence*

To recognize choice, and the possibility of error, is the consequence of eating the fruit of the tree of knowledge of good and evil. Adopting a critical legal

pluralist perspective implies rejecting the constricting matrix of doxology. The cult of isms is the reduction of ritual to rote: it is to stress law's pedigree to the exclusion of law's purpose or point. Worshipping a threshold test for law means that sources of law become nothing more than stamps of legal authenticity. Any reflexion about law's causal inception is dismissed as a non-legal inquiry more appropriately left to philosophers, sociologists, anthropologists, political scientists, or even economists. Setting law apart from human agency and the interaction among human beings from which it springs allows us to imagine the first question as one of validity and to then tie criteria of legal validity to state institutions. This, in turn, reassures us that we can easily locate and define a formal and coherently organized set of norms as "the law".

What we purchase in recognition and coherence, however, we sacrifice in range and comprehension. How may we express our sorrow for our idolatry and our desire for amendment of our conduct? Let us begin by conceiving another image of law – law not as artefact and instrument, but law as process and aspiration: "law as the endeavour of symbolizing human interaction under the governance of rules".<sup>[15]</sup> This conception of law recognizes the dynamic and unstable quality attendant on symbolizing the formation and following of rules in the course of human interaction. Instead of fixating on the mere end-product of that interaction, inquiry focuses on how that interaction is engaged.

### 3. *Absolution*

To examine law as engagement, process and aspiration requires us continuously to redirect our gaze towards legal actors, for it is ultimately their purposes which law serves and their behaviour through which law is revealed. Such attornment reminds us that we are each responsible "legal actors" rather than passive "legal subjects". Each person who commits herself or himself to a legal regime -and not just the over-emphasized "legal official" who purports to "make the law"- has a role in constructing the normativity of that regime.

While the term "legal subject" implies that human beings are cast outside and below the law (*sub-iacere*), the term "legal actor" stresses human agency and interaction with others in creating and recognizing law. Legal actors engage in the *jurisgenerative*<sup>[16]</sup> process by imagining, inventing and interpreting legal rules. Through their beliefs, behaviour and practices, they instantiate the rules they conceive and perceive. There is neither singularity, nor coherence, nor stability, nor boundary to an agent's normative commitments.<sup>[17]</sup>

Each of monism, centralism, positivism and prescriptivism reflects a different preoccupation with delineating a frontier between the legal (the communion of believers) and the non-legal (heretics or apostates) – either spatially (centralism), numerically (monism), analytically (positivism) or intellectually (prescriptivism). Legal orthodoxy fuses them into the golden idol of dogma. But like all idols, the

conception of law as extrinsic to human agency, is false.<sup>[18]</sup>

### III. OPENING PRAYER<sup>[19]</sup>

Psalm 121 – “I lift my eyes to the hills, whence cometh my help?”.

Having lifted our eyes to hills we face the challenge of re-thinking law interactionally. From where can we find a methodology to overcome the supposed distinction between law and human interaction? The legal pluralist project is, to be sure, not about ignoring distinctions by subsuming them under a structural-functional model that purports to find a single explanation for the different dimensions of legal normativity.<sup>[20]</sup> Rather, the goal is to portray legal and social phenomena in relation to each other and in their full richness and detail, questioning and testing concepts and categories by which legal and social life are presented as discontinuous.<sup>[21]</sup>

#### 1. *Understanding human relationships*

Just as the conceptual distinctions we make in developing a legal theory derive from the epistemological framework of our inquiry, so too the conceptual bases of particular legal doctrines stem from more imbedded intellectual commitments. Dominant socio-cultural-religious structures have historically provided the background frame for a whole series of interconnected legal doctrines and policies. Until quite recently the private law –what Jean Carbonnier called, in its presentation as a civil code, the civil (or social) constitution-<sup>[22]</sup> stood as the most significant reflection of these dominant socio-cultural-religious structures.<sup>[23]</sup>

Within the private law human interaction is cast in both instrumental and symbolic terms: the former primarily through obligational relationships deriving from conjunctural agency and framed through institutions like contracts, torts, restitution, and gifts mortis causa; and the latter primarily through status relationships built around high-affect social institutions – notably (1) spousal relationships like husband, wife, widow, widower, de facto spouse, putative spouse, concubine, separated spouse, and divorced former spouse, and (2) filiative relationships like parent, child, legitimate, illegitimate, niece, nephew, brother, sister, half-brother, half-sister, aunt, uncle, grandparent, in-laws, de cujus, heir at law, etc.. While obligational relationships have traditionally served a central organizing role in economic life, the deep import of status relationships has been most closely revealed in the law of persons, intestate succession, and the family.<sup>[24]</sup>

#### 2. *Marriage as status*

Until the last 50 years or so, European private law conceived only a limited

number of both spousal and filiative status relationships, all of which were nested within larger conceptual frameworks and policy judgments derived from religious (and particularly Christian) understandings of the family and marriage. These judgments initially addressed diverse first order issues like: (1) who is entitled to marry and under what conditions? (2) what are the economic consequences of marriage for couples? (3) what is the bearing of marriage on the contractual capacity of spouses? (4) what impact does the marriage of a child's parents have on his or her name and economic entitlements? (5) what types of legal exclusions are visited upon people married to each other (conflicts of interest, gift in fraud of creditors, and spousal non-torts, for example)? (6) when should marriage bear on principles of the criminal law such as those relating to evidentiary privilege, to conspiracies and accessories, and to the definition or non-definition of crimes (as, for example, the impossibility of spousal rape, sexual assault and theft)?

More recently, the normative impact of these private law concepts has come to transcend their direct personal object. Contemporary contractual arrangements with third parties also reflect the presuppositions of dominant socio-cultural-religious status relationships. The law of what was formerly known as the status of "Master and servant" offers several striking examples: (1) the concept of a family, and not a, living wage; (2) the designation of beneficiaries of private insurance, pension, health and disability benefits; (3) the types of state-run medical coverage, workers' compensation and wage-related social security entitlements that are transferable to family members; and (4) other fringe benefits of all descriptions (access to company housing, health clubs, golf clubs, conference travel, etc.).<sup>[25]</sup>

Of course, it should not be assumed that the State's attitude to status relationships is always benign. For many years, marriage itself was conceived as a patriarchal institution within which women were subjected to the power of their husbands, lost contractual capacity, could not own property apart from the "community" that was exclusively managed by her husband. Nor was the State's role merely passive as regards other social structures. Today, the State systematically encourages private institutions that nurture adult relationships (i.e. churches, benevolent associations etc.) and it broadly facilitates relationship-based contractual ordering that transcend previous conceptual boundaries (private pension, insurance, sick leave or other employment entitlements). Nor should it be assumed that the State has either a formal litmus test or settled functional criteria -like duration, intensity, scope, cohabitation, degree of economic and psychological integration or whatever- by which to identify which status relationships it will recognize. That said, most States imagine the primary domestic status to be marriage.

### 3. *Status as marriage*

Today there is an obvious disjuncture between the sociological reality of close

personal adult relationships of dependence and interdependence and legal definitions of marriage. The disjuncture is exacerbated because, over the past century, legislatures have consistently deployed the marriage relationship to organize public policy responses to a wide range of social issues.[\[26\]](#) What then, are alternative forms of justification open to states seeking to ground policy in respect of close personal adult relationships?

One mode of justification is neo-conceptualism: the invocation of “rights ideology” as a way of disanchoring concepts from their cultural grounding. In this endeavour discrimination and equality have assumed a dominant role. For example, a socio-cultural-religious concept of filiation that depends on notions of legitimacy flowing from the marriage of the child’s parents is seen to discriminate against children born out of wedlock. Equality demands that the legal default rule should be one that treats all biological children in the same way. Of course, claims of equality and non-discrimination depend on prior constructions of similarity, claims that invariably are not justified by those who wield the weapon of exclusion.

Functionalism is another justificatory approach which focuses on the question: what is the purpose for any given legal construction and given substantive policy? Of course, since purposes are themselves judgments of value about the way we construct facts, a host of other issues come immediately to the fore. Many of these resonate in social science disciplines like sociology and psychology. A handful of questions are pertinent.

The first is a sociological question. As a matter of sound public policy, why should the law worry about relationships at all? Are there things that happen in relationships that we see as socially beneficial, such that we should actually orient our legal-regulatory regimes to promote relationships rather than just targeting individuals? For the functionalist, the answer depends on the empirical evidence of the effects of stable, longer-term relationships on the health, happiness and productivity of peoples’ lives.[\[27\]](#)

The second inquiry is of a psychological character. Are there certain needs of adults as individuals -whether or not they are in any kind of relationship at all- that underpin our understanding of the human condition?[\[28\]](#) In identifying such needs (a not uncontroversial task) can we say the state has any role in recognizing, legitimating and meeting them? If so how should the State go about it? How, for example, do we know which relationships, if any, should be encouraged?

Finally, if we think that it is an important individual need to build and nurture affective relationships with other adults, how do we ensure that these relationships are neither dysfunctional nor pathological? What might be the

central characteristics of healthy relationships? According to empirical research, equality, commitment, respect, recognition and stability are central characteristics of healthy adult relationships. Even though one can see these qualities reflected in the modern bivalent Christian marriage vows –“to love, honour, cherish and respect, for better or worse, in sickness and in health, etc.”– they in fact have little to do with either religious dogma or with conjugality as such. Rather they signal the features of all adult relationships of high affect and interdependence in which parties have some understanding of their roles, and are comfortable with and accepting of those roles.[29]

#### IV. LITURGY OF THE WORD[30]

John 1: 1 – “In the beginning was the Word: the Word was with God and the Word was God”.

##### I. *First Reading*[31]

Genesis 11:9 – “That is why it was called Babel – because there the Lord confused the language of the whole world. From there the Lord scattered them over the face of the whole earth”.

For a legal pluralist, law is a language – a language of interaction. And like the manifold natural and artificial languages that human beings have invented,[32] the manifold legal languages we speak and act out every day are human inventions. Thus is raised the spectre of difference, of diversity, of social disaggregation.

A critical legal pluralism does not fear Babel. Rather than seeing the multiplicity of languages as the source of all discord, or the challenge to construct some unified harmony in defiance of this auditory variety, we can appreciate the potential of such plurality of difference for our flourishing as human beings. Just as a child brought up speaking more than one language benefits early on from learning that there can be drastically different ways of saying the same thing, so also does the jurist who learns that there is more than one way of expressing a legal idea.[33]

There is a plurality of differences in how human interaction can be symbolized as normative.[34] Plurality is present not just in the recognition of discrete languages of interaction, nor just in the recognition of multiple dialects, pidgins and creoles. Plurality is at the foundation of interaction itself – in its grammar, its syntax, its vocabulary, and its practice. What appears as one plays out as the many. A verb is more than just a word: it may have moods (indicative, imperative, interrogatory, subjunctive, hortatory), and voices (active, passive), tenses (present, imperfect, past, future, conditional, future anterior), number (singular, plural), cases (first, second and third persons), grammatical functions (gerunds,



gerundives, present participles, past participles), and structural properties (transitive, intransitive, reflexive).

In the same way, a legal rule is more than just a norm, and the grammar of normativity is equally complex.<sup>[35]</sup> The multiple moods and voices of interaction reflect the plural sites and modes of legal normativity. These moods and voices may be imagined as two spectra, the former capturing their site (the manner of their elaboration) and the latter their mode (the way in which meaning is extracted from them).<sup>[36]</sup> When these two spectra are imaged as intersecting axes, a four-cell table of normativity emerges.

The site of law (its manner of elaboration) may be explicit or implicit; this depends on whether the norm came into being as a result of a deliberate creative process or not. Because statutes are promulgated and judicial decisions handed down in full awareness of their normative status, as official product of an institutional process, they are examples of explicit legal norms. By contrast, implicit norms do not result (within any particular normative regime) from a conscious elaboration. Rather, they emerge from behavioural practices at home, at work or in the community. An implicit norm may result directly or indirectly from an identifiable social practice.

The modes of law (the way meaning may be extracted from norms) comprise the second axis of this normative typology; this relates to how a given norm is articulated. On the one hand, there are formal norms that are presented canonically and typically reflected in words like those of a statute. However, a formal norm may not necessarily be explicit in terms of the fact they may never have been consciously elaborated. Thus, norms derived from commercial practice are at once formal and implicit. On the other hand, there are inferential norms. Unlike formal norms, these do not possess a fixed textual or practical formulation. Thus, judicial decisions constitute examples of explicit yet inferential norms. While the courts are conscious of the fact they are elaborating legal norms, the *ratio decidendi* of a court judgment cannot be reduced to a precise rule through the simple application of a succinct formula; it must be inferred from the entire text of the judgment. Inferential norms may also be implicit. For example, the general principles at the foundation of a normative system like justice or equity are fluid concepts that are nowhere either written out or summed up in canonical form.

Together this normative map yields four archetypes: explicit and canonical norms (manifest or patent norms); explicit and inferential norms (allusive norms); implicit and canonical norms (customary norms); and implicit and inferential norms (latent norms). While it is intuitively plausible to plot existing artefacts into this matrix -for example, legislation as patent norm, judicial precedent as allusive norm, trade usage as customary norm, general principle of law as latent



norm- no one-to-one parallel is possible Some statutes may enact symbols or pictograms, rendering the norm allusive; some judgments state a “rule of law”, or a patent norm; some erstwhile general principles are specified by a judgment or a statute into patent or allusive form.[37] As in the grammar of natural languages, the grammar of normativity is hypothetical and is constantly shifting through its deployment. Understanding the possibility of law’s grammar is to understand both its syntax -the established usages of grammatical construction and the rules deduced therefrom- and modern usage.[38]

## **V. THE RESPONSORIAL PSALM[39]**

Psalm 145 - “The Lord is compassionate to all his creatures”.

Given that normative phenomena like the law of the political State are not tangible objects, the question becomes how to recognize the dynamic heterogeneity of different types of legal norms that shape understandings of marriage within any particular official system. For example, in the sociological sense, the concept of a close personal adult relationship is a congeries of implicit practices and inferential normative intendments. If, however, within any given legal regime, this relationship has been certified (canonized) through marriage, then the relationship is overlain with manifold explicit and formal rules and expectations. More than this, over time the normativity of a close personal adult relationship may come to be significantly shaped by implicit and formal practices of those within the relationship. And finally, especially where people in a troubled relationship seek help from a counselor, the relationship may also develop a set of highly explicit, but inferential norms. There is no language that holds these different normative registers in harmony. Each is an independent theme upon which the others can only be variations.[40]

## **VI. SECOND READING**

1 Corinthians 13: 1, 9, 12 - “If I have all the eloquence of men or of angels, but speak without love, I am simply a gong booming or a cymbal clashing [...]. For our knowledge is imperfect and our prophesying is imperfect...Now we are seeing a dim reflection in a mirror; but then we shall be seeing face to face”.

Any conception of law is necessarily partial; we speak only what we know, and we can never know unmediated by our time and location.[41] Before we say what we see is the law, we must be conscious of what we are doing and how we are doing it. Fully to understand law as a language of interaction we must attend to the grammar of all legal artefacts. The endeavour requires applying this typology of norms -this normative map- to law’s concepts, its institutions, its processes, its methodologies, and even the very bases of its authority.[42]

Consider, first of all, normative institutions. Explicit institutions may be distinguished from implicit ones by the degree to which they are the result of a conscious creation. Whether they are formal or inferential turns on the scope of authority to which they lay claim. Formal institutions, whose principal and primary goal is to create norms, justify their authority by reference to their “jurisdictional power”. Whereas inferential normative institutions are not solely based on the creation of norms but possess a commitment to broader social objectives that nonetheless involves the exercise of a certain external authority. Once again legal normative institutions may be both explicit and formal, like state legislatures, implicit and formal, like voluntary associations, explicit and inferential, like non-incorporated religious communities, or implicit and inferential, like persons of experience such as a trusted mentor or parent.

Normative procedures and methodologies may also be conceived as patent, customary, allusive or latent. Explicit normative processes may be distinguished from implicit processes by the presence of an outside third party whose role is to structure the relations between the two parties. In the case of implicit normative procedures, no such third party exists and it is the parties involved who themselves subject their behaviour to a normative analysis. Whether such procedures may be characterized as formal turns on whether they permit only a limited number of justificatory arguments to support the resulting norm. By contrast, an inferential procedure is elaborated from a variety of justificatory arguments whose inclusion is not governed by any particular constraint and whose spontaneous normative result is not presented in a syllogistic or otherwise imposed form. Thus, adjudication is an example of a manifest legal normative procedure, being both explicit and formal. Giving a discretionary decision, however, as it is both explicit and inferential, may be called an allusive normative procedure. Contractual negotiations, by their at once implicit and formal character, are a customary form. Finally, the continuation of relations based on trust and confidence, is a latent form because of its implicit and inferential nature.

Every artefact we associate with law in western society may be plotted along these intersecting axes. Normative diversity is inherent to social life and this heterogeneity presupposes that legal pluralism must reveal the normative complexity both across multiple legal orders occupying the same social space as well as within each one of them. Normative fluctuations persist: there exist unequal distributions of power among normative orders; and there exist different dynamics of power and counter-power within them. These fluctuations in power determine the trajectories of norms, normative institutions and normative processes. Such a plurality of artefacts both within regimes and across regimes can suggest that there is, in fact, no normativity – or at best that there is an irreducible normative *mêlée*.

Yet, human beings communicate despite the apparent sophistication of grammar, syntax and vocabulary of any given language. And human beings communicate despite the plurality of languages that we speak. And human language remains incredibly rich and diverse, despite the constant exportation and importation of linguistic artefacts. A legal pluralist would reach the same conclusions about the language of law. While all law is normative, all legal normativity, like all grammar and syntax is hypothetical.<sup>[43]</sup> The obligatory nature of a norm depends on the agency of the purported “norm-subject”. If the human agent does not regard himself or herself as having an obligation then no obligation exists. Because legal subjects are legal actors that play a role in constituting their normative reality, every person is the irreducible site of law. All human agents ultimately decide the relative weight of different normative regimes and different types of norms, and the precise bearing they have on their normative lives.

## VII. GOSPEL<sup>[44]</sup>

Luke 20: 25 - “Well then”, he said to them, “give back to Caesar what is Caesar's-- and to God what belongs to God”.

The concept of marriage that is predominant in states whose legal systems have been derived from Romano-Germanic and Common Law traditions emerged over the past millennium from a particular socio-cultural-religious heritage. While this concept never completely captured the sociology either of close personal adult relationships or of adult conjugal relationships, for several centuries the prescriptive idea of marriage as a formal rite consecrating a partnership (1) between one man and one woman, (2) who freely consent to the partnership, (3) who are not closely linked by consanguinity, (4) who pledge conjugal exclusivity to each other whatever life's fortune, (5) and who do so for their natural lives, did reflect (and perhaps even helped to construct) the dominant paradigm of domestic relationships.<sup>[45]</sup>

Today, however, this traditional concept can no longer be taken either as a descriptively accurate or a prescriptively dominant account of close personal adult relationships. The nuclear family (and the associated idea of marriage for love) exerts a less powerful bond on spouses than that historically exerted by the extended family (and the associated idea of marriage as a socio-political-economic arrangement between families). Latent and customary norms have been emerging that are at odds with the manifest legal norms treating high affect adult relationships. As people live longer, marriages last longer and marriage vows “till death do us part” become harder to sustain. The social stigma that once attached to practices like spousal abandonment, desertion, separation from bed and board, and divorce on the one hand, or living together as an unmarried couple,

adultery and group conjugality on the other, is much less potent than previously. Moreover, many other domestic arrangements between adults that historically remained relatively discreet are now being overtly proclaimed.

At the same time, States have increasingly come to deploy the concept of marriage as the primary omnibus referent for a whole gamut of social and economic policies - tax, pension, social welfare benefits, survivorship, housing and insurance rights. Even though it is not always clear that there is a direct connection between the fact of marriage and the policy goals being pursued, because marriage is a handy concept for identifying a large number of those who are to be targeted by the policies in question, it is often reflexively used by legislatures in this way. And because the law has now invested so much policy baggage in the concept of marriage it has made the definition of marriage and not the policy goals themselves the focus of political and social debate.<sup>[46]</sup>

Two fundamental roles of law are to announce principles for the effective organization of social life that take account of actual patterns of human interaction, and to state the central values and moral principles that are thought to be at the foundation of social life. Whatever the utility of a legal definition of marriage derived from religious ideals for consecrating certain high affect adult relationships, as the basis of legislative policy designed to promote the physical, emotional, economic, and psychological security of couples, the concept of marriage is both under and over inclusive.

It is under-inclusive because it excludes many stable, nurturing adult relationships of independence and interdependence that are deserving of being embraced within the social policies adopted by Parliament and recognized as involving such high affect relationships. The concept is also over-inclusive because some *de jure* marriages have no *de facto* content worthy of legal deference - the couple no longer lives together; or got married to facilitate immigration; or contracted a March-December marriage as an estate-tax planning vehicle; or sought simply to benefit from public or private income support programmes.

The traditional socio-cultural definition of marriage may have been, in the 19th and early 20th centuries, a reasonably effective proxy for identifying the beneficiaries of social policies. Most married persons were, most of the time, apt targets of the legal principle being announced (or appropriate recipients of whatever benefit was intended). Today, however, the increasing diversity of stable, nurturing, adult relationships means that marriage is no longer the optimal policy point of reference. Rather, it has simply become an easy tool for legislatures that do not have the political will to articulate the precise situations that they seek to target with any particular social or economic programme.

## VIII. HOMILY<sup>[47]</sup>

Genesis 1: 27 – “God created man in the image of himself, in the image of God he created them, male and female he created them”.

Early each summer, municipalities typically organize a “family day” in the local park. The community assembles for a picnic involving games and entertainment. Yet not all who actually attend are members of a conventional nuclear family. And of course, it would be silly for members of the local police force to be posted at the boundaries of the park to ensure that only real “families” were permitted to attend. After all, what is a real family?

If once the law had a well-worked out conception of what a family was it clearly no longer does. While at some level, law still makes a bow towards the idea of formal marriage, it only takes a moment's reflection on contemporary social arrangements to see how attenuated that bow has become. The popular language by which couples describe themselves –“partners”, “chums”, “roommates” or “spouses”– confirms the small regulatory impact that the religious notion of marriage now exerts. Today there is great variety in the types of conjugal relationships between two adults: married heterosexual couples; unmarried heterosexual couples, whether one or both have either never been married, previously married or are still married to someone else; same-sex couples, whether one or both of whom have been, or still are married to someone; and polygamous households, regardless of formal marital status.

But this is not all. There are a wide range and variety of households that do not involve conjugal relationships at all: a parent and adult child who live together; two unmarried adult siblings of the same or opposite sex who live together; close friends who have been housemates for years; mutual support households of persons, one or both of whom is suffering from a physical or mental disability; persons living together in institutions, long-term care facilities, nursing homes; and so on. In many, if not most, of these situations the people involved have no hesitation in conceiving of themselves as a domestic unit.

However much governments may wish to control the types of relationships that adults may form with each other, they have recently discovered their limited capacity to do so. The precise character of a close personal adult relationship between two people –whether solemnized by marriage or not, whether recognized by a church, the state, a community, or a family– is made unique by them. In a practical, day-to-day sense, the word marriage has become a self-defining or self-ascriptive concept. The concept comprises all those couples who consider themselves to be married, and all those who are considered as married by others.[48]

## **IX. PROFESSION OF FAITH[49]**

Matthew 22: 37-40 – “Jesus said, ‘You must love the Lord your God with all your heart, with all your soul and all your mind. This is the greatest and the first commandment. The second resembles it: you must love your neighbour as yourself. On these two commandments hang the whole Law, and the prophets also’”.

Being faithful goes well beyond adhering to empty doctrinal formulae. A critical legal pluralism is not concerned with propounding a core set of beliefs to the person endeavouring to understand the law.<sup>[50]</sup> Rather, it assumes the task of reminding those who profess that professions of faith begin with “credo” not “cognito”.

Self-ascriptive concepts are an important part of the official law in a liberal democracy. Allowing people to fashion their own lives, their own commitments, and their own families above and beyond what the state may choose to recognize is a powerful recognition of individual autonomy and responsibility. Unfortunately, however, self-ascriptive concepts are not always terribly helpful in cases where governments seek to organise social policy through law. There are two reasons why.

On the one hand, self-ascriptive concepts are culturally defined. There is a cultural meaning -more to the point, there are cultural meanings- to the concept that co-exist with whatever meaning or meanings the law seeks to impose. Since the law uses concepts and definitions as a way of announcing and framing rights and obligations, in these cases it constantly runs up against cultural practices that push on the limits of legal meaning. On the other hand, self-ascriptive concepts, being culturally rooted, often are not wielded to contest existing distributions of social power. Since one of the usual objects of social policy is to overcome gross disparities in power and to ensure that relationships have a strong dynamic of mutuality and equality, the law normally uses its concepts to identify a factual situation for which it imposes certain obligatory consequences.

No matter how broadly a concept is defined by law, if the status it confers depends only on self-ascription, many of those intended to be the beneficiaries of the status will be excluded. Suppose that the law were amended to provide that persons of the same sex could get married, and that were they to do so, the full panoply of rights and responsibilities currently attaching to the status of marriage would apply to the same sex-couple. This opening up of the concept of marriage might well address many of the legal concerns now expressed by same-sex couples. But just as in the case of heterosexual couples, it would be of no help to one of the partners in a common law same-sex relationship who wants to get married, but who is unable to convince the other that they should do so. Nor, even more so, would it assist an adult involved in a close personal

interdependent relationship seeking to formalize a status when the other party refuses.

One's faith must always be tested in the faith of others.<sup>[51]</sup>

## **X. PRAYERS OF THE FAITHFUL<sup>[52]</sup>**

1 John 3:18 - "My children, our love is not to be just words or mere talk, but something real and active".

Adopting a critical legal pluralist perspective facilitates informed human action. Acknowledgement of plurality and uncertainty does not preclude activity; it readies the soil for seeds of change. Take the example of determining who should be the appropriate beneficiaries of diverse State social policies. Over the past fifty years, a chasm has opened between the traditional socio-cultural-religious concept of marriage and the panoply of personal relationships ideally to be targeted by State social policy.

This disjuncture confronts States with deciding whether a response is warranted. They might, for example, decide that since the point of law is to be normative, the appropriate response is simply to police more effectively the forms of close personal relationships between adults. That is, States may insist of the primacy of law over fact. Or, they might choose the alternative route for bridging the gap – accepting the primacy of fact over law. As a rule, European States have taken the latter approach, adopting one of two predictable legal responses in doing so.

The first reflex is to extend the concept of marriage by analogy. Many legislatures have been responsive to the argument that other non-marriage relationships should be analogized to marriage for purposes of identifying who should be eligible to receive a given benefit. During World War II they often provided that most "common law" spouses of soldiers killed on active duty would be able to claim a military widows' pension under the same conditions as legally married widows of soldiers killed on active service. Over the years this type of extension of the definition of marriage by analogy has become a frequent practice.<sup>[53]</sup> Yet, because these extensions have always been an ad hoc response to particular situations where the appropriateness of the extension has been almost unanimously agreed, they have never provoked a rethinking of the policy bases of the benefit in question. Moreover, because the concept of marriage remains the default register for identifying who should receive these social benefits, there are clear limits on the kinds of relationships to which the analogy can be extended: no extended concept of the traditional socio-cultural definition of marriage will ever reach two elderly siblings who have always lived together in a non-conjugal relationship.<sup>[54]</sup>



For these reasons, other legislatures have accepted the argument that the concept of marriage should be explicitly expanded and redefined so as to remove from the idea two elements upon which it has heretofore rested: the notion of a relationship between two persons of opposite sexes; and the notion of a relationship that has as one of its potential outcomes, procreation. On this view, marriage would be redefined so as to cover all manner of non-traditional stable, adult relationships of dependence and interdependence.

These two responses have, of course, provoked consternation among policy-makers and confusion verging on a crisis among those charged with trying to draft legislation. As governments recognize the pitfalls of using socio-cultural concepts to ground the legal definitions through which social policies are advanced they are compelled to grapple with figuring out the best ways to express who should be entitled to claim the benefit of these policies. In a modern socio-demographically diverse society, where the life projects of citizens can be multiple and highly different one from the other, legal definitions grounded in the moral-religious traditions of a particular group are no longer a sound basis for deciding legal policy. In effect, whatever symbolic victory traditional marriage appears to enjoy by its continued presence on the statute books is unsustainable in the long term if the concept cannot reach a range of relationships of the same order as those it does embrace.<sup>[55]</sup>

## **XI. THE RITE OF MARRIAGE<sup>[56]</sup>**

Mark 10: 8-10 - “But from the beginning of creation God made them male and female. This is why a man must leave father and mother and the two become one body. They are no longer two, therefore, but one body. So the n, what God has united, man must not divide”.

### **I. *Statement of intentions*<sup>[57]</sup>**

The bond between state law and the concept of marriage is, in a secular society, an unholy union crying out for annulment or divorce. In contemporary debate the relationship is presented as one of conflicting supremacies.<sup>[58]</sup> For some, marriage has always been a religious institution and that “deeply held cultural traditions and religious belief in the sanctity of marriage as a union of one man and one woman” would be betrayed should the State disjoin the two. For others, the two ought never to have been conjoined and the State today is merely claiming ground it always controlled but never possessed.<sup>[59]</sup> Both mistake the issue. While the State in Europe could exist perfectly well without itself defining the concept of marriage until the 19th century -deferring that question to religious bodies- such an option is no longer possible in the 21st? The denial of internormative effect is not an option because there is neither one religious or cultural perspective nor a single secular perspective. To reconcile diverse and competing secular interests in a democratic society requires first the recognition

of diversity within religious and cultural traditions themselves.

2. *Expression of consent*[\[60\]](#)

Some would argue that whatever its sectarian origins, legal marriage now performs an important function as a secular institution; namely, it permits people the opportunity publicly to affirm their commitment to each other. To banish marriage from the legal landscape would create a void in society that religion either no longer can or should fill. However, the mere fact of legal solemnization says nothing of a relationship's duration, intensity or scope. Indeed, there is no necessary correlation between the legal concept of marriage and the fact of economic and psychological integration or even evidence of cohabitation. Far from signifying the presence of the traditional Christian wedding vows, the legal concept of marriage is more likely to evoke the image of a shaky institution laden with a legacy of patriarchy and chauvinism. No-fault divorce mechanisms and the absence of a limit on the number of times one can remarry provided the previous marriage has been legally dissolved results in civil marriage being a very weak symbol of mutual devotion.[\[61\]](#)

3. *Blessing and exchange of rings*[\[62\]](#)

What is more, religious ceremonies do not offer the only alternative to people wishing to express publicly their commitment to a relationship. A wide variety of media and expressive forms are possible for this action. Why should it matter whether "society" acknowledges this relationship at all? Besides, as it stands, does the place of marriage in the State law rubric actually lead to anything more being conferred on couples than certain social and economic benefits? Those who have engaged in the long struggle for equal recognition of same-sex partnerships may answer that it does. If anything the symbolic significance of the legal concept of marriage is its privileging of heterosexual monogamous relationships over homosexual ones. Maintaining the concept of marriage in law in order to expand its definitional boundaries to include same-sex couples, some would argue, is important for affirming the equal rights of gays and lesbians.

4. *Signing of the registry and certificates*

Another question is if the law is to distribute benefits based on concepts of relationship status, is not some form of legal certification necessary to recognize the relationships that qualify? In effect, some argue, since elimination of the concept of marriage would just lead to its reincarnation under another name, why bother? The purpose of state withdrawal from the marriage business is to see that people in certain relationships of dependence and interdependence gain access to the large number of benefits currently being reductively funneled through the legal concept of marriage. A critical legal pluralist approach to the question of how the State may reinforce close personal relationships in their fulfillment of peoples' social and psychological needs

requires paying attention to legal norms, institutions and methodology beyond those appearing in manifest form. Changing law's expressive forms means deferring to the wildly heterogeneous character of social life, and being resourceful in creating legal artefacts that recognize and engage with this heterogeneity.

## **XII. LITURGY OF THE EUCHARIST**[\[63\]](#)

Luke 22: 4 - "Then [Jesus] took some bread and when he had given thanks, broke it and gave it to them saying, 'This is my body which will be given for you; do this as a memorial of me'. He did the same with the cup after supper and said, 'This cup is the new covenant in my blood which will be poured out for you'".

### **I. *Presentation of the gifts***[\[64\]](#)

Matthew 25: 29 - "For everyone who has will be given more, and he will have abundance. Whoever does not have, even what he has will be taken from him".

There are two conceptions of law that may inform understanding of every one of its institutions. Law may be conceived of as a mere instrument of social control and made up of a series of commands directing human beings in their life projects and actions. Or it may be seen as a mechanism of interaction and empowerment that works by providing guidelines for self-directed human behaviour.[\[65\]](#)

The first conception rests on a rather pessimistic view of human nature. Because most people are not usually inclined to act fairly and responsibly towards each other, the directing hand of law, preferably official law in the form of statutes enforced by the governmental agencies and the police, is needed to organize people's lives. Law's role is to set out precisely not only what must be done, but how it must be done, and when. This idea of law leads to a quite specific model for the way in which legislation should be written. It treats laws as if they were the top-down orders of a business manager or the commands of an army general. The only concern of legislatures should be to draft a statute that is the most effective mechanism for issuing, transmitting and enforcing orders intended to regulate behaviour. Their purpose is to specify exactly what people can and cannot do, and to empower officials to ensure compliance.[\[66\]](#)

People who cleave to the second view usually have a more optimistic view of human nature. They believe that people really do have the capacity to live responsibly and with due regard for the interests of others. For them, fairness and reciprocity generally characterize social interaction. People only need to be reminded of their obligations and of the variety of ways in which to fulfil them. Official law directly comes into play only at the margins of everyday activity, in

those few cases when people behave irresponsibly. On this view, since most social practices and values reflect the aspirations of a liberal-democratic society, successful law depends only on enacting rules that are largely in harmony with these practices and values. The role of law is to help people to recognize the duties they have to each other, to encourage them to fulfil those duties, and to give them legal techniques and devices for doing so.[67]

The gift of law is its capacity to accomplish both purposes together - to celebrate our potentialities as human beings while recognizing our frequent shortcomings.[68] A critical legal pluralism takes such a view and avoids framing law dogmatically.[69]

## 2. *The eucharistic blessing*[70]

John 8: 1-11 - "Let he who is without sin cast the first stone."

If the law of marriage is fundamentally a law about human relationships, this requires a recasting of basic orientations. On the one hand, it suggests that procreation is only one feature of close personal adult relationships. On the other hand, it also suggests that conjugality – the sanctification of sexual desire is no longer a central element of close personal relationships. The policy centrepiece is to nurture the physical, emotional, psychological and economic security of persons in stable, nurturing, adult relationships of dependence and interdependence. How then, may such relationships be blessed? How might a legislature rewrite its various laws relating to pensions, tax, insurance, or whatever, so that the criterion for eligibility would relate to purposes of, and substantive facts about, the relationship -its length and character, for example- rather than to the precise marital status of the persons in it?

Since at least Roman times European private law and the law carried over to former European colonies have been grounded in an approach to legal definitions that lawyers usually call "legal formalism". This means that fundamental legal concepts have been defined in one of two ways. Some are defined by reference to something in the material world - physical persons, land, objects; others, that do not relate to a thing, but rather a status or an activity -a sale, a lease, heirship- have been defined by deducing their "true characteristics or their essential nature". Nonetheless, where a legal concept defined by its "essential characteristics" is grounded in socio-cultural reference points such as custom, tradition, religion, morality or ideology, analogical extensions can cause significant debate. This is particularly the case when they are fictitiously or even analogically extended by law well beyond the definitional limits provided by these other socio-cultural reference points. Enter functionalism.

### 3. *From Form to Function*

Only rarely have everyday legal concepts initially been defined by asking what purpose they serve. Today functionalism is becoming an increasingly common recourse, because a purposive approach allows more room for interpreting social facts and developing organizing frameworks than a neo-conceptualist or rights-based approach to legal change. But functionalism is not without its pitfalls. Years ago Hannah Arendt signaled the pervading tendency, particularly within the social sciences, of the “almost universal functionalization of all concepts and ideas”.<sup>[71]</sup> Just because two things perform the same function, does not mean they are the same thing. “It is as though I had the right to call the heel of my shoe a hammer because I, like most women, use it to drive nails into the wall”. Distinctions matter. Indeed, the purported “function” that unites disparate phenomena is itself a conceptual construction. Yet the plausibility of functionalism obscures its own contingency.

This said, in order for a legal pluralism to be hypothetically normative and not merely observational it is necessary to adopt some interpretive approach. What drives a critical legal pluralist approach to law is the acknowledgement that even if a functionalist approach involves the evaluation of purposes with no pre-determined ideological attachments, as interpretation it is not neutral. For a critical legal pluralism, functional equivalence must be found in a separate inquiry about the justness and justice of any particular claim to equality or equivalence. Functionality is an approach, not an outcome.

Our construction of social fact depends on our interpretive purposes. Because we are not all knowing, one of our purposes must be to keep our eyes and ears open to the potential plurality of conceptual tensions resulting from the act of interpreting social data. This admission is the key to employing a functionalist approach to examining legal concepts in general, and the concept of marriage in particular. The acknowledgement enables us to situate legal pluralism as legal theory: it presupposes that certain questions must be addressed; it is relatively catholic about the ideological foundations of normative systems; it acknowledges the contingency of notions such as “efficacy”; and it accepts that its descriptions will always be works of imagination, no matter how much they are informed by empirical enquiry.

### 4. *From function to symbol*

We propose reforming the law in light of these concerns. To be effective law reform must capture the loyalty and fidelity of citizens to the implicit values being advanced. The symbolic aspect of normativity, the message that a particular means of conceiving of rules gives to citizens is as important as any instrumental measure.

As Jean Hampton notes law possess a significant expressive force, symbolizing a community's sense of values, what she call its “political personality”.<sup>[72]</sup> The use of concepts that have a deep social meaning in order to achieve policies that have no necessary connection with the concept actually comes to change the essential characteristics of the concept, often in a way that conflicts with the understanding of the diverse non-state normative communities where it had its origins. It is time to stop thinking about the true definition of marriage and start thinking about how to identify the true scope of legitimate state interests in structuring and nurturing healthy adult relationships of dependence and interdependence that serve the interests of those who are involved in such relationships. The symbolic value of law that reflects this reordering in priorities expresses a political personality more attuned to the needs of human beings.

Almost all the social policies that are now made parasitic on the concept of marriage can be seen actually to depend on legislative assessments of the intensity of dependence and interdependence and nurture within a relationship. Thinking through what public policies we wish to pursue as a society, given the evident plurality of domestic situations that seem to cry out for some response is, obviously, a delicate and difficult task.

### **XIII. THE LORD’S PRAYER<sup>[73]</sup>**

Matthew 6:9-13 - “So you should pray like this: Our Father in heaven, may your name be held holy, your kingdom come, your will be done, on earth as in heaven. Give us today our daily bread. And forgive us our debts, as we have forgiven those who are in debt to us. And do not put us to the test, but save us from the evil one”.

The prayer for sustenance and purification is a recurrent, unceasing one in law. We need to believe that what we do has intrinsic meaning and we need reassurance that we can commit ourselves to finding and acting on that meaning. Remembering our debts reminds us to forgive our debtors. There is no fixed geography of temptation. Evil is in our failure to acknowledge the other, in our treatment of the Samaritan as unworthy of our regard.

### **XIV. THE NUPTIAL BLESSING<sup>[74]</sup>**

Luke 10: 30-37 - Jesus answered, "A certain man was going down from Jerusalem to Jericho, and he fell among robbers, who both stripped him and beat him, and departed, leaving him half dead [...]. By chance a certain Samaritan, as he traveled, came where he was. When he saw him, he was moved with compassion, came to him, and bound up his wounds, pouring on oil and wine. He set him on his own animal, and brought him to an inn, and took care of him [...]. Now which of these do you think seemed to be a neighbor

or to him who fell among the robbers?".

How important is the contemporary religious conception of marriage to deciding which close personal adult relationships are worthy of legal regard? This question begs for an answer that can only be given by questioning the rationale for current substantive restrictions on who may marry. In principle, there are six preconditions to marriage that are generally found in European and European derived law. Intending spouses: (1) must have reached the minimum aged to consent to marriage; (2) must have legal capacity to express that consent; (3) must not be too closely related to each other by consanguinity or alliance; (4) must not be lawfully married to someone else; (5) must be one of only two persons proposing to marry; and (6) must be of the opposite sex.

Today, each of these restrictions is subject to significant political contestation and is, to a greater or lesser extent, under reconsideration.

Some feel that there should be no difference between consent or capacity in marriage and consent or capacity to contract generally, or even that individual consent should be dispensed with. By contrast, others feel that consent is not enough – not just arranged marriages, but also March-December and December-March marriages (so-called intergenerational marriages) should not be permitted.

Again, some feel that the rules of consanguinity are too restrictive and that biology has disproved the “gene-pool” rationale for them. In any event, not all marriages are conjugal and not all conjugal marriages produce children. Conversely, some feel that these restrictions are too narrowly drawn and should be expanded to include relationships of alliance such as brother-in-law, sister-in-law, non-consanguineous nieces and nephews, and so on.

Still again, there are those who think the bigamy prohibition is anachronistic. Why cannot those who are married set up more than one marriage household? They point to the fact that support payments between ex spouses produce this effect as an economic matter anyway. By contrast, there are those who see it as too narrowly drawn. Most often this viewpoint is expressed in the idea that married couples should not be permitted to divorce.

The fourth requirement is also a point of friction. On the one hand, many religious traditions do permit polygamy and polyandry today. As secular States become more culturally diverse, why should they not do likewise? On the other hand, some feel that there is no difference between true polyandry and true polygamy and serial polyandry and serial polygamy. There must be a limit on the number of times people can marry.



Finally, there are many who believe that same-sex couples should be permitted to marry under exactly the same conditions as opposite-sex couples. Conversely, there are those who believe so strongly in the opposite sex requirement that they would prohibit marriage even between opposite sex couples when one or the other is trans-gendered.

## **XV. THE RITE OF PEACE**<sup>[75]</sup>

Revelation 19:7-9 - “And I seemed to hear the voices of a huge crowd, like the sound of the ocean or the great roll of thunder answering, ‘Alleluia! The reign of the Lord our God Almighty has begun; let us be glad and joyful and give praise to God because this is the time for the marriage of the Lamb. His bride is ready, and she has been able to dress herself in dazzling white linen, because her linen is made of good deeds of the saints’. The angel said: ‘Write this: Happy are those who are invited to the wedding feast of the Lamb’”.

In the current “preconditions” to marriage lie a number of lessons for the design of social institutions.<sup>[76]</sup> Many are central to the critical legal pluralism imaginary of law. For example, none of these preconditions are naturally given; all are the result of socio-cultural-religious judgements – judgements that are grounded in time and space and that are typically contested even within relatively homogenous communities. Moreover, the fact that these judgements are contested means that they are important to how people conceive who they other; definitions that are not important in this way – such as, what is a security interest? – are usually dealt with pragmatically.<sup>[77]</sup> Still again, the various requirements are not inextricably linked; it is possible to permit arranged marriages between those too young to consent without permitting same-sex marriages or vice versa, or to permit consanguineous marriages without permitting polygamy and polyandry, or vice versa. Fourth, their connection today to any other social policies that the State is pursuing is at best indirect; while at one point they may have been developed because the State was trying to reinforce a particular religious vision for society, this is frequently no longer an explicit policy.<sup>[78]</sup>

These lessons are only slowly percolating into legal policy. For example, people are now asking whether it is appropriate for legislatures to reconsider their use of definitions grounded in moral-religious ideals when they have available other ways of identifying the beneficiaries of social policies. In the 1970s, the legislative abolition of filiative distinctions between legitimate and illegitimate children, between legitimated and illegitimate children, and between adulterine and incestuous children is an example where social practice and government policy aimed at ensuring the “best interest of children” overtook religious precept. Should legislatures today abandon this type of legal definitions as the mechanism

by which to advance social policies designed to ensure the physical, economic, emotional and psychological security of adults living together? To put the matter slightly differently, it is now the case that we are capable of imagining marriage not as the reference point for social policies that transcend its boundaries but simply as a status relationship that has no purpose other than its own symbolic expression of commitment.<sup>[79]</sup>

Imagining the certification of close personal relationships between adults as a purely instrumental act that is no different from the process of obtaining a permit to drive an automobile misses the important symbolic function of socio-cultural-religious concepts. Even were it possible to pursue social policies by defining entitlement by reference to the policy being promoted, rather than by reference to traditional socio-cultural definitions, it is not clear that this would change the contours of much contemporary policy debate. It is true, of course, that in so far as the issues of physical, emotional, psychological and economic security are concerned, the policy question could then be seen as no longer involving an attempt to determine the “true definition” of marriage.

And yet, the metaphorical use of marriage has largely transcended both its religious and even its conjugal referents. People are said to be “married to their jobs”, or “wedded to a particular course of conduct”. What the term marriage in everyday life implies is intensity, a status and a sense of commitment. Is it necessarily inappropriate to characterize the bond between two sisters who have always lived together, or between a father and a son who have kept a common household as a marriage? A legal pluralistic peace allows for a non-totalizing catholicity. The paradox of a critical legal pluralism eclipses a tolerant totalitarianism because it allows us to see in our differences (not through them) our solidarity. The act of the rebel is, in this light, an individual but not a selfish act.<sup>[80]</sup>

## **XVI. COMMUNION<sup>[81]</sup>**

<sup>1</sup> John 3:18-24 - “God is greater than our conscience and he knows everything. My dear people, if we cannot be condemned by our own conscience, we need not be afraid in God’s presence”.

Despite the multitude of close personal adult relationships excluded from the orthodox legal definition of marriage, debate has primarily focused on same-sex conjugal unions alone. The social, economic and political responses have been several, highlighting the fact that even abstractly cast rules nonetheless privilege one conception of identity over numerous other conceptions. In the normative lives of those engaged with gay and lesbian communities the intendments of marriage may differ from the intendments presumed by insurance companies, employers and pension funds. In the normative universe of bridge clubs to which

co-habiting sisters belong, the intendments of the relationship may have little to do with any legislative regime proclaimed by the State. What is important to consider in assessing responses to claims for recognition by those committed to a close personal adult relationship is the way they frame their claims, and the reaction of other similarly situated couples to these claims.

Given that the most pressing claims for recognition over the past two decades have originated in the gay and lesbian communities the issue can be best examined by considering the way in which policy responses from the State might be framed, and the positions taken by diverse same-sex couples themselves to those possible responses. There are about a half-dozen commonly mooted positions offered in response to the claim for the recognition of same-sex unions.

Some would maintain the legislative status quo with no accommodation even of a “registered partnership” alternative for same-sex couples. This has been, and continues to be in most States with western European legal traditions, the approach of the past twenty decades.<sup>[82]</sup>

Others see the creation of a “registered partnership” alternative in parallel to marriage is the only available status for same-sex couples. Some proposals to establish “registered domestic partnerships” or “pactes de solidarité civile” are of this nature.<sup>[83]</sup>

Still others believe that the creation of a “registered partnership” alternative for everyone, including heterosexual couples, same-sex couples and other adults in non-conjugal but high-affect relationships of dependence and interdependence, with marriage as traditionally conceived preserved as an additional option for heterosexual conjugal relationships would be optimal.<sup>[84]</sup>

A fourth position is to redefine marriage so as to overcome certain prohibitions, notably by including same-sex couples. Presently, there are two areas where there exists a significant call to do so - the recognition of same-sex marriages and the recognition of polygamy and polyandry. It is not inconceivable, however, that because marriage remains the “preferred symbolic status marker” for close personal relationships there will soon be claims to remove consanguinity prohibitions such that parent-child and sibling partners (whether opposite sex or same-sex) can marry.

And finally, some would argue for the creation of a “registered partnership” regime open to all and the withdrawal of the State from the business of recognizing or legitimating marriage. Were such an option to be taken, the State would simply eliminate the concept of marriage from the statute book without replacing it with any other concept. All legal policies now made

contingent upon marriage, or analogies to it, would be pursued by reference to concepts directed specifically to the pursuit of those policies.

As a matter of antidiscrimination law, the fourth and fifth options would necessarily pass constitutional muster. As a matter of broad social consensus the first and second options seem to have broadest support. As a matter of social psychology, and the idea of State recognition of symbols of social solidarity, the third and fourth are most plausible. As a matter of reconciling competing interests in a multicultural, diverse society, where the life projects of citizens are displaying an enormous diversity the fifth may be the preferred option.

The last argument is most attractive to a legal pluralist perspective concerned with the objective of respecting the agency of those claiming particular sexual-orientation identities. Pluralists would not, that is, assume that within the same-sex community there is an essential identity that can be legally captured by a single regulatory regime tailor-made for the purpose.[\[85\]](#)

The character of the pluralist position can best be seen by looking at the various ways in which people who claim a particular identity within the gay-lesbian-bisexual-transgendered communities conceive the appropriate policy response. The different identity-positions that have been argued to date can be grouped into four main archetypes.

Some persons in same-sex relationships feel that their relationship is legally or morally incomplete unless it is certified by the State as marriage. This position imagines that non-State normative recognition -by a dissentient church for example, or by a community, an employer, or neighbours- is insufficient, even if that recognition is branded as a marriage. A response to the claim to be included in the form of public recognition by the State is required.

By contrast, some do not feel the need to formalize their relationship for reasons of moral or legal completeness, but support same-sex marriage because the current configuration of government policies provides certain desired benefits to married couples. Of course, the instrumental position could be accommodated either by opening up marriage to same-sex couples, or by a registered partnership regime for same-sex couples attributing the same social and legal benefits, or by the State withdrawing from the marriage business, and creating a universally-accessible regime of registered partnerships. This position again looks to the State, but in requiring no particular response beyond not differentiating types of status relationships is more consistent with the anti-prescriptivist logic of legal pluralism.

Some feel that the life-style and ethic of same-sex relationships are such as to contest normality and that permitting same-sex marriage will destroy the

distinctiveness of same-sex relationships and turn them into a mere reflection of heterosexual marriage with its attendant pathologies. Indeed, there are many who consider marriage to be an inherently heterosexual institution incapable of reforming itself. They fear that many same-sex couples will be unable to resist the normalizing pattern. Here, of course, one falls on the horns of a dilemma. The claim for resistance to recognition is a strong legal pluralist claim, but the accompanying claim to State-mandated exclusion is grounded in the conception of law as social control characteristic of legal orthodoxy.

Finally, some feel that while the third perspective has merit, the most radical opposition to any normality is the abnegation of a possibility. They seek to maintain State recognition of marriage, to make same-sex marriage a possibility, to make registered unions a possibility, and let both heterosexual and same-sex couples choose what forms of recognition, non-recognition or mis-recognition they desire. In such a positioning one sees the four claims of external legal pluralism – pluralism, polycentricity, interactionalism and anti-prescriptivism – conjoin to open up law's domain (law's sites); one also sees a reflection of internal legal pluralism in the rejection of institutionalization and formalization as litmus tests for identifying legal rules (law's modes).

Who, then, owns the concept of marriage? For the legal pluralist the answer must be – everybody, individually and collectively. The preferred alternative would be to allow two (perhaps even more than two) people involved in a high-affect relationships of dependence and interdependence to themselves decide how to express their particular identities. By de-coupling the legal framework currently glued together by the concept of marriage from the moral framework currently glued together by religious orthodoxy, each competing normative order would signal its commitment to facilitating the full richness of a plurality of individual identities.<sup>[86]</sup>

## **XVII. FINAL BLESSING<sup>[87]</sup>**

In the name of the Father, Son and Holy Spirit

In discussing a critical legal pluralism – its recognition of the inherent heterogeneity, flux and dissonance in the normative lives of human agents, the multiple trajectories of internormativity, and the fundamentally interactional nature of law itself – we have been advancing a view of the place of human beings in constituting their social and legal reality. We have framed inquiry through an examination of how the law of political States currently conceives close personal adult relationships. The success of any normative regime, including that of the State, depends on it engaging with and being understood by those to whom it is intended to speak. This means not just politicians, the legal professions, and the principal lobby groups that can influence legislatures; it means, above all, the

public. A critical legal pluralism invites us to think about law in new ways, by emphasizing law as an endeavour to symbolize the way we live in the world. The consequences for us may ultimately be that we decide to live in the world differently.

Consistently with critical legal pluralist methodology, we organize this inquiry around (and in counterpoint to) an explicit and formal normative regime - the liturgical form of the Roman Catholic wedding mass. This ceremony formally concludes in the same way it begins with the congregation making the sign of the cross. This action constitutes both a profession of faith in the central Christian doctrine of the Trinity and a familiar ritual for regular mass-goers. Indeed, the Roman Catholic wedding ceremony diverges very little from the standard format of the ordinary mass.<sup>[88]</sup> Laden with all the traditional dogma, symbols and rituals of Roman Catholic religious practice, the celebration of the sacrament of marriage signals an avowal and expression of Roman Catholic belief. While some couples may really only be testifying to a fondness for the photogenic quality of the religious aesthetic, theoretically at least, by marrying in the church each intending spouse expresses a willingness to situate the relationship within the normative domain of that religious institution. However, to say that there is only one normative realm within Roman Catholicism and merely a single set of norms would be a denial of the lived experience of many married Catholic couples. More than that, it would be to deny the role the believer plays in constituting his or her own faith.

Reconciling the values, principles and canons of one's religion with other sources of knowledge and experience is the challenge that confronts every Catholic, married or not, for "a human being must always obey the certain judgment of his conscience. As much as the Magisterium of the Roman Catholic Church presents an official interpretation of the tenets of the faith in the form of the Catechism and other canonical documents, ultimately it is individual followers of Roman Catholicism themselves who decide how to live out their faith."<sup>[89]</sup>

Faith without good works might be dead,<sup>[90]</sup> but without the faithful, the very conception of faith is unachievable. Faith like law lives in people. A critical legal pluralism rests on this dialogue of action and aspiration. After all, in a legal pluralist cosmology, eschatological questions are always present because they can themselves never be finally decided.

### **XVIII. RECESSIONAL HYMN<sup>[91]</sup>**

From so much loving and journeying, books emerge.  
And if they don't contain kisses or landscapes,



if they don't contain a man with his hands full,  
 if they don't contain a woman in every drop ,  
 hunger, desire, anger, roads,  
 they are no use as a shield or as a bell:  
 they have no eyes, and won't be able to open them,  
 they have the sound of dead precepts.

I loved the entangling of genitals,  
 and out of blood and love I carried my poems.  
 In hard earth I brought a rose to flower,  
 fought over by fire and dew.  
 That's how I could keep on singing.[92]

---

## REFERENCES

\* F.R. Scott Professor of Constitutional and Public Law, McGill University.

\*\* D.C.L.  
 candidate, McGill University.

[1] The Entrance Chant opens the celebration and accompanies the procession of the priest and wedding party up the aisle to the altar. Instead of the priest, the bride and groom come last in the procession in order to signify that they are the ministers of the Sacrament of Marriage. The purpose of the Entrance Chant is to foster the unity of the congregation and to introduce their thoughts to the mystery of the liturgical celebration. The capsule statements of the components of the mass presented in the footnotes to each title are derived from the United States Conference of Catholic Bishops (USCCB): Committee on the Liturgy, "General Instruction of the Roman Missal: The Structure of the Mass, Its Elements and Its Parts" online at: <http://www.usccb.org/liturgy/current/revmissalisromanien.shtml> and the Ordo Celebrandi Matrimonium Intra Missam : Rite of Marriage During Mass available online at: <http://www.catholicliturgy.com/index.cfm/FuseAction/TextContents/Index/4/SubIndex/67/TextIndex/8>. For the Entrance Chant see *ibid.*, at III A.

[2] Pablo Neruda, "Ars Magnetica" *Isla Negra: A Notebook*, New York, Farrar, Straus, Giroux, 1999 trans. by Alastair Reid, at page 326, lines 1-8.

[3] The purpose of the Greeting is to render manifest the mystery of the Church gathered together. This is usually followed by a brief introduction to the Mass of the day: USCCB, *supra* note 1, at IIIA.

[4] For reflections on various contemporary dimensions of legal pluralism see "Special Issue: Pluralizing Discourses of Law and Governance" *Northern Ireland Legal Quarterly*, 2006, No 57, p. 577-672. See also E. Melissaris, "The More the Merrier? A New Take on Legal Pluralism" *Social and Legal Studies*, 2004, No 13, p. 57.

[5] In a number of earlier texts one of the co-authors has sought to develop a conception of a critical legal pluralism. See R.A. Macdonald and M-M Kleinhans, "What is a critical legal pluralism?" *Canadian Journal of Law and Society*, 1997, Vol. 12, No 1, p. 25; R.A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" *Arizona Journal of International and Comparative Law*, 1998, No15, p. 69; R.A. Macdonald, "Critical Legal Pluralism as a Construction of Normativity and the Emergence



of Law" in A. Lajoie, et al, eds., *Théories et émergence du droit: pluralisme, surdétermination, effectivité*, Montreal, Éditions Thémis, 1998, at 12; R. A. Macdonald, "Pluralism in Law and Regime Theory" in R. Wolfe, ed., *Transatlantic Identity: Proceedings of the 1996 Canada-U.K. Colloquium*, Kingston, Institute of Intergovernmental Relations, 1997, at 37; R.A. Macdonald "Here, There ... and Everywhere - Theorizing Legal Pluralism; Theorizing Jacques Vanderlinden" in N. Kasirer, ed., *Étudier et enseigner le droit: hier, aujourd'hui et demain – Études offertes à Jacques Vanderlinden*, Montreal, Éditions Yvon Blais, 2006, at 381 (hereinafter "Here, There ... and Everywhere"); R.A. Macdonald and D. Sandomierski, "Against Nomopolies" *Northern Ireland Legal Quarterly*, 2006, No 57, p. 610 (hereinafter "Nomopolies").

[6] Of course, the very decision to deploy a concept like "close personal adult relationships" signals a departure from orthodoxy in that inquiry is framed without reference to traditional concepts like marriage or even filiation through which private law has historically imagined status relationships. On the justifications for and consequences of such a strategy see, Law Commission of Canada, *Beyond Conjuality: Recognizing and Supporting Close Personal Adult Relationships*, Ottawa, Minister of Public Works and Government Services, 2001.

[7] "In the Latin rite the celebration of marriage between two Catholic faithful normally takes place during Holy Mass, because of the connection of all the sacraments with the Paschal mystery of Christ. In the Eucharist the memorial of the New Covenant is realized, the New Covenant in which Christ has united himself forever to the Church, his beloved bride for whom he gave himself up." See *Catechism of the Catholic Church*, London, Geoffrey Chapman, 1998, at 363.

[8] See E. Goffman, *Frame Analysis: an Essay on the Organization of Experience*, Cambridge, Mass., Harvard University Press, 1974, for an analysis of how frames of reference such as those associated with ritual structure the possibilities of understanding we are capable of imagining.

[9] An analogous argument about the character of legal traditions is advanced in H.P. Glenn, *Legal Traditions of the World*, 2nd ed., New York, Oxford University Press, 2005 at chapters 1, 2 and 10.

[10] The purpose of carrying out this general formula of confession is for people to prepare their hearts for participation in the liturgical celebration: USCCB, *supra*, note 1 at III A.

[11] All biblical extracts are taken from *The Jerusalem Bible: Reader's Edition*, Garden City, New York: Doubleday & Company, Inc., 1967. This is the version accepted for Roman Catholic masses and differs from the more well known Protestant text known as *The King James Version*.

[12] The quoted expression is from William James, "Percept and Concept -- The Import of Concepts," in *Some Problems of Philosophy*, 1911: "If my reader can succeed in abstracting from all conceptual interpretation and lapse back into his immediate sensible life at this very moment, he will find it to be what some one has called a big blooming buzzing confusion, as free from contradiction in its 'much-at-onceness' as it is all alive and evidently there."

[13] For a discussion of how conceptions of law function in an analogous fashion to colour filters see R.A. Macdonald, "Unitary Law Re-form, Pluralistic Law Re-substance: Illuminating Legal Change", *Louisiana Law Review*, 2007, No 67, (forthcoming).

[14] See "Here, There and Everywhere", *supra*, note 5. The allegory is not merely conjunctural. Monism, centralism and positivism like Matthew, Mark and Luke, are synoptic; prescriptivism like John resonates as a meditation on identity. See R. Brown, et al, *The New Biblical Commentary*, London, Chapman, 1995, c. 41, 42, 43 and 61. For an application to legal analysis that implicitly ties Mark to monism, Matthew to

centralism, Luke to positivism and John to prescriptivism, see R.A. Macdonald, "Epistles to Apostles", *Alberta Law Review*, 2001, No 39, p. 668.

[15] The implications of such a view are explored in "Here, There and Everywhere", *supra*, note 5 at 393-394. For a slightly different statement see L. Fuller, "law is the enterprise of subjecting human conduct to the governance of rules" in *The Morality of Law*, 2nd, New Haven, Yale University Press, 1969, at 106.

[16] The term is from Robert Cover, "Nomos and Narrative" *Harvard Law Review*, 1983, Vol. 97, No 4 at 28. Cover's jurisprudence is ambiguous. Some such as Martha Minow, "Introduction", in Minow et al. (eds.), *Narrative, Violence and the Law: The Essays of Robert Cover*, 1993, claim, at p. 9, that Cover did not concede the necessary superiority of state norms; others, like Ryan, "Meaning and Alterity", p.267, *ibid.*, suggest the contrary.

[17] For development of the theme of normative heterogeneity, flux and dissonance, see R.A. Macdonald, "Les Vieilles gardes. Hypothèses sur l'émergence des normes, l'internormativité et le désordre à travers une typologie des institutions normatives" in J.G. Belley, ed., *Le droit soluble: contributions québécoises à l'étude de l'internormativité*, Paris, L.G.D.J., 1996, at 233 (hereinafter *Les Vieilles gardes*).

[18] The assumptions through which orthodoxy constructs legal actors as subjects are explored in "Nomopolies" *supra* note 5, at 623-632.

[19] The faithful, together with the priest, observe a brief silence so that they may be conscious of the fact that they are in God's presence and may formulate their petitions mentally. Then the priest says a prayer to express the character of the celebration—in this case, a celebration of the Sacrament of Marriage. The people, uniting themselves to this entreaty, make the prayer their own with the acclamation Amen. See USCCB, *supra* note 1 at IIIA.

[20] For a strong critique of misplaced social scientism in legal pluralist theory see B. Z. Tamanaha, "The Folly of the Social-Scientific Version of Legal Pluralism" *Journal of Law and Society*, 1993, Vol. 20, p. 192, reprinted in *A General Jurisprudence of Law and Society*, Oxford: Oxford University Press, 2001.

[21] Daniel Jutras, "The Legal Dimensions of Everyday Life" *Canadian Journal of Law and Society*, 2001, Vol. 16, p. 45; R.A. Macdonald, *Lessons of Everyday Law*, Montreal, McGill-Queens University Press, 2002.

[22] J. Carbonnier, "Le Code civil" in P. Nora, ed., *Les Lieux de mémoire*, vol 2, *La Nation*, Paris, Gallimard, 1986. In Quebec the 1993 Civil Code is often characterized as representing a « projet de société ». See « Préface » in *Commentaires du Ministre de la justice*, Quebec, Éditeur Officiel, 1993.

[23] For a discussion of the social and political origins of the French civil code see J. Carbonnier, "Le Code Napoléon en tant que phénomène sociologique" *Droit prospectif: Revue de la recherche juridique*, 1991, p. 327

[24] Of course, certain other institutions, notably the trust, the concept of fiduciary relationships, the ideas of tutorship and curatorship, and more remotely the notion of administration of the property of others, inescapably combine both economic and status relationships. See, for discussion of this point, D. Waters, L. Smith and M. Gillen, *Waters' Law of Trusts in Canada*, Toronto, Carswell, 2005; and M. Cantin Cumyn, *L'administration du bien d'autrui*, Cowansville, Éditions Yvon Blais, 2000.

[25] See the discussion in *Beyond Conjuality*, *supra*, note 6, at 40-42 and sources cited. At the same time, the public, non-employment related social welfare network was built up in large part around the notion of the child-rearing family, and especially where the parents were married to each other. See *ibid.*, at 37-112.

[26] The obvious consequence is the need for States to develop a secular conception of marriage which, while fundamentally grounded in socio-cultural-religious dogma

acknowledges – sometimes through legal fiction (like the recognition given to putative marriages) sometimes through presumed intention (like the recognition given to relatively stable *de facto* relationships from which issue children) – is grounded in other policy considerations. See Robert Leckey, “Profane Matrimony” *Canadian Journal of Law and Society*, 2006, Vol. 21, p. 1 for a careful analysis of these disjunctures as they arose in debates about whether the State should permit the marriage of a man to his deceased wife’s sister.

[27] See the multiple studies sponsored by the Vanier Institute of the Family, available at -- <http://www.vifamily.ca/about/about.html>

[28] On this point consider the idea of a hierarchy of needs as elaborated by A. Maslow, *A Psychology of Being* (Princeton: Van Nostrand, 1962).

[29] See Law Commission of Canada, *Discussion Paper: Recognizing and Supporting Close Personal Adult Relationships*, Ottawa, Minister of Public Works and Government Services, 2000.

[30] This section of the Mass features readings and chants drawn from Sacred Scripture. Thereby, God speaks to his people, revealing the mystery of redemption and salvation while offering them spiritual nourishment; moreover, it is believed that Christ himself is present in the midst of the faithful through his word. See USCCB, *supra*, note 1, at IIIB.

[31] Non-biblical texts are excluded from the Liturgy of the Word. The first reading is typically drawn from the Hebrew Scriptures and the second reading from the Christian Scriptures in order to shed light on the unity of both testaments and salvation history. See USCCB, *supra*, note 1, at IIIB.

[32] On law as a social symbolism generally see S.K. Langer, *Philosophy in a New Key*, 3rd ed., Cambridge, Harvard University Press, 1957. On the idea of law as a language of interaction see L. Fuller, “Law as an Instrument of Social Control and Law as Facilitation of Human Interaction”, *Brigham Young University Law Review*, 1975, p. 89.

[33] The story of Babel is often presented as teaching that when human beings had but one language, they were able to undertake a conquest of the heavens. Only God’s wrath prevented them from building upon the unity of our speech. However, an alternative interpretation commends itself. We were misguided in believing that a single language would give us the power to reach absolute heights. Far from being wrathful God saved us from our hubris. To ensure that we would never fall prey to it again, we have been blessed with a multiplicity of languages. This latter reading, in which God’s creation of a plurality of languages is regarded as a blessing and a gift rather than a curse and a hindrance to our life on earth together, reflects the hermeneutic commitment of critical legal pluralism. See R.A. Macdonald, “Legal Bilingualism”, *McGill Law Journal*, 1997, Vol. 42, p. 119. Another reading of the story of Babel is given by Barbara Johnson, *Mother Tongues: Sexuality, Trials, Motherhood, Translation*, Cambridge, London, Harvard University Press, 2003, pp. 16-17. She discusses how the mythical narrative construction of a period like the one in Babel is an exercise in back-formation. According to the logic of back-formation, the presence of a multiplicity now indicates an original unity. This, however, is not necessarily true. The motive for this particular type of back-formation stems from a desire to justify the difficulty we encounter when faced with the multiplicity of languages; rather than confront the challenge we invent a story that explains it as punishment, to be borne and gritted not embraced and engaged with.

[34] The differences between economic, sociological, theological, psychological and legal normativity are discussed in R.A. Macdonald, “Triangulating Social Law Reform” in Y. Gendreau, ed. *Mapping Society Through Law*, Montreal, Éditions Thémis, 2004, p. 199.

[35] Many jurists have attempted a grammar of norms. At one extreme one may situate Kelsen, who imagine a formal singularity to legal normativity: “law is the norm that

stipulates the sanction” H. Kelsen, *General Theory of Law and State*, A. Wedberg trans., New York, Russell and Russell, 1961, p. 61; At the other, one may situate Bentham, who imagines an incredibly diverse taxonomy of legal rules. J. Bentham, *Limits of Jurisprudence Defined: Of Laws in General*, London, Athlone Press, 1970.

[36] See R.A. Macdonald, “Vers la reconnaissance d’une normativité implicite et inférentielle”, *Sociologie et Sociétés*, 1986, XVIII, p. 47.

[37] There is a further complication. Norms may change their character through internormative transfer. It may be that a consciously elaborated norm from a particular legal regime reflects itself as an implicit norm by unconscious adoption within a different regime. And it may be that one regime explicitly enacts a norm that is only implicit in the regime from which it is transferred. These internormative transfers are addressed in R.A. Macdonald and H. Kong, “Patchwork Law Reform” *Osgoode Hall Law Journal*, 2006, Vol. 44, p. 11.

[38] On this general conception of normativity see R.A. Macdonald, “Office Politics” *University of Toronto Law Journal*, 1990, Vol. 40, p. 451.

[39] The purpose of the responsorial psalm is to foster meditation on the word of God. See USCCB, *supra*, note 1 at IIIB.

[40] The notion of theme and variation in legal normativity is explored in R. A. Macdonald and C. Siebert, “Orchestrating Legal Multilingualism: 12 Études” in J.-C. G  mar and N. Kasirer, eds., *Jurilinguistique: entre langues et droits*, Montreal, Th  mis, 2005, p. 377.

[41] We are like the traveler in Kafka’s *Before the Law*, forever precluded from a face to face encounter with the law. See F. Kafka, *The Trial* in *Complete Stories*, W. and E. Muir trans., London, Minerva, 1992, p. 3.

[42] See R.A. Macdonald, *Les Vieilles gardes*, *supra*, note 16 for a more extensive elaboration and application of the legal pluralistic analysis of normative types to institutions, processes and methodologies.

[43] For a like conclusion see H. Fowler, *A Dictionary of Modern English Usage*, 2nd ed. revised by E. Gowers, Oxford, Clarendon, 1968.

[44] The reading of the Gospel is central to the Liturgy of the Word because through relating the words and deeds of Jesus Christ one most powerfully evokes the presence of the Risen Lord among the faithful; therefore all stand up just before it is read and sing the Gospel Acclamation. See USCCB, *supra*, note 1, at IIIB.

[45] For discussion see M.D. Jordan, *Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage*, Chicago, University of Chicago Press, 2005. For a broader cultural perspective see A. Gautier, “Legal Regulation of Marital Relations: An Historical and Comparative Approach”, *International Journal of Law Policy and Family*, 2005, Vol. 19, p. 47.

[46] For a comprehensive discussion of more than 1000 usages of the term marriage in federal legislation in Canada, and an inventory of the manifold policy concerns that these usages instantiate see *Beyond Conjuality*, *supra*, note 6.

[47] The homily is a reflection on some aspect of the readings from Sacred Scripture and is meant to take into account both the mystery being celebrated and the particular needs of the listeners. See USCCB, *supra*, note 1, at IIIB.

[48] For a like conclusion in the context of same-sex marriage, see R. Leckey, “Private Law as Constitutional Context for Same-Sex Marriage”, *Journal of Constitutional Law*, 2007, Vol. 2 (forthcoming).

[49] The purpose of the Profession of Faith, or Creed, is to respond to the word of God by calling to mind and proclaiming the great mysteries of the faith just prior to these mysteries being celebrated in the Eucharist. The profession of faith originates with the apostle, Peter. Luke 9:20 - “But you”, [Jesus] said, ‘who do you say I am?’ It was Peter who spoke

up. 'The Christ of God,' he said." In the Roman Catholic Mass, the profession is made through the recitation of a formula approved for liturgical use i.e. the Nicene or Apostle's Creed, each emphasizing different doctrinal positions of the Church. See USCCB, *supra*, note 1 at IIIB.

[50] The observations that give rise to monism, centralism, positivism and prescriptivism as interpretations of law are not in themselves uncongenial to a critical legal pluralism. But by over-accentuating the importance of any or all of these interpretive commitments, one risks falling into the fanaticism of the heretic or even apostate. The debate between Richard Posner and Robin West addresses the risk. See R. West, "Authority, Autonomy and Choice: the role of consent in the moral and political vision of Franz Kafka and Richard Posner", *Harvard Law Review*, 1985, Vol. 99, p. 384; R. Posner, "The Ethical Significance of Free Choice: A Reply to Professor West", *Harvard Law Review*, 1986, Vol. 99, p. 1449; and R. West, "Submission, Choice and Ethics: A Rejoinder to Judge Posner", *Harvard Law Review*, 1986, Vol. 99, p. 1449.

[51] In this sense, all law, whatever its site and whatever its mode can only be a hypothesis of action. All normativity is ultimately implicit and inferential. See R.A. Macdonald and J. MacLean, "No Toilets in Park", *McGill Law Journal*, 2005, Vol. 50, 721.

[52] In the Prayers of the Faithful, the people offer prayers to God for the salvation of all. In this way, the Prayers of the Faithful serve a particular purpose in the course of the wedding celebration, by situating the marital union between two people within the context of society at large. See USCCB, *supra*, note 1 at IIIB.

[53] The Canadian example is instructive. During the 1970s the regulatory frame was extended to all common law couples whose relationships lasted for three years. In the 1990s, following a decade of test cases, the Supreme Court of Canada determined in *M. v. H.*, S.C.R., 1999, No 1, p. 328 that legislation denying to sex-same couples the benefit of support obligations under family law legislation was unconstitutional. The Parliament of Canada then responding by enacting legislation entitled the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 which amended several hundred federal statutes to extend social benefits previously available only to heterosexual couples, whether married or not, to same-sex couples.

[54] The extent of the policy conundrum can be seen in the different reactions of Canada's federal Parliament and provincial legislatures to the *M. v. H.* decision. In the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12 Parliament merely extended the scope of the definition of common law spouse, which till then had been analogized to the definition of "spouse" in federal legislation, so as to include same sex couples. In Ontario, by contrast, the Act to amend certain statutes because of the Supreme Court of Canada Decision in *M. v. H.*, S.O. 1999, c. 6 redefined the word "spouse" to exclude common law spouses, and created a new category of "non-spousal relationships" that included both heterosexual and homosexual couples.

[55] More than this, current legislative and judicial responses consciously use an outdated conception of family and marriage to avoid addressing the policy concerns that underlie the recognition of close personal adult relationships. For example, in Canada the federal Parliament was explicitly invited by the Law Commission of Canada in 2001 to address the fundamental policy question. It declined, but rather, in the [Reference re Same-Sex Marriage](#), S.C.R., 2004, No 3, p. 698 it asked the Supreme Court to pass on the constitutionality of legislation that when enacted became the *Civil Marriage Act*, S.C. 2005, c. 33. The Court obligingly concluded that the proposed legislation -- which removed the opposite sex requirement as a requisite to marriage -- did not infringe section 15 (the equal protection section) of the Canadian Charter of Rights and Freedoms.



[56] “According to the Latin tradition the spouses as ministers of Christ’s grace, mutually confer upon each other the sacrament of Matrimony by expressing their consent before the Church.” 1623 Catechism of the Catholic Church, London, Geoffrey Chapman, 1998.

[57] The priest questions the couple about their freedom of choice, faithfulness to each other, and the acceptance and upbringing of children. See Rev. Joseph Champlin, “The Rite of Marriage” in *Together for Life*, Notre Dame, Indiana, Ave Maria Press, 2004, p. 87.

[58] The expression is from R. Leckey, *Profane Matrimony*, supra, note 25, at 2.

[59] In Canada the two positions were argued in these terms by leaders of Canada’s leading political parties. See Canada, House of Commons Debates (16 February 2005) at 3580 et seq. (Mr. Harper), and 2575 et seq. (Mr. Martin)

[60] In the first form of the consent, the ritual text indicates the groom and bride make this statement to each other. See Rev. Joseph Champlin, “The Rite of Marriage” loc. cit. note 57. In actual practice, however, they generally repeat it phrase by phrase after the priest or deacon. Thus, even though the Western theology of marriage stresses that the bride and groom are the ministers, in practice, they do not often exchange their consent in either form without the mediation of the priest or deacon; See Paul Turner, “The Theology of Marriage in the Ordo and Practice of the Roman Rite” *Ephrem’s Theological Journal* (8/2) available online at:

[http://www.paulturner.org/marriage\\_theology.htm](http://www.paulturner.org/marriage_theology.htm).

[61] In *Sex and Social Justice*, New York, Oxford University Press, 1999, Martha Nussbaum argues that the so-called traditional view covers up a number of doctrinal and practical differences in people’s experiences of marriage within every religious tradition.

[62] In the ring ceremony, the groom and bride give the rings to each other. The priest or deacon blesses the rings, but the ministers – the couple – make the presentation. See Rev. Joseph Champlin, “The Rite of Marriage” supra note 57, p. 89, 90.

[63] Eucharist is one of the seven sacraments of the Roman Catholic Church, and is also considered the “the source and summit of the Christian life”. It acknowledges Jesus’ instruction to his disciples (1 [Corinthians 11:24-25](#)) and is a commemoration of the [Passion, Death,](#) and [Resurrection](#) of Christ (the [Paschal Mystery](#)). See Catechism of the Catholic Church, supra note 6.

[64] Bread, wine and water are brought to the altar because according to the Gospel these are the elements Jesus took into his hands at the Last Supper. See USCCB, supra, note 1, at IIIC.

[65] On the general character of rules see H.M. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Administration of Law*, in W. N. Eskridge and P.P. Frickey, eds., Westbury N.Y., Foundation Press, 1994; F. Shauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Oxford, Clarendon Press, 1991.

[66] This view is implicit Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, H.L.A. Hart and J.H. Burns, eds., Oxford, Oxford University Press, 1996.

[67] See Thomas Aquinas, *Summa Theologica*, prima secundae.

[68] See L. Fuller, “Law as an Instrument of Social Control” supra, note 31.

[69] Just as Jesus, in responding to those who would condemn the adulteress, draws a line in the sand accompanied by an invitation to those who would act in good faith rather than carving commandments into stone to discipline the unfaithful, a legal pluralist does not presume that law must proscribe definitively in order to prescribe the possibilities for responsible behaviour.

[70] In this blessing thanks is given to God for the whole work of salvation; according to the doctrine of transubstantiation, the offerings of bread and wine become the Body and Blood of Christ. See USCCB, supra note 1, at IIIC.

[71] Hannah Arendt, *What is Authority?* in *Between the Past and the Future: Eight Exercises in Political Thought*, Harmondsworth, Penguin, 1968, p. 101.

[72] J. Hampton, "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law", *Canadian Journal of Law and Jurisprudence*, 1998, Vol. 11, p. 23.

[73] In the Lord's Prayer a petition is made for daily food, which for Christians means preeminently the eucharistic bread, and also for purification from sin, so that what is holy may, in fact, be given to those who are holy. See USCCB, *supra*, note 1, at IIIC.

[74] This blessing replaces the embolism that would otherwise follow the Our Father. It signifies the blessing of the couple's marital union in the eyes of God and his church. While it is the couple's consent that is essential to the sacrament of marriage, the priest bestows God's blessing on the couple to signify that their union has been formed within the Church. See Rev. Joseph Champlin, "The Rite of Marriage" *supra* note 57, p. 89.

[75] The Church asks for peace and unity for herself and for the whole human family, and the faithful express to each other their ecclesial communion and mutual charity before communicating in the Sacrament. See USCCB, *supra* at IIIC.

[76] An excellent discussion of the manner in which state regulation of marriage and of same-sex relationships needs to be understood as interacting with other normative regulatory orders may be found in R. Leckey, "Harmonizing Family Law's Identities", *Queen's Law Journal*, 2002, Vol. 28, p. 221.

[77] The point is developed in detail in M. Bridge et al., "Formalism, Functionalism, and Understanding the Law of Secured Transactions", *McGill Law Journal*, 1999, Vol. 44, p. 567.

[78] There is still considerable divergence even among European States, however, as to the importance of religion to the design of secular institutions. In some, like Poland today, secular conceptions of marriage do not carry significant normative weight, while in others, like France, they do. Further, in some countries like Canada, secular conceptions grounded in equality arguments found in the Canadian Charter of Rights and Freedoms dominate the way policy is debated. For a discussion of the complexity of different type of identity claims see R. Leckey, "Chosen Discrimination", *Supreme Court Law Review*, 2nd, 2002, Vol. 18, p. 445.

[79] Of course, the paradox in Canada is that, until very recently, the very cases that led to the recasting of marriage have been historically cases brought precisely for economic purposes, not symbolic purposes. See the discussion in *Beyond Conjugality*, *supra*, note 6.

[80] "Man's solidarity is founded upon rebellion, and rebellion, in its turn, can only find its justification in this solidarity." A. Camus, *The Rebel*, New York, Vintage Books, 1956, p. 22.

[81] Though they are many, the faithful receive from the one bread the Lord's Body and from the one chalice the Lord's Blood in the same way the Apostles received them from Christ's own hands. See USCCB, *supra* at IIIC. D. Thomas "My Bread you Snap" *Collected Poems 1934-1952*, London, Phoenix, 2003: "This bread I break was once the oat,/ This wine upon a foreign tree/ Plunged in its fruit;/ Man in the day or wind at night/ Laid the crops low, broke the grape's joy./ Once in this wine the summer blood/ Knocked in the flesh that decked the vine, / Once in this bread/ The oat was merry in the wind; / Man broke the sun, pulled the wind down./ This flesh you break, this blood you let / Make desolation in the vein, / Were oat and grape/ Born of the sensual root and sap; / My wine you drink, my bread you snap."



[82] Such responses are often grounded in the (demonstrably false) claim that the concept of marriage has been impervious to previous attempts to modify its character. For example, rules relating to the age of capacity, parental requisitions, the nature of the consent required of intending spouses, the rules relating to prohibited degrees of consanguinity or alliance, the legal capacity of married women, the exercise of parental authority, and the generalized introduction of no-fault divorce are significant legislative initiatives that, over the past 200 years, have reconstituted marriage. See, for a careful analysis, R. Leckey, *Family Law as Fundamental Private Law* Canadian Bar Review, 2007, (forthcoming).

[83] At one point, the National Assembly in France considered adopting such a measure, but when article 515-1 was added to the Civil Code in 1999 it was expressly made open to both same-sex and opposite sex couples: Art. 515-1. – “Un pacte civil de solidarité est un contrat conclu par deux personnes physiques majeures, de sexe différent ou de même sexe, pour organiser leur vie commune. “ (Added by Loi n° 99-944 du 15 novembre 1999).

[84] In no proposal currently in force has a legislature contemplated that the "registered domestic partnership" or "civil union" might be extended to parent and child or siblings. See, for example, article 521.1 para. 2 of the Civil Code of Québec, which explicitly excludes ascendants, descendants, brothers and sisters from its scope. A similar exclusion may be found in article 515-2 of the French Civil Code. These exclusions confirm that the solidarity in question is sexual in character

[85] This conclusion is specifically argued in R.A. Macdonald, “Legal Republicanism and Legal Pluralism: Two Takes on Identity and Diversity” in M. Bussani and M. Graziadei, eds. *Human Diversity and the Law*, Brussels, Bruylant, 2005, p. 43-70.

[86] Of course, to amend State law in such a fashion could well be perceived as a last resort of those who would deny a secular sacramental to same-sex couples. For this reason, any reconfiguration of marriage within the State legal order should presume a transitional period (say, of one year) when all those who today are committed to a high affect adult relationship but who may not marry would have the option to do so. Only thereafter would the State recast its symbolic vision of close personal relationships between adults.

[87] The people are dismissed to go out and praise and do the good works of God. See USCCB, *supra* at IIID.

[88] According to the ordinary form, where both parties are baptized Catholic, the marriage rite will take place in conjunction with the Mass; however, within the extraordinary form of the marriage rite i.e. where there is a danger of death or no priest or deacon is available, the marriage rite may be celebrated without the Mass. Moreover, where a Catholic is marrying a non-Christian, the marriage rite will follow a paraliturgical form; that is, there will be no celebration of the Eucharist. See Assembly of Québec Catholic Bishops, *Canonical and Pastoral Guide for Parishes*, Montréal, Wilson & Lafleur, 2003.

[89] Catechism of the Catholic Church, London, Geoffrey Chapman, 1998, p. 1790; See John Henry Cardinal Newman, ‘Letter to the Duke of Norfolk’ V in *Certain Difficulties felt by Anglicans in Catholic Teaching II*, London, Longmans Green, 1885, p. 245.

[90] James 2: 14 – “What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him?”

[91] The Recessional hymn is played at the end of mass as the priest and wedding party exit down the aisle. The song is intended to signal that those who have just shared in the Eucharist are now sent forth to spread the Good News to the world. See USCCB, *supra*, note 1 at IIID.

[92] Pablo Neruda, “Ars Magnetica”, *supra* note 2, page 326, lines 1-13.