EDITORIAL: IN NORMATIVE SPACE

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This issue of the European Journal of Legal Studies opens up the second volume of the periodical. In many ways, it is very convenient that an issue that marks a new beginning for the publication is dedicated to emerging areas of law or new ‘spaces of normativity’.

Before I move to discussing the topic and the contributions to this issue, I would like to focus on some new features of this new volume of the EJLS. First, we have developed a new website that improves on the strengths of our previous website and incorporates some new features, such as a search engine to enable readers better to explore our growing archive of cutting-edge scholarship.

Secondly, the Board of Editors of the EJLS has changed its linguistic policy. While in the first volume we ensured that each article was published in two European languages, at least one being in English or French, an assessment of the cost-benefit of this feature of the EJLS has led us to reformulate our policy. From this issue onwards, the EJLS will still accept submissions in all European languages (subject, naturally, to the linguistic abilities of the Board), but translations will only be provided in case the languages in which the articles have been submitted are not understood by large portions of the EJLS readership.

The third feature is the addition of a book review section to the Journal. Through these reviews, our aim is to offer intellectual dialogue, by fostering the discussion of new book releases. More than simply describing new books and calling attention to them for our readership, our aim is to discuss claims and ideas, and offer new critical perspectives on ideas advanced in the books, as a means to offer a supplementary tool to those reading the books reviewed.

In this issue, we have two book reviews. The first is written by David Baez Seara and it reviews a book by one of the European Journal of Legal Studies’s authors, David Ordóñez Solís. Ordóñez Solís’s book is in many

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ways inspired by the content of his contribution to the EJLS,1 as well as by other articles published under the same issue, testifying to the importance of gathering scholarship in issues each dedicated to exploring the several dimensions of a single topic. Baez Seara examines Ordóñez Solís’s book by investigating the concept of legal pluralism, one of the core concepts in it.

Another book review is written by the present author and it is a review of a collective work, edited by Francesco Francioni and Federico Lenzerini, commenting on the 1972 World Heritage Convention for the protection of cultural and natural heritage. The review looks at the growth of the area of cultural and natural heritage law, and the importance of the system created by this 1972 instrument, the reach of which has extended much beyond what was originally devised. It is a portrait of the development of a living instrument of international law over more than three decades of practice.

Thinking of spaces of normativity in contemporary law implies not only looking at the emergence of varying spaces of normativity in positive law but also considering them from non-legal perspectives. Two non-legal ways of looking at normativity appear in the contributions you will find in this issue.

The first way is to look at the idea from a theoretical perspective, which may be either political or adopt a more general philosophical take on the question. This first non-legal way to address the matter—that is, the political dimensions of normativity and the spaces created thereby—is represented by Antonio Estella’s article. He looks at the relationship between credibility and flexibility in the political process and the way this affects law-making. Using the case of presidential term limits as a background for his discussion, Estella examines the choice between law and politics as different tools to encapsulate commitments. Law, according to him, offers the maximum of credibility actors in the political process can hope for, even though choosing the defined, binding set of rules offered by law over the open-ended, fluid solutions one can find through politics implies a certain loss of flexibility. It is the motivations of the political actors when making the commitment that determines whether law or politics will be chosen, either at the moment of making the commitment or at the moment of implementing it. Estella’s contribution looks therefore at how the political process constitutes a new space for legal action, but also at how the very same political process can engulf law. Politics is, thus, a space of normativity and law a space of politicisation.

A more general philosophical take on normativity, addressing the legal effects of changing self-perceptions human beings have, can be seen in Rostam Josef Neuwirth’s paper. Neuwirth analyses the changes in human perception brought about by technological innovation and how these changing perceptions have affected the regulatory process. He looks at law as mnemonics or, more generally, as a cognitive process. He argues for a cognitive approach to law, through which legal scholarship should look less at the periphery of legal process and more at its core, at how the human mind operates in the understanding of core norms and applies them. He argues that territoriality, sovereignty and other key concepts for the understanding of the notion of ‘spaces of normativity’ - discussed below - should be taken as secondary to mental processes, as mere projections of the mind to fill lacunae created by a lack of self-understanding. He further argues that the current tendency towards over-regulation is a product of this lack of self-understanding, and that fundamental concepts must be reassessed in light of new technological advances that allow for a better understanding of the human mind and how it works.

In this sense, the mind is the primary space of normativity and all other emerging spheres of legal action are incomplete and insufficient responses, which fail to acknowledge the role of the human mind in constructing reality. This resembles Plato’s myth of the cavern, in the sense that it promotes an ideal reality that exists on a perfect plane and can only be partially perceived by our senses; becoming thus our imperfect, over-regulated reality. As long as the change in scientific paradigm that Neuwirth proposes does not happen, one must still look at the currently existing normative spaces and their treatment by the law.

When one thinks of ‘spaces of normativity’ from a legal perspective, one necessarily thinks of areas in which the law is applied. This idea is loosely grasped by two different notions, one that is connected to both legal and political theory and the other more strictly legal. The first notion is that of sovereignty, addressed by Marinus Ossewaarde’s article in this issue. He looks at the Westphalian and ancient Greek or Attic conceptions of statehood, investigating the role of sovereignty in these two types of states. He argues that the notion of sovereignty is restricted to the Westphalian and post-Westphalian states, by looking at Carl Schmitt’s “poetics of space”. Analysing the “poetics of space”, he infers that the nomos of Schmitt’s theory bases normativity on boundaries and delimited spaces, whereas the same was not true in Attica. In Attica, sovereign will was not the basis for law, as in the Westphalian legal space; on the contrary, it was the equivalent of lawlessness. The rule of law in the city-states of Attica derived from the rule of reason alone, and not from some extraneous idea of sovereignty.
While Schmitt prophesises that the future of the European *nomos* goes beyond the boundaries of the nation state, he is incapable of offering an alternative. The idea of sovereignty has been reinvented, as Ossewaarde reminds us. This has led to eclipsing Schmitt’s *nomos*, approaching the Attica ideals of the rule of reason, while not discarding the role of sovereignty. Sovereignty has been expanded and new, supranational global actors have come into play to replace the nation state as the key actor in people’s lives. One alternative would be to offer the return of the rule of reason. In this sense, Ossewaarde’s reading, by suggesting that the rule of reason—that is, the product of the human mind—can construct and legitimate normativity, refers back to Neuwirth’s paper. However, Ossewaarde’s conclusion suggests a much darker scenario; one in which, in order to exist, post-Westphalian normativity requires a common enemy and constant war—citing as an example the US-led war against terrorism, or its reinvention by the simple re-drawing of national boundaries, such as the creation of the European Union as a new state-like enterprise.

The strictly legal approach is illuminated by the concept of jurisdiction. Jurisdiction draws the limits of the application of law according to some pre-defined criterion; be it spatial, temporal or personal. New developments in the operation of the legal order have, however, altered the notion of jurisdiction.

Much of this is attributable to the phenomenon of globalisation. For instance, if one looks at territorial jurisdiction—and, thus, to a territorial space of normativity—as the dominant form of jurisdiction, one must consider that, while there have always been exceptions to strict territoriality, the emergence of a world in which territorial boundaries lose much of its meaning—at least to the extent that they are perceived as limitations upon human activity—casts ‘jurisdiction’ in a whole new light. As such, analysing ‘spaces of normativity’ implies asking some questions related to the very core of the notion of jurisdiction and the application of the law.

First, one has to inquire into the extent to which there can be territories beyond the reach of law. Guantánamo Bay is the most common example, but there is also the case of an oil platform outside of the British coast and on international waters, which has been bought by a private individual who soon after proclaimed the independent state of New Zealand. The platform, being on international waters, evades national jurisdictions and is used for hosting gambling and pornography websites. The ambiguous territoriality of these places puts them into a particular position regarding their capacity to ‘evade’ normativity or create black holes in which law
does not apply or, at least, where the application of law is not a given.

Another question is that of new jurisdictional links based on ‘personal’ characteristics. The protection of vulnerable parties is one example. The paradigmatic example of a vulnerable party in a private law relationship being the consumer, one can look at new legal developments aimed at consumer protection precisely as instances of new spaces of normativity. The idea of the consumer as a subject of rights is spurring legal action at the domestic, regional and international levels; one of the most recent and remarkable developments in this regard is the elaboration of an Inter-American Convention on Private International Law on the Law Applicable to Consumer Contracts and Transactions, that shifts the goal of regulation of private international law from the convenience of the municipal judge to that of protecting the individual consumer.

The contribution by Christian Nick deals with aspects of private law as emerging areas of normativity. He contends that the revision of international private law at the European level necessarily leads to reassessing the concept and the role of ‘space’ in private international law. While ‘space’ as the constituent factor in the choice of the law in international private law in the past is eroding, party autonomy becomes paramount. This does not only apply to ‘substantive’ private international law areas, like international contracts, but also extends to legal sectors where party autonomy has not traditionally played a role in private international law, such as family law and succession law. Family and succession law have long been considered to be part of the ordre public and, for this reason, party autonomy was very limited, if not absent. In this way, subjective private ‘will’ elements in international private law prime over the objective ‘space’ element and, once again, the state is not the exclusive source of normativity; the power to create normativity shifting in favour of the affected parties.

In the international legal space, one can look at emerging areas and types of normativity from three different angles. One possible angle is that of supra-nationalism and the way international and supra-national law influences national law- and policy-making, directing even the actions of private actors in a rather direct way. Jürgen Friedrich and Eva Julia Lohse’s contribution is very telling in this regard. They look at the emergence of new forms of governance in international law that do not derive from the work of states, but from the direct work of international organisations, on a level that is rather technical yet vital for policy-making. Through three case studies -namely, the Food and Agriculture Organisation Code of Conduct for Responsible Fisheries, the FAO Pesticide Code, and the Organisation for Economic Cooperation and Development Guidelines for
Multinational Enterprises—, they describe how these technical measures adopted at the international level by low-profile organisations have an impact in domestic policy design and implementation. As new forms of governance blur the distinction between the domestic and the international normative spaces, as new normative space is created, or at least reconfigured, out of this blurring of barriers. While Nick’s contribution focuses on the emergence of normative spaces in the blurring of the public – private distinction, Friedrich and Lohse look at how yet another classic dichotomy of law, that of national versus international, is reassessed and gives rise to new spheres of normativity.

Friedrich and Lohse’s core argument is that there is a need to increase the accountability and legitimacy of such emerging mechanisms of governance. While in the past the traditional international law of treaties ensured legitimacy, as treaty law required municipal incorporation, these emerging forms of governance dispense with such requirements and an alternative way must be found for them to be appropriately checked. The authors look at instruments of what they call ‘sustainable governance’; that is, instruments related to sustainable development issues, particularly international codes of conduct, and the way they influence administrative and private action at the national level. In this sense, their piece offers an innovation by looking not only at the international administrative space created by these regimes, but also to a new, differentiated administrative space created nationally. Their work then evidences how one single phenomenon—that of global administrative law—can give rise to multiple new spaces of normativity, which derive precisely from the interaction between multiple levels of legal ordering, and how a single normative instrument can cut across these different levels and affect all of them; international law, municipal administrative law, private ordering.

A second angle in international law is the notion of jurisdiction without borders; that is, of universal jurisdiction. Universal jurisdiction can be applied mainly in relation to violations of traditional ius cogens and erga omnes rules and obligations; even though there have been debates on the possibility of implementing universal civil jurisdiction with respect to the internet, as a space without borders. Marjan Ajevski’s and Axelle Reiter-Korkmaz’s contributions address these issues from different angles.

On one hand, Marjan Ajevski examines the work of the United Nations’ International Law Commission on state responsibility as crystallised in the Draft Articles on Responsibility of States for Internationally Wrongful Acts and the way they relate to the concept of universal jurisdiction. He investigates how normativity is born out of spaces where no framework is clearly and immediately applicable or, at least, not exclusively. He
investigates the intersections between the general public international law of state responsibility and the specialised field of international criminal law, particularly with regard to the responsibility for violations of norms of *ius cogens*. A space of normativity is, thus, found precisely in the merging of borderline rules of two areas of law.

Ajevski argues that the notion of ‘serious breach’ of the ILC Draft Articles can help reinforce and expand the reach of universal jurisdiction as an adjudicative tool for international justice. Communitarianism, or the idea that the international community is in fact a community bound by certain fundamental rules, helps create arguments that enforce the obligations of the members of the international community towards each other. Normativity comes from a new type of bond between states. This fosters the growth of a new, unified sphere of normativity, which in many ways is related to the project of the so-called ‘transnational constitutionalism’.

On the other hand, Axelle Reiter-Korkmaz’s project is more ambitious than Ajevski’s. Her article still deals with transnational constitutionalism. Yet, she does not limit herself to offering new tools that can serve as examples of an emerging space of normativity. On the contrary, she contends that human rights and *ius cogens* rules lay the foundations for an “overarching hierarchy of international law”, as the title of her article suggests. She claims that the lack of centralisation of the international legal order gives rise to an order composed mainly of customary rules that have crystallised over time, with the exception of the Charter of the United Nations; which, in her view, reverts the paradigm of international law from a sovereignty-based Westphalian approach to an universalistic conception that goes beyond and above the state. As the universal order acquires an objective existence, it turns into a social contract for the world. And human rights are, precisely, at the centre of this revolution.

Axelle Reiter-Korkmaz’s reading of the post-Westphalian order can be compared to Marinus Ossewaarde’s. While the latter’s view is a bit gloomier, though, the former finds in human liberty and human rights the new logic that can reinvent, reorient and transcend post-Westphalian sovereignty. The fact that human rights obligations are ‘integral’—and, thus, that they do not require reciprocity for states to be bound by them—actually creates a trend towards a truly objective legal order that no longer depends solely on the coordination of interests among states, but also subordinates states to certain sets of values. Human rights are the new

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'world public order' and, as such, recreate international normativity by providing the tools for a new space of normativity. In that new order, states are no longer the almighty subjects of Westphalian normativity, but rather the humble participants of an order aimed at protecting individual human beings in their autonomy.

Yet another issue is that of competing jurisdictions in international adjudication or the existence of plural jurisdictions to address the very same issues. From the perspective of the parties involved in the cases, it creates forum shopping. This phenomenon is known in the spheres of international trade law and international human rights law; it is also bound to occur in cases of international environmental law. From the perspective of general international law, this multiplicity can be seen as creating not necessarily fragmentation but a counter-movement, to the extent that these multiple fora communicate amongst each other for one reason or another; creating, in fact, much more uniformity than it is suggested at first sight. This also relates to transnational constitutionalism.

The phenomenon of transnational constitutionalism—and the normative spaces created by it—are by no means restricted to international law and it extends to European Community law. The contribution by Aurélien Raccah offers an interesting insight on the European dimension. Aurélien Raccah looks at how EU legislation makes its way into national legal orders, focusing on the direct application of EU law by regional and local authorities in three EU member states; the United Kingdom, Germany and France. To a certain extent, this recalls the exercise by Friedrich and

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3 A particularly interesting example of this is the poultry dispute between Argentina and Brazil, which was first presented before the MERCOSUR dispute settlement mechanism and, then, re-presented before the World Trade Organisation; MERCOSUR, *Laudo do Tribunal Arbitral ad hoc do MERCOSUL Constituído para Decidir sobre a Reclamação Feita pela República Federativa do Brasil à República Argentina sobre a “Aplicação de Medidas Antidumping contra a Exportação de Frangos Inteiros, Provenientes do Brasil (Res. 574/2000) do Ministério de Economia da República Argentina” [Award of the ad hoc MERCOSUR Arbitral Panel Constitute to Decide on the Complaint made by the Federative Republic of Brazil to the Argentean Republic on the “Application of Anti-Dumping Measures against the Export of Poultry coming from Brazil (Res. 574/2000) of the Ministry of Economy of the Argentinean Republic”], 21 May 2001; WTO Dispute Settlement Body, *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, DS241, Panel Report, 22 Apr. 2003.

4 One recent example is that of the Norwegian religious education cases, in which the victims were divided into two groups, one presenting the case before the European Court of Human Rights and the other before the United Nations Human Rights Committee; H.R. Committee, *Um and Ben Leirvag et al. v. Norway*, req. No 1155/2003, 23 Nov. 2004; E.C.H.R., *Folgero et al. v. Norway*, req. No 15472/02, 29 June 2007.
Lohse mentioned above to the extent that the direct application of non-national law by local authorities, without municipal implementation, gives rise to a new sphere of normativity. But Raccah’s argument goes beyond that; partly because of the nature of European Union law, which is meant to have direct application by the national judge. He looks not only at how national authorities have incorporated and applied EU law at the central level of administration, but also at the local and regional levels; fragmented and diverse, yet united by the application of a single body of law that has not been laid down by the central authority of their states.

Oreste Pollicino’s article examines the European arrest warrant as an example of the new phase of European constitutionalism, based on the third pillar; namely, police and judicial cooperation in criminal matters. Looking at the German, Polish and Czech constitutional reactions to the European arrest warrant, Pollicino discusses how the European Union is increasingly walking towards being a more unified order, much in the way that Ossewaarde talks in his article. While constitutional courts in many of the member states still worry about losing their power of ‘last word’ in all legal matters concerning that specific country, others have embraced European constitutionalism in all of its dimensions.

European constitutionalism is also the topic of a one-day high level conference that took place at the European University Institute earlier this year. In a heated debate, Mattias Kumm, Julio Baquero Cruz, Miguel Poiares Maduro and Neil Walker offered four competing visions of European constitutionalism. This debate evidences that, while the European constitutional space is a tangible –if yet still emerging– sphere of normativity, there is still room for much debate as to what one expects to accomplish with such a space. Accordingly, when one speaks of spaces of normativity, the discussion should aim not only at proving their existence, but also at uncovering their goals.

This awareness colours the contribution of Pauline Westerman’s article to this issue. She also looks at the contribution of the European Union in creating new forms of normativity, but she looks at them from a more general perspective; examining how legal orders tend to exclude some people or, at least, to create obstacles to individuals who are deemed ‘unwanted’ by society. As a matter of fact, instead of saying that the legal order legitimates pre-existing social prejudices, she comes to the point of affirming that it is the unequal legal order that gives rise to these prejudices. She argues that the European Union’s changing legal structure accentuates this exclusion, while at the same time expanding and covering terrains that had previously escaped formalisation, by proscribing states of affairs instead of only regulating relations involving people. A relational
view of law –regulating rights, duties and institutional arrangements– is no longer there; instead, what one finds is goal-oriented legal discourse.

Pauline Westerman’s article is a sad reminder of how spaces of normativity, even though they can take up more areas of regulation, are by no means automatically promoting justice and human well-being; at least, not for all. The fact that expansion of legal reach is not necessarily accompanied by greater inclusion must always be borne in mind when devising spheres of normativity.

This set of articles does not tackle all the possible issues related to ‘spaces of normativity’, but it is an interesting and rich collection. And it proves us all that normativity can take on many forms and operate in multiple spheres. This serves as a reminder of the power and the limits of law. These texts show how law can make its presence felt in multiple spheres of human activity, some of which were originally outside the reach of the law. While this might be encouraging for lawyers all around the world –because it means that law is effectively present everywhere and that, hence, there will always be a need for lawyers–, it is also important to keep in mind that law is supposed to operate as a fallback mechanism to control abuses in human interactions and not as a master plan for them. Such a ‘legalistic empire’ can only keep human beings apart from each other, from finding solace in spaces filled with mandates other than normativity. These law-free spaces are important and the reader should bare this in mind while going through these texts. On behalf of the Editorial Board of the European Journal of Legal Studies, I hope you will enjoy reading them.
SERIOUS BREACHES, THE DRAFT ARTICLES ON STATE RESPONSIBILITY AND UNIVERSAL JURISDICTION

Marjan Ajevski*

I. INTRODUCTION

On its fifty-first session, the International Law Commission (henceforth, “ILC”) adopted the Draft Articles on State Responsibility1 (henceforth, “Draft Articles”) and submitted them to the General Assembly for approval in 2001. The work of the ILC on the Draft Articles took more than forty-four years before the Draft Articles reached their final shape. During the process of their drafting, several of its special rapporteurs came up with different solutions to the various problems at hand. One characteristic of the Draft Articles that is especially emblematic of these several (and sometimes turbulent) changes during their preparatory period was the issue of obligations and responsibilities arising out of a breach of a ius cogens norm or -as it was put in the earlier proposals of the Draft Articles- obligations arising out of crimes of states.2

The Draft Articles have been the focus of scholarly attention since their adoption by the ILC, as well as during the entire drafting period. Part of these scholarly contributions are used in this paper in order to explain some of the concepts discussed in the Draft Articles themselves; namely, those dealing with serious breaches of peremptory norms, the invocation of the responsibility of states and the duty to cooperate. But, there has been no discussion on the possible consequences that the Draft Articles may have, or have had, on other issues of international law dealing with similar concepts.

A similar phenomenon has happened with regard to the scholarly contributions on universal jurisdiction. There has been a wide discussion

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of issues relevant to universal jurisdiction ranging from its legality, its limitations in terms of state and individual immunity, its pitfalls and its futility. However, none have tackled the possibility of using concepts that are not closely related to individual criminal responsibility, but that can be used in an innovative way to further the reach of universal jurisdiction. It is within this gap in the discussion of both fields of international law that I want to position my research.

As this paper’s title suggests, I will discuss the responsibilities and consequences arising from a serious breach of obligations emanating from a peremptory norm in the Draft Articles. I will also discuss the implications that this has to international legal issues other than state responsibility, more specifically with its implications to universal jurisdiction. I will investigate the possibility of whether and how one can use a codification that deals with the responsibility of states, to issues that regulate the criminal responsibility of individuals. My hypothesis is that certain obligations that have been codified in the Draft Articles (like the duty to cooperate) have permeated the narrow sphere of state responsibility in other fields of international law. These obligations can be combined with the peremptory status of the crimes falling under universal jurisdiction and can give an argument that states are obliged to: one, bring prosecutions against those individuals responsible for international crimes; and two, render assistance to each other in order to facilitate such prosecutions.

In section II, I will explain the notion of ‘serious breach’ as it is portrayed in the Draft Articles and the obligations and consequences that arise from it. In section III, I will briefly explain the notion of ‘universal jurisdiction’ and the crimes that are covered by it. I will also discuss their peremptory status, as well as the nature and consequences of peremptory norms. In section IV, I will combine the arguments of these separate spheres of international law and discuss its implications. I will forward the argument that the concept of communitarianism, specifically recognised in the Draft Articles and inherent to the concept of ius cogens, gives rise to, if not an obligation to prosecute, then at least a strong additional argument in the arsenal of the supporters of prosecutions under universal jurisdiction. I will also argue that the duty to cooperate in order to bring an end to a breach extends to requests of prosecuting states to other states for judicial assistance in criminal matters, regardless of bilateral arrangements among those states.

II. **SERIOUS BREACHES OF A PEREMPTORY NORM IN THE DRAFT ARTICLES ON STATE RESPONSIBILITY: THE INCORPORATION OF THE COMMUNAL SPIRIT INTO THE ARTICLES**

1. *Overview of the development of the concept of ‘serious breach’ in the Draft Articles*

In 2001, the ILC submitted for approval its report on its fifty-first session and with it the final Draft Articles on the Responsibility of States for Internationally Wrongful Acts to the United Nations General Assembly (henceforth, “UNGA”). The Commission’s work of four decades on the issue had finally come to an end. The Draft Articles themselves have undergone significant changes during the four decades of drafting. The whole concept of ‘responsibility of states’ dates back to before the creation of the UN and draws its roots from cases of diplomatic protection and the sending of diplomatic envoys.\(^4\) This concept has emerged in an age of bilateralism and most of its rules deal with the invocation of state responsibility in situations arising out of bilateral relations; or multilateral relations where the consequences of the wrongful acts are limited to one or a small number of states. With the emergence of closer ties between states and the realisation that certain interests are common and vital to all states, the view on the norms governing the issue of state responsibility also started to change, reflecting this realisation.

One of the most notable changes in the whole concept of responsibility of states was the introduction of the distinction between the concept of international crimes of states and international *delicts* in 1976. This was accomplished through the provisional adoption of Article 19 that dealt with this issue.\(^5\) Article 19 of the 1976 Draft\(^6\) tried to incorporate the then

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fresh development of the concept of *ius cogens* brought on by the adoption of the 1969 Vienna Convention on the Law of Treaties, and especially Article 53, where *ius cogens* is defined. Even as early as 1939, in his Hague Academy lectures, the Special Rapporteur Roberto Ago—under whom the provisional adoption of Article 19 occurred—had put forward the idea that a distinction could be made between state crimes and *delicts*. The idea, for Ago, was not to put the focus on the infliction of punishment on the responsible state, but on the repressive character of the countermeasures that could be used in case of an international crime.

This suggestion was not well accepted by some states and was opposed during the entire drafting history of the Draft Articles, as a concept that has no foundation in customary international law in relation to state responsibility. Although some states were strong supporters of the concept of international crimes of states, the concept was dropped by the time of the third and final reading of the Draft Articles. It was replaced by the notion of ‘serious breach of a peremptory norm’, which was introduced in Articles 40 and 41 of the final Draft Articles. An approach of a single type of responsibility of states for the commission of an internationally wrongful act was thus put into place and the distinction between crimes and *delicts* at least when it came to states became history. Crawford himself presented this shift of terminology in the Draft Articles as more than just a makeover of the concept of international crimes of states that could be used as a means of sneaking that same concept more easily under the radar of objector states. On the contrary, this shift was presented as a change of concepts that puts more focus on peremptory norms as a better established concept of international law than international crimes of states.

Regardless of the fact whether the change from international crimes of states to serious breaches of peremptory norms is a mere cosmetic change or has a wider conceptual meaning, there are two important points that I want to highlight for our current discussion. The first point is the fact of the recognition of special communitarian interests of individual states as

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7 G. NOLTE, “From Dionisio Anzilotti to Roberto Ago”, supra note 4, p. 1093.
8 Ibid.
10 Most notably the Nordic countries; see *ibid.*, § 53.
parts of a wider community of states; and second that this recognition has
not been changed in any of the proposals put forward in the Draft Articles
since the introduction of the divisions between crimes and delicts in 1976.
The evolution of the notions of obligations *erga omnes* specifically
recognised by the International Court of Justice (henceforth “ICJ”) in the
*Barcelona Traction Case* and later confirmed in the *East Timor Case*, as
well as the development of the concept of *ius cogens* in the 1969 Vienna
Convention, led to the special recognition of these concepts in the Draft
Articles. This was originally carried out by the introduction of crimes of
states in Article 19 and later changed to the concept of serious breach. I
will detail what an obligation of *erga omnes* character entails later in this
section, while the consequences of *ius cogens* norms will be discussed more
broadly in section III.

2. **Serious breaches of an obligation arising under a peremptory norm of general international law in the Draft Articles**

As noted previously, Articles 40 and 41 introduce the concept of ‘serious
breach of a peremptory norm of general international law’ and they state:

“Article 40 - Application of this chapter:
- This chapter applies to the international responsibility which is
  entailed by a serious breach by a state of an obligation arising under
  a peremptory norm of general international law.
- A breach of such an obligation is serious if it involves a gross or
  systematic failure by the responsible state to fulfil the obligation”.

“Article 41 - Particular consequences of a serious breach of an
obligation under this chapter:
- States shall cooperate to bring to an end through lawful means any
  serious breach within the meaning of Article 40.
- No state shall recognise as lawful a situation created by a serious
  breach within the meaning of Article 40, nor render aid or
  assistance in maintaining that situation.
- This article is without prejudice to the other consequences
  referred to in this Part and to such further consequences that a
  breach to which this chapter applies may entail under international

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15 *Ibid.*, Part II, Chapter III.
As we can see from Articles 40 and 41, the Draft Articles deal only with serious breaches of obligations that arise under peremptory norms of international law. The Commentaries to the Draft Articles do not give a specific list or a set of criteria to define either what a peremptory norm is or what constitutes a serious breach. A peremptory norm is defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as a “norm of general international law [...] accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The ICJ, for example, has found that the use of force contrary to the principles of the Charter is a peremptory norm in the Nicaragua Case, as well as the prohibition of genocide and non-discrimination in the Armed Activities on the Territory of the Congo Case. Unfortunately, the ICJ has not elaborated on a set of criteria for recognition of a norm as achieving the status of ius cogens in its case law. The Draft Articles elegantly avoid this issue by specifying that they do not deal with substantive rules, but with secondary rules of international law. The ILC, nevertheless, gives some examples that are already recognised as such, with the emphasis that the examples given by no means constitute an exhaustive list.

Not every breach of an obligation arising under a peremptory norm gives rise to the provisions in Article 40 and 41, but only a serious one. In order for a breach to be deemed serious, it has to be considered a “gross or systematic failure by the responsible state to fulfil the obligation”. The breach can either be gross or systematic; it does not require both elements to be present. For a breach to be regarded as systematic, it has to be

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16 Ibid., Articles 40 and 41, p. 282.
20 International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 40, §§ 3-6; see also E. WYLER, From “State Crime” to Responsibility for “Serious Breaches” of Obligations Under Peremptory Norms of General International Law, supra note 5, pp. 1154-1157.
21 International Law Commission, 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, Article 40 § 2.
22 International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 40, § 7.
Serious Breaches carried out in an “organised and deliberate way”. The term ‘gross’, on the other hand, refers to the intensity of the violation or of its effects. Therefore, the term ‘serious’ denotes that a certain magnitude or scale of violations is necessary for it to be deemed a serious breach of an obligation arising under peremptory norms. For instance, in relation to the crime of torture, although it has attained the status of a peremptory norm, acts of torture need to be committed on a wider or systematic scale for them to achieve the status of a serious breach. Not every act of torture can bring about the type of responsibility envisaged in the Draft Articles. Nevertheless, the Commentaries do say that certain acts, by their very nature, can only be committed in a gross and systematic manner; aggression being the prime example given in the Commentaries.

Article 41, on the other hand, deals with the specific obligations that other states have. By the term ‘other states’, the Draft Articles refer to the members of the international community that are neither an injured state, nor a responsible state. Article 41’s first obligation is for states to “cooperate to bring to an end through lawful means any serious breach”. Article 41 § 1, therefore, creates a positive obligation on states to cooperate in order to facilitate the end of a breach. The Commentaries do not specify any special mechanism through which this cooperation should take place but they, however, note that this type of cooperation is best placed within the mechanisms of the United Nations. The Commentaries also do not say what type of measures such cooperation should produce, since this will depend on the type of the peremptory norm and the type of breach in question. What they say is that “it is, however, made clear that the obligation to cooperate applies to states whether or not they are individually affected by the serious breach; what is called for in the face of serious breaches is a joint and coordinated effort by all states to counteract the effects of these breaches”.

The Commentaries do not specifically say that the duty to cooperate is

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23 Ibid, § 8.
24 Ibid.
25 Ibid.
26 International Law Commission, 2001 Draft Articles, supra note 21, Article 41 § 1.
27 International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 41, § 2.
28 See, for more details on the duty to cooperate and Articles 40 and 41, A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, supra note 3, pp. 1185-1188; E. WYLER, “From ‘State Crime’ to Responsibility for ‘Serious Breaches’ of Obligations Under Peremptory Norms of General International Law”, supra note 5.
29 International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 41, § 3.
firmly established in international customary law and say that it may reflect a progressive development on the part of the Commission.\textsuperscript{30} But, as Andrea Gattini has argued, the duty to cooperate has been stressed in several international documents, including Article 4 (a) of the Declaration of Principles on Friendly Relations and Cooperation of States adopted by the UNGA. According to the Declaration, states are required to cooperate in the maintenance of international peace and security and, in Article 4 (b) of the same declaration, for the promotion and respect of human rights and fundamental freedoms, as well as the elimination of every kind of racial discrimination and religious intolerance.\textsuperscript{31} In his view, the high political connotation of the Declaration makes it “apparent that the ILC codified rather than developed the obligation to cooperate in bringing the violation to an end”.\textsuperscript{32}

A second set of obligations arising from a serious breach is put down in Article 41 § 2 and these are: first the duty not to recognise as lawful the situation arising from the breach; and second not to render aid or assistance in maintaining that situation. The first of these two obligations requires that states, as members of the international community, do not recognise the situation that arises from the serious breach. A specific example of this obligation not to recognise is the non-recognition, neither through formal steps nor by specific actions, of the acquisition of a territory from another state by the use of force.\textsuperscript{33} The obligation not to recognise the situation as legal also applies to the responsible state and even to the directly injured state. This is so because the injury is afflicted to the international community as a whole and, consequently, a waiver or recognition by the injured state would not preclude the responsibility of the state that is in breach.\textsuperscript{34} The scope of the obligation not to recognise the situation is not unqualified and certain limits were put in the ICJ’s advisory opinion concerning Namibia (South West Africa):

“The non-recognition of South Africa’s administration of the territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the government of South Africa on behalf of or concerning Namibia after the termination of the mandate are illegal and invalid, this invalidity cannot be extended to

\textsuperscript{30} Ibid.
\textsuperscript{31} A. GATTINI, “A Return Ticket to ‘Communitarisme’ Please”, supra note 5, p. 1186.
\textsuperscript{32} Ibid.
\textsuperscript{33} International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 41, § 5.
\textsuperscript{34} Ibid, § 9.
those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the territory”.

The obligation not to recognise and especially not to collectively recognise the consequences resulting from a serious breach is seen by the ILC as a prerequisite for any community response and a minimum necessary response by states to such a breach. The Namibia (South West Africa) opinion and the ILC Commentaries to Article 41 are not very clear as to what other situation the obligation not to recognise and its exceptions apply. This is also true of its scope and, consequently, a wide margin is left to the discretion of the states and to the prevailing situation.

The second obligation arising from Article 41 § 2 is the duty “not to render aid or assistance in maintaining that situation”. This obligation deals with the question of the response of the other states after the fact of the occurrence of the serious breach. This obligation should be read in conjunction with Article 16 of the Draft Articles, which deals with assistance by third states after the commission of an internationally wrongful act.

The obligations not to recognise and not to render aid and assistance seem to be two sides of the same coin. The first is a negative obligation not to recognise a situation as legal; the second is a positive obligation, i.e., an obligation not to take positive steps to maintain the consequences of that breach. Again it is important to point out that both the Commentaries and the ICJ’s Namibia (South West Africa) opinion do not give more precise guidelines on what constitutes aiding and assisting the maintenance of the consequences of the breach and leaves it to the specific situation at hand.

Article 41 § 3 is what the ILC calls a ‘saving clause’, denoting two
consequences. First, that the obligations set forth in Article 41 §§ 1 and 2 do not prejudice the consequences for the responsible state prescribed in the other parts of the Draft Articles; namely, the cessation of the breach, the continuance of the performance of its obligations, the giving of guarantees of non-repetition and the making of reparations in conformity with the rules set out in the Draft Articles. Second, that the consequences and obligations set out in Article 41 §§ 1 and 2 do not prejudice other consequences set out in other rules mainly of a primary nature of international law. One example given in the Commentaries is the collective response through the United Nations Security Council (henceforth, “UNSC”), including the use of force to counteract an act of aggression.

3. **Who can invoke the responsibility of a state?**

Part III of the Draft Articles prescribes the implementation of state responsibility and it is covered in Articles 42-54. These articles deal with issues like: who can invoke state responsibility; what steps do they have to follow; how can a state lose its claim; whether countermeasures are allowed; who can use them and under what circumstances? One brief note before going more deeply into the issue of who can invoke the responsibility of a state: one cannot but notice the fact that the Draft Articles do not deal with an emerging and growing issue of invoking state responsibility by private; non-state actors. This can be seen as a missed opportunity by the ILC to either codify or bring about a progressive development in the field. This is even more obvious when considering the fact that a wide number of international tribunals give standing to individuals or NGO’s or other private parties and that there are international tribunals that also deal with the criminal responsibility of individuals. In an age where an increasing number of institutions or international regimes are becoming or incorporating certain features of

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supranational arrangements, it is hardly justifiable not to discuss the
invoking of state responsibility by private parties.

Regardless of this gap, there is a certain characteristic of Part III of the
Draft Articles that is of significant importance for this topic; namely, the
invocation of state responsibility by a state other than the injured state in
cases of a breach of an obligation \textit{erga omnes}, set down in Article 48. The
notion of \textit{erga omnes} obligations has been established by the ICJ in the
\textit{Barcelona Traction Case} where it said:

“In particular, an essential distinction should be drawn between the
obligations of a state towards the international community as a
whole, and those arising vis-à-vis another state in the field of
diplomatic protection. By their very nature the former are the
concern of all states. In view of the importance of the rights
involved, all states can be held to have a legal interest in their
protection; they are obligations \textit{erga omnes}”.\footnote{47}

The ICJ gave some tentative clues as to where those obligations arise
from; namely, from the outlawing of aggression and genocide, the
principles and rules concerning the basic rights and freedoms of the human
person, the protection against slavery and racial discrimination,\footnote{48} as well as
interference with the right of self-determination of peoples.\footnote{49}

I would now like to shortly comment on the links between obligations \textit{erga
omnes} and norms of \textit{ius cogens}. Obligations \textit{erga omnes} are obligations that are
owed to every state because every state has an interest in securing that
obligation. The term ‘\textit{erga omnes}’ only deals with the issue of obligations
that one state has towards other state in the international
community of states. On the other hand, the term ‘\textit{ius cogens}’ depicts the
status that norms have, relative to all other types of norms of international
law. It can be said that these are similar concepts but looked at from
different vantage points, one from the point of obligations, the other from

\footnote{46} There are differing interpretations on what a supranational body or system is but
one of their main traits is the ability to penetrate the surface of the state and be able
to interact with the different players of the internal legal system of the state; see, for
more details, L.R. HELFER and A.-M. SLAUGHTER, “Toward a Theory of
Effective Supranational Adjudication”, supra note 45.
\footnote{48} \textit{Ibid}, § 34.
\footnote{49} I.C.J., \textit{East Timor}, § 39.
the point of hierarchy of norms.\textsuperscript{50} It is not always clear whether an obligation that has an \textit{erga omnes} character is always a \textit{ius cogens} norm, but it seems that the reverse is almost certainly true; a \textit{ius cogens} norm will always produce obligations \textit{erga omnes}, due to the underlying values that it enshrines.\textsuperscript{51}

The ILC itself had to consider this issue of the interplay between obligations \textit{erga omnes} and norms of \textit{ius cogens} when deciding on what to focus - peremptory norms or obligations \textit{erga omnes} - when talking about the consequences of a breach of a peremptory norm and the issue of who has the right to invoke the international responsibility of a state. It came to the conclusion that there is no settled answer to whether, when one speaks about \textit{erga omnes} and \textit{ius cogens}, one is using interchangeable or separate and distinct concepts. The ILC put it best when talking about the relation between \textit{ius cogens} and \textit{erga omnes} by saying:

“Whether or not peremptory norms of general international law and obligations to the international community as a whole are aspects of a single basic idea, there is at the very least substantial overlap between them. The examples which the International Court has given of obligations towards the international community as a whole all concern obligations which, it is generally accepted, arise under peremptory norms of general international law. Likewise the examples of peremptory norms given by the Commission in its commentary to what became Article 53 of the Vienna Convention involve obligations to the international community as a whole. But there is at least a difference in emphasis. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all states in compliance - i.e., in terms of the present Articles, in being entitled to invoke the responsibility of any state in breach”.\textsuperscript{52}

I would like to stress that for this paper the issues seems to be moot considering the fact that the crimes discussed below are universally accepted as producing \textit{erga omnes} obligations, due to the values that


\textsuperscript{52} International Law Commission, \textit{Commentaries to the Draft Articles, supra} note 14, Part II, Chapter III, § 7.
Article 48 answers the question of who can invoke the responsibility of a state other than the injured state. There are two types of states that fall under this category: the first being a group of states to which the responsible states owe certain obligations; e.g., a group created by a multilateral treaty that is established to protect a particular interest of that group of states. I will not deal with these types of obligations in this paper because they are not a reflection of communitarianism in international law, but of a mechanism of protection of interests that are particular to a specific group of states that may not be shared by the community of states as a whole. The second group of states is comprised of all states in the international community because the obligations in question are of an erga omnes character; i.e., they are owed to the international community as a whole.

The ILC included the provisions of Article 48 § 1 (b) in order to give effect to the ICJ’s statement on erga omnes obligations in the Barcelona Traction Case. Specifically, it understood that, in obligations that are deemed to be of such importance as to be qualified as erga omnes, every state has a legal interest in their protection. There are no special criteria that a state has to meet in order to be able to invoke the responsibility of the state in breach, since obligations erga omnes are owed to the international community as a whole and every state is a part of that same community.

Under the provisions of Article 48 § 2, a state other than the injured state has certain prerogatives. Namely, it can call for a cessation of the breach; a return to normal behaviour of the responsible state; to request guarantees of non-repetition of the act; and, according to subparagraph (b), claim reparations. The list given in Article 48 § 2 is exhaustive, which means that other states do not have the full range of options that injured states have when responding to a breach of an obligation.

One important distinction between the options that an injured state has, contrary to all other states in terms of responses to an internationally wrongful act, is the recourse to countermeasures. Countermeasures are acts that would normally be considered as internationally wrongful acts if they were not undertaken for the purpose of forcing the responsible state
to cease its wrongful act, to start the procedure of compliance with its obligations and to start making the appropriate reparations. Countermeasures that are taken by other states on behalf of the injured state in relation to breaches of obligations erga omnes are called countermeasures of general interest or collective countermeasures. The reason why countermeasures of general interests are not specifically authorised in the Draft Articles is because countermeasures are a legal notion commonly associated with self-help and more in private rather than public law. They are available to injured states because the institutions of the international system have failed and, therefore, it is up to the individual state to correct the wrong that has been inflicted upon it. Because it is a mechanism of self-help, the concept of collective countermeasures inherently relies on the self-assessment of the injured party to decide whether an internationally wrongful act has been performed. A further reason why the ILC did not want to specifically put countermeasures of general interest in the Draft Articles is the fact that the ILC itself was afraid that countermeasures of general interest would open the door to international vigilantism.

But this is not the whole story. Staying in the field of countermeasures, the ILC, in Article 54, decided to put another savings clause by saying that the chapter dealing with countermeasures and the lack of inclusion of countermeasures of general interests does not prejudice the taking of other lawful means to bring about the invocation of responsibility by states other than the injured state as in case of Article 48. This means that states are free to take any lawful actions, individually or collectively, either through an international organisation or as a coalition, to put pressure on the responsible state for a cessation of the wrongful act and for reparations to the injured state.

The Commentaries argue that the actions envisaged in Article 48 § 2 can only be taken on behalf of the injured state, especially with regard to the

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60 The Commentaries give a number of examples where states have acted collectively in this manner but still concludes that the practices is embryonic to be deemed as reaching the status of customary law; see International Law Commission, Commentaries to the Draft Articles, supra note 14, Article 54, §§ 2-4.
request for reparations, and in certain instances the state making such a claim might be requested to show that it is acting in the interest of the injured party.\textsuperscript{64} It is important that states are authorised to invoke the responsibility of a state when there is no directly injured state, especially when a norm requiring an \textit{erga omnes} obligation is breached. This is because of the fact that in such instances, it is theoretically possible that there will be no single state authorised to call for the cessation of the wrongful act by the responsible state and the act would continue. This is particularly true for obligations that are of such importance that they are owed to the international community as a whole. It has been noted,\textsuperscript{62} though, that because other measures under Article 54 have been limited to only lawful means countermeasures are precluded under the Draft Articles. This is because countermeasures are by definition unlawful acts if adopted without prior commitment of a wrongful act of the state against which the countermeasures are taken. At this point, I would like to summarise the argument by quoting the Commentaries to the Draft Articles:

“The current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of states. At present there appears to be no clearly recognised entitlement of states referred to in Article 48 to take countermeasures in the collective interest. Consequently it is not appropriate to include in the present Articles a provision concerning the question whether other states, identified in Article 48, are permitted to take countermeasures in order to induce a responsible state to comply with its obligations. Instead Chapter II includes a saving clause which reserves the position and leaves the resolution of the matter to the further development of international law”.\textsuperscript{63}

4. \textit{The idea of communitarianism in the Draft Articles}

The concept of responsibility of states for internationally wrongful acts in its initial historical conception it was inherently bilateral as were most relations among states. Even though multilateral agreements did exist they were seen as nothing more than a bundle of bilateral agreements.\textsuperscript{64} On the

\textsuperscript{61} \textit{Ibid.}, Article 48, § 12.
\textsuperscript{62} See D. ALLAND, “Countermeasures of General Interest”, \textit{supra} note 58.
\textsuperscript{63} It is worth noting that the Commentaries do mention a significant number of instances where states have acted collectively in response to breaches of \textit{ius cogens}; see International Law Commission, \textit{Commentaries to the Draft Articles}, \textit{supra} note 14, Article 54, § 6.
\textsuperscript{64} International Law Commission, \textit{Commentaries to the Draft Articles}, \textit{supra} note 14, Article 42, § 8; which state that, “although a multilateral treaty will characteristically establish a framework of rules applicable to all the states parties, in certain cases its
other hand, after World War II, the setting of international law and the international system as a whole began to change; we can no longer talk about international relations in the typical sense, but rather of transnational relations.\(^6\) In this transnational world, the interactions in the international arena are no longer carried out by governments alone, through their organs for foreign affairs or by international organisations, but more and more between groups of individuals, NGOs, multinational companies, unions, guilds and professional societies, independent agencies and individuals themselves. The international system has moved from the concept of billiard balls to the concept of the spider’s web, where the interactions between individuals grow at an impressive rate. The world has become more globalised, as well as more fragmented, and a sense of a world community is more and more evident.

These changes have found their way into the Draft Articles on State Responsibility. Articles 40, 41, 48 and 54, recognise the importance of the values that \textit{ius cogens} norms protect and, consequently, create the obligation for states, even those who are not directly affected by the breach, to cooperate in order to bring about its end and to counter its effects.\(^6\) Furthermore, the Draft Articles prescribe the negative obligation of not recognising the situation arising from the breach of a \textit{ius cogens} norm and the obligation not to take positive steps like aiding and assisting in perpetuating the situation created by the breach.

The Draft Articles also give effect to the notion of obligations \textit{erga omnes}, obligations that are owed to the international community of states as a whole, because it is recognised that every member of that community has a legal interest in the performance of these types of obligations. It does so by allowing for every member of that community to call on the responsible state to be accountable. Every state can call on the responsible state to cease the wrongful act, to continue its normal and lawful conduct and to give appropriate reparations for the damages caused. Although the Draft Articles do not speak of countermeasures of general interest, whether taken collectively or by individually concerned states, they do not exclude them either. This is because their practice is still not sufficient for it to

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\(^{6}\) International Law Commission, \textit{Commentaries to the Draft Articles}, \textit{supra} note 14, Article 41, § 3.
have crystallised into customary international law, and thus allowing in the future for individual states to take the cause of the international community when a breach of a *ius cogens* or *erga omnes* norm would occur.

III. A SHORT DISCUSSION OF UNIVERSAL JURISDICTION

1. Overview of the concept

One of the first difficulties presented when discussing universal jurisdiction is the problem of its definition. When discussing universal jurisdiction judges and scholars have referred to it as a “true”, “classical”, “pure”, universal jurisdiction “properly so called” and so on. The *ad hoc* judge, Van den Wyngaert, in the *Arrest Warrant Case* concluded that “there is no generally accepted definition of universal jurisdiction in conventional or customary law; states that have incorporated that principle in their domestic legislation have done so in a very different way”. 67 Both scholars and judges have used different terms from ‘true’, ‘proper’ and ‘pure’ universal jurisdiction, to using a narrower term like universal jurisdiction *in absentia* 68 as a separate concept. The term ‘universal jurisdiction’ itself implies that what is understood to be the subject of its discussion is the jurisdiction of states. Under public international law, there are two types of jurisdiction that a state may have; one is the jurisdiction to prescribe and the other is the jurisdiction to enforce. 69 Since this discussion is about criminal law the discussion below is limited to criminal jurisdiction exercised by states.

Jurisdiction to prescribe means that a state can prescribe a certain conduct by groups or individuals as criminal, either by statutory acts, executive orders or judicial decisions; to state what the *mens rea* and the *actus reus* of the crime is and prescribe penalties for it. What conduct is deemed criminal is generally left to the discretion of the states themselves. 70 On the other hand, a jurisdiction to enforce means that a state can take actions directed to enforcing the laws it has enacted. This can be executed through various different kinds of organs, most notably through its police forces and judicial bodies. 71 These are separate kinds of jurisdictions and, although they are intertwined—that is to say, a state cannot have a jurisdiction to enforce if it first did not prescribe that conduct as criminal—,

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68 See ibid., GUILLAUME, Separate Opinion; HIGGINS, KOOIJMANS and BUERGENTHAL, Joint Separate Opinion.
70 Ibid., p. 737.
71 Ibid.
they have to be kept apart when discussing them, since their use in similar situations can have different consequences under international law. Namely, the exercise of the jurisdiction to enforce on the territory of another state, without that state’s express permission, is contrary to international law. This is best summarised in the dictum of the Permanent Court International Justice (henceforth, “PCIJ”) in the Lotus Case. The Lotus standard is given by the majority decision, which reads that:

“[International law] far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards to other cases, every state remains free to adopt the principles which it regards as best and most suitable”.

But, in order for a state to have wrongfully conferred upon itself extraterritorial jurisdiction, a rule of public international law must be shown to exist barring that specific kind of jurisdiction. And the court in the preceding paragraphs found one such prohibition, namely:

“The first and foremost restriction imposed by international law upon a state is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another state. In this sense, jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or from a convention”.

States can prescribe their jurisdiction under several ‘heads’ or ‘titles’ which give the specific conduct in question a link to the state itself and therefore generally shows the underlying interest of that state to prosecute that conduct. These titles are: the territoriality principle, the nationality principle, the passive personality principle, the protective principle and the universality principle. The doctrine of effect has also been used by several states to define their jurisdiction. The latter five principles are also known as extraterritoriality principles.

The most widely-used kind of jurisdiction is the territorial jurisdiction.

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73 Ibid.
This jurisdiction means that a state can prescribe and prosecute a crime that has been committed on the territory of that state. In the term ‘territory of a state’, aircraft and sea vessels that use that state’s flag are included. A crime does not have to be completely perpetrated on the territory of the state for it to have jurisdiction. A crime can be started in the territory of one state and be finished in another, the most typical example being when a person fires a gun across the border from one state into another and kills a person on the other side. The act was started on the territory of one state but was finished on the territory of another. In this case, under the territoriality principle, both states have the jurisdiction over that crime. The territoriality principle is the most widely used because the state has the most clear link with the crime; it has the general responsibility over the conduct of law on its soil, the evidence and witnesses are on its territory as well as the victims of the crime. The vindication of the victimised individual or group is also best accomplished by territorial jurisdiction.\(^{75}\)

The nationality principle is an extraterritorial one, meaning that it is mostly used when a national of that state commits a crime outside the territory of the individual’s state. In this case the state of which the individual is a national can prosecute her. This principle has been largely part of the continental law systems, but it is not unknown in Common Law systems for the most serious crimes, such as murder or treason. This principle is used because of the special link that an individual has with her state through her nationality. A further argument is that, in some instances, states have clauses for non-extradition of nationals to other states in their constitutions and when an individual tries to escape justice by seeking refuge in her own state, the state of nationality can prosecute her in the interest of justice.\(^{76}\)

The passive personality principle means that a state can have jurisdiction over a crime that has been committed abroad against one of its nationals. This is a rarely used concept and has been controversial in the past.\(^{77}\) Today, as it has been said by judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant Case*, this principle “meets with relatively little opposition, at least so far as a particular category of offences is


\(^{77}\) See P.C.I.J., *S.S. ‘Lotus’ (France v Turkey)*, 7 Sept. 1927, LODER, Dissenting Opinion, p. 36.
The protective principle allows for a state to prescribe and prosecute a crime that has been committed abroad by an individual who is not a national. The rationale behind this is that because the crime in question affects the vital national interests of the state, it can prosecute it. A prime example for this is counterfeiting the currency of a state, which is widely considered as a crime that falls under the protective principle because counterfeiting of the national currency, cumulatively taken, can subvert the national economy. The crime of treason is also another good example of this principle since the act is done against the national security interests of the state. The protective principle is combined with the effects doctrine which means that if a conduct can have an adverse effect in the territory of a state, the state can criminalise that conduct, like attempted smuggling of narcotics into the territory of a state. In this example, even though the crime was not committed on the territory of the prosecuting state or by its nationals and its nationals are not yet victims, the negative effect that narcotics can have motivates the state to protect itself. The effects doctrine is mostly used in matters when prescribing immigration laws and economic offences and has most recently been used by the United States and the European Union in their antitrust legislations.

The final principle which has been used by states to prescribe a conduct as criminal is the universality principle, which is the partial topic of this paper. This principle means that a state can assert jurisdiction over a crime that does not have any of the above-mentioned links to it. The crime could have been committed on the territory of another state by an individual that is not a national of that state, against an individual that is also not its national and that does not have a dilatory effect on its territory, but under the doctrine of universal jurisdiction, the state can still exercise jurisdiction over that crime.

In order to further clarify my point, since, as we have seen, different terms are used for the concept of universal jurisdiction, I will define ‘universal jurisdiction’ – for the purposes of this paper – as the jurisdiction of states to prescribe and prosecute a certain conduct that is directed against

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international norms, values and interests that are deemed to be vital to the community of nations so as to entail universal condemnation as a criminal conduct without any other links to the state prescribing it. This definition offers a combination of two different elements, one that has been put forward by the 2001 Princeton Principles on Universal Jurisdiction, which define universal jurisdiction as criminal jurisdiction based solely on the nature of the crime.\textsuperscript{81} According to the Princeton Principles, the specific heinousness of the crime is what warrants universal jurisdiction over that crime.\textsuperscript{82} I argue that the heinousness of a crime is not a specific enough term for a definition since a murder in most cases is heinous, but it is not something that we associate with universal jurisdiction.\textsuperscript{83} Therefore, I would introduce a second element, brought forward by Theodor Meron; namely, that “these are [...] offences that are recognised by the community of nations as of universal concern, and as subject to universal condemnation”.\textsuperscript{84} The fact that the crime that is committed is directed at the values and interests that are vital to the community of nations as a whole is the element that should define these crimes as falling under universal jurisdiction.

2. **Universal jurisdiction but for what crimes?**

As the *Lotus Case* shows, unless a prohibitive rule of international law exists, states are generally free to prescribe their jurisdiction in a manner that they see fit and for crimes which they deem fit. After saying this, it seems unnecessary to go into any great length as to why states should stop only for a certain number of crimes; and if they should then why only for those and not others. This is not the specific topic of this paper, but suffice it to say that one good reason why states stop at a small number of crimes is strictly prudential: if states prescribe universal jurisdiction for every crime in their criminal codes they would never be able to handle all the cases that come up in the world. A second reason is the fact that not

\begin{itemize}
\item \textsuperscript{81} 2001 *Princeton Principles on Universal Jurisdiction*, Principle 1 § 1, p. 28; which states that, “for the purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”.
\item \textsuperscript{82} 2001 *Princeton Principles on Universal Jurisdiction*, p. 48; which states that “it should be carefully noted that the list of serious crimes is explicitly illustrative, not exhaustive; Principle 2 § 1 leaves open the possibility that, in the future, other crimes may be deemed of such a heinous nature as to warrant the application of universal jurisdiction”.
\end{itemize}
all crimes are recognised as international crimes. Because of the limits of this paper, I will use the list of crimes that has been put forward by the Princeton Principles on Universal Jurisdiction as an authoritative one and point the reader in that direction for a good discussion on the issue. In this part of the paper, I will deal with the nature of the crimes and their peremptory status in international law.

The Princeton Principles list the following crimes: piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. This list is ordered according to historical progression and in no way should it be construed as indicating any preference of one crime over another in terms of their gravity. One can deduct several commonalities that have been discussed in the literature in connection with these crimes. The first common characteristic is that they are all general rules of international law of a customary nature and, therefore, obligatory to all states. Except for crimes against humanity all of the crimes are set down in international treaties which have crystallised into custom or have been codified from custom to treaty. But, this only means that states are obligated to prevent or prosecute the commission of these acts and does not say what jurisdiction should be awarded for them. These rules are of a substantive law nature; they define the conduct that is criminalised and prescribe the criminal responsibility of the individual that commits them. What these rules do not do is settle the issue of jurisdiction of states when it comes to the obligation to prosecute. The narrowest obligation that arises for states from this is to prescribe the conduct as criminal in their domestic laws and prosecute these crimes if they are committed on their territory. Furthermore, these norms deal with the responsibility of individuals and not of states, although they do prescribe certain obligation on states like the obligation to prosecute if they are committed on their territory.

The second common characteristic of these crimes is the fact that they have been recognised by courts or scholars as being peremptory norms of international law or ius cogens. The concept of ‘ius cogens’ saw its first codification in Article 53 of the 1969 Vienna Convention on the Law of Treaties, which stipulates that:

"Article 53 - Treaties conflicting with a peremptory norm of general

86 Ibid., p. 45.
**international law:**
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

But the idea of *ius cogens* itself goes back longer than the drafting history of the Vienna Convention. The idea came to be discussed in the late 1930s, as Verdross wrote his article on *Forbidden Treaties in International Law*, forwarding the notion that there are certain treaties that should not be recognised or enforced by international tribunals because they are *contra bonos mores* or against good morals. He found the source of *ius cogens* in the general principles of law that are common to all nations. He argued that all nations, democratic or totalitarian, restrict the freedom of contract in domestic law by declaring all contracts or agreements that are against the good morals of the given society null and void. He also gives examples of nations and provisions. He later goes on to give four examples of treaties that would be against the good morals of international society.

The outbreak of WW II tabled the discussion for some better time in the future, but this was not for long. The concept was briefly re-visited by Humphrey in 1945, arguing that the development of international relations has produced an international society; and where there is a society there is law *ubi societas ibi ius* and some of that law protects the core values of that society and therefore has priority. The notion that international agreements can be found as producing no legal effect because they are against the good morals of a society, was recognised in a brief reference in a decision of the Military Tribunal in Nuremberg under Control Council Law No 10 in the case of *United States v. Krupp*. The Tribunal said that even if there were a treaty that authorised French prisoners of war to be used in the German armaments industry, those treaties would be void

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under international law as contraire aux bonnes moeurs.\textsuperscript{94}

The debate about the concept of ‘ius cogens’ has been continuing in various different forums with certain authors giving reasons for,\textsuperscript{95} and others giving reasons against the concept or its dangers and its futility.\textsuperscript{96} One of the points of contention about ius cogens norms is their source. Article 53 of the Vienna Convention states that peremptory norms are norms “accepted and recognised by the international community of states as a whole” and therefore puts the source of peremptory norms in the consent of states. Others put the source of ius cogens norms in natural law, international public order, or general principles of international law.\textsuperscript{97} If the source of ius cogens is derived from consent of states, then their applicability is limited only to the law on treaties with regard to the validity and applicability of treaties. For those who see the sources of ius cogens norms in public order, peremptory norms are there to protect the highest values of the community of states and, therefore, are of a higher level in the hierarchy of norms. They also radiate their effect beyond treaty law and can be used in the sphere of the other two sources of international law, which are customs and general principles of international law. As the ad hoc judge Dugard puts it in his separate opinion in the Armed Activities on the

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\textsuperscript{97} See D. SHELTON, “Normative Hierarchy in International Law”, supra note 94, pp. 300-302.
\end{flushright}
"Norms of *ius cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognise the most important rights of the international order – such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community – the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination. This explains why they enjoy a hierarchical superiority to other norms in the international legal order. The fact that norms of *ius cogens* advance both principle and policy means that they must inevitably play a dominant role in the process of judicial choice”.  

The concept of ‘*ius cogens*’ as defined in Article 53 of the Vienna Convention has two major components: first, that it is a superior norm in terms of hierarchy to all other norms of international law that are not of the same stature; and, secondly, in order to produce such an effect it has to be recognised as such by the international community of states as a whole. Decision of international tribunals give some clues as to the first consequences, although the use varies from tribunal to tribunal.

The ICJ for instance has tried to settle the issues brought before it without the help of *ius cogens*. In the *Nicaragua Case*, the Court pronounced the prohibition of aggression as a *ius cogens* norm only as an extra argument in its decision of why to continue with the case, despite the stark objections raised by the United States. It did not elaborate any further on what the consequences of *ius cogens* norms are or how one can identify them. In another decision on *Armed Activities on the Territory of the Congo*, the ICJ went into more detail on their consequences. The Court remained very cautious of using *ius cogens* norms to trump other norms of international law. In the *Armed Activities on the Territory of the Congo Case*, the ICJ, although finding that the crime of genocide set out in the Genocide Convention is of a peremptory character, decided that its *ius cogens* nature is only with regard to the substantive provisions of the Genocide Convention and it does not apply to the provisions on jurisdictional issues. Thus, it could be said that it is similar to the notion that reservations are allowed for provisions of a treaty that are not against its object and purpose and the jurisdictional clauses are not the object or

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99 Ibid., DUGARD, Separate Opinion, § 10.
the purpose of the Convention. Thus, the reservation that Rwanda made when it acceded to the Genocide Convention with regard to the compulsory jurisdiction of the ICJ in disputes arising out of the Genocide Convention cannot be overridden by the *ius cogens* nature of the crime of genocide.\(^{100}\)

The Court seems to leave some room for manoeuvre by saying that a peremptory rules of international law do not exist in terms of the provisions of Article 9,\(^{101}\) which deals with the jurisdiction of the ICJ in relation to disputes arising from the Genocide Convention. Therefore, reservations to Article 9 do not go against the *ius cogens* nature of the norms in the Genocide Convention.\(^{102}\) Future developments seem to depend on how narrow the Court or other bodies interpret the case law of the ICJ. Hopefully, the ICJ or other courts in their future judgments will interpret the decision in the case so as to mean that it is only related to the rules that govern the jurisdiction of the ICJ as just another forum for settling disputes between states. The is the first majority opinion in which the Court specifically enters into a discussion on the issue of peremptory norms and hopefully the Court will have more courage in its next decisions when expanding on this concept. However, for the moment, the conclusion stands that the ICJ seems reluctant to use the concept of peremptory norms to trumph over clearly established concepts like, the consensual character of the jurisdiction of the ICJ.\(^ {103}\)

\(^{100}\) I.C.J., *Armed Activities on the Territory of the Congo* [DRC v. Rwanda], 3 Feb. 2006, § 67; which states that “Rwanda’s reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention; in the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention”.

\(^{101}\) Article 9 of the Genocide Convention confers jurisdiction to the ICJ on any disputes including responsibility for genocide by any state. Disputes between the contracting parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

\(^{102}\) Ibid., § 69; which states that “in so far as the DRC contended further that Rwanda’s reservation is in conflict with a peremptory norm of general international law, it suffices for the Court to note that no such norm presently exists requiring a state to consent to the jurisdiction of the Court in order to settle a dispute relating to the Genocide Convention; Rwanda’s reservation cannot therefore, on such grounds, be regarded as lacking legal effect”.

\(^{103}\) Ibid., DUGARD, Separate Opinion, §§ 13-14; who states that “in the present case, the Court is confronted with a very different situation; the Court is not asked, in the
Other international tribunals have also very rarely used the concept of ‘ius
cogens’. Tribunals that are likely to come across the concept are tribunals
that deal with human rights issues like, the European Court of Human
Rights (ECHR), the European Court of Justice (ECJ), the Inter-American
Court of Human Rights (ACHR) and the International Criminal Tribunal
for the Former Yugoslavia (ICTY). These tribunals have made decisions
concerning ius cogens in different issues. For example, the ECHR, in the
case of \textit{Al-Adsani v. UK},\textsuperscript{104} did not use the \textit{ius cogens} character of the
prohibition of torture to override the issue of state immunity in civil
matters. The Court did not find a violation of Article 6 \textit{-i.e., access to
courts}, when the UK denied standing to Al-Adsani to sue Kuwait for
damages arising out of torture. For the Court, even though the prohibition
against torture has risen to the status of peremptory norm, it still does not
trump over immunities \textit{ratione personae} of states in civil matters, while at
the same time not awarding the same status of \textit{ius cogens} to these
immunities.\textsuperscript{105} This case was decided by a very narrow majority, nine votes
to eight, and the dissenters had their say in the matter. They clearly
recognised the full effect of the concept of \textit{ius cogens} and its overriding
consequence to norms that are not of the same stature. More importantly,
in my view, the dissenters put the source and the purpose of \textit{ius cogens} in
“ordre public; that is, the basic values of the international community,
[which] cannot be subject to unilateral or contractual forms of derogation
from their imperative contents”.\textsuperscript{106} In the words of the dissenting
members:

“Due to the interplay of the \textit{ius cogens} rule on prohibition of torture
and the rules on state immunity, the procedural bar of state
exercise of its legitimate judicial function, to exercise its choice between competing
sources in a manner which gives effect to a norm of \textit{ius cogens}; on the contrary, it is
asked to overthrow an established principle –that the basis of the Court’s jurisdiction
is consent- which is founded in its Statute (Article 36), endorsed by unqualified state
practice and backed by \textit{opinio juris}; it is, in effect, asked to invoke a peremptory norm
to trump a norm of general international law accepted and recognised by the
international community of states as a whole, and which has guided the Court for
over 80 years; this is a bridge too far [...]; for this reason the Court, in the present
instance, has rightly held that although norms of \textit{ius cogens} are to be recognised by the
Court, and presumably to be invoked by the Court in future in the exercise of its
judicial function, there are limits to be placed on the role of \textit{ius cogens}; the request to
overthrow the principle of consent as the basis for its jurisdiction goes beyond these
limits; this, in effect, is what the Court has held”.

\textsuperscript{105} \textit{Ibid.}, §§ 62-66.
\textsuperscript{106} \textit{Ibid.}, ROZAKIS, CAFLISCH, WILDHABER, COSTA, CABRAL BARRETO
and VAJIC, Joint Dissenting Opinion, § 2.
immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on state immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *ius cogens*.

Other courts have used *ius cogens* in other ways. For instance, it can be said that the ICTY, in the *Furundzija Case*, made an intellectual exercise when it went on to find that the prohibition of torture is a peremptory norm of international law, since its findings did not have any effect on the case at hand. The pronouncement that the prohibition of torture is a *ius cogens* norm would not make the guilt of Anto Furundzija any greater under the ICTY Statute. Nor would it help in putting aside the fair trial provisions for a more certain and a speedier conviction. Nevertheless, the Tribunal continued discussing at length the practical implications of *ius cogens* norms on international and domestic norms and, when it comes to the issue of universal jurisdiction, it had to say that:

“Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *ius cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign states, and on the other hand bar states from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for states’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.”

The ECJ, on the other hand, has used *ius cogens* in order to strengthen its somewhat controversial—and, in some circles, unpopular—judgments. In the case of *Kadi v. Council*, the ECJ used the concept of *ius cogens* to imply that it can review the legality of a Security Council resolution regarding the seizure of funds of suspected supporters of terrorists, because it may conflict with the fundamental rights of the human person, which have

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107 Ibid., § 3.
109 Ibid., § 156.
attained peremptory status. It said that “the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible”.

Similarly, the Inter-American Court of Human Rights has used the concept of *ius cogens* to strengthen its somewhat controversial advisory opinion on the rights of undocumented migrants. In this case, the Court noted that non-discrimination has attained the status of a peremptory norm and that it produced certain effects, and that:

“In its development and by its definition, *ius cogens* is not limited to treaty law. The sphere of *ius cogens* has expanded to encompass general international law, including all legal acts. *Ius cogens* has also emerged in the law of the international responsibility of states and, finally, has had an influence on the basic principles of the international legal order.”

The brief case reference in this part of the paper suggests that courts rarely use the concept of *ius cogens* and that they all recognise that in theory they trump other norms of international law that are not of the same stature. But as we have seen in the cases of the ICJ and the ECHR, these courts are not willing to use *ius cogens* to override fairly established rules of international law, like the consensual nature of the jurisdiction of the ICJ and state immunity in civil matters. On the other hand, the ECJ and the ACHR used *ius cogens* as an extra argument in their reasoning for their somewhat controversial decisions. But, one notion for our paper is very important, and that is the fact that the concept of *ius cogens* norms has, in the words of the ACHR, permeated in other regimes of international law beyond the realm of the laws of treaties and can be now used as a yardstick for other concepts and all acts of states.

The second implication given by the definition of *ius cogens* in the Vienna Convention is the questions of how we can recognise a norm of *ius cogens*, what are the criteria for it achieving such a status? A small help is given in the words “recognised by the international community of states as a

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114 *Ibid.*.
whole”, but that does not give many tantalising clues as to what constitutes the ‘international community of states as a whole’ and where one can find that recognition.

The ILC, in its commentaries to the Draft on the Law of Treaties, that later became the Vienna Convention, when elaborating on the concept of *ius cogens*, said that:

“There is no simple criterion by which to identify a general rule of international law as having the character of *ius cogens*. Moreover, the majority of the general rules of international law do not have that character, and states may contract out of them by treaty. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law. Nor would it be correct to say that a provision in a treaty possesses the character of *ius cogens* merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void”.115

*Ius cogens* norms can arise from all sources of international law, custom, convention or general principle, and it is worth noting that “it is not the form of a general rule of international law but the particular nature of the subject-matter with which it deals that may [...] give it the character of *ius cogens*”.116 But the criterion which is set out in Article 53 cannot be easily set aside. The requirement is that the norm is recognised as such by the international community of states as a whole. The question arises that if recognition of the entire community of states is needed, then does that mean that any member of that community has a right to veto the emergence of a *ius cogens* norm? One consequence of that sentence is that it is only states that can give rise to peremptory norms. Opinions and practices of international organisations do not count. This is inherent in the term ‘community of states’. Statements made at the Vienna conference on the Law of Treaties by state representatives give clues to the answer to this question. Every member of the international community does not have a veto power; rather a peremptory norm can come into existence if the essential members of the international community of states recognise it as such.117

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117 See D. SHELTON, “Normative Hierarchy in International Law”, *supra* note 94; E.M. KORNICKER UHLMANN, “State Community Interests, Ius Cogens and
A third common characteristic of these crimes is that their *ius cogens* character under international law cloaks them with obligations that are of an *erga omnes* nature. What that means is that the obligations in question are owed to every member of the international community as a whole and not just towards specifically determined or affected states. Every state has a legal interest in securing the performance of these obligations. A more detailed discussion on the consequences of *erga omnes* obligations is presented in the previous Part of this paper. The problem with *erga omnes* obligations is the fact that they have limited use. This has been revealed in the *East Timor Case*, where the ICJ said that the *erga omnes* character of a norm and the consent to jurisdiction of the ICJ are two separate issues and that because a norm is of an *erga omnes* character it does not mean that the ICJ can rule on the lawfulness of a conduct of a state— in this case, Indonesia— that is not a party to the case.\(^\text{118}\)

**IV. OVERLAP OF THESE CONCEPTS AND ITS CONSEQUENCES**

Traditionally, international law has been seen as an aggregate of norms that governs international relations. As an aggregate of norms it prescribes what states must not do, or prohibitive norms; what states must do, or prescriptive norms; and what they may do, or permissive norms.\(^\text{119}\) The system in which this aggregate of norms exists is a system of juxtaposed states, which at times organise part of their endeavours in specific fields of interest through international organisations. The PCIJ summarised it best when it said that:

“The rules of law binding upon states [...] emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims”.\(^\text{120}\)

A consequence of a system of the sovereign and equal states is a decentralised lawmaking process where there is no ultimate lawmaker who can decide what rule is a legal norm and what is a moral rule. A further consequence is that we cannot *per se* organise the system of norms in a specific hierarchy. If there is a hierarchy of norms then that hierarchy has

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\(^\text{119}\) P. WEIL, “Towards Relative Normativity in International Law”, *supra* note 96, p. 413.  
to be consented to by all states. Even for a norm to be a norm of general international law, it has to be consented to by all states. Doing anything less would “blur the normative threshold”¹²¹ and would create confusion as to what constitutes law, what is a binding legal obligation and what is a moral one. At least, that was the traditional positivist view of international law.

Today, the system of equal states is by and large still in existence, but with numerous distortions in its midst. We have regimes with supranational features that are flourishing, that are quite successful and are multiplying.¹²² We are no longer talking about international relations but of trans-national relations,¹²³ where the interactions that cross the borders of nations are no longer dominated by interactions between states or states and private persons, but overwhelmingly, by private parties. Even the interactions between states on an official level is no longer exclusively done by their ministries of foreign affairs and today we have professional civil servants from different governmental departments, independent agencies, police departments, prosecutorial services and courts interacting with each other.

The sense of an international community is more present than ever before. These three concepts – that is, *ius cogens*, invocation of the responsibility of states by other than the injured state(s) and universal jurisdiction – are at the forefront of it and it is no surprise that they are very much intertwined. The concept of ‘obligations *erga omnes*’ was recognised because of a sense that certain obligations, even though not specifically agreed upon, are common and shared by all states and that every state has an interest in their performance. These obligations are closely linked to core values of the international society – i.e., the peaceful coexistence of nations, the respect for human dignity and the human person –, core values that are of such importance that are elevated to norms of a higher and imperative level. If these norms are violated, then international law creates not only the responsibility of states, but of individuals as well, by creating international crimes and conferring individual criminal responsibility. One segment of enforcement of international crimes is universal jurisdiction, which again is a concept for the protection of communitarian interests.

International crimes, at least those discussed in the Princeton Principles, are of *a ius cogens* nature. The *ius cogens* status of these crimes means that they trump over other norms of international law that are not of the same rank, like state immunity. Even the ECHR, in the *Al-Adsani v. UK Case*, confirmed that there is no state immunity in criminal matters, although they have confirmed it in civil matters *ratione personae*. Their execution is a serious breach of an obligation arising under a peremptory norm, which under Article 41 requires a communal response by all states—even those who are not directly affected by the breach—in order to bring an end to the breach and to counter its effects. States can take several steps on how to bring an end to a breach, but since we are talking here about international criminal law norms, one step would be to create an international tribunal like in the case of the ICTY, ICTR or the International Criminal Court. But states do not always respond adequately as a community and they often fail to respond at all because of political considerations. In such cases, can an individual state hoist up the banner of protecting the communal interests? I submit that the Draft Articles not only codify the obligation to cooperate, but also the obligation to take steps to stop the breach and to counter its effects. It seems logical that the obligation to cooperate would be useless if there was no prior obligation—or, at least, the possibility—of taking the measures to counter the effects of the breach individually. One can not be required to take measures collectively which one would not be required to take individually.

Furthermore, the Draft Articles specifically authorise states to call to responsibility the responsible state even though they are not the injured state. And again, if we develop the concept and transplant it to the realm of individual criminal responsibility, then we can say that any state, although not directly affected by the breach, has an interest in preserving the performance of the obligation. Consequently, it can call on the perpetrator, be it a state—as per Article 48 of the Draft Articles—or an individual, to responsibility. As a consequence to the individual perpetrator, this would mean launching a criminal process against her.

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124 E.C.H.R., *Al-Adsani v. UK*, 21 Nov. 2001, § 65; which states that “the international prohibition against official torture had the character of *ius cogens* or a peremptory norm and that no immunity was enjoyed by a torturer from one Torture Convention state from the criminal jurisdiction of another; but, as the working group of the ILC itself acknowledged, that case concerned the immunity *ratione materiae* from criminal jurisdiction of a former head of state, who was at the material time physically within the United Kingdom; as the judgments in the case made clear, the conclusion of the House of Lords did not in any way affect the immunity *ratione personae* of foreign sovereign states from the civil jurisdiction in respect of such acts”.

125 International Law Commission, *Commentaries to the Draft Articles*, supra note 14, Article 41, § 3.
Calling on the responsibility of an individual is a far smaller intrusion into the sovereignty of states than calling on its state responsibility. If the greater intrusion is authorised, then it is logical to conclude that the smaller one is as well.

We now have to consider the objection that the ILC was silent on the issue of calling for the responsibility of individuals for international crimes. True the ILC did not consider the possibility of a state calling for the individual criminal responsibility for violations of international crimes, although they fall under the concept of ‘ius cogens’ as codified in the Draft Articles. The answer to this objection would be that it was not in the mandate of the ILC to consider this issue, because its mandate was limited to state responsibility and did not include individual criminal responsibility. But creating the obligation to respond to a serious breach of a peremptory norm is not limited to responding only to state actions causing the breach. There are no reasons why the observance of the mandate of the ILC by not discussing issues that were not on its agenda would prejudice this interpretation of the duty to respond and cooperate. We are well aware that today a great number of the breaches of ius cogens norms specifically protected by international criminal law are carried out by non-state actors. It would be silly to think that, because there is no direct state involvement than states that are not directly affected by the breach cannot act to put a stop to the breach and counter its effects.

Furthermore, the Draft Articles themselves do not preclude countermeasures of general interests or the taking of any lawful measures that are not mentioned in its Commentaries. Universal jurisdiction is a lawful measure that can be taken by a state in line with the Lotus standard; i.e., so long as it is not enforced on the territory of another state without that state’s consent. The lawful mechanism in question is the request for help in judicial matters, which is another example of cooperation in order to bring an end to the breach and to counter its effects. And let us remember that states are obliged to cooperate to that effect, which transplanted to individual responsibility would mean that states are obliged to give any assistance available to the prosecuting state. As we know, cooperation in judicial matters is normally carried out through bilateral treaties; extradition being the prime example. What I argue is that even in absence of bilateral treaty commitments of cooperation in judicial matters, the duty to cooperate would extend to all states and that they would be obligated to respond favourably to any request for assistance by the prosecuting state.

The ius cogens nature of these crimes, furthermore, would give them the possibility to trump over other norms of international law and even
domestic law. One such norm that was specifically recognised to be overridden by another *ius cogens* norm was the immunity *ratione materiae* of heads of states in the *Pinochet Case*,\(^\text{126}\) later confirmed in the ECHR’s *Al-Adsani v. UK* judgment.\(^\text{127}\) Although the ICJ did not want to use *ius cogens* to trump fairly established rules of international law, like the consensual character of its jurisdiction, it nevertheless narrowed its decision. It went on to say that the reasons for not using the overriding characteristic of peremptory norms is because the *ius cogens* provisions of the Genocide Convention are only related to the substantive part of the crime and not to the dispute resolution mechanisms in the Convention, like Article 9.\(^\text{128}\)

In order to better explain the concept, I will present a hypothetical case scenario. Let us imagine that in state A there is a civil conflict based on ethnic hatred. A rebel group created on an ethnic basis has seized territory where the majority of that ethnic group resides. It launches attacks from that territory on the civilian population not of its ethnic group in the rest of state A. The attacks can be qualified as crimes against humanity. The government of state A is trying to fight off the attacks, but it is not able to control its entire territory. State A is not a party to the Rome Statute and the backing of one of the permanent members of the UNSC is halting any reference by the Council to the ICC or any other collective action through the UN mechanisms.

In situations like these, although there has been a breach of a *ius cogens* norm, that breach cannot be attributed to state A and, consequently, other states cannot call for its international responsibility.\(^\text{129}\) Nevertheless, the breach itself triggers the duty of states other than state A -since, in this case, it is the one that is directly affected by the breach- to cooperate in order to bring an end to the breach and to counter its effects.\(^\text{130}\) In this scenario, the cooperative endeavour is not feasible because of the insurgent group’s support by a permanent member of the UNSC with veto powers. However, this does not mitigate the duty of other states to try to bring an end to the breach or counter its effects.

Let us now say that state B is shocked by the atrocities committed during the conflict. It has the financial and other resources to prosecute the

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\(^{126}\) House of Lords, *R v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte*, 1 AC 61; 1 AC 147; 2 All ER 97; 2 WLR 827.  
\(^{128}\) See discussion *supra* note 100.  
\(^{129}\) See International Law Commission, *2001 Draft Articles, supra* note 21, Article 10 § 2.  
\(^{130}\) International Law Commission, *2001 Draft Articles, supra* note 21, Article 41 § 1; Commentaries to the Draft Articles, *supra* note 14, §§ 2-3.
individuals it deems responsible and its law on criminal procedure has proscribed universal jurisdiction for crimes against humanity. As we by now know, the *Lotus* standard allows state B to prescribe such jurisdiction, so long as it does not attempt to enforce it on the territory of another state without that state’s permission. It is presumed that the judicial system in state B satisfies the standards of fair trial procedures enshrined in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. And now let us also assume that one of the leaders of the insurgent group has fled state A and is seeking asylum in state C. State B feels that it has sufficient evidence to launch a case against the insurgent leader and files an extradition request with state C.

In this situation, state B has several arguments that it can use in order to persuade state C to cooperate and surrender the insurgent leader for trial. State B can argue that the positive obligations of Article 41 § 1 require state C to join in this prosecution. State B can argue that the prosecution has now become a cooperative effort in order to deter the further continuation of the breach and to counter its effects by restoring the balance of justice. It will say that the essence of the duty prescribed in Article 41 § 1 is focused on putting an end to the breach, not on calling other states to responsibility. It can further argue that the duty in Article 41 § 2 extends to not giving support or safe haven to non-state actors and individuals and not just states, because it would amount to: *first*, the recognition of the legality of his actions; and, *second*, rendering assistance in maintaining the situation caused by the breach. In the case that state C has statutory provisions stating that a person that has applied for asylum cannot be extradited to a third country, state B can argue that the *ius cogens* nature of crimes against humanity would trump not only other international norms, but domestic laws of non-extradition as well.

This situation is designed with the possibility of prosecuting non-state actors in mind, where their actions cannot be imputed to the state where the breach has occurred. But, there is no overwhelming reason why these obligations would not apply to other scenarios that would involve state actors. The obligations to take actions to put and end to a breach and to counter its effects have no limitations that they apply only when dealing with non-state actors. Quite to the contrary, they are designed to apply in terms of state responsibility, where state actors are, by definition, involved. Legally there are no compelling objections why this would not be so. The only objections are of a political or prudential nature and, although valid, they are not part of the examination in this paper.

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V. Conclusion

As the Advisory Opinion on Undocumented Migrants suggests, the concept of ‘ius cogens’ has extended beyond the realm of the laws of treaties where it was first codified and found its place in another codification of the ILC; namely, the Draft Articles on State Responsibility. Consequently, the obligations that are created by these norms go beyond the law of treaties and now not only treaties can be null and void – that is, can be found not to produce legal effects – but also Security Council Resolutions and all other acts. Ius cogens norms produce the effect that if the obligations arising from them are breached then states are obliged to try to put an end to it and to counter its effects by taking lawful measures. More specifically, states are authorised to act in the community’s interest by calling on the international responsibility of the responsible state. The obligation to put an end and to counter the effects of a breach can also be said to transcend the barriers of state responsibility where it first found its place. One of the measures to put an end or to counter the breach which can be undertaken is universal jurisdiction. Universal jurisdiction gives states the ability to prosecute the individuals responsible for that breach and if certain conditions are in place – for instance, the availability of the suspect – this possibility should be used. This does not mean that the states prescribing universal jurisdiction can enforce it on the territory of another state without that state’s consent, because universal jurisdiction is not a substantive provision of these international crimes and has not risen to the status of ius cogens. Quite to the contrary, the sovereign equality of states is a ius cogens norm. But, because of the obligations of cooperation in the Draft Articles, other states would be obliged to give judicial assistance to the prosecuting state as a way of putting an end to the breach and countering its effects.
I. INTRODUCTION

In the wake of increasingly global economic, social and environmental interdependencies, new challenges for traditional forms of governance arise. They prompt the emergence of new forms of governance at the international level beyond traditional international treaty law. International organisations, for example, while often limited in their formal authority to set binding norms, frequently respond to the pressing functional necessities by developing various forms of voluntary instruments. These instruments set standards and prescribe rules of behaviour for public and private actors within the domestic normative space.¹

While traditional international lawmaking safeguarded the conceptions of state sovereignty through consent and ratification requirements as well as the doctrine of subjects of international law, and thereby upheld a clear distinction between the international and domestic normative space, these new forms of governance contribute to a blurring of this distinction.² International norms aim at directly regulating private actors, and representatives of the national executive cooperate in international bodies and implement the resulting rules at home even without formal transposition or ratification. As the domestic legal sphere is thus penetrated and determined by the international legal sphere in new ways and through new processes, traditional forms of legitimacy connected to the traditional sources and procedures of law-making are called into question.

In the ongoing global scholarly effort of finding new forms of legitimacy and accountability for phenomena of global governance and

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administration,³ we believe that it is paramount to take a close look at the actual functioning of particular instruments in specific regimes and issue areas, namely the field of behavioural standards in sustainable development. The diversity and fragmentation of international cooperation and administration requires a detailed regime and instrument-specific analysis of the functions and impact of the activities before one can assess and prescribe on how to improve legitimacy and accountability of such instruments. One can certainly perceive many different approaches to such an analysis. Considering that legitimacy was "in the world of traditional international treaty law" secured to a considerable extent by the proviso of domestically legitimated implementation procedures, we look at how new instruments diverge from these traditional ways. In other words, to reconsider the junctures of the domestic and international law for specific areas of governance and specific instruments will help to identify whether and why new legitimacy challenges arise from new developments.

With this paper, we attempt to provide such an analysis for the area of instruments of sustainable governance by looking at the various modes of how the norms of these instruments determine and thus internationalise domestic administration. By concentrating on a limited number of similar but nevertheless sufficiently diverse international codes of conduct that address sustainable development issues (Part II), we strive to strike the balance between specificity and generalisation. Our subsequent analysis aims to provide not only a detailed account of the impact and influence of such norms, but more importantly attempts to establish a taxonomy of various modes of implementation indicating various ways in which these norms directly determine administrative or private action (Part III).

We thereby aspire to underscore existing theoretical assumptions on the impact of nonbinding norms on domestic law with examples. While there is a growing body of scholarship investigating the emergence of global administration and administrative law, detailed accounts of the impact on the national administrative law and governance are rare.⁴ Even though the analysis takes German administrative and constitutional doctrine as a point of departure, it carefully draws general conclusions on the impact of

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³ The global administrative law project at New York University has inspired a global debate; see the project's website: http://iilj.org/GAL/default.asp; compare also the results of an international conference on legitimacy at the Max Planck Institute for Comparative Public and International law, in R. WOLFRUM and V. RÖBEN, Legitimacy in International Law, Heidelberg 2008.

⁴ For notable exceptions in German scholarship, see B.-O. BRYDE, Internationale Verhaltensregeln für Private – Völkerrechtliche und verfassungsrechtliche Aspekte, Frankfurt am Main, 1981, pp. 21-41; C. TIETJE, Internationalisiertes Verwaltungsverhältnis, Berlin, 2001, which has a clear focus on binding international instruments.
such norms with the help of examples from other legal cultures, owing to the fact that administration functions differently throughout legal cultures. Administration is thus widely understood as the self-dependent formation and organisation of a polity within the legal framework through measures aimed at realising the objectives promulgated by legislation. For the sake of reducing complexity, we omit possible interrelationships between international nonbinding norms and international treaty law, since our focus is on direct implementation into domestic law and administrative action. This process of implementation may in some cases but not necessarily be indirectly enhanced through treaty law incorporating soft law. Throughout the analysis and in our conclusion we attempt to juxtapose the identified taxonomy of modes of implementation with specific legitimacy challenges arising in each particular case, thereby indicating the need for reform and further research (Part IV).

II. INTERNATIONAL CODES OF CONDUCT

Three expressly voluntary codes of conduct and the activities pertaining to their implementation provide the background for this study. The selection stands for three fundamental regulatory problems in international (environmental) affairs, namely common goods protection, trade of dangerous goods and regulation of multinational enterprises, which had at least at the time of the adoption of the instruments not been adequately addressed by international law. Instead, international organisations attempted to fill the regulatory gap with nonbinding codes of conduct and various international compliance-enhancing mechanisms. The three cases therefore illustrate efforts of international organisations to respond to functional necessities with expressly voluntary instruments in the absence of international regulation by states.

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7 Cf FAO Code of Conduct on Responsible Fisheries, Article 1; FAO Code on the Distribution and Use of Pesticides, Article 1 § 1; OECD Guidelines for Multinational Corporations, § 1.
1. **Fisheries regulation: The FAO Code of Conduct for Responsible Fisheries**

The Code of Conduct for Responsible Fisheries (henceforth, “CCRF”) was unanimously adopted by the FAO Conference on 31 October 1995 as part of a resolution. The CCRF is explicitly voluntary (Article 1 § 1). The central aim of the CCRF is to ensure sustainable exploitation of aquatic living resources in harmony with the environment. It contains principles and proposes measures and policies for better conservation, management, and the utilisation of marine living resources, as well as standards regarding trade and marketing of fish. It is meant to apply to all fisheries. Addressees of the Code are all states irrespective of their membership to the FAO, but also governmental and non-governmental regional and global organisations as well as fishing entities and all persons engaged in activities related to fisheries.

The main document of the CCRF is further supplemented by numerous more precise Technical Guidelines on Implementation and Supplementary Guidelines and by several International Plans of Action. A salient feature of the CCRF is the follow-up mechanism by which the FAO attempts to enhance the implementation of the Code. In addition to extensive compliance assistance programmes directed mainly at capacity building and support of developing countries, the FAO has established what can be classified as a reporting and monitoring system. According to this system, “members would provide information on national implementation using a questionnaire to be designed by the Secretariat”.

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11 It had been agreed upon by the FAO Council at its 112th session in 1997 following a proposal from the Committee on Fisheries (COFI); FAO COFI, *Report of the 22nd session of the Committee on Fisheries*, 17-20 Mar. 1997, FAO Fisheries Report No 562 FIPL/R562 (En), § 29.
2. Regulation of pesticides and chemicals: The FAO Pesticide Code and UNEP’s London Guidelines as precursors of the PIC Convention

The FAO International Code of Conduct on the Distribution and Use of Pesticides (henceforth, “Pesticides Code”),\textsuperscript{12} adopted by the FAO Conference in 1985, and the UNEP London Guidelines for the Exchange of Information on Chemicals in International Trade\textsuperscript{13} adopted as a decision by UNEP’s Governing Council in 1987, represent an outstanding example of the successful joint effort of two international organisations to use nonbinding codes of conduct to establish and implement international standards on pesticide and chemical regulation. In 1989, both organisations amended their respective instruments to include the principle and procedure of “prior informed consent” (henceforth, “PIC”). The voluntary procedure provided the basis for the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (henceforth, “PIC Convention”). It was adopted in 1998 and entered into force in 2004 and largely reflects the voluntary procedure.

3. Regulation of corporate behaviour: The OECD Guidelines

The OECD Guidelines for Multinational Enterprises (henceforth, “OECD Guidelines”)\textsuperscript{14} were adopted in 1976 as part of a declaration on international investment and multinational enterprises and extensively revised by 2000. The Guidelines and their procedures of implementation are remarkable for the comprehensive notice-and-comment procedures which ensure broad participation of advisory bodies, including NGOs, via OECD Watch. The Guidelines establish explicitly voluntary\textsuperscript{15} standards of behaviour for business enterprises operating in and from adhering countries. The aim of the Guidelines is to improve corporate responsibility in a broad range of areas as diverse as human rights, labour relations and consumer protection and, since 1991, environmental stewardship. Although mainly directed at enterprises, the Guidelines equally address governments, as is illustrated by their recommendation that governments should encourage and promote the use of the Guidelines by the enterprises operating from their territory.\textsuperscript{16} Although formally adopted as a

\textsuperscript{13} UNEP Governing Council, Decision 14/27, 17 June 1987.
\textsuperscript{15} OECD Guidelines, Chapter I, § 1 reads: “observance of the Guidelines by enterprises is voluntary and not legally enforceable” [emphasis added].
\textsuperscript{16} OECD Guidelines, Chapter I, §§ 2 and 10.
declaration outside the framework of the OECD, the OECD Council immediately after the adoption decided\textsuperscript{17} that the OECD would take over the task of implementing the declaration.\textsuperscript{18} In line with the general approach of the Guidelines to directly address enterprises, the thus-developed international implementation procedures comprise a remarkable complaint procedure allowing interested persons or groups to challenge activities of multinational enterprises.

III. A TAXONOMY OF MODES OF IMPLEMENTATION:
HOW INTERNATIONAL CODES OF CONDUCT ENTER THE NATIONAL NORMATIVE SPACE

1. Policy-making and action plans

One objective of codes of conduct is to change the general policy of a state.\textsuperscript{19} This may occur through parliamentary or executive legislative acts, but mostly it is not undertaken by the administration itself but by the governing part of the executive. This is not a legal effect strictly speaking. Yet, it furthers implementation by legislation and administrative action and therefore, in the long run, it has legal consequences, also by serving as a point of reference for future legislation or lower level administrative action.

For example, the influence of the CCRF and its accompanying International Plans of Action at the policy-making level of the EC is clearly visible. The Green Paper on the Future of the Common Fisheries Policies adopted by the EC Commission expressly draws on the CCRF as an expression of the “large worldwide consensus on the overall objective of fisheries policy”\textsuperscript{20} when suggesting the basic principles of the new policy.\textsuperscript{20} Furthermore, the International Action Plans are implemented by Community Action Plans and expressly referred to.\textsuperscript{21} Codes of conduct are

\textsuperscript{18} \textit{Ibid.}, Preamble.
thus used as a source of authority for new strategies.

Comprehensive policies by national governments raise awareness with local authorities to the issues of the codes of conduct and change their behaviour—formally based on law or not—when applying administrative measures. This is reflected by the ‘call’ to the local governments of the coastal states of India to translate policy into action by setting up legal tools and implementing mechanisms while directly referring to international obligations under the CCRF. The change in paradigms in fishery policy is supposed to mirror every component of the CCRF.  

2. Specific legislative implementation: Establishment of a legal framework for administrative action

The nonbinding nature of the instruments does not prevent states from legislating accordingly. Nonbinding international standards then alter national law as national legislation in the spirit and sometimes even with the wording of the codes of conduct is adopted or references to international codes of conduct are included in legislative acts.

Even though changes in the ‘law in the books’ may not always translate into actual environmental improvement and major implementation problems—in particular in developing countries—severely limit actual environmental effectiveness, formal compliance with nonbinding


The impact of the codes of conduct is not limited to less developed countries. For instance, seventy percent of the FAO member states are using the vessel monitoring systems recommended by the CCRF. Yet, established legal orders recur less often to international instruments, as frequently the existing legislative instruments had already been in accordance with the international codes. The Indian government, for instance, stresses that the “Insecticide Act, 1968, and the rules framed there under take care of [...] all the provisions of the Code of Conduct” on the Distribution and Use of Pesticides. Likewise, according to the Implementation Plan for the Code of Conduct for Responsible Fisheries by the U.S. National Marine Fisheries Service, the ideas of the CCRF had already been part of U.S. fisheries legislation before the CCRF had been implemented.


28 One has to be careful to conclude from the existence of laws in conformity with the international codes that this is always due to compliance with international law as many (Western) laws date from before the negotiation of the 1985 Pesticides Code or the 1995 CCRF respectively. Especially in Canada, the change of attitude towards exploitation of marine resources had occurred before the CCRF and had even furthered and largely influenced its negotiation. See Canadian Fisheries, Responsible Fisheries Summary, Code of Conduct for Responsible Fishing Operations, Dec. 2003, available through Fisheries and Oceans Canada.

negotiated. However, the 1976 Magnuson-Stevens Fishery Conservation and Management Act had to be amended by the 1996 Sustainable Fisheries Act in order to capture most of the principles of responsible fisheries in Articles 6 to 8 of the CCRF.

a. The need for legislative implementation

Code-specific legislation is the only way the legislature can oblige the national administration to respect and implement the nonbinding international standards. In contrast to international treaties, nonbinding codes of conduct neither become part of the national legal order for monist systems nor do they have to be transposed into national law for dualist systems. Thus, the national administration is not per se legally bound by them. State action in relation to its citizens is only possible within the framework of the respective administrative and constitutional law. As administrative power is delegated power that can only be exercised within the framework of law and in reliance on competences assigned by the legislature, the legislature has to transform codes of conduct into binding national law if it strives to guarantee compliance. Without a specific legislative act, specific actions in accordance with the respective code of conduct would not be guaranteed but be dependent on the respective inclination of administrative officials and the breadth of their discretionary power. Legislation is thus used in order to ‘program’

33 For the German legal order, see C. TIETJE, Internationalisiertes Verwaltungsverhalten, supra note 4, pp. 608-613 and 622-623; who emphasises that Article 20 § 3 of the German Constitution “all state power is bound by law and statutes” obviously does not include non-binding international norms, nor does Article 59 § 2 of the German Constitution, which demands that international treaties have to be transposed by national statutory law.
34 European Commission, Action plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002, COM (2002) 180, Article 2 § 2, “to give binding effect to […] instruments”; the European Commission further proposes that Community rules banning trade in fishery products taken in breach of international agreements on responsible fishing are adopted, thus seeking an efficient way to enforce norms on responsible fishing; although the action plan speaks of “international agreements”, the nonbinding CCRF is likely to be included, as the European Commission explicitly refers to the CCRF and the Action Plan to prevent illicit, unreported and unregulated fishing by the FAO-COFI of 23 June 2001 in the introduction.
35 See infra, for an analysis of implementation without specific legislative acts: Part III, C, 2 and 3.
administrative behaviour in the spirit of the codes of conduct. Transposing nonbinding international standards into binding national law carries the advantage of preventing legal uncertainty. Moreover, uniform legislation within one state guarantees a level playing field for private actors.

Legal acts are also needed to underscore a change in policy by introducing new institutions, instruments and agencies competent to enforce and implement the legislation in accordance with the code of conduct. This appears to be the first essential step to face institutional shortcomings identified by the FAO as a fundamental problem in the implementation of the codes. For example, the Indian government established a Coastal Aquaculture Authority in order to promote environment-friendly and responsible aquaculture. Also, the number of developing countries without an approved legislative authority to regulate the distribution and use of pesticides has significantly decreased between 1986 and 1993 after the Pesticides Code had been elaborated. Likewise, the government of the Republic of Korea adopted a full pesticides registration scheme

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36 This is proposed by A. FAGENHOLZ, “A Fish in Water: Sustainable Canadian Atlantic Fisheries Management and International Law”, University of Pennsylvania Journal of International Economic Law, 2004, pp. 639-667, at p. 641; see also D.J. DOULMAN, Requirement for Structural Change, supra note 19, Heading V.


pursuant to Article 3 and Article 6 § 1 (2) of the Pesticides Code.\textsuperscript{41}

A transposition into national law also becomes indispensable when codes do not contain detailed rules, but rather define goals which can be reached by different means. For example, Article 7 § 6 (9) of the CCFR reads “states should take appropriate measures to minimize waste, discards, catch by lost and abandoned gear”; therefore, leaving a broad margin for the state to decide how it is going to fulfil this ‘obligation’ and leaving leeway to adapt laws to national particularities.\textsuperscript{42} Legislation that defines the means of administrative and factual implementation then becomes indispensable. This task of defining the national policy should rest to a large amount with the national legislator as the directly legitimated sovereign.\textsuperscript{43}

A similar need for legislative transformation exists when states – perhaps for reasons of capacity - prefer to ‘pick and choose’ from the practices of the code when enacting national legislation;\textsuperscript{44} i.e., they do not transfer the complete code of conduct, but only those provisions that suit their policies or fit with the existing laws. For example, Council Regulation 2371/2002/EC on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy\textsuperscript{45} strikes a balance between word-to-word transferrals like Article 2 § 2 (i) of Regulation 2371/2002/EC - which mirrors Article 7 § 5 (1-2) of the CCRF-, and its own measures filling in the margins like in Article 7 § 1 (7) of the CCRF. Accordingly, many countries report that “large proportions of the CCRF […] have been


\textsuperscript{42} Cf D.J. DOULMAN, Requirement for Structural Change, supra note 19.

\textsuperscript{43} Although the codes are mainly addressed to the state in general, it is mostly seen as the duty of the legislation to create an enforceable background for state policies; see, e.g., H. LAZOU MÄR, “Législation phytosanitaire”, supra note 38, pp. 19-20, who emphasises the duties of the legislative power to vest the administration with powers to regulate certain areas of pesticide control.


“assimilated into national legislation” [emphasis added] rather than directly ‘translated’ from international codes of conduct.

b. Problems and benefits of ‘programmed legislation’

One should not overlook that international codes of conduct often provide—in particular, through supplementary instruments and guidelines—for rather detailed norms prescribing the means of implementation. If followed, codes of conduct therefore often serve as a sort of blueprint for legislation; a feature which renders codes of conduct particularly useful for those countries regulating the issue for the first time and lacking the resources and capacity for drafting adequate legislation. Legislation is then closely oriented by the wording of the codes of conduct and their technical guidelines. For example, the proposal for a revised Marine Fishing Regulation Act in India contains a strict ban on all types of destructive methods of fishing, closely resembling Article 8 § 4 (2) of the CCRF; “states should prohibit dynamiting, poisoning and other comparable destructive fishing practices”.

Despite the specific legislative enactment, such ‘programmed legislation’ may raise particular legitimacy challenges. The main concern is the factual shift of norm making to the international level. Even though this may not per se contravene constitutional provisions as long as basic principles of

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48 Indian Comprehensive Marine Fishing Policy, supra note 22, Article 5 § 4.


50 So far, the transfer of international law into national law has been called “parallel legislation”; cf P. KUNIG, “The Relevance of Resolutions and Declarations of International Organisations for Municipal Law”, in G.I. TUNKIN and R. WOLFRUM, *International Law and Municipal Law*, Berlin, 1988, pp. 59-78, at p. 65; to underscore the fact that national law, which is enacted in a parallel process, mirrors international law; as this complete transfer is rather seldom, the term ‘programmed legislation’ seems more adequate, reflecting the triggering of legislative processes through international codes of conduct with a foreseeable outcome.
democratic legitimation are respected,\(^{51}\) the discussion of legislative options that should take place in the national parliaments is transferred to the international level, where it is conducted by representatives of the executive branch without direct participation and often insufficiently controlled by the national legislatures. To the extent that parliaments – often overwhelmed by the technical complexity of the issue and politically unable to unwrap the international ‘package deal’ – only copy and rubberstamp the international instrument, debate on such norms and the balancing of interests in fact shifts from the national to the international. This poses legitimacy challenges for control of the executive by national legislature as well as norm elaboration and decision-making procedures at the international level.\(^{52}\)

A further if unrelated problem particularly of programmed legislation is the loss of flexibility. Once the transposed codes are ‘petrified’ in municipal law, modification is difficult and national implementation does not keep pace with international changes.\(^{53}\) Codes of conduct are supposed to initiate law-making processes, but they are not their result; thus, legislation that follows the wording too closely terminates this process.\(^{54}\) In order to tie national legislation to the international developments, parliaments have to either periodically review national legislation and revise it every time a modification at the international level takes place – and thus give up their authority to decide on the birth and life of a legislative act – or have to recur to dynamic references to international norms in national legislation. The latter is however not completely free from legitimacy concerns, as the following discussion will show.

c. Implementation by reference

Another way to determine national administrative behaviour is to incorporate a reference to international law in a national statute. Referencing occurs either by direct reference to a specific code, like in § 23 (1) of the German Plant Protection Act,\(^{55}\) which particularly mentions

\(^{51}\) In German law, the question of whether Article 59 § 2 of the Constitution prohibits transposition of soft-law norms was very much discussed; see, for an overview, C. ENGEL, *Völkerrecht als Tatbestandsmerkmal deutscher Normen*, Berlin, 1989, pp. 246–250, who reaches the conclusion that a transposition is permissible. This will be discussed in more detail in the final considerations.

\(^{52}\) See C. ENGEL, *Völkerrecht*, supra note 51, pp. 247–249.


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the Pesticides Code as a norm to be taken into account, or by the general notion that international standards or agreements have to be considered. Following § 23 (1) of the German Plant Protection Act an export license for pesticides may only be granted if the Pesticides Code is respected. This means that the issue is directly conditioned by international nonbinding standards which thereby gain binding force.

The use of such a dynamic reference, which always refers to the version of the international instrument currently in force, guarantees that the flexibility of international codes of conduct is safeguarded and reflected. In that sense, dynamic references can be perceived as the legal ideal of the principle of international cooperation, as the process of determination and filling-in of norms is left to the international level. References also lead to an enhanced harmonisation of rules governing certain areas as there are the same benchmarks for administrative and private behaviour everywhere. National unilateralist leanings are hence prevented.

Yet, such dynamic references are often problematic from the point of view of national constitutional law. As can be seen with § 23 (1) of the German Plant Protection Act, the legislator, instead of defining the further criteria for an export permit itself, leaves the administration to choose the applicable principles from the Pesticides Code and to interpret the partly vague terms. On the one hand, this gives leeway to the administration and thus strengthens its position and at the same time renders nonbinding norms capable of being adjudicated and enforced; on the other hand, such a general reference might contravene principles of non-delegation and of definiteness of the wording of enactments. In addition, dynamic references pose a problem of legal clarity and security, as for its addressees it is

56 2003 Tanzanian Fisheries Act, Article 8 § 3 appears to be another example; stating that “a local authority with the responsibility to exercise functions in accordance with the provisions of this Act, Code of Conduct for responsible fisheries”; however, the function of the reference remains unclear, as it might also only define the kind of local authority more closely without explaining which role the CCRF plays in this context. An Act to repeal and replace the Fisheries Act, 1970, to make provisions for sustainable development, protection, conservation, aquaculture development, regulation and control of fish, fish products, aquatic flora and its products, and for related matters, United Republic of Tanzania, No 22 of 2003, 13 Nov. 2003, http://faolex.fao.org/docs/pdf/tan53024.pdf.
57 C. TIETJE, Internationalisiertes Verwaltungshandeln, supra note 4, p. 605.
58 See E. REHBINDER, “Das neue Pflanzenschutzgesetz”, Natur und Recht, 1987, pp. 68-74, at p. 71; stating that one of the incentives for the reference to the Pesticides Code in the 1986 German Plant Protection Act, supra note 55, § 23 (1) was to prevent an isolated German solution to problems connected with the export of pesticides.
59 For this principle as a basis of American administrative law, see J.M. BEERMAN, Administrative Law, New York, 2006, pp. 9-14.
unclear which rules are binding and currently in force. It might also be uncertain to what extent the international norm is referred to.\textsuperscript{60}

As opposed to static references where the legislature incorporates a known and defined body of law into national law, dynamic references open the national legal order to changes that are not undertaken by the national legislature but by representatives of the governing branch on the international level.\textsuperscript{61} The extent of future modifications is often not even foreseeable. Thus, parliamentary control and responsibility for the precise content is lost and the question of democratic legitimacy is even more crucial than in cases where international soft-law norms are directly transferred into municipal law.\textsuperscript{62} From the perspective of German constitutional law, however, these aspects are only problematic in two situations: first, if the subject at stake constitutionally requires a parliamentary decision, for example when fundamental rights are concerned, and second, if the reference is so vague that the international legislator is completely free in enacting and modifying the international instrument.\textsuperscript{63}

In any case, a dynamic reference to an international instrument also poses the kind of legitimacy questions already hinted at in relation to programmed legislation, but with more urgency. While programmed legislation, although possibly shifting the debate to the international level, guarantees a legislative approval of the instrument, a dynamic reference surrenders even the possibility of a veto and therefore curtails the role of the parliament and in particular that of the opposition which loses the possibility to contest particular developments.

d. Implementation through nonbinding national codes of conduct

So far, we have only looked at transposition by legislative acts that consequently alter the content and structure of national legal orders by incorporating norms of international provenience. Particularly codes of conduct may enter the ‘legal’ sphere of the national legal order through yet another gateway. Following a trend to move beyond mere command-and-control regulation, municipal legislatures refrain from enacting legislation in accordance with the codes, but rather extrapolate the voluntary,

\textsuperscript{60} For German law, see Federal Administrative Court, BVerfGE 47, 285, 311.
\textsuperscript{61} C. TIETJE, \textit{Internationalisiertes Verwaltungshandeln, supra} note 4, p. 601 and pp. 603-616.
\textsuperscript{62} This problem has been widely discussed in German constitutional law; see, for further references, C. ENGEL, \textit{Völkerrecht, supra} note 51, pp. 41-43; C. TIETJE, \textit{Internationalisiertes Verwaltungshandeln, supra} note 4.
\textsuperscript{63} C. ENGEL, \textit{Völkerrecht, supra} note 51, p. 42.
flexible, bottom-up approach of international codes of conduct, which count on the participation and support of local private actors, by encouraging or even relying on national private codes of conduct. One interesting example from another issue area is the German implementation of the European Code of Conduct for European firms operating in South Africa\(^{64}\), where the parliament expressly refrained from legislative implementation.\(^{65}\)

With respect to the CCRF, the Canadian Code of Conduct for Responsible Fishing Operations\(^{66}\) is a grassroots initiative designed by fishermen and prompted by the Canadian government in order to address the diverse needs of Canadian fisheries by encouraging a non-regulatory approach.\(^{67}\) The implementation and ratification were overseen by the Canadian Responsible Fisheries Board and a secretariat until 2003.\(^{68}\) Surprisingly, the national code of conduct does not only mirror the content of the CCRF, but also its elaboration process was quite comparable to that of international agreements or parliamentary acts in a federal system. A consensus code was agreed upon by sixty representatives from all fishing industry sectors in 1998 and had then to be ratified by the local fisheries organisations; mainly by direct voting of fishermen within their organisation.\(^{69}\) Thus, its enactment followed a quasi-parliamentary process, which surely added to its legitimacy and credibility. So far, the Canadian Code of Conduct has been ratified by sixty Canadian fisheries organisations representing eighty percent of the landings. This reliance on

\(^{64}\) Ministers of Foreign Affairs of the Member States of the EEC, *Code of Conduct for Companies with Subsidiaries, Branches or Representations in South Africa*, 20 Sept. 1977, Bull. EC 9-1977, pp. 46-47; this Code provided guidelines on how to do business in an apartheid environment; it included measures on equal pay, access to education, non-discrimination in the workplace and the recognition of trade unions.


\(^{68}\) See Canadian Fisheries, *Responsible Fisheries Summary: Code of Conduct for Responsible Fishing Operations*, Dec. 2003, available through the Department of Fisheries and Oceans of Canada; in May 2003, the Canadian government withdrew funding and staff support for the Responsible Fisheries Board; since then, the execution of the Canadian Code of Conduct lies solely with the Responsible Fisheries Federation, a private board composed of representatives of different Canadian fisheries and fishery associations without any involvement by the state; see Parliament of Canada, *Briefing session with the Canadian Responsible Fisheries Federation*, 37th Parliament, 3d Session, 27 Apr. 2004, http://cmte.parl.gc.ca.

private self-regulation is seen as a fundamental change in Canadian fisheries management.\(^{70}\)

In the context of the reform of the Common Fisheries Policy, the EC Commission has developed a voluntary European Code of Sustainable and Responsible Fisheries Practices directed at its fishing sector which is based on the framework of the CCRF\(^ {71}\) and, thereby, encourages responsible fishery practices within the EU with the enhanced authority of the EC Commission.

3. **Administrative implementation in absence of code-specific parliamentary legislation**

Although it carries the advantages spelled out above, specific legislative action is not the only way through which nonbinding norms can enter the domestic legal sphere. In fact, one of the distinctive characteristics of nonbinding instruments remains the possibility of implementation without ratification and a corresponding legislative act, through administrative activity. Provisions of the international codes of conduct then directly serve as guiding norms for administrative action without any legislative basis.\(^ {72}\) This may in particular occur in legal orders where there are no or insufficient laws regulating a particular issue area,\(^ {73}\) since in this case administrative action might be the only way to implement the ideas of the codes of conduct.\(^ {74}\)


\(^{73}\) Cf D.M. PALLANGYO, “Environmental Law in Tanzania: How Far Have We Gone?”, 3/1 *Law, Environment and Development Journal*, 2007, http://www.lead-journal.org/content/07026.pdf, pp. 26-35, at p. 34; on the state of Tanzanian environmental protection laws in 2007; see also FAO, *Analysis of Government Responses, supra note 23*, Article 7; “forty-three percent of developing countries [...] did not have any regulations in force to be able to restrict the availability of pesticides [...]”.

\(^{74}\) The FAO states that “several developing countries indicated that they were actively relying on the provisions of the Code and the Technical Guidelines concerned for guidance in controlling the introduction and use of pesticides” in *Analysis of Government Responses, supra note 23*. 
At least from the perspective of a German lawyer who is accustomed to the requirement or _proviso_ of parliamentary authorisation for any administrative activity, direct implementation of international codes of conduct by administrators is largely a question of the width of the margin of discretion left to the administrator in the relevant legal system and culture. In legal orders like the German, which are foremost based on material criteria, administrative action has to be mostly conditioned by legislation, whereas in legal orders like the French or the English, which rely on procedural justice, the requirements of the codes of conduct are more easily introduced directly via administrative discretion. Some form of ‘permission’ by the legislator—even if not necessarily code-specific—to take international standards as a basis of administrative decision-making is thus a precondition for administrative implementation from a German perspective. Yet, these permissions can be rather vague or not directly aimed at introducing international codes of conduct. As a result, and in contrast to treaty law implementation which always requires the specific legislative act of ratification, the administrative branch may implement codes of conduct on their own discretion even if the parliament has never considered the issue. In consequence, international soft law—if compared to treaty law—allows for a growing emancipation of the administrative branch from the legislative branch since it is enabled to recur to international standards and thus its basis for decisions is broadened. A growing reliance on nonbinding international instruments as a form of international cooperation therefore challenges traditional conceptions of legitimacy of international acts at the national level.

Given the interest of this paper in different modes of implementation

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75 For the European context, see R. BREUER, “Zunehmende Vielgestaltigkeit der Instrumente im deutschen und europäischen Umweltrecht – Probleme der Stimmigkeit und des Zusammenwirkens”, _Neue Zeitschrift für Verwaltungsrecht_, 1997, pp. 833-845, at p. 837; who points out that, different from Germany, most states, like England or France, rely on a wide margin of discretion for the administration and a minimum of material requirements for administrative action.

76 R. BREUER, _ibid._, p. 836.

77 See also J.M. BEERMAN, _Administrative Law_, supra note 59, pp. 3-4; “congress often instructs an agency in very broad terms and leaves important matters to agency discretion, including […] the requirements for obtaining the various benefits, licenses, and permits administered or required by federal law in numerous areas”.

78 C. TIETJE, _Die Internationalität des Verwaltungstaates – Vom internationalen Verwaltungsrecht des Lorenz von Stein zum heutigen Verwaltungsverhalten_, Lorenz-von-Stein-Gedächtnisvorlesung No 4, Kiel, 2001, p. 22; who talks about internationalisation in general; however, the influence of soft-law norms could even be stronger, as contrary to treaties they do not have to be transposed and thus stay on the international level.
which may each trigger distinct legitimacy challenges, one should distinguish between the adoption of legal acts or internal guidelines by the administration, and further between regulative, distributive and non-regulative or informal modes of implementation in individual decisions as used in the following analysis.

a. Implementation through administrative law-making

In most states, the executive branch is entitled to enact its own regulations in order to concretise parliamentary acts, specify technical requirements or regulate a limited area. Based on an authorisation by law, those decrees, regulations or ordinances can mirror international codes of conduct.

For example, Article 27 of the 2007 Canadian Bill for the Fisheries Act entitles the minister to enact regulations that specify eligibility criteria for a fishing licence. As Article 25 § 2 (g) allows the minister to take into account “any other consideration that the minister considers relevant” when exercising his powers, he can include ideas of the CCRF into binding administrative law and thus make adherence to the CCRF a condition for the granting of licences.79

In Cambodia, the implementation of a pesticides management scheme compliant with the Pesticides Code was mainly effectuated by Sub-decree No 69 on the standard and management of agricultural material80, which regulates -together with the Prakas No 245-81 detailed procedures of registration, import, export, permits, packages, labels, disposal of empty containers, sale, advertisement, trader obligations, control and management.82

As already indicated above, this mode of influence may result in implementation of a code of conduct without specific parliamentary approval. If the ordinances are closely worded after the codes of conduct,83

80 Sub-decree No 69, supra note 49, Annex 1.
82 The same is true in Viet Nam, where the Ordinance on Plant Protection and Quarantine, Công Bão No 37, 8 Oct. 2001, pp. 3-10, http://faolex.fao.org/docs/pdf/vie35158.pdf, has been revised in order to include pesticide regulations and Decision No 121/1999, 25 Aug. 25 1999, Official Gazette No 44 (30-11-1999), pp. 13-18, on permitted pesticides, has been enacted due to the FAO Pesticides Code; see also DO VAN HOE, “Report on Viet Nam”, supra note 47.
83 See, for example, Article 20 of the Sub-decree No 69, supra note 49; where Cambodia uses nearly the exact wording as Article 8 § 1 (2) of the Pesticides Code.
or make use of dynamic references, the administration may even leave the delegated law-making power de facto to an international organisation. This may foster trans-national unification of administrative knowledge and action, as the ideas behind the ordinances stem from the same source.

b. Implementation through regulative administrative action

An important administrative task is to regulate public life by responding to and preventing individual dangers to public safety. This is mainly done by means of control, licenses and prohibitions, but also by administrative sanctions and other measures that take place after an infringement has occurred.

The international codes of conduct refer surprisingly often to these traditional administrative means, for even though the codes are nonbinding, control of private actors by the state appears to be the most effective way of realising the goals manifested therein. For example, Article 7 § 1 (7) of the CCRF reads:

“States should establish [...] effective mechanisms for fisheries monitoring, surveillance, control and enforcement to ensure compliance with their conservation and management measures”.

i. Use of margins of discretion

If the legislature has not programmed administrative action by material legal requirements, implementation of codes of conduct is up to the discretion of the administrator within the margin opened by law. Since the administration is granted scopes of decision in order to optimise administrative decisions, sufficiently precise provisions of international codes of conduct could and should serve as a benchmark for an internationally agreed-upon optimum. Exercise of discretion in the light of the codes of conduct—for example, requiring fishers to use only environmentally safe fishing gear or distributors of pesticides to reduce risks to human health—is valid, even if there is no transposing law.

Regulation of private behaviour can for instance be realised by conditional

84 See also U.S. Department of Commerce, Implementation Plan for the Code of Conduct for Responsible Fisheries, supra note 30; “to reach its objectives, NMFS has to carry out [...] mainly [...] regulatory activities”.

85 Other examples include CCRF, Articles 7 § 7 (2-3) and 8 § 4 (r-2); Pesticides Code, Articles 5 § 1 (1)–introduction of a registration and control system–, 5 § 1 (3) and 6 § 1 (2).

86 See D. EHLERS, supra note 6, § 1 V 6, No 51.

87 CCRF, Article 6 § 6.

88 Pesticides Code, Article 3 § 10.
permits that allow an (environmentally) risky undertaking only if requirements under the code of conduct are met, as long as, within its discretion, the administration deems this necessary to meet the legal requirements for a permit. For instance, the OECD Guidelines have been inserted in state contracts or licence requests.

Codes of conduct can further be of use for administrative risk evaluation as they set an international standard of not yet environmentally risky behaviour as well as of actions suitable to prevent the occurrence of a hazard. They might also serve as a yardstick when an authorising agency conducts an environment impact assessment. An undertaking in accordance with the requirements of a specific code of conduct can be deemed not to constitute a hazardous impact on the environment. However, the code of conduct only indicates that the undertaking is not harmful to the environment, but is not binding for the administrative agency in the sense that compliance with the code of conduct would be sufficient for the applicant. In order to reach this effect some kind of legislative approval of the code of conduct as a standard is needed.  

ii. Interpretation of indeterminate legal terms

Even if there is no explicit margin of discretion, codes of conduct can serve as new principles for interpretation and concretisation of indeterminate legal terms. Whenever statutes make use of wide and indeterminate concepts like ‘state of the art’, ‘detrimental impacts on the environment’, ‘good practice’ or ‘protection of the common good’, the

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89 Under German law, Federal Administrative Procedure Act (Verwaltungsverfahrensgesetz), 23 Jan. 2002, Bundesgesetzblatt, 2002, p. I-102, § 36; German Federal Pollution Control Act (Bundesimmissionsschutzgesetz), 26 Sept. 2002, Bundesgesetzblatt, 2002, p. I-3830, § 12; Federal Water Resources Act (Wasserhaushaltsgesetz), 19 Aug. 2002, Bundesgesetzblatt, 2002, p. I-3245, § 4; allow that conditions and obligations may be attached to a permit in order to make an undertaking licensable. It lies with the administrative discretion to decide whether a condition is indispensable and what the content of such a condition might be as long as it is not disproportionate.


91 FAO, Analysis of Government Responses, supra note 23, Articles 3-5, relying on the Code of Conduct for guidance; see also Pesticides Code, Article 1 § 2; “may judge whether their proposed actions and the actions of others constitute acceptable practices”.

92 German Federal Pollution Control Act, supra note 89, § 5 (i) No 2; “Stand der Technik”.

93 Ibid.,§ 5 (i) No 1; “schädliche Umwelteinwirkungen”.

94 German Plant Protection Act, supra note 55, § 2 (a) (i) (i); “gute fachliche Praxis”.

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administration is called upon to interpret these concepts when applying the law and might do so in conformity with international codes of conduct. This interpretation might be standardised nationally by internal regulations or instructions, which play an important part in the uniform application of the law.96

One example is § 6 of the German Plant Protection Act that authorises the competent agency to implement measures in order to guarantee that pesticides are only applied with “best practice”.97 The provision reflects Article 3 § 10 and Article 5 § 5 (1-2) of the Pesticides Code, which demand the reduction of health and environment hazards by state action. However, it is difficult to prove that the advice given for best practice by the Federal Ministry for Food, Agriculture and Forestry98 in order to guide users of pesticides is actually meant to implement the Pesticides Code, as no direct reference has been made. Likewise, it is not clear, if administrative authorities interpret best practice as ‘following the pertinent articles of the Pesticides Code’.

Overall, an interpretation in the light of international codes of conduct may be legitimate and valid under constitutional law if such international norms are only used as an additional source of inspiration and a supplementary argument in a balanced administrative decision.99 In other

95 Police Functions Act of Bavaria (Bayerisches Polizeiaufgabengesetz), 14 Sept. 1990, Gesetz- und Verordnungsblatt, 1990, p. 397, Article 2 § 1; “Gefahren für die öffentliche Sicherheit und Ordnung”.
96 See infra: Section III, C, 4.
97 Plant Protection Act, supra note 55, § 6 (1) reads: “bei der Anwendung von Pflanzenschutzmitteln ist nach guter fachlicher Praxis zu verfahren; Pflanzenschutzmittel dürfen nicht angewandt werden, soweit der Anwender damit rechnen muss, dass ihre Anwendung im Einzelfall schädliche Auswirkungen auf die Gesundheit von Mensch und Tier oder auf Grundwasser oder sonstige erhebliche schädliche Auswirkungen, insbesondere auf den Naturhaushalt, hat; die zuständige Behörde kann Maßnahmen anordnen, die zur Erfüllung der in den Sätzen 1 und 2 genannten Anforderungen erforderlich sind” [the use of pesticides should be guided by good practice; pesticides must not be used if it is foreseeable for the user that this might cause detriment for human or animal health or groundwater or other severe harm, especially to nature; the competent authority may order measures to ensure the fulfilment of the above-mentioned requirements] [emphasis added].
99 This has been the outcome of several judgments of German administrative courts; see, e.g., Administrative Court Frankfurt, 19 June 1988, Neue Juristische Wochenschrift, 1988, pp. 3032-3035, at p. 3033, concerning the UN Charter of the Rights of the Child, which only entered into force as a binding convention in 1990; where the
words, there is nothing wrong if the administrator looks for expert opinion at the international level when taking its decision. This has been stressed by the Swiss *Rekurskommision für Chemikalien*. It found that an agency is entitled to recur to nonbinding international norms—in this case the manual on development and use of FAO and WHO specifications for pesticides—\(^{100}\) in order to guarantee a consistent interpretation of the law, since they reflect an international consent on the latest state of scientific and technical knowledge.\(^ {101}\)

A decision, however, that exclusively refers to a nonbinding international standard as the only permissible standard without regard to (differing) national requirements may raise more difficult questions, since the codes of conduct are not binding national law and have not been enacted by the national legislator. As they are nonbinding principles, they cannot be used to restrict individual freedom and civil rights without some kind of legislative basis.\(^ {102}\) This would contravene principles of legal clarity and security, as the citizen has no authoritative source of the nonbinding law and does not know whether and to what extent national administrative decisions will be based on it. National fundamental rights and their influence on administrative balancing of interests override the indicative effect of codes of conduct.\(^ {103}\) Therefore, in order to ensure an effective implementation, parliaments will have to enact constitutionally valid legislation that permits justified interference with fundamental freedoms such as the right to property or to exercise a profession.

c. Implementation through distributive administration and policy

Apart from restricting the individual freedom to act by licensing schemes and sanctions, administrations may also partly without being specifically

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\(^{100}\) FAO, *Manual on Development and Use of FAO and WHO Specifications for Pesticides*, FAO/WHO Joint Meeting on Pesticide Specifications (JMPS), Rome 2002; which has been incorporated into the FAO Pesticides Code.

\(^{101}\) Eidgenössische Rekurskommision für Chemikalien, 28 Feb. 2006, CHEM 05.002, p. 16.


authorised to do so—promote compliance with codes through distributive administration; for example, by granting subsidies. Such “distributive policy supports private activities that are beneficial to society but would usually not be undertaken”.

Following internal guidelines or legislative acts, a subsidy may thus be only granted to those individuals and corporations who respect the principles of a code of conduct. For example, the U.S. Fishing Capacity Reduction Program provides funding for a vessel and permit buyback program in order to reduce excess fishing capacity according to Article 7 § 6 of the CCRF.

The same is true wherever national administration does not directly subsidise individuals, but uses public funds to (co-)finance the infrastructure that is needed by private actors in order to implement requirements of the codes of conducts like facilities for safe-landing in the fisheries sector or collecting points for empty pesticides containers; for instance, Article 8 § 9 (i) of the CCRF and Article 10 § 7 of the Pesticides Code.

Moreover, the administration can be influenced by codes of conduct in a way that it abolishes previously existing subsidies for behaviour ‘outlawed’ by the code of conduct like the use of pesticides.

Among the various forms of distributive administration, the granting of export credits for external trade to the exporting industry provides one of the rare tools with which administrations may be able to influence private companies abroad. According to the OECD, twenty-nine out of thirty-nine states adhering to the OECD Guidelines for Multinational Corporations used them in the context of export credits and investment guarantees as of 2007. Remarkable as they are, these linkages are comparatively loose. The granting of export credits is not specifically conditioned upon compliance with the OECD Guidelines. Export credit agencies in various countries rather call the attention of exporters to the OECD Guidelines in a more or less systematic way.

In some cases, however, the linkages are more formalised. For instance, applicants to export credits or investment guarantees in the Netherlands

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107 M. SINGH, “Report on India”, supra note 29; “policy support: phasing out of subsidy on pesticides”.
only qualify for these benefits if they state that they are aware of the OECD Guidelines and that they will endeavour to comply with them to the best of their ability.\footnote{OECD, \textit{Annual Meeting of National Contact Points 2007}, supra note 108, Table 1.} Even in this case, a clear conditionality is not established, since the granting of the credits or guarantees is not conditioned upon actual compliance. But the example illustrates nevertheless how nonbinding instruments, which were developed without this specific purpose, may over time enter distributive administrative practices. Even though a statement as the one required of applicants by the Dutch export credit agency may not carry legal consequences if it is not part of the contract, a company is certainly well advised to comply if it intends to gain continuous support in the future.

A clear linkage between export credits and a nonbinding environmental law instrument can be observed with respect to OECD recommendations on common approaches to export credit policy. Distributive administration “at least, in Germany” must not necessarily be pre-structured and based on a legislative act.\footnote{See supra; P. KUNIG, “Relevance of Resolutions”, supra note 50, p. 68.} The annual parliamentary decision on the general budget allocates the funds to the responsible ministry, but otherwise remains silent on the substantive issues. Questionable as this lack of a parliamentary act may be in light of the fact that the denial of subsidies can amount to an equally strong interference with civil rights as the denial of a license or the prohibition of an undertaking,\footnote{B.-O. BRYDE, \textit{Internationale Verhaltensregeln}, supra note 4, p. 39; who, on the contrary, sees the limits in the equal treatment-clause of the Constitution; thus, the preferential treatment of ‘followers’ of the code is not arbitrary.} the administration of export credits is therefore almost completely left to the discretion of the administration. It can decide over the substantive criteria for the allocation of funds.


\footnote{OECD, \textit{Annual Meeting of National Contact Points 2007}, supra note 108, Table 1.}
the Observance of Ecological, Social and Sustainable Development Aspects,\textsuperscript{114} which now only play a supplementary role. Although not binding upon members, the OECD Recommendation is thus directly implemented by the administration without any substantive parliamentary participation.\textsuperscript{115}

d. Implementation through administrative guidelines and instructions

In order to guarantee a consistent application of law, higher administrative bodies issue internal regulations and instructions to all agencies. They can embody provisions of the international codes of conduct in order to keep the flexible approach of the codes of conduct; the administration recurs to individual decisions based on internal instructions that can be modified more easily than an official legal act.\textsuperscript{116}

One example of such a mode of implementation can be seen in the implementation of the CCRF in Brazil. Empowered by Article 23 of Law No 10.683,\textsuperscript{117} the Brazilian Special Secretary for Aquaculture and Fisheries - \textit{Secretaria Especial de Aqüicultura e Pesca} - has the power to formulate policies and directives for the development of fisheries and aquaculture production. The Special Secretary has recently enacted an internal administrative directive - \textit{Instrução Normativa} - establishing the criteria for the development of local plans for marine protected areas. The directive includes a specific reference to the CCRF. The code of conduct thus determines the conditions and restrictions which these planned areas should meet.\textsuperscript{118} Other internal administrative Brazilian directives specifically refer to all recommendations or to one article of the CCRF in

\begin{itemize}
\item \textsuperscript{115} It is telling when the German export credit agency on its website speaks of “the Common Approaches as internationally binding set of rules dealing with the subject of environment and officially supported export credits”; cf http://www.agaportal.de/en/aga/grundzuege/umweltaspekte.html.
\item \textsuperscript{116} This had been the case with the European Code of Conduct for European firms operating in South Africa, \textit{supra} note 64; where the German government did not make use of the authorisation to enact an ordinance in the Foreign Trade Act (\textit{Außenhandelsgesetz}), 9 June 2005, \textit{Bundesgesetzblatt} 50/2005, § 7 (1); cf H.-J. VON BÜLOW, “Schwierigkeiten”, \textit{supra} note 65, p. 601.
\item \textsuperscript{118} Article 2 IX of the \textit{Instrução Normativa} No 17, 23 Sept. 2005, http://www.ipaam.br/legislacao.
Although internal guidelines are not directly addressed to the citizen, they have de facto implications for private actors as they unify the interpretation of indefinite legal terms. Using such internal guidelines, administrators have at their disposal an important tool to push the uniform implementation of the codes of conduct even if a legislative transposition has not occurred. This is particularly interesting, as often representatives of higher administrative bodies have participated in the elaboration of codes of conduct on the international level and can therefore ensure that the ideas of the code of conduct are disseminated via lower agencies while filling in margins of discretion.

e. Implementation through non-regulatory and informal administration

Administrative tasks include non-regulatory measures, mainly information, guidance, recommendations, warnings, awareness-raising and reports, which influence the options for action and decisions of the citizens by making the administrative sources of knowledge accessible to them. This aspect is important, as codes of conduct are partly addressed to private actors. States follow an increasingly self- or non-regulative approach, based on the responsible and free decision of the private actor, to reduce the risks to the public good in the same or even a better way than through regulation. This change in paradigms – particularly in legal orders that traditionally rely to a large extent on regulatory administration – is fostered by the international codes of conduct as they promote a multi-stakeholder approach through cooperation with the informed public and do not simply rely on state-run management measures. In the long run, non-regulatory measures are necessary in order to ensure that industry complies voluntarily with the codes of conduct, which will make enforcement more cost-effective. Yet, this also means that a strong regulatory tradition might hinder the success of the codes in that

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123 CCRF, Articles 1 § 2 and 2 (j); Pesticides Code, Article 1 § 2.

124 D.J. DOULMAN, Requirement for Structural Change, supra note 19, Heading V.
particular legal order.

In order to leave space for private decisions, private actors must have the opportunity of access to good information about the proposals of the codes of conduct. This is recognised by national governments who launched different kinds of informational programs. Effective means are the dissemination of translated versions of the code of conduct and awareness-raising measures such as posters, brochures and workshops.¹²⁵ This has, for instance, been attempted by the government program called Safe and Responsible Use of Pesticides (SARUP) in Cambodia; however, such campaigns often face financial restraints.¹²⁶ Often governments publish guidelines for interpretation of the codes of conduct in order to render imprecise or unclear provisions comprehensible for private actors. In doing so, the administration can set a national standard of private, codex-conform behaviour, not leaving the interpretation to private actors alone.¹²⁷

The executive may also warn consumers against the use of certain products or certain practices which have been declared harmful to health or environment by the codes of conduct and thus put into effect the goals of the codes. Furthermore, by refraining from warnings against products for which the industry meets the requirements of the codes of conduct, private compliance is enhanced.¹²⁸

Governments have also resorted to market mechanisms as means of implementation. For example, they create public labelling programs. The German Federal Ministry for Food, Agriculture and Consumer Protection, for instance, aspires to introduce an environmental label on the basis of the FAO Guidelines for the Eco-Labelling of Fish and Fishery Products from Marine Capture Fisheries,¹²⁹ which are to a large extent based on the CCRF.¹³⁰ An innovative approach to promote compliance with the CCRF

¹²⁸ D. EHLERS, supra note 6, § 1, IX, No 73.
¹²⁹ Compare: www.portal-fischerei.de.
¹³⁰ FAO, Guidelines for the Eco-labeling of Fish and Fishery Products from Marine Capture Fisheries, adopted at twenty-sixth session of the Committee on Fisheries, Rome, 7-11 Mar. 2005; references to the CCRF are frequently made throughout the document, and it is stressed in § 2 (i) that eco-labelling schemes should generally be consistent with -inter alia- the CCRF.
has been taken in Canada, where each year a national award is presented to commercial fish harvesters by the national fisheries authority in recognition of their outstanding contribution to responsible fishing.\footnote{Fisheries and Oceans Canada / Pêches et Océans Canada, “Backgrounder: 2001 Recipients of the National Awards and the Roméo LeBlanc Medal for Responsible Fishing”, May 2001, www.dfo-mpo.gc.ca/media/backgrou/2001/hq-ac37-162_e.htm; equally, the U.S. National Oceanic and Atmospheric Administration (NOAA) has created the Sustainable Fisheries Leadership Award, http://www.nmfs.noaa.gov/awards/index.htm, in cooperation with a contracted non-profit organisation.} Instead of regulating commercial fishing, the government gives an incentive to fish harvesters to adhere to the CCRF and to serve as a role model to other fish harvesters and at the same time safeguards the voluntary and multi-stakeholder approach of the CCRF. In doing so, the public concerned is enabled and motivated to adhere to the codes of conduct and consumers can control the action of the private sector, while at the same time the state guarantees an impartial assessment of compliance with the code; thus, combining legal and market mechanisms.

4. **Implementation through private actors: A diminished role of the state**

The increasing influence of private actors in international affairs is reflected in the rapid and ubiquitous emergence of private governance or private standard-setting initiatives; a development that has been described as “administration beyond the state”.\footnote{See only B. KINGSBURY, N. KRISCH and R. STEWART, *The Emergence of Global Administrative Law*, IIIJ Working Paper 2004/1, Global Administrative Law Series, www.iilj.org.} In this part, we want to highlight how international codes of conduct - although adopted in international organisations by governments - also contribute to broadening the realm of private actor governance or administration and, therefore, to the general trend of a diminishing the role of the state.

The adoption of codes of conduct explicitly or implicitly encourages the implementation and administration through private actors - like industry, NGO’s and consumers - which rely on such codes to increase their own leverage and governance potential by drawing on the acceptance of the internationally legitimised codes. This often volitional distribution of regulative power to private actors and loss of control traditionally vested in the state is one of the remarkable effects of internationalisation of national law and administration through international codes of conduct.

As indicated, private implementation activities are premeditated in the development of codes of conduct which are also directly addressed to
private business actors and deliberately integrate civil society in monitoring and reporting. For example, Article 4 § 1 of the CCRF provides that:

“All members and non-members of FAO, fishing entities and relevant sub-regional, regional and global organizations, whether governmental or nongovernmental, and all persons concerned with the conservation, management and utilization of fisheries resources and trade in fish and fishery products should collaborate in the fulfilment and implementation of the objectives and principles contained in this Code”.

In other words:

“It was recognised from the outset that industry and international non-governmental organisations (NGOs) would play an important role in its implementation”.

Private implementation of the codes of conduct unfolds in numerous ways. Generally speaking, self-regulation can hereby be distinguished from private regulation of other private actors.

First, as indicated, codes of conduct encourage self-regulatory mechanisms and private business initiatives. Industry associations, for example, have a strong interest in safeguarding a positive reputation of their industry. The Australian Seafood Industry Council is one of these organisations which have established a code of conduct based on the CCRF. Another example has already been given above by quoting the Canadian Code of Conduct for Responsible Fisheries. Especially in developing countries, industry initiatives like CropLife, an international stewardship project by pesticide-producing companies, provide programs for and solutions to safe and responsible use of pesticides. They adhere to the Pesticides Code and replace state action where national governments fail to enact or enforce effective legislation. For example, CropLife Mauritius initiated

133 D.J. DOULMAN, Requirement for Structural Change, supra note 19, Heading II.
135 See supra: Section III, B, 4.
137 See, on the other hand, M. SINGH, “Report on India”, supra note 29; who complains that “most of the chemical pesticides manufactures/firms/dealers are not
Code of Conduct reinforcement workshops for its members, thus helping to disseminate the principles with private stakeholders.\textsuperscript{138} Also the OECD guidelines have been incorporated into national codes of conduct by the industry several times; often initiated by NGOs and due to market reasons.\textsuperscript{139}

Second, private actors, in particular NGOs, as well as multi-stakeholder initiatives draw on the international norms to establish implementation mechanisms \textit{vis-à-vis} third party private actors. NGOs thereby pressure industry as they often feel that self-regulation is simply adopted by the industry as a window-dressing exercise and “as means of avoiding more stringent regulation by the public sector”.\textsuperscript{140} In pursuing the objective of counterbalancing such tendencies, NGOs and multi-stakeholder initiatives rely on market mechanisms. An outstanding example is the eco-labelling initiative of the Marine Stewardship Council which follows the example of the successful Forest Stewardship Council. The Principles and Criteria for Sustainable Fishing of the Marine Stewardship Council represent the leading standard against which fisheries are assessed before being certified; the label being a main market tool for an informed consumers’ choice based on the CCRF.\textsuperscript{141} This means that the provisions of the CCRF are indirectly impacting the fisheries methods of a considerable part of the industry.

Similarly, non-governmental organisations like the Pesticide Action Network control private industry and its compliance with international codes of conduct, whenever in their opinion self-regulating mechanisms fail. Naming and shaming hereby draws on the need and interest of the industry in safeguarding a good reputation and in avoiding damages from negative media coverage. A prominent example is the case of Syngenta, a leading Swiss company in the production of agrochemicals, which as a coming forward in strength in creating awareness among general masses about hazardous effects of chemical pesticides and are still advocating the advantages of their product just to sell them in the market for their own profits”.

\textsuperscript{141} Compare: Marine Stewardship Council, http://eng.msc.org; according to MSC information, about six percent of the world's total wild capture fisheries are now engaged in this programme, including forty-two percent of the global wild salmon catch.
member of CropLife International promotes adherence to the Pesticides Code. A group of non-governmental organisations accused them of advertising Paraquat—a widely used pesticide that is not on the PIC-list, but banned in several countries including Switzerland—142 in Thailand in a manner that contravened Article 11 § 2 (18) of the Pesticides Code.143 Since the public announcement of this contravention was not successful, an online-court against Syngenta, where public opinion could be expressed by voting ‘guilty’ or ‘non-guilty’ as a form of ‘naming and shaming’, was established.144 National administrative or criminal sanctions would probably have been ineffective in this case; especially as Syngenta violated nonbinding international law out of reach of Swiss as well as Thai authorities.

Although effective, this kind of private control runs the risk of not respecting constitutional principles like due process and neutrality and of manipulating its outcome, while interference with civil rights-like property or the right to exercise a profession-through “plebiscitary created loss of reputation”145 can amount to an encroachment similar to that classically attributed to state action. In other words, if the state and international codes of conduct rely on private control, it has to be considered whether some kind of procedural security can be provided; either through state measures or by international bodies. Seen in this light, the OECD specific instances procedure provides a formalised alternative where NGOs and labour is to some extent given a voice while at the same time providing procedural safeguards such as a kind of a ‘right to be heard’ and a sort of appeal possibility through which decisions at the national level can be reviewed at the international level.

Finally, private actors also contribute to the monitoring of compliance by public and private addressees. NGOs monitor state action mainly through political pressure. The Secretariat of the FAO, for example, sends questionnaires to NGOs as part of the international reporting mechanism established to further the implementation of the codes of conduct by both

142 Cf Question to the Swiss National Council (Nationalrat), 24 Sept. 2002, Postulat No 02.3477; Statement of the Swiss Federal Council (Bundesrat), 20 Nov. 2002; http://search.parlament.ch.
145 R. SUTER, ibid.
states and private actors. The FAO then relies on their reports for developing further instruments or adapting their strategies and compliance assistance programs.

Interestingly enough, support of companies does not stop at efforts to demonstrate compliance and thereby safeguard their reputation, but also includes capacity building measures. For example, when the PIC principle was adopted, it was added as one element of the capacity building initiatives of the so-called ‘Safe Use Project’ which was financed and conducted by the International Group of National Associations of Manufacturers of Agrochemical Products (GIFAP).\footnote{The ‘Safe Use Project’ also included education, provision of protective clothing as well as the distribution of pesticide antidotes; Compare D.G. VICTOR, “Learning by Doing” in the Nonbinding International Regime to Manage Trade in Hazardous Chemicals and Pesticides”, in D.G. VICTOR et. al., The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice, Cambridge, 1998, pp. 221-281, at p. 255.}

The illustrated structural change in administrative law and action away from state regulation towards support of self-regulation mechanisms and public-private-partnerships is a process that occurs increasingly in all areas of public administration.\footnote{Compare D. EHLERS, supra note 6, § 1, IX; who refers to the necessity for such forms of action in order to secure effective protection of common goods; namely, by making use of a sense of community as well as the self-interest of citizens.} Although at first sight appearing to be formal intergovernmental instruments, international codes of conduct directed towards a collaboration of all stakeholders\footnote{Compare CCRF, Article 4 § 1.} contribute to this process. At the same time, this shows the particular potential of such instruments in contrast to purely private initiatives. International codes of conduct represent a form of cooperation or division of labour between increasingly powerful private actors and states. They could thus serve as a model for integrating private actors in ways unknown to treaty law while at the same time keeping some government control and state-induced legitimacy.

5. Implementation through international administrative procedures

Some codes of conduct, especially in the field of social corporate responsibility, mainly aim to directly change the behaviour of private actors. They not only almost exclusively address business actors, but also establish international administrative procedures to directly implement such norms. An example in this respect is the specific instances procedure of the OECD Guidelines.\footnote{Such a procedure also exists for the implementation of the ILO Tripartite Declaration by which labour standards are established.} According to this procedure, anyone may
bring ‘specific instances’ assumed to constitute an act of violation of the Guidelines by an enterprise to the attention of the National Contact Points (NCPs).\textsuperscript{150} Following an initial assessment whether to consider the issue, and a subsequent attempt to mediate between the enterprise and the complainant, an NCP may issue statements and make recommendations on how the Guidelines should be understood and implemented. The results of the procedure are published, thereby raising the pressure on companies which have an interest in avoiding ‘reputational’ costs. The procedure therefore foremost relies on the initiative of private actors to bring complaints. The NCPs are national governmental or private–public agencies ‘often situated within a ministry’, which then serve as mere administrative agents for the international procedure, because they have to follow international procedural rules established in a binding decision of the OECD Council. Moreover, the activities of the NCPs take place under the oversight by the OECD Investment Committee. A review procedure can be triggered by a request for assistance in the interpretation of the Guidelines and the Committee will consider giving a clarification on whether an NCP has correctly interpreted the Guidelines. This review procedure resembles appeal procedures on issues of law which can be seen as indicators for the emergence of global administrative law.\textsuperscript{151}

Although such procedures do not completely bypass the state, the approach is not foremost directed at legislative or other implementation by nation states. The difference to traditional international law is striking. The implication is (again) a changing role of the state in some fields from the main regulatory entity to a mere implementing agency that is determined by international administrative law in its decision-making.

\textbf{IV. Conclusion}\textsuperscript{152}

Although our analysis generally supports claims regarding the importance and compliance-inducing capacity of nonbinding international norms,\textsuperscript{152} it likewise points to the need for differentiation. The degree of impact of nonbinding norms not only depends on the nature of the specific regulatory issue, interest structures as well as the specific formal characteristics of the instrument such as source, participating actors, addressees and compliance mechanisms. Our analysis illustrates that it also depends to a considerable degree on the specific characteristics of the

\textsuperscript{150} OECD, Council Decision C (2000) 96, Procedural Guidance, Section I, C.
\textsuperscript{151} On the phenomenon of Global Administrative Law, see B. KINGSBURY, N. KRISCH and R. STEWART, \textit{Global Administrative Law}, supra note 132.
\textsuperscript{152} See, on this issue, the collection of papers in D. SHELTON, \textit{Commitment and Compliance: The Role of Nonbinding Norms in the International Legal System}, Oxford, 2000.
various domestic legal orders that respond to such normative impulses. Thus, the degree of institutional organisation, the density of domestic regulation of the matter and the underlying legal culture of a particular domestic legal order may lead to different degrees and different ways of implementation. Although one should be careful with generalisations, it seems as if in less densely regulated legal orders—possibly combined with less regulatory capacity—nonbinding international norms often find a broader field for application and reception. Developing countries with lower regulatory capacity may also have a stronger dependency on international and private actors for implementation. And a legal culture that does not know a strict separation of governing and administrating bodies or leaves more discretionary leeway to the executive\textsuperscript{153} should be generally more conducive to implementing international codes of conduct directly through administrators who network with their transnational counterparts even without a specific legislative act.

Our analysis has further identified some of the main junctures of the international and the domestic administrative spaces that serve as pathways of influence for the analysed international instruments. As already hinted at, we believe that such an analysis of the functions and potential impact of such instruments is a precondition for considerations on specific legitimacy requirements.

On the basis of this taxonomy, we would now like to point to some legitimacy challenges that specifically arise in the context of nonbinding instruments wherever such instruments trigger a deviation from traditional legitimacy safeguards. Simply pointing to the international and domestic legality of implementation processes is hereby not sufficient, since legality merely mirrors the actual state of legal development. In our view, the question of legitimacy, by asking whether such exercise of public authority is sufficiently justified and therefore acceptable,\textsuperscript{154} goes beyond mere

\textsuperscript{153} As do the US; cf O. LEPSIUS, Verwaltungsrecht unter dem Common Law, Tübingen, 1997, p. 16; who states that “in the USA administration and governance are not strictly distinguished”; W. DURNER, “Rechtspolitische Spielräume im Bereich der dritten Säule: Prüfungsumfang, Kontrolldichte, prozessuale Ausgestaltung und Fehlerfolgen”, in W. DURNER and C. WALTER, Rechtspolitische Spielräume bei der Umsetzung der Arbus-Konvention, Berlin, 2005, pp. 64 ff., at p. 66.

questions of legality. It identifies the particular challenges for future doctrinal but also domestic and international legal developments. This may in particular include future development and adjustment of international institutional law and domestic constitutional and administrative law.

First, it has been observed that nonbinding norms contribute to the privatisation of the exercise of public functions such as the protection of the environment. In such cases, where states not only rely on private actors as agents who supplement their own efforts, legitimacy challenges arise from the factual retreat of the states from exercising public authority. Naturally, such a statement assumes the continuing importance of the state as a legitimating factor in times of the proliferation of other actors that cannot build on any generally agreed source of legitimacy. In the end, private actors, be it industry or NGOs, are responsible to particular constituencies and not to the general public. Assuming a superior legitimacy base at least of democratic states and a responsibility of states to protect human rights of their citizens, states can only legitimately retreat as long as they ensure the effectiveness and legitimacy of privatising mechanisms. This includes safeguarding fundamental freedoms from infringement by private actors, but also environmental stewardship in a way that ensures the livelihood of citizens and sufficient balancing of interests.

In contrast to purely private forms of governance, international codes of conduct provide a tool to ensure government input into the main decisions while acknowledging the importance of private actors. One legitimacy challenge is thus to acknowledge the supplementary character of such endeavour and to secure a meaningful balancing of interests at the international level and the on-going guarantee of certain fundamental safeguards on the domestic level.

Regarding implementation by states, a general distinction appears to directly flow from the international approach of a particular code of conduct. Instruments which largely build on state implementation must be distinguished from those which almost exclusively aim at regulating private actors but use states as administrative agents, as in the case of the OECD Guidelines.

In the latter case, the role of the state is reduced to that of an administrator in the international compliance or review procedures. Nonbinding norms are then supported by domestic administrators—as in the case of the National Contact Points—without implicating a

legitimisation by domestic administrative law or the domestic legislator. Although states may continue to regulate private entities, the approach starkly contrasts with the perceivable international alternative of an international treaty directed at internationally harmonised state implementation through domestically legitimated procedures ensuring a balance of interests and state-backed enforcement. From the perspective of both effectiveness and legitimacy, the diminished role of the state in the general approach of such codes thus becomes problematic if they are used as alternatives to treaty making. Even if only used in a supplementary way, the need for procedural law ensuring the balance of interests, participation of stakeholders as well as room for political discourse appears to be a necessity. The new procedural rules providing for a review of decisions of National Contact Points and the employment of notice-and-comment procedures in the last revision of the OECD Guidelines in the year 2000 appear as a positive development in that regard.

In cases where instruments are mainly directed at and implemented through national domestic law and administrative action based on domestic administrative law, the different modes of implementation point to various legitimacy challenges. One hereby needs to roughly distinguish between specific legislative implementation and the possibility of direct implementation by administrators without such a specific legislative act.

Although it seems at first sight that specific legislative acts sufficiently legitimise the implementation of international norms, the particularities of nonbinding instruments may require additional safeguards in the case of programmed legislation and dynamic references. Dynamic references enable the direct incorporation of changes that have not and could not be foreseen by the national legislature when enacting the original law. Thus, the legislature leaves decision-making to international bodies which “in the case of nonbinding instruments” do not necessarily decide on the basis of consent. A transparent and inclusive procedure at the international level as well as control and review mechanisms at the national level seem therefore important to grant legitimacy to such references. Although less problematic than dynamic references, programmed legislation that rubberstamps international norms also contributes to a shift of the democratic discourse to the international level, thereby restricting the influence of national constituencies and in particular of the opposition in a parliament.

The remedy cannot be to prescribe legislative self-restraint. The standard setting exercise at the international level only makes sense if the

\[156\] B.-O. BRYDE, Internationale Verhaltensregeln, supra note 4, p. 37.
instrument is implemented without calling into question its content, process of elaboration, etc. Thus, programmed legislation is paramount if one aims to avoid upsetting the balance of different economic, environmental and social aspects reached at the international level, and in order to provide a reliable and legitimate source of norms in particular to those (developing) countries with limited capacities. Consequently, it is in the interest of all participants in the norm setting endeavour to provide for additional legitimating procedures already at the international level. This must include procedures which ensure that national publics and the political opposition are linked to these processes, in order to uphold the legitimating function of the national public discourse which is essential for the legitimacy of both international norm production and –for the above-mentioned reason– of national implementation.

One possible means to achieve this could be improved access to information and participation of the public in environmental policy-making and administration. A recommendation to this effect has been adopted by the Meeting of the Parties of the Aarhus Convention in the Almaty Guidelines in 2005. They call for the application of the principles of the Aarhus Convention; public participation and access to information at the level of international institutions. International institutional procedures should also ensure the equal participation of developing and developed countries, as well as regional groups, since the adoption of nonbinding instruments at the international level may deviate from the principle of consent which safeguards the sovereign equality of states.

Such procedures are even more pertinent if one considers direct implementation through administrative action without a specific legislative act. Of course, the issue is not simply one of circumventing the parliament. Administrative action can only take place within the margins left for action by the national legislator. Still, as already observed by Tomuschat in 1978, the use of nonbinding instruments increases the weight of the executive as opposed to the legislator. As could be seen in the analysis, the shift to nonbinding international norms enables the executive to –directly or through internal guidelines and instructions– implement norms within their margin of discretion without any specific

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parliamentary act on the issue. To the extent that nonbinding norms become increasingly important in the process of internationalisation, this development raises the concern that the increasing use of nonbinding norms increases executive power to the detriment of parliamentary participation and control.\textsuperscript{159} In addition to the already mentioned procedures, the particular potential of nonbinding norms to be directly implemented points to the need to reinforce the control of the executive branch by the legislature before the adoption of the instrument at the international level. In Germany, parliament disposes of important possibilities to control the executive in the said sense besides approval through legislative acts.\textsuperscript{160} These may include the right of the parliament to ask the federal government to report on international developments, discuss issues publicly or the power of the parliament to issue resolutions regarding specific legal positions.\textsuperscript{161} Such control through transparency and public debate is not equivalent to a legislative act, but carries important controlling potential and should therefore not be underestimated.\textsuperscript{162}

Taking all the outlined challenges seriously is paramount in ensuring long-term legitimacy and therefore effective sustainable governance by means of these new voluntary approaches. In identifying challenges and in putting forward our propositions, we are of course aware of our underlying –and perhaps biased– motivation to ‘keep the state in’. To be sure, this should not be understood as a backlash of traditionalism which does not acknowledge the changing nature of the international system and the rising importance of other actors. The opposite is true. Especially in times where ‘voluntary’ and ‘private’ seem to be en vogue, cautious remarks seem to be in order not to simply give up established and internationally agreed upon categories and factors of legitimacy, including the importance of a meaningful role of the state as the guarantor of effectiveness and legitimacy, before alternative mechanisms have been developed. Our propositions for reform and further research outlined briefly in this conclusion accordingly strive to take the new opportunities and challenges into account but attempt to avoid the danger which lies in simply discarding what has been achieved in the ordering of society so far.

\textsuperscript{159} For early warnings, consider B.-O. BRYDE, \textit{Internationale Verhaltensregeln für Private}, supra note 4, p. 36; C. TOMUSCHAT, “Verfassungsstaat”, \textit{ibid.}


\textsuperscript{161} German Constitution, Article 43 § 1.

\textsuperscript{162} U. DIECKERT, \textit{Die Bedeutung unverbindlicher Entscheidungen internationaler Organisationen für das innerstaatliche Recht der Bundesrepublik Deutschland}, 1993, p. 164; C. TOMUSCHAT, “Verfassungsstaat”, \textit{supra} note 158, p. 36.
I. THE EMERGENCE OF UNIVERSAL RULES AND THE BUILDING OF A NEW NORMATIVE SPACE IN PUBLIC INTERNATIONAL LAW

The adoption of universal norms has revolutionised the conception of normativity at the international level. The traditional focus on a centralised regulatory authority is replaced by the idea of a spontaneous order, which progressively emerged from the decentralised actions of multiple agents. Indeed, the current international system is largely the result of a long process of codification or crystallisation of essentially customary rules, which have developed over time through the unconcerted acts posed at different levels by the various actors that compose the international community. It can be said that the international legal order is distinct in its absence of centralised law-making institutions; typically, all subjects of international law are able to participate in the elaboration of supra-national norms that will then bind them. In particular, the Charter of the United Nations and the various international human rights treaties adopted under its frame are the product of a liberal cosmopolitan vision of the world and of trans-national relations.

The Charter of the United Nations is, in this respect, a truly revolutionary document. It endorses a complete shift - if not a reversal - in paradigm, from the traditional Westphalian to a clearly universalist conception of international law. The regime it introduces relies on the existence of an international community, beyond and above the state. Membership in this new social entity, as well as its concerns and interests, are not restricted to that of the sole nation-states. It is, on the contrary, composed of many diverse types of actors, including private individuals. In this view, the foundational role of the Charter could not be over-emphasised. It did not merely create one more legal order but established a set of rather novel institutions and conferred a supra-national constitutional status to basic

* PhD researcher, European University Institute.
2 The 1648 Peace of Westphalia, which ended the Thirty Years War, is at the origin of the modern concept of state sovereignty. It gives effect to the principle of territoriality and to the equality of sovereign states that hold absolute unchecked powers and exclusive control over their national territory, independent of their respective size and military strength. See: G. BERLIA, “Remarques sur la paix de Westphalie”, in Mélanges Basdevant, Paris, Pedone, 1960, pp. 35-42.
international norms and principles. Its implementation initiated a transforming process for the control mechanisms and the power dynamics at the global level. It has also been the origin of the concept of international public order and the international entrenchment of core normative values, shared by all humanity with an aim to protect each and every single human being against instances of aggression and abuse.

Fundamentally, the Charter constitutes a radical switch of perspective in international relations, going from a state-centric to a truly cosmopolitan world order, and passing from unconstrained national sovereignty to a new international sovereignty. Following its adoption, the international legal order has become independent from states’ sovereign powers. Even though it was originally established by the expression of states’ assent, it progressively developed an ‘objective’ existence of its own. In view of this, the Charter is effectively analogous to an actual social contract; thus, providing legitimacy for a universal legal order and its institutions. It is a remarkably concrete achievement. Contrasting in that the tacit or hypothetical variants of the social contract theory, sometimes put forward at the national level in an attempt to justify coercive institutions, the international system is grounded in a real constitutive legal document, which effectively binds the parties to this agreement. This implies that the transfer of competences from the domestic to the supra-national level and the ensuing devolution of traditional state-owned prerogatives to the international community are irreversible. In this regard, attention should be paid to the distinctive nature and scope of the United Nations’ Charter. As the founding text of this organisation, it applies immediately and without exceptions or reservations to all its members. This means that it obliges the quasi-totality of states worldwide to abide by its provisions, including those protecting individual rights and interests.

This point is particularly important and, as such, cannot be ignored when analysing or interpreting the content and application of contemporary rules of international law. In particular, it should always be kept in mind in the context of human rights and humanitarian dispositions, which constitute the keystone of the Charter. In fact, the Charter completely reverses the values on which the international society is founded by freeing individuals from states’ almighty power, conferring to them inalienable rights, irrespective of their ethnicity, background and sex, and prioritising

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4 See: UN Charter, Preamble; which posits peace and human rights as the main aims of the organisation.
them by opposition to governments now bound to guarantee those rights.\(^5\)

As a result, the unity of the contemporary international system is less organic than substantive. It is based on the hierarchy of norms that ensues from the recognition, in Article 53 of the 1969 Vienna Convention on the Law of Treaties, of the notion of *ius cogens*; a legal concept itself derived from the higher rank assigned to the basic principles entrenched in the Charter. These peremptory rules, which are by their legal status placed above the will of the states and outside the scope of treaties’ control, constitute the core of an emerging concept of international public order. In a word, *ius cogens* norms are at the origin of a new type of normative space, of sovereignty, and of constitutionality.

In this perspective, international institutions have a mandate to guarantee the respect of the international public order and implement the rules of *ius cogens*; chiefly, the non-aggression principle and the rules protecting fundamental rights and liberties (both in times of peace and of war), which are themselves an inter-individual application of this principle. In this regard, one cannot ignore that the protection of human rights in the United Nations system is linked to broader issues of peace and security,\(^6\) and that the core of absolutely inalienable entitlements is composed of precisely those rights most connected to such questions. While this is surely partly due to the original function and nature of the United Nations as an organisation, it also links individual liberties to a generalised application of the principle of non-aggression, be it among states, communities, private entities or individuals. This all-encompassing principle of non-aggression, then, constitutes the foundation on which the entire international edifice is built.

The supervisory and guarantor role conferred specifically to supra-national institutions and more loosely to the international community as a whole in relation to peremptory rules of international law implies that, in cases of violations of these norms, they are empowered to punish the offenders. Besides, the creation and progressive extension of international mechanisms of supervision reinforces the ban on domestic abuses of these

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rules. And the recognition of the existence of an ‘actio popularis’ against such breaches, open to all components of the international community, significantly enhances their protection. Furthermore, it entails that state sovereignty is legally restricted by the respect of *ius cogens*. Such a model conflicts eventually with republican or majoritarian notions about governmental functions and democracy, which are essentially state-centred rather than universalistic. It also clashes irreconcilably with realist views of international relations, which assert uncompromisingly the prevalence of uninhibited state sovereignty and prerogatives. Ultimately, it is built on the primacy of the individual over the community and the polity and, consequently, promotes the protection of human rights against states’ overriding power. Finally, it rests on the belief that the recognition of a common humanity can only pass by that of each of its members.

Whereas this double process of organic de-centralisation and substantive unification of the law, and even the mere existence of the notion of *ius cogens*, have been contested until recently, the detractors of such a line of argumentation fail to appreciate the complexity of the international system taken as a whole, and its progressive move away from the traditional state-centric Westphalian model since the adoption of the Charter of the United Nations. In particular, even though *ius cogens* is sometimes relied on for purely instrumental or strategic purposes, one should not forget that – far from constituting “a ‘legal word’ devoid of any coherent meaning” – it remains an important concept of positive law, as well as the key stone of the international legal order. Hence, the mere fact that it incorporates values of a mostly ethical nature into the fabric of the law does not give reason to refute its crucial position and function in the development of the supra-national system. In view of this, it is important to look both at its contents and its place in the evolution of general international law, in order to fully appreciate the paradigm shift it creates inside the concept of normative order and the consequences for the architecture of a worldwide global regime.

This paper attempts to do this in light of the role played by human rights,

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as the most archetypical example of integral norms, in the creation of this new vision of normativity. The specific focus is motivated by the position occupied by fundamental rights in the general structure of the international system. The progressive entrenchment of human rights, through the recognition of their peremptory status, as the centre of the international public order is challenging the traditional concept of state sovereignty, and replacing it by a new form of international sovereignty of an intrinsically liberal nature. The duties that international human rights law creates for states are not only owed to the protected individuals and legal persons. Because they make up a crucial part of the international public order and are defined as superior interests of the international community, they can be sanctioned by the entire international community. Subsequently, they are insulated from states’ obsession with national sovereignty and governmental attempts to reduce them. States’ duty to respect them exists, regardless of their ratification of the relevant treaties, derived instead directly from membership and participation in the international society. In consequence, they ground the contemporary evolution and integration of general public international law along the lines of a new global normativity, ultimately based on a universal recognition of the humanity of every individual.

II. THE OBJECT OF INTERNATIONAL HUMAN RIGHTS LAW AND THE CREATION OF A NEW VISION OF NORMATIVITY

In order to fully understand and elucidate the complexities and technicalities of a legal norm, one must analyse it in the light of its ultimate aim and social function.9 This explains the insertion, by Article 31 of the 1969 Vienna Convention on the Law of Treaties, of the famous ‘object and purpose’ test—which states that “a treaty shall be interpreted [...] in the light of its object and purpose”—into the theory of interpretation of international agreements. Accordingly, the idea lying at the core of any international instrument ought to be insulated from adverse attacks and teleological considerations can never be ignored, even in the frame of a thoroughly descriptive account of the law. More precisely, when a certain ideology presided to the creation of a given set of norms, it cannot be dismissed altogether. It undoubtedly was the case for human rights conventions and, to a lesser extent, for the Charter of the United Nations; a fact which cannot be neglected. This implies that, even when looking at their specific provisions, the original aim and theoretical structure underlying the whole human rights project should not be forgotten.

9 P.-M. DUPUY, L’unité de l’ordre juridique international, o.c., p. 27.
The object and purpose of international human rights and humanitarian law is neither to establish reciprocal rights and obligations between states for their mutual benefit nor to organise a legal frame for their contractual relations. It does not aim at forwarding national interests or at adjudicating the conflicting claims, disagreements and ambitions of differing governments. On the contrary, human rights and humanitarian conventions are multilateral legal agreements composed of a set of ‘absolute’, objective or ‘self-existent’ obligations that states parties unilaterally commit themselves to comply with.\textsuperscript{10} Hence, they constitute ‘integral’ treaties, by opposition to ‘interdependent’, reciprocal, ‘concessionary’ or \textit{synallagmatiques} conventions. In other words, they are disconnected from the idea of reciprocity that traditionally tainted most international accords. And they generate obligations that depend neither legally nor practically on their parallel execution by other parties to the same agreement. In contrast, they give rise to autonomously and absolutely binding duties, owed to the entire world rather than merely to the contracting parties.\textsuperscript{11} This means that, when they ratify those treaties, members of the international community undertake to respect and guarantee the individual rights they protect, regardless of the actions of other states.

This constitutes the uniqueness of this type of treaty in comparison with other international instruments. And it has been alleged to justify at least some departure from the classical secondary rules of general international law.\textsuperscript{12} However, the recognition of this specificity and of the ensuing exceptional treatment of human rights issues, in key international agreements codifying secondary international norms, shows that the

\begin{itemize}
\item See, for a detailed analysis of this phenomenon and its relevance for human rights and humanitarian law:
\item P.-M. DUPUY, \textit{L’unité de l’ordre juridique international}, o.c., pp. 139-141 and 382, note 763.
\end{itemize}
application of different solutions to human rights issues is actually in conformity with the said norms. For example, Article 60 § 5 of the 1969 Vienna Convention on the Law of Treaties specifies that a material breach of such a treaty does not result in its suspension or its termination. Similarly, it would never justify comparable violations of its provisions (even) regarding nationals of the infringing state. Indeed, the duties undertaken are due-by all subjects of international law-to the international community at large and do not cease to exist simply because of one country’s failure to comply with them. This is the essence of integral obligations.

In addition, states parties to these instruments do not merely engage themselves to guarantee the freedom of fellow member states’ citizens. They vouch to protect the individual rights of every person residing on their territory or within their jurisdiction, independent of her nationality and origins, which includes ‘illegal’ immigrants. For example, Article 1 of the European Convention demands that states “secure to everyone within their jurisdiction the rights and freedoms defined”. This covers all persons effectively under their power, be them nationals of the controlling authority or subjects of other (non-)signatory states. So, human rights norms refer to the universal identity of human beings. And the basic underlying idea is to treat every person as a human being, a rule that does

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13 See: E. SCHWELB, “The Law of Treaties and Human rights”, in Mélanges Mc Dougall, New York, Free Press, 1976, pp. 262-290, at pp. 278-281; who defends that this disposition should be read in the light of the sixth paragraph of its preamble, which points out its coverage of all human rights and humanitarian treaties.


17 H.R. Committee, General Comment No 15 (27) on the Position of Aliens under the Covenant, 22 July 1986, § 1.

18 H.R. Committee, General Comment No 24 (52) on Issues 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, 2 Nov. 1994, § 17.


20 P.-M. DUPUY, Droit international public, 8th ed., o.c., p. 214.

not admit any exception. This idea is already expressed in Article 28 of the Universal Declaration, which declares that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realised”. It binds all public institutions at the global, trans-national, municipal and local levels, to protect the said entitlements and provide a frame in which individuals can freely exercise their liberties.

Essentially, international human rights law constitutes the personal rights of each and every individual into universal absolute obligations that the international community owes to her because of her humanity. As a result, one can say that international human rights law stands as a legal order of a quasi-constitutional type. This reinforces the logical primacy of supra-national human rights norms over contradictory rules which are part of the national legal order, even though domestic authorities are usually charged with the enforcement of those international dispositions.\(^{18}\) The European Court and Commission of Human Rights have expressly recognised this and underlined the European constitutional value of the European Convention on Human Rights in several instances, specifying that this treaty is “a constitutional instrument of European public order”.\(^{19}\) This is equally valid at the universal level,\(^ {20}\) where the Universal Declaration is seen as a “part of the constitutional structure of the world community”, together with the Charter of the United Nations.\(^ {21}\) Hence, the international bill of rights “may, by finally constituting the individual as a subject of the international commonwealth, prove to be the first decisive

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step in the evolution of the federation of the world”. 22 More radically, the recent international sovereignty ultimately takes its roots in an inalienable liberal right to liberty and self-determination of all individuals.

Aside from the Charter, the development of human rights norms and the creation of new trans-national institutions further consecrate the evolution “away from the classic regime of state sovereignty [...] toward the firm entrenchment of the liberal regime of international sovereignty”. 23 Accordingly, the system of inter-states complaints obligatory under Article 24 of the European Convention on Human Rights 24 is considered as a remedy against a breach of Europe’s public order. The same applies to the optional systems of inter-states requests under Article 41 of the International Covenant on Civil and Political Rights and Article 45 of the Inter-American Convention. It is the case especially for the latter, since the Inter-American Court endorsed the very same approach to this issue as its European counter-part and referred extensively to Strasbourg case law in doing so. 25 By definition, inter-states complaints mechanisms embody the very idea that “how a government treats its own citizens is no longer its exclusive business, but a matter of legitimate concern for other states” and their individual inhabitants. 26

The International Court of Justice has adopted similar views on the place of human rights conventions in the international system. It first stressed the “common interest” underlying this type of treaties in its advisory

24 European Convention on Human rights, new Article 33.
opinion regarding reservations to the Convention for the Prevention and Punishment of the Crime of Genocide. 27 And it confirmed, in the Barcelona Traction Case, that human rights obligations are erga omnes “obligations of a state towards the international community as a whole” - namely, obligations whose fulfilment can validly be claimed by every member of that community, independent of any particular agreement relative to the issue in hand - and that, subsequently, all states have the same legal interest in their protection; 28 an interest that is closely tied to the principle of legality and the respect of the rule of law at the international level. 29 International human rights law is undeniably contributing to the emergence of “a new legal order, which encompasses a notion of international society”; 30 as well as to the materialisation of an “international civil society” able to claim respect for the rights of its individual components. 31

This position has been clearly defended by Roberto Ago, who considers that the idea of erga omnes obligations is narrowly bound to the existence of an international community and the institutionalisation of such a community. 32 Due to his key role in the International Law Commission during the early codification of the project on states’ international responsibility, his views on the question have been very influential on the ulterior work of the Commission. As a result, the International Law Commission has endorsed a similar approach in its recent codification of the responsibility of states for the violation of peremptory norms of

29 P.-M. DUPUY, Droit international public, 8th ed., o.c., p. 243.
30 P.-M. DUPUY, L’unité de l’ordre juridique international, o.c., p. 359.
international law.

III. **The International Law Commission Codification of States International Liability as a Consecration of This New Conception of Normativity**

The need to protect fundamental freedoms and entitlements has strongly influenced the writing of the 2001 final Draft Articles on the Responsibility of States for Internationally Wrongful Acts, later annexed to a resolution of the General Assembly. In addition, this project largely contributes to the crystallisation of several innovative tendencies regarding international human rights law and to the entrenchment of a novel approach to normativity at the international level.

First of all, the Draft Articles foresee two distinct sources of states’ responsibility. On one side, Article 42 (b) (ii) of this document deals only with the question of inter-dependent obligations and thus with the “invocation of the responsibility” by a state which has been personally injured, as is anyhow mentioned in the title of this disposition. Contrasting this provision, Article 48 institutes an *actio popularis* to the benefit of associations of states and the international community. So, its application is not conditioned by a personal lesion of the state that brings it into play. Article 48 § 1 refers to two groups of integral obligations: those “owed to a group of states including that state” which is invoking the responsibility of another, like duties towards a regional organisation; and those “owed to the international community as a whole”. These two types of rules are objective obligations, which do not engage any notion of reciprocity and are never “of such a character as radically to change the position of all other states to which the obligation is owed with respect to the further performance of the obligation”.

Article 48 § 1 (a) protects the interests of regional organisations or of other states’ groupings, in as much as they differ from the interests of their members. For instance, each member state of the European Union could invoke, in place of the European Commission, the responsibility of another state “irrespective of its belonging or not to the union”, for the violation of the duties it owes to the European institutions. The same applies to states belonging to the Council of Europe or the Organisation of

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American States, which constitutes recognition of the mechanism of inter-
state applications existing inside these two institutions. Thereby, Article 48 § 1 (a) allows a sort of narrow actio popularis in relation to the protection
of the object and interests of international organisations. And it de facto
gives them a certain form of international legal personality.

But Article 48 § 1 (b) goes much further, as it permits any state to
intervene in the event of a breach of erga omnes obligations. Every
government may then ask for the cessation of any infraction to these
norms and the reparation of the violation on behalf of the victim. Article 48 § 1 (b) confirms thereby the position of the International Criminal
Tribunal for the Former Yugoslavia, which considers that such obligations
are “owed towards all the other members of the international community,
each of which then has a correlative right”. And it equally endorses the
Tribunal’s judgement that their violation “simultaneously constitutes a
breach of the correlative right of all members of the international
community and gives rise to a claim for compliance accruing to each and
every member, which then has the right to insist on fulfilment of the
obligation or in any case to call for the breach to be discontinued”.

This constitutes the foundation for a multilateral frame, where the notion
of reciprocity is diluted and an authentic actio popularis is open to all states,
aimed at the protection of the international public order. This prevalence
of objective interests over subjective ones serves the function of restoring
international legality, even in the cases where the wronged state is a small
powerless country without enough weight on the international scene, and
which will not challenge a stronger nation in fear of retaliation. Although
Article 48 § 3 refers to Article 45 regarding the “loss of the right to invoke
responsibility”, which prevents any state to invoke the responsibility of
another when “the injured state has validly waived the claim”, states cannot
validly renounce to a request grounded on the lack of respect of
peremptory obligations. In truth, they are not allowed to derogate from
these norms even by means of agreement or treaty. So, it seems that they
could not possibly acquiesce validly to violations of erga omnes obligations
either, as these similarly guarantee superior interests of the international
community.

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36 See, for hints at such a result:
A. PELLET, “Le nouveau projet de la CDI sur la responsabilité de l’état pour fait internationalement illicite: Requiem pour le crime?”, in Mélanges Cassese, o.c., pp. 655-
683, at pp. 660 and 682.
37 See, for a defence of the inapplicability of Article 45 to the circumstances of
Article 48 § 1 (b):
Secondly, Articles 25 § 1 (b), 33 § 1, 42 (b) and 48 § 1 (b) of the Draft Articles do not speak of an ‘international community of states’ but of the ‘international community as a whole’, which extends the scope of this concept to cover non-state actors. Moreover, according to Article 48 § 2 (b), public authorities introducing an action on the basis of Article 48 § 1 can require the responsible government to repair the damage caused to the injured state or “the beneficiaries of the obligation breached”. This *alinea* implies that they can defend on this ground not only the interests of other states, but also those of private entities or individuals. This second aspect of the *actio popularis*, which is already tacitly expressed in Article 48 § 2 (b), is confirmed by the mention in Article 39 of the contribution to the injury “of the injured state or any person or entity in relation to whom reparation is sought”. Besides, the direct victims of infractions to *erga omnes* obligations – as those of breaches of peremptory norms of international law – are rarely states and usually private individuals.

Subsequently, any state can use the *actio popularis* consecrated in Article 48 to oppose and sanction violations of *erga omnes* obligations to the benefit of individuals who are not its own nationals or residents and, in particular, breaches of the fundamental rights and freedoms that the offending state is bound to respect under treaties it has signed or customary international law. This corollary is corroborated by the absence of application of the clause inserted in Article 44 (a) – on the “admissibility of claims” – to human rights norms, an inapplicability which has been explicitly underlined during the debates of the International Law Commission. Article 44 (a) otherwise stipulates that “the responsibility of a state may not be invoked if the claim is not brought in accordance with any applicable rule relating to the nationality of claims”. Its exclusion in matters related to the protection of individual entitlements further derives from the fact that what has already been said in relation to the waiving of states’ responsibility under Article 45 and *erga omnes* obligations is equally valid for...


38 A. PELLET, “Le nouveau projet de la CDI sur la responsabilité de l’état pour fait internationalement illicite”, *o.c.*, p. 666; who is critical of the wording of these articles but still observes, in this regard, that the notion of international community has expanded since the adoption of the 1969 Vienna Convention.

This institutionalises a universal system of inter-states applications comparable to the one recognised by the Council of Europe and the Organisation of American States. The next step on this line would involve granting the same right of action to individuals or other non-state actors, a development that is already observable in the increasing precedence given to the rights and interests of victims in international criminal law.

Thirdly, the Draft Articles confer the status of *ius cogens* to the whole set of human rights. Indeed, the project adopted on second reading in 2001 mixes the notions of *erga omnes* obligations and *ius cogens*. It uses them alternatively, substituting one for the other. The third chapter of the second part of the Draft is titled “serious breaches of obligations under peremptory norms of general international law”. Articles 40 and 41, which are included in the said chapter, refer to this very concept; and so does Article 26. By opposition, the first chapter of the third part speaks of obligations owed to the international community or *erga omnes* obligations, as the texts previously adopted. The switch from one term to the other in different dispositions as well as in successive versions of the same provisions consecrates the exact correspondence that exists between the two concepts, in conformity with the definition of *ius cogens* in Article 53 of the Vienna Convention. Moreover, the International Law Commission has interchangeably made use of both expressions during its debates and justifies the resulting confusion by alleging that the obligations arising under these two types of norms largely coincide. Consequently, the norms protecting fundamental freedoms, whose *erga omnes* character is traditionally recognised, also benefit from the status of peremptory obligations or *ius cogens*.

Even so, one might argue that the mix-up of the two terms in the Draft Articles results from an over-simplification of reality and not from a

40 A. GATTINI, “The Obligations of States Likely to Invoke the Responsibility for Serious Breaches of International Peremptory Norms”, o.c., Section III - 3.

41 International Law Commission, 2001 *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, o.c., Articles 42 § 1 (b) and 48 § 1 (b).


B. SIMMA, “Bilateralism and Community Interest in the Law of State Responsibility”, in *Mélanges Rosenne*, Dordrecht, Nijhoff, 1989, pp. 821-ff., at p. 825; who judges that the two terms refer to different aspects of the same norms, that they “constitute but the two sides of one and the same coin”.
conscious decision to extend the scope of *ius cogens* to cover all *erga omnes* obligations. However, the Draft does not solely confuse the two notions, and use them in an overlapping fashion. It goes much further in that direction, with the result that the perfect compatibility and equalisation of both terms cannot be denied so easily.

To begin with, it explicitly refers to the peremptory status of individual rights in its Article 50 § 1, concerning the “obligations not affected by countermeasures”; specifying that “countermeasures shall not affect: the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; obligations for the protection of fundamental human rights; obligations of a humanitarian character prohibiting reprisals; [and] other obligations under peremptory norms of general international law”. This disposition mirrors Article 60 of the Vienna Convention, which exempt “treaties of a humanitarian character” from being suspended or terminated as a result of violations of their provisions by states parties to these treaties. Although it leaves the door open for potential new candidates to that status, it expressly recognises the *ius cogens* or peremptory character of the three first categories of obligations it cites, including the protection of human rights.

Here again, one might claim that the mentioned rights are solely the most important ones or those belonging to the hardcore of non-derogable provisions, which cannot be restricted even in times of war or public emergency threatening the life of the nation. On one hand, it can be formally argued that all rights that cannot be suspended under these safety clauses have by definition *ius cogens* status. Article 53 of the 1969 Vienna Convention on the Law of Treaties expressly singles out peremptory norms of general international law as rules “from which no derogation is permitted”. Thus, peremptoriness can be considered as a synonym for inalienability. As a result, the human rights specifically identified in international treaties to remain always inalienable –independent of the gravity of the circumstances– belong *essentially* to this category. On the other hand, nothing indicates that Article 53 merely covers this particular category of individual freedoms and entitlements. And it is still improbable that the expression “fundamental human rights” in Article 50 § 1 of the Draft Articles would only refer to the few rights listed in derogation clauses.

On the contrary, it seems that this expression needs to be interpreted much more broadly, as it is done in the title of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Indeed, in its famous obiter dictum in the Barcelona Traction Case, the International Court of Justice uses the quasi-identical expression of “basic rights of the human person” in relation to the concept of erga omnes obligations. The similitude is even more flagrant in the French version of the judgement, which speaks of “droits fondamentaux de la personne humaine”. Besides, all the international rules protecting human rights are applicable erga omnes. And the dictum of the Court has been interpreted as a reference to the two United Nations Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, before these instruments had even entered into force.

In addition, a distinction among the different human rights cannot be justified at this level, neither on a theoretical basis nor by reference to the practice of international bodies monitoring the respect of individual rights and freedoms. Finally, the deliberations during the Vienna Conference regarding the parallel Article 60 of the Vienna Convention referred not only to the 1949 Geneva Conventions, but also to the status and protection of refugees, the prohibition of slavery, the interdiction of genocide and, ultimately, to the “conventions for the protection of human rights in general”. Article 50 § 1 pertains, therefore, to the customary parts of the Universal Declaration of Human Rights and all the dispositions of the two International Covenants, as well as to the other international treaties protecting human rights at the global level.

IV. THE POSITION OF INTERNATIONAL HUMAN RIGHTS NORMS AT THE CORE OF THIS NEW CONCEPTION OF NORMATIVITY

The confusion introduced between the notions of ius cogens and erga omnes obligations and the recognition of the peremptory character of all human

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rights in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts are a crystallisation of recent doctrinal developments on the topic.\textsuperscript{50} The “futility” of trying to draw a distinction between the two concepts is clearly evidenced by the observation that “authors have sometimes come to opposite conclusions as to the larger or narrower scope of either”.\textsuperscript{51} More crucially, the International Court of Justice appears to have paved the way to the International Law Commission in failing to differentiate noticeably the two concepts.\textsuperscript{52} And, fundamentally, it is equally implied in the analytical description and clarification of both concepts, underlying the doctrinal definitions.

The rules of \textit{ius cogens} have been compared to domestic rules of public policy or public order.\textsuperscript{53} Indeed, \textit{ius cogens} – whose origins are generally traced to Roman Law – is seen as an embodiment of the principle that “certain types of contract are, by their very nature, injurious to society and therefore contrary to public policy”.\textsuperscript{54} It incorporates a notion of international public order or “public order of the international community”, composed of international rules and principles which cannot be impaired by the invocation of contrary multilateral agreements or unilateral actions. This entrenchment is motivated by the fact that any such attack would go against what constitutes the very foundation of public international law.\textsuperscript{55} Accordingly, it would even bind dissenting

\textsuperscript{50} See, among others, for a clear doctrinal endorsement of the confusion between the two notions: B. SIMMA, “From Bilateralism to Community Interest in International Law”, o.c., pp. 292–294 and 300; who remarks that, although some norms could theoretically be applicable \textit{erga omnes} without having a peremptory character, examples of such rules appears practically speaking difficult to conceive.


\textsuperscript{53} P.M. DUPUY, \textit{Droit international public}, 8th ed., o.c., pp. 21 and 294–297.


states,\textsuperscript{56} whether opposed to the concept as such or to its inclusion of some specific norms. Thereby, the notion of \textit{ius cogens} participates to the transformation of the supra-national system into “universal international law”.\textsuperscript{57} Hence, it is introducing into the international legal order a source of objective illegality, which all states can invoke without being affected directly.\textsuperscript{58} Yet, this is precisely the meaning of \textit{erga omnes} obligations and their main documented effect. Incidentally, the definition of peremptory norm in Article 53 of the Vienna Convention expressly refers to the notion of international community (even if it uses the old expression ‘international community of states’). The terminological confusion introduced by the International Law Commission would, then, correspond to a transcription of this analytical and the ensuing academic vision of \textit{ius cogens}.

In consequence, the Commission cannot be reproached its activism, since its Draft Articles merely embody an approach shared by a conceptual analysis of the relevant terms, the similar perception of a large segment of the doctrine, and a clear jurisprudential trend at the international level. For that reason, the \textit{ius cogens} status of all human rights provisions ought to be currently assured and defended. On top of this, and independently of it, the peremptory character of the whole body of international human rights treaties and customs has also been advanced by part of the international case law and doctrine, although it has always been an object of controversy.

On one side, some authors have contested the very notion of customary

M. BOS, \textit{A Methodology of International Law}, p. 246.
See also: A. VERDROSS, “Ius Dispositivum and Ius Cogens in International Law”, \textit{American Journal of International Law}, 1966, pp. 55 ff., at p. 58; who underlines that \textit{ius cogens} serves the needs of the international society as a whole, rather than those of particular member states.
international peremptory norms, scepticism stemming from the lack of a clear consensus on the norms benefiting from this status. Yet, this lack of consensus is not enough in itself to cast doubts on the category as a whole. At least, many decisions of the International Court of Justice affirm the peremptory character of a number of fundamental rights and freedoms. However, the jurisprudence of the majority of the International Court of Justice seems to restrict the scope of *ius cogens* to a limited number of rights and liberties: those considered non-derogable in all human rights instruments; the ban on genocide; the condemnation of crimes against humanity; and the basic principles of humanitarian law, which basically encompass similar norms, with the adjunction of Article 3 common to the four Geneva Conventions and the rule condemning the killing of prisoners of war. A notable addition to the traditional list of inalienable rights is that of the prohibition of discriminations based on grounds of race, colour, descent and national or ethnic origin. This jurisprudence seriously minimises the impact of peremptory provisions, in particular with respect to economic, social and cultural rights. In fact, it only adds to the lists of non-derogable rights inserted in all human rights conventions the need to respect fair trial guarantees and to care for the wounded and sick, as well as the ban of abusive deprivations of personal freedom and racial discriminations.

Specifically, the proscription of the sole acts of discrimination which are

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based on race, colour, descent and national or ethnic origin as a rule of *ius
cogens* appears decidedly unsatisfactory. Moreover, it has now become
highly contestable. In particular, excluding gender equality from the core
of non-derogable norms is truly problematic, considering the gravity of
human rights violations resulting from discriminations against women. In
addition, it neglects the fact that the United Nations Charter, whose
dispositions are binding on all members of this organisation and thus on
the quasi-totality of states, outlaws sex-based discriminations in several of
its provisions. More generally, the Inter-American Court of Human
Rights has recently recognised, in an advisory opinion concerning the
rights of ‘illegal’ migrants to fair trial and adequate labour standards, the
peremptory character of the principle of equality and non-discrimination
taken as a whole. The Court specifies that “this principle may be
considered peremptory under general international law, in as much as it
applies to all states, whether or not they are party to a specific
international treaty, and gives rise to effects with regard to third parties,
including individuals”. And it justifies this judgement by the fact that “the
whole legal structure of national and international public order rests on”
the ban of any discrimination. As a result, it sums up that the
“discriminatory treatment of any person, owing to gender, race, colour,
language, religion or belief, political or other opinion, national, ethnic or
social origin, nationality, age, economic situation, property, civil status,
birth or any other status is unacceptable”.

The exclusion of all economic and social rights from the list of peremptory
international rules is equally upsetting. Yet, this conclusion was put into
question by a decision of the Appeals Chamber of the International
Tribunal for the former Yugoslavia, which declared that “most customary
rules of international humanitarian law” are norms of *ius cogens*. In the
light of the Tribunal’s views regarding the customary character of the
biggest part of the laws and customs of war, this decision does, in turn,
give a peremptory status to most provisions of the *ius in bello*. This largely
extends the number of non-derogable individual freedoms and

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62 UN Charter, Articles 1 § 3, 8, 13 § 1, 55, 56, 62 § 2 and 76.
64 I.C.T.Y., Appeals Chamber, *Tadic Case (Prijedor)*, IT-94-1-AR72, *Decision on the
A. CASSESE, “The International Criminal Tribunal for the Former Yugoslavia and
229-247, at pp. 240-241.
65 I.C.T.Y., Appeals Chamber, *Tadic Case (Prijedor)*, IT-94-1-AR72, *Decision on the
entitlements, including in the field of economic, social and cultural rights.

Furthermore, the Court of First Instance of the European Communities had to deal with the contents of international *ius cogens* in several decisions, in the context of the United Nations Security Council's imposition upon all states members of that organisation to freeze the bank accounts of suspected terrorists. It, unfortunately, upheld the European anti-terrorism measures adopted in application of the mentioned Security Council resolutions. However, it did not stop its analysis there. In the process of reaching its verdict, it judged that it cannot review the legality of such resolutions, beyond their conformity with peremptory norms of international law, and went on to examine the scope of such a category of rules. During the subsequent investigation of this question, it recognised that the protection of private property, the entitlement to a fair hearing and the access to an effective judicial remedy are part of the core human rights provisions benefiting from *ius cogens* status, even though it only sanctions arbitrary deprivations of these liberties.66 In view of the fact that international organs have the tendency to concede a lesser ranking in the rights hierarchy to individual property than to most other human rights, this shows a marked tendency in favour of recognising such a character to all individual freedoms and entitlements.

On the other side, it has been suggested that all the norms of humanitarian law and the treaties protecting human rights universally ought to be judged as imperative provisions.67 For instance, the Human Rights Committee underlines the peremptory character of a great number of rights.68 The Inter-American Commission also recognises the *ius cogens* status of fundamental freedoms and entitlements69 and affirms, along the same lines, but with a more specific focus on applicable regional instruments, that the entire American Declaration of the Rights and Duties of Man is

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H. MOSLER, *The International Society as a Legal Community*, o.c., p. 60.
68 H.R. Committee, *General Comment No 24 (52)*, o.c., § 8.
“a mandatory rule of *ius cogens*”.\(^{70}\)

The Japanese judge Tanaka adopts a similar position in his famous dissenting opinion before the International Court of Justice, in the *African South West Case*. During his evaluation of the claim of the principle of non-discrimination to the status of *ius cogens*, he extends it to all other human rights. In consequence, he considers that human rights “are not the product of a particular juridical system in the hierarchy of the legal order, but the same human rights must be recognised, respected and protected everywhere man goes”. Then, he adds that “the existence of human rights does not depend on the will of the state”. To be sure, “a state or states are not capable of creating human rights”. On the contrary, “they can only confirm their existence and give them protection”. As a result, “the role of the state is no more than declaratory”.\(^{71}\) Moreover, in the *Nicaragua Case*, the Court goes into the same direction, although without expressly mentioning the notion of *ius cogens*. And it points out that the inexistence of any conventional engagement for a country’s public authorities to respect human rights does not mean that this state can violate individual rights with impunity.\(^{72}\) This indicates that the Court gives to general international human rights law as a whole a peremptory status or, at the very least, a customary character.

**V. THE CONSEQUENCES OF THIS NEW CONCEPTION OF NORMATIVITY FOR THE PROTECTION OF INDIVIDUAL RIGHTS**

The crystallisation of this developing tendency and the recognition by the International Law Commission of the fact that all human rights belong to *ius cogens* bears a capital importance in practical terms. Indeed, the peremptory norms of general international law or rules of *ius cogens* are specifically defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties as norms “accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. This prohibition of any possibility for states to depart from the rules of *ius cogens*, even through a bilateral or multilateral treaty binding the sole parties to this agreement, constitutes their superiority in comparison with provisions of *ius dispositivum*.\(^{73}\)


\(^{73}\) A. DE HOOGH, *Obligations Erga Omnes and International Crimes*, o.c., p. 45.
As a result of this, treaties which conflict with peremptory norms of international law already existing at the time of their conclusion are void, while the emergence of new peremptory norms invalidates and terminates all conflicting treaties previously adopted. Indeed, “the basic characteristic of a *ius cogens* rule is that, as a source of law in the now vertical international legal system, it overrides any other rule which does not have the same status”. So, “in the event of a conflict between a *ius cogens* rule and any other rule of international law, the former prevails”, with the result that “the conflicting rule is null and void, or, in any event, does not produce legal effects which are in contradiction with the content of the peremptory rule”. In consequence, *ius cogens* norms introduce a hierarchy among international norms and serve as criteria both for the validity of other legal rules and for the legality of states’ acts.

Moreover, according to the legal stance expressed in Article 44 § 5 of the Vienna Convention, it seems that invalidation of a treaty in reason of its Article 53 –that is, for inconsistency with a peremptory rule of international law- affects its entirety and not merely the inconsistent clause. Yet, annulling the sole conflicting dispositions appears preferable where they can be severed from the rest of the agreement and that the aim of the latter does not contradict any peremptory norm. And, the International Law Commission allows the parties to revise themselves the endangered treaty to bring it in line with *ius cogens* and salvage it from nullity. Accessorily, most of the rules of *ius cogens* that were proposed by national delegations during the drafting of the Vienna Convention have a customary origin, even if their primary position in the structure of the international system let them escape the hazards of states’ fluctuating practice. But some of them can also derive from treaties, general

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75 P.M. DUPUY, *Droit international public*, 8th ed., o.c., p. 296.


See also, on the uncertainty surrounding the sources of *ius cogens* norms: M. BYERS, *Custom, Power and the Power of Rules*, Cambridge, Cambridge University Press, 1999, pp. 187-195; who analyses in details the similitude and divergence between these rules and the three primary sources of international law to conclude that they are more alike customary norms.

principles of international law, or United Nations resolutions.

Anyhow, the wording of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts results in banning any treaty abolishing or negatively affecting international human rights law—be it under the cover of reservations—and in rendering these norms indistinguishably applicable in peace and wartime, as well as absolutely non-derogable in cases of state of emergency. This is an important departure from the ordinary rules governing other treaty provisions and international customs. Indeed, although they cannot be the objects of any reservation, some derogation can normally be taken from customary rules and states can contract treaties derogating from some of these norms in their bilateral relations. Conversely, human rights instruments are, now, legally immunised against such common dangers.

As a corollary of their *erga omnes* and *ius cogens* character, their appertaining to an international public order and the ensuing *actio popularis* against domestic attacks on the liberties they protect, individual rights and freedoms are excluded—in the limits of their enactment in international agreements and customary law—from the powers of domestic authorities. By definition, international human rights and humanitarian norms can, therefore, never be legitimately or validly subjected to states’ assaults. In the end, they are legally removed from the scope of state sovereignty; they take precedent over it and curtail its legitimate scope. Essentially, they constitute both the foundation and the keystone of a transfer of the ultimate sovereignty to the international community, to the detriment of the powers and competences of its member states.

On the basis of their privileged position, it has been argued that “the Vienna Convention on the Law of Treaties does not and cannot apply in quite the same manner to the interpretation of human rights treaties as it does to ordinary treaties” and that “autonomous rules may have to be

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developed for the interpretation of human rights instruments”.\textsuperscript{82} This being said, a departure from the dispositions of the Vienna Convention is not even necessary to ground a restrained conception of state sovereignty and the absolute priority of individual entitlements over conflicting considerations. As mentioned above, Article 31 of the Vienna Convention states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The application of this principle of interpretation to the case in hand permits to bypass the question of the need to construct an alternative set of secondary rules to deal with fundamental rights. To sum up, Article 31 provides a textual justification for taking into consideration the particular aim and specific position of human rights instruments, when interpreting them. This motivates, in turn, the adoption of distinct solutions in practical instances, \textit{without} departing from the frame of the Vienna Convention.

The International Law Association draws the consequences of these developments until their logical conclusions and, eventually, completely dissociates human rights from states powers and undertakings. It remarks that fundamental rights “are no longer the reverse side of laws, their mirror image, as it were”; that is to say, that they “must still exist even if all states with their statutes and laws were to collapse”.\textsuperscript{83} Incidentally, this pronouncement is confirmed by the Preamble to the Inter-American Convention on Human Rights, whose second paragraph specifies that “the essential rights of man are not derived from one’s being a national of a certain state” and that “they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”. Thus, “since they are not derived from the state or any other external authority, they may

See also: E.C.H.R., \textit{Belilos v. Switzerland}, 29 Apr. 1988, J. DE MEYER, Concurring Opinion, \textit{Series A}, Vol. 132; who refers to the notion of \textit{ius cogens} after stating that the respect and protection of individual rights exists “even in the absence of any instrument of positive law”.
C. TOMUSCHAT, \textit{Human Rights}, Oxford, Oxford University Press, 2003, p. 60; who acknowledges that, with the end of the cold war and the fall of communism, “the intellectual premise according to which human rights cannot be conceived of without and outside the state seems to have lost ground”.
not be taken away by any authority". Similarly, the Inter-American Court of Human Rights considers that “human rights must be respected and guaranteed by all states”. And it justifies this stance by an appeal to the fact that they are “superior to the power of the state, whatever its political structure”. In a nutshell, individuals hold basic rights because of their humanity and not due to some legal tie with the country of which they are nationals. Therefore, they owe everything to themselves and nothing to the state.

This type of approach is often criticised as the expression of a natural law conception and generally discarded as such. However, the primacy of individual freedom over public interests and the general welfare, the obligation for states parties to the United Nations to respect fundamental rights independent of further agreement on their part, and the international protection of those basic entitlements in all instances, are not mainly rooted in natural rights and their correlative duties. They are, on the contrary, integral components of the international legal order as it stands today; and their affirmation is nothing but positivistic. In fact, they simply refer to the existence, in positive international law, of peremptory norms –namely, *ius cogens* obligations, which are undoubtedly a part of the current legal order at the international level- and to states’ duties towards the international community, as distinct from the sum of all states that belong to it. This is inherent to the fact that the international arena is not restricted anymore to a select club of states, but composed of a wide array of public and private actors, whose conflicting claims need to be protected globally.

VI. THE FUNCTION OF HUMAN RIGHTS IN THE STRUCTURING OF A NEW UNIVERSAL SPACE OF NORMATIVITY

The distinctive role played by human rights treaties and their specific

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functions imply that these instruments can never admit clauses limiting the scope or application of their provisions for contradictory purposes. As a result, restrictions to these norms can solely be permitted where this is done with the clear and incontestable aim of guaranteeing and enhancing the protection of individual rights. This contention is supported by the particular position occupied by fundamental rights in the general structure of the international system and favours a vision of international sovereignty residing in the international community as a whole and constructed around the protection of individual entitlements, over its 'political' state-based Westphalian counterpart. Under this new paradigm, the international society becomes the first guarantor of fundamental liberties. Consequently, at the international level, the possibility emerges for unmediated individual claims addressed directly to the international community, independent of any grounding in the nation-state. And, in due course, we end up with a radically cosmopolitan model for the global society.

Bearing in mind the notoriously poor record of state organs and public officials, whenever they are given the opportunity to deal with such private actors as they wish to, the rights and interests of those new international subjects are clearly better protected before supra-national institutions. Accordingly, the international supervision of the respect of human rights and the presence of international mechanisms facilitating the defence of individuals against the national establishment, which is exercising power over them, are answering to an imperative need of the international community.\(^88\) To be sure, abandoning the protection of human rights to domestic authorities, which are the prime violators of individual freedom,\(^89\) is obviously inadequate, if not entirely dangerous. Seeing the prominent place given to fundamental rights and more generally to individual concerns in contemporary international law, this had to be remedied one way or another. In consequence, international law and the international society are entrusted with a twofold role as guardians of humanitarian norms and obstacles to states’ misdeeds. The role of supervising the respect of these fundamental freedoms and entitlements is ultimately entrusted to the whole international community; that is, all

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\(^{88}\) H. MOSLER, *The International Society as a Legal Community*, o.c., p. 59.

\(^{89}\) See, among others, for a particularly enlightening characterisation of the situation: A. CASSESE, “La valeur actuelle des droits de l’homme”, in *Mélanges R.-J. Dupuy*, Paris, Pedone, 1991, pp. 65-75, at pp. 71-72; who observes that, although states are supposed to ensure the respect of human rights, they are on the contrary the main violators of these rights and underlines the absurdity of having to rely on governments’ protection of individual freedoms by comparing it to kindly asking a seventeenth century slave-trader to abandon or reduce his commercial practice.
subjects of public international law in their capacity of trans-national actors and subjects of a cosmopolitan legal order. The enforcement of these norms is, accordingly, equally entrusted to the entire international community; more specifically, to domestic courts and tribunals in first instance and with an appeal before international monitoring bodies.

Through the recognition of their legal prevalence in supra-national documents, fundamental rights are actually providing the conceptual linkage between liberalism and contemporary developments in international law; leading to a new concept of liberal sovereignty, where states “sovereignty is not absolute and includes respect for its legal limitations”. Incontestably, “sovereignty is only a name given to so much of the international field as is left by law to the individual action of states”. In the first place, states’ pretensions to sovereignty rest, at the international level, on the recognition of this principle in the Charter of the United Nations. As a result, national sovereignty is only appropriate so long as states act inside the limits established by the Charter and respect the norms it protects. This includes, above all, the rights of individuals living under their jurisdiction. In consequence, domestic authorities lose their sovereign control when they are implicated in human rights violations, as the commission of such abuses is clearly outside the limits of the dominion that the Charter concedes to them. Therefore, rights are the principal channel of the contemporary shift from a traditionalist archetype of state sovereignty to a paradigm of liberal international or cosmopolitan sovereignty, which seeks to curtail political power and render it accountable by placing “at its centre the primacy of individual human beings”.

As such, rights determine the limits of law’s legitimacy and the democratic character of the polity. They “serve as constraints on which institutions we should have” and as standards of legality of municipal organs. A legitimate state is a rights-respecting state, and democratic institutions are

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92 D. HELD, “Law of States, Law of Peoples”, o.c., especially pp. 1-2 and 38-39; who underlines that “the study of the nature and changing forms of sovereignty is the study of the shifting meaning of rightful political authority”, that “sovereignty is a contested phenomenon” and that, “in tracing shifts in the regime of sovereignty, the concern is with the reconfiguration of the proper form and limits of political power and the changing connotation of legitimate political authority”.
institutions protective of basic rights. Accordingly, just institutions, both at the trans-national and at the municipal level, emerge from the antecedent rights of individuals. This inverts the conventional republican conception, where fundamental liberties materialise as the result of the adoption of traditional democratic principles or the institutionalisation of the general will. Indeed, the entrenchment of basic rights in constitutional documents, international treaties and customs becomes the cornerstone of states’ legitimacy. Subsequently, legal norms and decisions that ostensibly infringe fundamental rights need not only to be considered unjust but also invalid. In a nutshell, human rights constitute at the same time constraints on the individual actions of every agent and standards for the evaluation of the legitimacy of political structures and the validity of laws.

In this new perspective, human rights constitute a sort of Hartian ‘rule of recognition’ of the international legal order; namely, they serve as criteria for the validity at the supra-national level of each and every legal provision otherwise adopted. Herbert Hart defines a rule of recognition as “a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation”. It is normally concerned with conferring powers but it can, nevertheless, include substantive and even moral conditions. It unifies all other norms into a coherent legal system. And it operates as a benchmark for their validity. Therefore, it constitutes the defining element and the ultimate foundation of the entire legal order. Hart adds that “for the most part the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified”, in practice, by various actors, chiefly including judicial bodies. This entails a clearly customary aspect.

Besides, the validity of that particular rule does not need to be demonstrated. In spite of the fact that it serves as a touchstone for the validity of all other rules within a given legal order, it cannot (logically) ground either its own legitimacy or that of the system as a whole. These two issues are clearly interdependent but they require some further justification, as well as an extra-legal point of reference from which to assess their truthfulness. Yet, as long as one remains inside the legal paradigm, the rule of recognition functions as a factor of self-validation and rationalisation of that regime. Hence, Hart’s rule of recognition is, at the same time, a norm and a blunt fact. It also has both a legal and a meta-legal character. In a way, it is axiomatic precisely because it is the keystone of the system, the main hypothesis on which it is constructed and from
which it derives its internal consistency.\textsuperscript{94}

This is precisely the role played by human rights on the international plane. Their \textit{ius cogens} status does not merely give them a peremptory character but implies also that no treaty can restrict or oppose them. This means that they work in practice as a standard for the legality of other norms, which is the nature and function Hart ascribes to his rule of recognition. Accordingly, the European Court of Human Rights considers that domestic rules and policies which violate basic human rights cannot qualify as the law, at least for the purposes of the Convention.\textsuperscript{95} Moreover, as part of the wider set of \textit{ius cogens} norms, they have a customary character at the international level. And the progressive strengthening of their effective recognition and protection has been tightly linked to the development of international customs. Further, although not always explicitly articulated, their impact on the pronouncements of international courts, supervisory organs and other institutions is undoubtedly decisive. They are posited as the core of the recently emerging international public order and the principal justification for the post-Westphalian shift from traditional states’ sovereignty to a new conception of sovereignty, residing in the international community, as the guarantor of universal principles and the protector of individual entitlements. In consequence, they constitute the perfect illustration of the materialisation of the international legal integration process through a normative hierarchy and of a universal, extra-territorial and quasi-objective, substantive law; hence, embodying a radically novel conception of normative space and normativity.


I. INTRODUCTION

One of the most crucial dilemmas political actors have to face is how to give credibility to their promises without losing flexibility. To provide credibility to their promises, political actors may use a number of instruments. One of them is known as ‘commitment technologies’. A commitment is a way to tie political actors’ hands. More technically, a commitment is a way to eliminate one of the alternative courses of action—or strategies—available to political actors, or a way to make that alternative very costly for them.¹ For example, a political actor promises to regenerate politics—end corruption—in a given state. He, then, commits himself not to be president for more than two mandates. To this end, he proposes a constitutional amendment to insert a presidential term limit (henceforth, “PTL”) clause in the Constitution. This amendment would render credibility to his commitment not to be president for more than two mandates. In turn, this would make trustworthy his promise to combat corruption.

When speaking about commitment technologies, it is important to differentiate between two elements: the content of the commitment and the form it adopts. Ideally speaking, and to continue with our example, one could encapsulate the commitment not to be president for more than two mandates in a number of forms. One could, for example, make a constitutional or other whatsoever legal amendment. Another possibility would be to make a political commitment; for example, the incumbent could announce his commitment to the political party he belongs to and to the society at large. There are still other ways to encapsulate commitments. For example, religion or morals do encapsulate commitments; at least, they do for those who believe in a particular religion or hold a particular set of ethical rules. However, for political

actors, at the time to make a commitment, the main choice is between politics or law.

In this article, I shall try to answer two related questions. First, when does it make sense for a political actor to choose law instead of politics in order to encapsulate commitments? My argument is that political actors, if rational, would be expected to choose law instead of politics when they are interested in giving the maximum degree of credibility to a particular commitment. However, choosing law may imply a loss of flexibility. Therefore, if rational, political actors should choose politics instead of law when looking for more flexibility than credibility. Of course, this argument relies upon a certain vision of law as credibility, according to which law is the most sophisticated institutional technology designed to give credibility to commitments. I shall explain this vision in the first part of this article.

The second question relates to the conditions under which political actors will choose law instead of politics. In other words, the second question relates to the conditions under which political actors will want more credibility than flexibility. My argument here will be that this decision is contingent upon the political actors’ motivations lying behind the commitment, both at the time they make the commitment and at the time they have to implement it.

In order to illustrate this discussion, I will use a particular example, the example of presidential term limits. It must be clear from the outset that my purpose is not to explain the emergence and evolution of this commitment. I will use the PTL example only as a way to better illustrate the principal arguments of this paper.

II. LAW AS CREDIBILITY

As stated before, the first question I want to address is when it is rational for a political actor to choose law instead of politics for commitments. On one hand, political actors make promises continually. Politics is based -at least, in part- in the political actors’ capacity to make promises. However, the interesting thing about politics is not political actors’ agency to make promises, but rather the capacity to make the others believe that they will fulfil the promises they make. In other words, one of the main issues in politics is how political actors solve, or attempt to solve, their credibility problems. Therefore, when a political actor promises, for example, that he is going to reduce taxes, it is legitimate that people question -at least, to a certain extent- whether the political actor will implement his commitment. Note that the importance of this lies in the fact that, other things being equal, people’s support to the political actor will be
contingent upon the capacity he has to make them believe in his promise. Thomas Schelling formulates very nicely the importance of credibility in politics in the following passage:

“After facts, and predictions, we come at last to intentions. Can the president convince us that he is determined to do what he has said he will do? Can he persuade us that he will not change his mind as the costs accumulate and the risks become vivid? Has he correctly assessed the costs and the risks, or does his adamant determination reflect innocent miscalculation?”

The story of the debate around presidential term limits in Spain may be useful to further show the credibility problems a political actor has to face. Contrary to what happens in the US Constitution Twenty-Second Amendment, the Spanish Constitution does not establish a clause limiting the number of presidential terms. But also differently from what happened in the US tradition before the Twenty-Second Amendment was enacted, in Spanish young democracy there has not been a political tradition of limiting presidential mandates. The American tradition was started by George Washington and was respected, in spite of several unsuccessful attempts to break it, until Franklyn Delano Roosevelt came to power. Once FDR’s second mandate was approaching its end, the Second World War exploded; which, according to all chronicles, was at the basis of FDR’s decision to burst the PTL American tradition. FDR won not only a third mandate, but also a fourth one. After this episode—considered by some as one of the most regrettable chapters of American constitutional history—Republicans prompted an amendment to the US Constitution in order to introduce a PTL clause, which took effect in 1951.

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3 This amendment reads as follows: “No person shall be elected to the office of the president more than twice, and no person who has held the office of president, or acted as president, for more than two years of a term to which some other person was elected president shall be elected to the office of the president more than once. But this article shall not apply to any person holding the office of president, when this article was proposed by the Congress, and shall not prevent any person who may be holding the office of president, or acting as president, during the term within which this article becomes operative from holding the office of president or acting as president during the remainder of such term”.

4 FDR served as president of the United States from 1933 to 37 (first term); from 1937 to 1941 (second term); and from 1941 to 1945 (third term). In 1944, he won a fourth term, but died in April 1945.

As I said before, the situation in Spain is quite the opposite of that in the US. There is no constitutional clause limiting presidential mandates and no PTL political tradition. However, Aznar promised when he was the candidate of the conservative Popular Party to the presidency – in the wake of the 1996 general election – that, if he was elected, he would not stay in power for more than two mandates; that is, eight years. According to him,\(^6\) this was part of a number of measures addressed to “regenerate politics” in Spain. Politics had to be regenerated in such a way because it was not good for the country that the same person stayed in office for so long as prime minister González had; that is, fourteen years. This being the case, Aznar actually won the 1996 election and the next general election in 2000. When the time of the 2004 election was approaching, there was a vivid public debate in Spain about who Aznar’s successor would be. Many said that Aznar would be his own successor.\(^7\) These rumours increased during discussions about the Spanish participation in the Iraq war. In fact, Aznar said that he would not run for a third mandate “except if extraordinary circumstances” required it. Many understood that – as had happened in the US case – the war would be the exceptional circumstance Aznar was talking about. In fact, debate about whether Aznar would honour his compromise only ceased when, six months before the election, he nominated Mariano Rajoy as his successor; a nomination which was accepted by the Spanish Popular Party.

This story shows that credibility was the issue at stake; people were not certain about what Aznar’s true intentions were. However, it also shows that flexibility was at least as important as credibility. It is very likely that Aznar wanted to keep an ‘exit door’ to leave the political commitment he had made. As he suggested himself – and as the American case seemed to imply –,\(^8\) the possibility that new and unexpected circumstances emerge precludes that he tie his hands completely. Spain could enter a war; terrorism could hit hard enough to compromise Spanish democracy; or, more realistically, the battle for Aznar’s succession could prove fatal for

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\(^7\) See, for example, I. VILLA, “Aznar sucede a Aznar” [Aznar succeeds Aznar], *Libertad Digital*, 31 Oct. 2001.

\(^8\) Stein, speaking of the American presidential term tradition, reports the following: “Jefferson still thought to safeguard with an amendment what he hoped, in lieu of an amendment, would become a custom; notwithstanding, [...] he admitted that he might approve and even run for a third term in one exceptional, but very unlikely situation – namely, circumstances in which “a division about a successor [...] might bring a monarchist”. The most formidable enemy of the third term in all American history here admits that he might change his mind and modify his principles “in case of an emergency”.

the Popular Party’s expectations of staying in power. If these risks became real, then, Aznar would have to withdraw his promise. A political commitment was, therefore, the adequate instrument for attending to the requirements of flexibility.

Political actors constantly face similar kinds of dilemmas between credibility and flexibility. They in fact would choose, if possible, the best of both worlds; to make credible commitments that do not entail a big loss in terms of flexibility. But, of course, the world is imperfect and, as we know, there is a trade-off between credibility and flexibility. In general, it can be stated that the more the credibility, the less the flexibility, and *vice versa*. When political actors privilege flexibility over credibility, as in the Spanish PTL case, they will choose political instruments. They may again, as in the Spanish PTL case-compromise ‘their word’-and, therefore, their reputation- that they will do what they promised they would do; they also may sign political pacts with other political parties, in particular, with the opposition or they may make certain gestures. The arsenal of political instruments at the disposal of political actors is, in this regard, quite diverse. However, if political actors privilege credibility over flexibility, they will use law. Again, the armoury of instruments is quite varied. They may, for example, insert a given commitment in the Constitution, as happened in the American PTL case with the Twenty-Second Amendment; they may pass laws or regulations; or they may sign international treaties.

Therefore, law may be better explained and understood in the context of the dilemmas that political actors face between credibility and flexibility. In such a context, law can be conceived of as the most sophisticated institutional technology at the disposition of political actors to give credibility to the commitments they make. This statement rests, of course, upon a number of important assumptions, which need to be dealt with in turn.

### III. THE EMERGENCE OF THE RULE OF LAW

Following Machiavelli, Stephen Holmes explains the emergence of the rule of law out of the need that the rulers benefit from the cooperation of those over whom they rule. The governing class’ self-interest in the people’s cooperation would not explain by itself the emergence nor the decline of the rule of law in a specific historical context, but it would at least explain why the ruling might “encourage or discourage” such developments. Starting from this premise, Holmes theoretically reviews

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some of the basic features of the rule of law, to confirm his hypothesis that “the political ruler first submits to regularised constraints when he perceives the benefits of so doing”. For example, as regards ‘self-restraint’, he argues that the reason why the powerful accept limits on their power is that self-restraint in fact increases their power. He states that “self-restraint is a tool and it can be explicitly advertised and consciously embraced because it furthers desired ends”. He also claims that, “from Voltaire to Max Weber, continental intellectuals urged their own autocratic regimes to imitate British political institutions on the grounds that limited government [...] would increase the military power and economic wealth of their countries”. Regarding the sister issue of ‘judicial independence’, Holmes considers that delegating power to the judges in fact “improves [the ruling] position”. Maximising power is as important as deniability for the governing class. Therefore, as Machiavelli puts it, “princes must make others responsible for imposing burdens, while handing out gracious gifts themselves”. Turning to legal certainty – or, in his own word, ‘predictability’ –, Holmes argues that “the principal reason why people with power agree to render their own behaviour predictable is that even the most powerful people need cooperation to attain their ends”. And he adds that the political ruler “can attain his objectives [...] only if he distributes rights and resources downwards in a way best calculated to conciliate confidence of the people”.

The bottom line of Holmes’ position is that the ruling class needs cooperation from those over whom they rule to attain their ends and, therefore, they commit with the ruled; further, these commitments are encapsulated in law. The fact that they are encapsulated in law is an additional guarantee that, once the interest in cooperation from the ruled fades, the ruling class commitments will be respected. Law implies here all the features that make the fulfilment of the ruling commitments not dependant on him. In this sense, judicial independence – or, to put it in legal theory terms, the ‘autonomy’ of law – is of utmost importance. But the other features Holmes speaks about – such as legal certainty, generality, abstraction and the like – are at least as important. All of them together help to build people’s confidence that once their cooperation is not needed anymore, the probability of commitment implementation will still be high enough. This long-term confidence in the fulfilment of commitments that law is able to build is also important for the ruling. If the ruling gave the impression that they would withdraw their commitment once their interest in cooperation from the ruled faded, then

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they would not be able to get the cooperation they need. Law is, therefore, a tool that serves the interest of both the ruling and the ruled, although in different ways.

As Holmes points out, the motivation of the ruling is the main variable that one has to take into account to attempt to explain the emergence (or not) of the rule of law.\textsuperscript{11} For Holmes, motivation means here self-interest. Though we shall return to the fundamental issue of motivations in the second part of this paper, it is enough for the moment to assume that the rulers’ motivation is self-interest. If there is self-interest in obtaining cooperation from the ruled, we could expect the emergence of law. And the stronger this drive, the harder the law will be. Implicit in this position we find the correlative idea that the more loose self-interest gets, the greater the political actor’s demand for flexibility and, therefore, the wider the place for politics.

\textbf{IV. Choice between law and politics and norm selection}

Graphic No 1 further shows the relation between law and politics in the context of the dilemma between credibility and flexibility. In this graph, law would be placed in the upper-left hand square. This would be so because all norms falling in this square would respect the trade-off according to what would have more credibility at the expense of less flexibility. In turn, politics would be placed in the lower-right hand square. This would be so because all political instruments that one can conceive of would respect the trade-off according to what would have more flexibility, but at the expense of less credibility.

\textsuperscript{11} \textit{Ibid.}, p. 34.
The two remaining squares, the upper-right hand square and the lower-left hand square, would represent cases in which the trade-off between credibility and flexibility does not hold. In the first case or upper-right hand square we would have situations -either legal norms or political instruments- of high credibility as well as high flexibility. This, as I suggested before, would be heaven for political actors. However, from the perspective of the concept of law as credibility, it would be impossible to find norms with high degrees of credibility as well as flexibility. At the same time, it would not be possible to find highly flexible political pacts or instruments that would also purport high degrees of credibility. To formulate it in other terms, the upper-right hand square would embrace ideal cases, cases that could not happen in the real world.

It is, on the contrary, possible to imagine real cases that could be placed in the lower-left hand square. For example, there are constitutions with low degrees of credibility but that are highly inflexible. For instance, the EC Treaty -which works as a constitution for all purposes- is very difficult to amend as it requires unanimity of member states; but, as is widely acknowledged, its degree of compliance is low throughout the European Union. In turn, the American presidential term limit tradition is a case of a political instrument that could fit in this square. The history of this commitment proves that exit from it became quite a difficult enterprise; however, almost all presidents from Washington to FDR had to make efforts to convince the public that they would keep their promises that they would not be president more than two mandates. In any case, the point here is not so much whether we can find real-life cases that could be inserted in this square. It is more theoretical: instruments, either legal or
political, falling in this square would constitute cases of ‘system malfunction’. That is, a constitution with a low degree of credibility but high rigidity may exist, but this would be a symptom that the legal system in question is not working properly. And a political commitment not to be president for more than two mandates, which is difficult to escape from but has a low degree of credibility, may also exist, but this would be irrational. Political actors would be better off having, in this case, a legal commitment rather than a political one.

The realm of law would, therefore, be represented by the upper-left hand square. To use other terms, from the perspective of the concept of law as credibility, all norms of a working legal system would have to fall at some point in that square. This statement is not only descriptive; it is also normative. This means that, from the perspective of this concept, all norms should at least be more credible than flexible. It also means that the credibility of a norm is (or should be) a function of its lack of flexibility. Or more plainly, it is a function of its rigidity.

This being the case, then the question turns out to be how to measure the rigidity of a norm. One could use many measures to do this, but the most important one, other things being equal, is through approval and amendment procedures. The harder the approval and amendment procedures of a norm is, the higher is its rigidity and, therefore, the higher its credibility. For the sake of parsimony, I shall call this measure ‘resistance to change’. The degree of resistance to change of a given norm is in fact a transaction cost. It involves the time that a political actor has to invest in approving or amending a norm, the resources he has to employ to this end, the cost of gathering information, and the like. Therefore, as transaction costs rise, the credibility of a norm rises in parallel. The most costly norms are the norms that have the highest degree of credibility.

This perspective also allows us to introduce ourselves into the debate of norm selection. Why do legal orders establish different kinds of norms? In positivist legal theory, a given legal order is always comprised of different types of norms; at the minimum, constitutions, laws and regulations. The validity of norms would be explained by reference to superior norms and, in the last instance, to the so-called Grundnorm, the basic law. Relations between norms would be of a hierarchical character. Thus, constitutions

12 The notion of ‘law’ that is implicit in this approach is substantive, not formal. Therefore, from the perspective of the concept of ‘law as credibility’, a written norm, which has been adopted according to legal procedures, would not be considered as ‘law’ if it does not respect the condition that it is more credible than flexible. On the contrary, a social norm or a political covenant, not incorporated in the legal system as written law, can be considered ‘law’ if the previous condition holds.
would be placed at the tip of the so-called normative pyramid; then, we
would have laws; then, regulations, and so forth. The basic characteristic
that would differentiate different types of norms would be procedures.
Thus, constitutions would be the most difficult norms to adopt and
amend. Due to this technical reason, it would be impractical that all legal
commitments were encapsulated in constitutions. Therefore, the existence
of different kinds of norms would be explained for reasons of expediency.

Even though positivist legal theory is a good point of departure for the
concept of law as credibility, it is clear that this kind of argument is rather
of a functionalist sort. That is, it explains the existence of different kind of
norms by making reference to how the legal system works. However, as
Elster has pointed out in a different context, the problem with functional
explanations is precisely that they do not explain. Reference to legal
procedures explains how constitutions, or laws, or regulations, are
approved or amended; it does not tell anything, however, about why we
have different norms—and, therefore, different procedures—in a given legal
system.

To answer to this question we need, once again, to place law in a wider
context. This context is the context of the dilemmas that political actors
have to face between credibility and flexibility. As shown in graphic No 2,
different kinds of norms would constitute different equilibrium points
between credibility and flexibility. Constitutions would have, according to
this graphic, the highest degree of credibility and the lowest degree of
flexibility. This would be the case because their resistance to change would
be the highest of the whole legal system. That is, it would be very costly to
approve and modify them. Then, we would have laws which, if one follows
the graphic, would be less credible but more flexible than constitutions.
And, in the third place, we would have regulations; the least credible legal
act but also the most flexible one.

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13 J. ELSTER, “Marxism, Functionalism and Game Theory: The Case for
If this holds true, then the existence of each of these types of norms would be explained not by reference to the way they are adopted and amended but by reference to the way political actors want to solve their credibility dilemmas. If a political actor wanted to adopt a given commitment - say, the commitment not to be president more than two mandates - and give to it the highest degree of credibility, it would have to opt for constitutional reform. If it wanted to have more flexibility, it would have to descend to laws or to regulations. Thus, differences between norms would be explained through the political actors' needs in terms of credibility and flexibility. Formulated in other terms, normative typology would be explained by reference to the need of political actors to have a choice of legal instruments wide enough to be able to select different equilibrium points between credibility and flexibility, in which credibility would always prevail over flexibility.

Graphic No 2 also explains the place politics has in terms of the concept of law as credibility. A political pact, for example, would have an inferior degree of credibility than the least credible of legal acts, regulations, but more flexibility. Therefore if rational, a political actor searching for more flexibility than credibility should opt for a political instrument to encapsulate his commitment.

This does not mean, as lawyers in the positivist tradition wrongly tend to think, that making and, above all, breaking commitments encapsulated in political instruments are without costs. As happens with legal commitments, entering political commitments may entail transaction costs. Moreover, breaking political commitments may entail a kind of cost that does not normally appear in the realm of law; I am referring to reputation costs. Breaking one’s word may be very costly for a political actor’s reputation before the public at large; breaking a political pact may
entail a serious loss of reputation vis-à-vis the other party to the pact, and so on.

The cost of reputation plays an important role when the time comes for a political actor to make a choice between law and politics. If the political actor is able to anticipate that the reputational costs of breaking the political commitment will be higher than the transaction costs that would entail modifying a norm, he should, if rational, choose law instead of politics. Instead, if the reputational costs were lower than the transaction costs, he should choose politics and not law. For example, imagine that Aznar knew that if he broke his political commitment not to be president more than two mandates, he would have to pay a high price in terms of his own reputation. In this case, it would be advisable that he adopted a legal commitment. That is, the increase of reputational costs would make his political commitment more credible than flexible. And as I have shown in graphic No 1, the realm of law precisely comprises all the cases in which credibility is higher than flexibility.

V. AN ILLUSTRATION THROUGH GAME THEORY

In the following, I will further explore the interaction between law and politics as regards the credibility dilemmas that I have discussed in the previous section, through a game theory set-up. In the following set-up, we have two players, the president and the people. The content of the commitment is PTL.

In the game (see figure 1), the president may either make a legal or a political commitment. People move next. People have two strategies: to either cooperate or not cooperate. To cooperate means, in the context of the game, ‘to pay taxes’, and not to cooperate means ‘not to pay taxes’. The president moves in the last place, and he has two strategies, to either cooperate or not cooperate. In this context, the first strategy means ‘to respect the legal commitment’ and the second ‘to modify the legal commitment through legal means’ or, alternatively, ‘to break the political commitment’ or ‘to respect the political commitment’.

I assume the following aspects. In the first place, in the president’s order of preferences, he prefers that the game end in mutual cooperation (C) rather than in the president cheating the people (Ch). He also prefers this alternative to paying the costs of modifying the constitution or breaking the political commitment (Sa) and this to being a sucker (S); that is, to cooperating when the people do not pay their taxes. The people’s order of preference is the same: the people prefer that the game ends in mutual cooperation (C) rather than in the people cheating the president (Ch), but
they prefer cheating to being sanctioned for not paying their taxes (S1) and this to being a sucker (S2); paying their taxes and having the president modifying the constitution or breaking the political commitment.

In second place, costs are given the following values. Starting with the president’s costs, I assume, first, that the cost of modifying the legal commitment is equivalent to 3 (PrCmLC = 3) whereas the cost of breaking the political commitment equals 1 (PrCbPC = 1). This difference is explained by the following reason: modifying the constitution entails costs that are superior to the reputation costs that the president would have to pay if he broke his PTL promise. Formulated in other terms, in this game, opting for law to encapsulate the PTL commitment would be more credible than opting for politics. Thus the game respects the ‘law as credibility’ paradigm that we have discussed in the previous sections of this paper. Second, the costs the president would have to pay if he was cheated and still cooperated—if he was a sucker—in the case he had made a legal commitment equals 4 (PrCSuckerLC = 4) and the same cost would equal 5 if he had opted for a political commitment (PrCSuckerPC = 5). The reason for this difference is that we are in a game with complete and perfect information. Therefore, if the president observes that the people are not cooperating, it would be irrational for him not to escape from the political commitment, taking into account that the cost of breaking it would be less than the cost of modifying the constitution.

As regards the people’s costs, these would be the following. First, the people’s cost of not paying the taxes would be 2 (PeCnpt = 2). This cost would be the same whether the president made a legal or a political commitment since this cost would not depend on this but, for example, on penal legislation concerning taxes. Second, the people’s costs of being a sucker would be 4 in the case that the president had made a legal commitment (PeCSuckerLC = 4) and 5 in the case that he had made a political commitment (PeCSuckerPC = 5). This difference would be explained for the following reason: taking into account that the political commitment is less credible than the legal commitment, it would be more rational to think that, in his last move, the probability that the president breaks it is higher than if he had made a legal commitment. To formulate it in other terms, under a political commitment, the sucker would be even more of a sucker if the president broke his promise and the people cooperated.

Finally, rewards would be the following. Starting with the president’s rewards, he would obtain a reward of 4 if people cooperated (PrRCoop = 4) and a reward of 1 if he could cheat the people (PrRCh = 1). It is important to remember, at this point, that we have argued before (in point 3 of this
article) that the need for cooperation from the people is the condition that makes most likely the emergence of law. In this case, it is obvious that the president wants cooperation from the people; if he could not collect money from taxes, he would have to shut down his office.

The people’s rewards would be 4 in the case of cooperation (PeRCoop = 4) and 1 in the case of cheating the president (PeRCh = 1). Thus, I assume in this game that people would be better off cooperating than not; imagine that people badly want the president to leave the presidency at the end of his mandate.

**Table 1: Assumptions in game 1**

<table>
<thead>
<tr>
<th>Order of Preferences</th>
<th>(C(^{14}), Ch(^{15}), Sa(^{16}), S(^{17}))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>President</strong></td>
<td></td>
</tr>
<tr>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td>- PeRCh(^{18}) = 3</td>
<td></td>
</tr>
<tr>
<td>- PeChP(^{19}) = 1</td>
<td></td>
</tr>
<tr>
<td>- PeCSucker(^{20}) =</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
</tr>
<tr>
<td>- PeCSuckerP(^{21}) = 5</td>
<td></td>
</tr>
<tr>
<td>Rewards</td>
<td></td>
</tr>
<tr>
<td>- PeRCoop(^{22}) = 4</td>
<td></td>
</tr>
<tr>
<td>- PeRCh(^{23}) = 1</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Order of Preferences</th>
<th>(C(^{24}), Ch(^{25}), Sa(^{26}), S(^{27}))</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>People</strong></td>
<td></td>
</tr>
<tr>
<td>Costs</td>
<td></td>
</tr>
<tr>
<td>- PeCrpt(^{28}) = 2</td>
<td></td>
</tr>
<tr>
<td>- PeCSucker(^{29}) =</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td></td>
</tr>
<tr>
<td>- PeCSuckerP(^{30}) = 5</td>
<td></td>
</tr>
<tr>
<td>Rewards</td>
<td></td>
</tr>
<tr>
<td>- PeRCoop(^{31}) = 4</td>
<td></td>
</tr>
<tr>
<td>- PeRCh(^{32}) = 1</td>
<td></td>
</tr>
</tbody>
</table>
The pay-off structure of the game would be the following, given the president made a legal commitment. First, if both players cooperated, the president would then obtain a pay-off of 4 and the people would also obtain a pay-off of 4. Second, if the people cooperated and the president did not cooperate, he would obtain a pay-off of 2 and the people would get a pay-off of 0. Third, if the people did not cooperate and the president did, he would obtain a pay-off of 0 and the people would get a pay-off of 3. Finally, if they both did not cooperate, he would obtain a pay-off of 1 and the people a pay-off of 2.

If, in the alternative, the president made a political commitment, we would have the following pay-off structure. First, in the case the game ended in mutual cooperation, both players would get 4. Second, if the people cooperated and the president not, the president would get 4 and the people -1. Third, if the people defected and the president cooperated, the president would get -1 and the people 3. And fourth, if the game ended in mutual defection, both players would get 2.

As illustrated in figure 1, the game has one Nash equilibrium; namely, cooperate, cooperate. The equilibrium path would be the following: first, the president makes a legal commitment; then, the people move and cooperate; and, finally, the president ends the game by cooperating.

The explanation of this result would be the following. Given the pay-off structure of the game, it is clear that the president would obtain a pay-off of 4 in three cases: if the people cooperated with him and he cooperated with the people under a legal commitment; if he cooperated with the people and the people with him under a political commitment; and if the people cooperated with him but he cheated the people under a political commitment. Knowing this, the people would cooperate with the president if he made a legal commitment — people would obtain in this case a pay-off of 4 as well — but would not cooperate with the president if he made a political commitment. This would be the case for the following reasons. If one looks at figure 1, it is clear that, in the case the president made a political commitment and the people cooperated, the president would be indifferent between cooperating or not with the people. He would obtain a pay-off of 4 in both cases. Knowing this, the people would not cooperate with the president if he made a political commitment, because the people would run the risk that the president ended the game by not cooperating; and, in this case, the people would obtain a pay-off of —
This being the case, if the people did not cooperate with him, the president would defect as well. In this case, both would obtain a pay-off of 2. Given this equilibrium path of the game in the case that the president made a political commitment, it is rational that he would opt for making a legal commitment.

**Figure 1: Cooperation game with a legal commitment**

![Cooperation game diagram](image)

Where:  
LC = Legal Commitment  
PC = Political Commitment  
C = Cooperate  
D = Defect

VI. CONDITIONS FOR THE EMERGENCE OF LAW AS CREDIBILITY

The second question I want to address in this article is related to the conditions for the emergence of law as credibility. We have seen so far that law can be better understood as the most sophisticated institutional technology intended to give credibility to commitments. Therefore, if rational, political actors should choose law if and only if they are going to obtain a plus of credibility, compared to other instruments that could encapsulate the commitment they want to make.

In the third section of this article, I already argued, following Stephen

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14 I assume that the classical rationality paradigm of economic theory does hold here as regards risk attitudes of players. Therefore, both people and the president are averse to risk.
Holmes, that the most important independent variable that would explain the tendency of political actors to use law would be self-interest. In particular, it was argued that their need for obtaining cooperation from the ruled to obtain the preferences of the ruling is the key to understanding the emergence or the retrenchment of the rule of law. In this section, I shall further refine and develop this argument.

To start with, it is important to acknowledge that political actors are not always motivated by their egoistic self-interest. As Holmes himself contends,\(^\text{15}\) using self-interest as the only motivation underlying political actors’ behaviour offers a “highly stylised and simplified account of the emergence” of the rule of law. To further refine this account, it is therefore necessary to introduce other types of motivations that even though less recurrent in political actors’ rationale are nonetheless at least as relevant as self-interest.

In this vein, Elster speaks of three kinds of human behaviour motivation: interest, reason and passion. According to this author,

“By interest, I mean the pursuit of individual or group advantage. [...] Among the passions, I include not only the emotions as usually understood, but also hunger, thirst, sexual desire, states of pain and states of intoxication from drugs, and madness. By reason, I mean any impartial attitude motivated by concern for the common good or for individual rights and duties”.\(^\text{16}\)

Besides political actors’ different kinds of motivations, we need, in second place, to introduce the time variable in our analysis. In effect, political actors, if rational, look ahead and reason backwards when considering whether to make a commitment or not. That is, they do not only think of the time in which they make the commitment; they also think, or attempt to think, of the time in which the commitment they made will have to be fulfilled.

However, political actors, as all human beings do, may change motivations over time. Elster refers to this aspect as ‘time-inconsistency’. Political actors try to cope with time inconsistency in a variety of ways. Precisely one of the ways to cope with it is through commitment technologies.

Mixing both aspects—the taxonomy of political actors’ motivations and the

\(^{15}\) S. HOLMES, “Lineages of the Rule of Law”, \textit{o.c.}

\(^{16}\) J. ELSTER, “Don’t Burn your Bridge before You Come to It: Ambiguities and Complexities of Pre-Commitment”, \textit{University of Texas Law Review}, 2003, pp. 1755-ff.
time variable further helps to refine the way in which we can understand the choice by a political actor of law instead of politics, since it provides us with a more realistic framework of the conditions under which these choices are normally made. To clarify: imagine that a political actor is considering committing himself not to be president for more than two mandates. In time 1, the time in which he is considering making the commitment, he is motivated by self-interest: he thinks that if he commits, he will have more chances of winning an election. However, this actor is able to anticipate that, in time 2, when the time to fulfil the commitment comes, the emergence of unforeseen circumstances—for example, a war—may advise that the general interests of the nation would be better served if his party did not change candidate. He also knows that, given those circumstances, reason—which has been defined here as the ‘common good’—would weigh more in his decision than self-interest. In this case, and even though he would have more chance of winning the election if he encapsulated his PTL commitment in the constitution, he decides to make a political announcement that he will not stay in office for more than two terms.

VII. Motivations and Time-inconsistency

We therefore have to take into account which motives political actors will have at the time they make the commitment (time 1) and which reasons they foresee will motivate their behaviour at the time they have to fulfil their commitments (time 2) in order to clarify the conditions under which law understood as credibility is more likely to emerge.

In table 2, I present a summary of all possible combinations of motives both in time 1 and in time 2 and the outcomes these combinations may yield. I use as an example the limitation of presidential mandates. Therefore, my point of departure is a political actor who has to make the choice of encapsulating his commitment not to be president for more than two mandates either in law or in politics. I assume in my example that the political actor is rational and able to anticipate what his motivation will be in time 2.
1. *Interest versus interest, reason or passion*

In the first scenario, the president is motivated by interest at time 1, and he is able to anticipate that he is going to be motivated also by interest at time 2. In this case, the outcome would be a political commitment. Being motivated by interest in time 1 means that he commits to limit presidential terms because he thinks that, in this way, he will be closer to winning the next election. In turn, being motivated by interest in time 2 means that the president will anticipate that he might want to stay in office in time 2. A political commitment would offer him a better way to escape from his promise than a legal commitment; however, this would reduce his chances of winning at time 1. My hypothesis is that his selfish motivation to survive in the long run would weigh more than his need for cooperation from the people in the short term. This would explain the emergence of politics in this case.

In a second scenario, the president could anticipate that he is going to be motivated by reason *i.e.*, the ‘common good’ in time 2. As we argued before, our political actor might want to leave a door open to escape from his commitment because he might think that the country would be better off if his party did not change candidate. He would opt in this case for a
legal commitment. In effect, his interest in time 1 in winning the election would weigh more in his decision. Even though he could anticipate that his motives are going to evolve towards reason with the passage of time, a political actor motivated by interest in time 1 is, by essence, a ‘short-runner’. Winning the election would be more important than the common good of the country, taking into account that the decision has to be taken in time 1. This is why he would make a legal commitment.

The third scenario is the case in which our political actor anticipates that passion is the motive that is going to drive his behaviour in time 2. Passion would mean here ‘power addiction’. Thus, our political actor knows that he likes power too much and that, once he stays in power for a certain amount of time, he would never ever want to leave it. In this case, he would make a legal commitment. The reason why he would make a legal commitment in this case is because interest in time 1 and passion in time 2 work together in the same direction. If motivated by interest, he would make a legal commitment; his commitment would be more credible and, therefore, this would increase his chances of winning the election. And if motivated by passion later on, a legal commitment would make it harder for him to unfold his determination to stay in office. Both sorts of motivations would advise him to make the most stringent commitment to leave office he can afford.

Therefore, we have two instances in which law would be likely to emerge: the case of interest versus reason and the case of interest versus passion. This means that there would be one case in which Holmes’ hypothesis would not hold; interest versus interest. To be sure, this outcome could be modified if other variables appeared. For example, it is clear that the more the president’s re-election depended on his commitment, the more weight he would give to his interest in time 1 over his interest in time 2. To put it in other words, if his re-election depended on his ability to make a credible commitment to limit presidential terms, the president would become more myopic. Beliefs could also play an important role here and could, at the end, modify again the outcome for this scenario. For example, the president could firmly believe that a corruption scandal will explode. He could be interested in staying in office in order to shelter himself from legal attacks from the general attorney. In this case, his beliefs about the future could make him get back to a political commitment, even though he knew that re-election would be closer if he made a legal commitment.

However, for analysing all these scenarios I have not taken into account the role that other variables – like exogenous variables, or beliefs, for example – could play. Other things being equal, in a situation in which the president had an interest in winning the election at time 1, and he could
anticipate that his interest at time 2 would be political survival, it is reasonable to think that he will use a lighter form of commitment.

2. **Reason versus interest, reason or passion**

In this set of cases, I assume that the president would be motivated in time 1 by reason. I have identified ‘reason’ here with the ‘common good’. Therefore, the president would commit to limit his terms in office because he would think that, in this way, the country would be better off. A limit on presidential terms in office would, at the minimum, be a vaccine against corruption; and, at the maximum, it would mitigate the risk of dictatorship.

However, in a first scenario, the president would be able to anticipate that he will be motivated by interest in time 2. As I have said before, ‘interest’ in time 2 means that the president anticipates that his motives will evolve towards political survival. This being the case, the president makes a legal commitment. The mechanism that would explain this choice would be that in the time the president has to make a choice, he is motivated by the common good. Precisely because he is in a cold state of mind, he is able to anticipate that his motivation can evolve towards political survival and, therefore, he opts for a tighter form of commitment.

In a second scenario, the president would also be motivated by reason in time 2. In this case, the president would make a political commitment as well. As stated previously, ‘reason’ would mean, in time 2, that the president thinks that the country is going to be better served if he does not leave office. This is an interesting case, in which reason would play against reason. Which of both would have more weight in the choice that the president has to make? If his concern for common good in time 1 weighed more than his concern for common good in time 2, then he would probably make a legal commitment; and, if his concern for common good at time 2 prevailed, he would make a political commitment. What is the reason why I conclude that he would do the second thing and not the first? The mechanism that would explain his decision to adopt a political commitment is, again, that he would be motivated, at the time he has to make a decision, by reason, and not by interest or passion. And a political actor motivated by reason, by the common good, is more able than a political actor motivated by interest or passion, to look ahead and reason backwards. In other words, prudence would assist him more than if he was motivated by interest or reason. Therefore, if prudent, he would be able to anticipate that the common good of the country would be better served if he stayed, and this would advise him to encapsulate his commitment in an instrument from which there could be easy escape.
In a third scenario, the president would be motivated by passion in time 2. Passion in time 2 means, as has been pointed out before, ‘power-addiction’. The president, even though concerned by the common good in time 1, would be able to anticipate that, with the passage of time, he would become a power addict. But he makes this kind of reflection inspired by reason. In a state in which quietness would dominate his spirit, he would be able to understand the need to commit to leave office in a stringent way. He would, then, make a legal commitment.

Therefore, we would have two more instances in which law understood as credibility could emerge. Cases of reason versus passion are considered, by the literature that deals with commitment technologies, as the prototypical example in which law is likely to emerge. Sometimes, human beings are able to anticipate, when they are in a state of reasonable coldness, that this rationale may be substituted by emotions with the passage of time and with the prospect of commitment fulfilment. The example here is, traditionally, constitutional law making. In a state of calmness, political actors are able to anticipate that in the future the emergence of political passions may produce disruptions. They, therefore, commit to the main rules of the game before these passions arise.

The second case that we have analysed here, reason versus interest, has been less studied by the literature on commitment technologies. However, the mechanism that would explain the emergence of law in this type of situation would be similar to that in the case of reason versus passion; reasonable and prudent men are able to anticipate that their motives are going to evolve towards political survival. This hypothesis is realistic. Once in power, political actors become political survivalists. The best time to counter-balance such interest would be the moment in which the commitment has to be made. Law, if credible enough, would then be the adequate instrument for tying a political actor’s hands.

3. **Passion versus interest, reason or passion**

In this set of cases, we are going to analyse three scenarios in which our political actor makes his choice motivated by emotions. In particular, the president would commit to limit presidential terms out of conviction; he is a vocal passionate advocate of checks and balances and he thinks that putting a limit on presidential mandates would be a step further in realising his ideological program in this regard. Note that his commitment to PTL does not come from interest—it is independent of whether he enhances his chances of winning with this commitment—or from a concern for the common good of the nation. It comes from ideology; it comes from
an intense conviction about what the right thing to do in politics is.

Jon Elster, following Loewenstein terminology here, calls the two first cases ‘passion versus interest, and passion versus reason’ ‘hot to cold’ empathy gaps. They differ from ‘cold to hot’ empathy gaps, which have been examined previously. Thus, the cases of interest versus passion and reason versus passion would be instances of ‘cold to hot’ empathy gaps. The traditional view on the matter holds that the most likely scenario for the emergence of commitments —and, therefore, for the emergence of tight forms of commitments— is when we have a ‘cold to hot’ empathy gap. That is, when political actors, either motivated by interest or by reason, are able to visualise that passion will be the motive that will drive their behaviour in time 2, it is more likely that hard forms of commitment will emerge. My account is, as has been seen, in line with the traditional view on the matter. However, Elster argues that, even though it may seem paradoxical at first sight, ‘hot to cold’ empathy gaps may be an instance in which tight forms of commitment may emerge as well.

Therefore, in a first scenario, the president knows that he is going to be motivated by interest in time 2. As we know, interest in time 2 means ‘political survival’. How would an actor intoxicated by the vapours of ideological radicalism behave if he had to make a decision in this regard? He would, of course, make a legal commitment. There are two reasons for this. First, because he would be intoxicated by ideology and, in these cases, it is hard to see that motivations may evolve with time and that, once in power, the ideological fever may fade and be substituted by the interest of staying in power. An alternative explanation would be that he might visualise that if he did not make a hard commitment to limit his presidential terms in office when he is in state of ideological convulsion, the passage of time could mean that other considerations —in particular, interest— were taken into account in his decision. This is an instance in which passion really plays against interest. In other words, the president would take advantage of the fact that he is motivated by passion in time 1 to stick to his preference at that time, fearing that if his state of mind changed to a colder mood, he might not take the same decision.

This second explanation is, in my view, more plausible than the first, since it assumes a certain degree of rationality in the political actor’s spirit. As Elster points out, passion is the opposite of reason understood as common good, not rationality. Political actors, even if ideologically intoxicated, are able to see that their ideological fervour may be appeased with the passage of time and precisely react against it. This argument also helps to build a hypothesis as regards the second scenario, passion versus reason. At time 2, reason would mean that the president thinks that the common good of the
country would be better served if he does not leave office. In this case, the president would also make a legal commitment to limit presidential terms in office. And he would do this, again, out of fear. He might think that, as time passes, other considerations would be taken into account—in particular, his concern for the common good of the nation—and this could make him have doubts about his ideological commitment to checks and balances. The best thing to do would be, in this situation of ideological compulsion, to conjure the fears of reasonableness through tying the president’s hands as hard as he can.

The third scenario is one in which passion plays against passion. Passion in time 2 means, as we already know, that the president becomes a ‘power addict’ in time 2. This case would be an easy one; passion at time 1 and passion at time 2 would work in the same direction. Therefore, if a political actor strongly motivated by checks and balances thinks that, once in power, he could become a power addict, then the most rational thing to do for him would be to adopt a tight form of commitment.

4. Law, a product of passion?

The most interesting conclusion that we may extract from the preceding analysis is that, of all three settings, law is more likely to emerge when passion is present at time 1. ‘Hot to cold’ empathy gap cases would be the instances where law, understood as credibility, would have more chances to emerge.

To be sure, this conclusion could be nuanced in a number of ways. In the first place, it is clear that I have given determined meanings to what interest, passion and reason mean in time 1 and time 2. When the time for a political actor to make a commitment comes, other motive-contents could be at play. The previous analysis is, nonetheless, realistic. I am not assuming anything extraordinary as far as the content of the motives of our player is concerned. Further, the hypotheses about motivations that I have built are in part based on my analysis of the PTL commitment both in the US and in Spain. In any case, the important thing would be to point out that it is not totally incorrect to argue that law may be the product of passion; on the contrary, as the cases that I have discussed show, passion can be the most appropriate atmosphere for the emergence of law, at least under certain conditions.

Second, as I have already discussed, I have totally excluded in my analysis the role that other variables could and, in fact, do play when a political actor has to make a choice of this significance. For example, the emergence of exogenous variables, such as a corruption scandal when the
president has to make the choice between law and politics, or beliefs, such as when the president believes that a war may explode in the close future, may change outcomes. However, the hypotheses that were presented before were the most parsimonious. My argument is that, admitting that many factors can intersect in the decision a political actor has to make between law and politics, motives are the most important independent variable one should take into account to attempt to explain such choices.

Therefore, my analysis leads to two sorts of generalisations. The first generalisation that can be made is that if similar conditions to the ones that I have taken into account in this article appeared, one should expect similar outcomes to the ones I have established. That is, given similar conditions, in most of the cases seven out of nine political actors should choose law instead of politics. Therefore, only in cases in which interest played against interest, and reason against reason, we should expect *ceteris paribus* the emergence of politics.

This result may be paradoxical if tested against real life politics. As a matter of fact, we can observe a lot of politics going around in liberal democracies. However, one observes as well a lot of law going around. The process of over-regulation that many liberal democracies at both sides of the Atlantic have witnessed after the Second World War might find explanation from the perspective of the hypotheses that I have outlined here. Anyhow, it is important to note that the model I have outlined here is theoretical. This model could serve, at the very least, to judge whether the emergence of law in a given case is a rational outcome or not.

The second generalisation that it is possible to make is that the previous analysis sets a framework that allows a better understanding of what law is. This framework has three bases. The first one is that law is better understood not as an autonomous entity but, rather, in the context of the dilemmas between credibility and flexibility that political actors have to face. The second basis is that law is better conceived of as a very sophisticated institutional technology that political actors have created in order to instil credibility in the commitments they make. And the third and last basis would be political actors’ motivations. Whether law emerges or not at the end of the day will depend, in the first place, on the motives political actors have at the time they have to make a choice between law or politics; but it will also depend on the motives they anticipate they will have at the time they have to implement their commitments.
**LAW AS MNEMONICS: THE MIND AS THE PRIME SOURCE OF NORMATIVITY**

Rostam Josef Neuwirth*

**I. INTRODUCTION TO LAW AS MNEMONICS**

“The senses are so strong and impetuous, O Arjuna, that they forcibly carry away the mind even of a man of discrimination who is endeavouring to control them”.¹

The term ‘mnemonics’ derives from the Greek Goddess Mnemosyne and generally denotes a system of devices that serve to assist and to improve the memory.² Memory in turn is supposed to assist the mind in the constant challenges it faces, caused by both changing situations and the constant influx of information that we perceive through our senses. Based on the senses, the mind guides our actions, which in turn are influenced by perception through our senses. Equally, our perception influences our actions against the backdrop of a changing environment, based on our memory and the information stored therein. This is the process that we generally experience as our daily routine in which, it is advocated, the law provides us with guidance derived from the collective memory of society or mankind as a whole.

In ideal conditions, law performs the role of a mnemonic device for society as a whole. In analogy to Otto Rank’s comparison of the creation of myths through the mass dreams of the people,³ human made law is ideally the expression of the collective experiences of all humans being transformed into a common sense. Such ‘common sense’⁴ (sensus communis) was precisely the term used by Aristotle and elaborated upon by Leonardo Da Vinci to denominate the centre of human perception, where the information is judged and whence all consequent actions originate.⁴ In other words, it is

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¹ BHAGAVAD-GĪṬĀ, Ch. 2, Text 60.
common knowledge but not commonly acknowledged that the accuracy of human judgment is inextricably linked to the reliability of its information, which again depends on the degree of the combination of the content of information reaching the mind via the various sources of our senses and sensations.

Unfortunately, however, in the process of law-making, we usually neither identify the best ideas nor create the adequate institutions; where, in turn, these ideas can be collected and realised. In other words, no apt structures are in place which would allow for the due collection of such collective information and the subsequent expression of the common will of human kind as a whole against the backdrop of an ever faster changing world. To give an example, visa regulations and immigration laws along national territorial boundaries are the ultimate shame of our failure to recognise the unity of the world we inhabit and to accordingly organise the life of all mankind in a more holistic manner. Similarly, one must ask whether the present practice of a rigid set of reform rules and ratification procedures for the treaties of the European Union truly reflect the European political reality where, I am inclined to believe, it is not the lack of a European demos as such that is to be deplored but instead the wide absence of an adequate forum for the formulation and expression of the European people’s common will.

Consequently, instead of overly debating existing concepts -such as the nation state and territoriality-, we should seriously start to allow new ideas for the organisation of the complex relationships that govern life in a globalised world to be formulated and to pave the way for a new understanding of law and normativity. This, it is submitted here, is necessary given that perception itself -understood as the process of receiving information through our various senses- has undergone drastic changes throughout the 20th century. The central argument is that many of the consequences that these changes entail can only be successfully met by shifting the interest from the periphery closer to the centre from where law and normativity truly emanate; i.e., the human mind.

With the human mind as the centre of perceptive gravity, this article advocates the understanding of law as mnemonics; which basically entails a critique of our present conception of law along the following lines:

First, it can be understood as a criticism of the ‘static’ nature assigned to law; namely, the rigidity with regard to changes in time and space. ‘Static’

in this context, however, must not be confused with the important task inherent in law to provide stability and predictability, especially through its repeated application. As we know from amendments to positive law or from a deviation from the rule of *stare decisis*, changing the law can mean to keep things as they are and *vice versa*. Such criticism mainly opposes an archaic interpretation of law based on a strictly dichotomous or dualist thinking which often comes with dogmatic ideas – such as ideas about (capital) punishment, or religious and other fundamentalism –, bringing about fatal encroachments on human freedom. In short, the major concern of such archaic understanding of law is the superficial fight against the symptoms without duly analysing the causes.

The second criticism closely relates to the one of a mere dichotomous thinking and addresses the fragmentation that has seized the sphere of law based on our fragmented perception and resulting in an incomplete understanding of human nature. Such fragmented understanding of law applies both to the legal field in itself, such as the splits in public and private or domestic and international law show, but also to its relation to other scientific disciplines, such as economics, history, psychology and political science. Both scenarios are caused by inadequate conception resulting in a lack of consistency and communication between research in different fields and, particularly for the field of law, in an insufficient consideration of the wider context. As a response to this lack of consistency, law as mnemonics advocates a more holistic approach, which means that it demands the maximisation of relevant information underlying the legal process; *i.e.*, not only the duty to take into account existing information but also to accept and duly consider the probability of the incompleteness of our knowledge. This criticism finally also entails that law as mnemonics, in correspondence to the functioning of the mind, calls for a reduction of the so-called 'mnemonic traces'; or legal norms, to use the language of juridical sciences. This is because the mind’s activity aims at minimising data and not at the collection of a large amount of data.

**II. NORMATIVITY AND THE MIND: LAW BETWEEN PERCEPTION, MEMORY, AND CHANGE**

> “Il y a ma vérité, il y a ta vérité et il y a [...] la vérité”.

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7 *Tierno Bokar* is a play based on a book by Malian writer Amadou Hampaté Bâ.
Law is often asked to deliver justice and, in order to do so, the expectation is that it must be based on truth. Truth and justice, however, may be of ephemeral character; both changing over time and with places. This problem of law has been described as follows:

“The omnipresence of change throughout all human experience thus creates a fundamental problem for law; namely, how can law preserve its integrity over time, while managing to address the newly emerging circumstances that continually arise throughout our history”.

This problem of law is further aggravated or even caused by the nature of perception which suggests that there are as many truths as there are ‘litigants’. For this reason, law has developed, in abstract, the dialectic principle of *altera pars audiatur* (hear the other side). Being realistic about what we call ‘universal’ truth, this principle is based on the reasoning that the wider the spectrum of evidence analysed, the higher the approximation of truth; or, in other words, “four or six, when including the judge’s eyes certainly see more than two”. This means that the more complete the information, the better the judgement or the closer to the truth, which in this context is synonymous for justice. Moreover, it reflects the principal logic underlying legal reasoning which is rooted in a dialectical process otherwise known as the legal syllogism. This process, illustrated by *justitia* and the two scales, is strictly based on the mentioned dichotomous thinking and is deemed to produce a higher level of understanding in the synthesis of two (or more) conflicting opinions. By inference, law’s central function is to establish justice against an ever-changing environment through an inclusive truth-finding mission based on the active participation of all persons, whether indirectly or directly, concerned. It can be added that, in those cases where the participation of all cannot be guaranteed, a legal fiction, based on principles of participatory democracy - e.g., a jury representing the ‘people’, or parliament the population-, serves as a substitute for the interests of the litigants whereas, on the other side, in similar terms, a judge substitutes the relevant ‘polity’, as the supreme instance of truth that we humans were capable of conceiving in our mind and projecting in reality so far. However, the involvement of all individuals, even if through various legal fictions, such as participatory democracy, is far from being achieved.

Notwithstanding the lack of understanding that incomplete information

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entails, it is precisely the logic that formed the basis for linking our mind to our reality that has become drastically altered with the dawn of the 20th century. In history, most important paradigm changes, initiated by so-called *Sternstunden der Menschheit* (“decisive moments in history”) and announcing the beginning of a new era for humanity, were preceded by different technological—i.e., mechanical, industrial, digital—innovations capable of affecting in one way or another, all of our known and, presumably, also our unknown, senses.

At the dawn of the 20th century, the principal premonition was the invention of the cinématographe, a motion-picture camera and projector in one; which was formally accomplished in 1895 by the frères Lumières. Since then, this technology that allowed for the first time to record, reproduce, store, and present moving images to a wider audience, has subsequently become further refined in its applicability and extended in its scope through the invention of television, satellite broadcasting, or digitisation to mention but a few stages. With this transition from a single static photograph to a dynamic chain of moving pictures, also our perception and the deriving theoretical explanations of human perception gradually changed. Such change has also urged Paul Nora to investigate more closely the links between history and memory leading him to the conclusion that memory has become transformed and that a decisive shift from the historical to the psychological has occurred with the consequence that:

> “The total psychologisation of contemporary memory entails a completely new economy of the identity of the self, the mechanics of memory and the relevance of the past”.

Thus, as reflected in the material world in various new technological innovations—notably, in the fields of transport and communications—it can be said that our perception has, caused by the influences of these new media on the mind, drastically changed and with it also the identity of the self. However, most of these changes have gone unrecognised in the legal world and, notably, its international instruments and institutions; which is why more conflicts will continue to occur and to challenge law. It is

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therefore only logical that the laws that were enacted in the past need to be adapted accordingly and new conceptual approaches be formulated in order to tackle the challenges of today and tomorrow. In this context, it is highly regrettable that, especially in Europe and often in mainstream academia, the formulation of new ideas or introduction of new concepts for debate—such as, for instance, a cognitive science of law—is prevented or merely dismissed as ‘unscientific’ because it is found to be outside the traditional perception of legal science.

1. Some selected conceptual responses to change

“Photography is truth. And cinema is truth twenty-four times a second”.11

Unlike in the legal field, the change of perception has gradually infiltrated public awareness through the works of a few pioneers and continues to do so practically in all branches of science but particularly in psychology, physics, the arts, and technology; to mention but a few. A very early testimony is that of Ernst Mach, formulated in his Beiträge zur Analyse der Empfindungen, published in 1885, in which he also ponders on the psychological implications of the ‘law of associations’ for the human mind. According to this law, it is after each time that two different concepts are evoked together that each one of them will automatically be remembered when the other is evoked.12 This ‘law’ stands in clear contrast to the natural desire, particularly strong in the scientific world, to solely ‘dissect’ and analyse instead of synthesise after the process of critical analysis has been concluded. Despite the increase in the strong simultaneous influx of information on all our known (and unknown) senses in the form of text, picture, sound and movement, many urgent policy problems, as the present split in the economic and political organisation of world affairs shows, remain fragmented and de-compartmentalised.

The strong implications of the chronology of the new inventions for all our senses combined was well-understood by George Orwell. In his famous novel Nineteen Eighty-Four, he concludes rightly that the invention of print made it easier to manipulate public opinion, but “the film and the radio carried the process further”.13 The reference to the possibility of manipulating public opinion is linked to the increasing influx of information to our mind through several senses simultaneously. Years before Orwell's Nineteen Eighty-Four, the new possibilities of perception

11 A quote from Jean-Luc Godard.
13 G. ORWELL, Nineteen Eighty-Four, 1948.
linked to these novel media was already the subject of early critical thoughts by Walter Benjamin in his well-known article *Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit*. In this article, he not only considered the impact these perceptive changes may have on reality but also projected them, like Orwell did later, into the far future. In a condensed combination, he presented his thoughts as follows:

“Mass reproduction is aided especially by the reproduction of masses. In big parades and monster rallies, in sports events, and in war, all of which nowadays are captured by camera and sound recording, the masses are brought face to face with themselves. This process, whose significance need not be stressed, is intimately connected with the development of the techniques of reproduction and photography. Mass movements are usually discerned more clearly by a camera than by the naked eye. A bird’s-eye view best captures gatherings of hundreds of thousands. And even though such a view may be as accessible to the human eye as it is to the camera, the image received by the eye cannot be enlarged the way a negative is enlarged".14

This paragraph reflects well the many profound challenges the new media bore in themselves not only for our self-perception but, consequently, also for the organisation of the life of the individual as a member of society. Like a big mirror, the motion picture and later global television broadcasting via satellites would drastically alter the possibilities of individual as well as collective self-perception in a way that Narcissus would not have dreamt about in his worst nightmares. For a visual proof of this change in perception it suffices to compare the difference in the depiction of reflections in the painting *Narcissus* (1597-1599) by Michelangelo Merisi da Caravaggio (1571-1610) and in the painting *La reproduction interdite* (1937) by René François Ghislain Magritte (1898-1967); which both display, albeit in quite different forms, the reflection of a person in a surface that forms images by reflection; namely, water in the former and a mirror in the latter.15

Thus, examples of this shift in human perception are manifold but they have in common that, if before theories of perception were atomistic and static, they now tend to be more holistic and dynamic, although they are occasionally still not widely accepted. This was the case of protagonists of the *Gestalttheorie*, who contended *inter alia* that the perception of all the individual constituents of any entity together constitutes something else and adds something new, a so-called “*Gestalt*” (shape), to the sum of the single individual constituents. *Gestalt* theory, thus, contends as a basic principle that the whole is greater than the sum of its parts. In accordance with this approach, Christian von Ehrenfels, for example, wrote that a sequence of twelve tones is no longer only a sequence of twelve single tones, but also constitutes the foundation of a melody.\(^{16}\) Such an approach brings about a different attitude towards the relation between the single component and the *Gestalt* as a whole. This is *a fortiori* true for a motion picture movie, which is at the same time a film strip made of kilometres of single photographs including single tones echoed and words spoken. It is more complex still with our sense of smell and its integration with other sources of sensory information.\(^{17}\) And what about the entirety of sensory information that reaches our brain through our senses? They may well constitute a *Gestalt* on their own and not only the source of our entire present well-being or malaise but also the basis for our consciousness and personality.

Therefore, growing complexity makes it necessary to enhance our perception through the integration of all our senses into one. Such integration is essential if we want to master all the influences that we are exposed to. In analogy to the mind, in a democracy—which cannot only be defined as a form of government but also as a discipline of mind—, we must equally integrate all aspects of life in a community in order to give it a new *Gestalt*. Applying this principle to different qualities of such *Gestalten* (shapes), Christian von Ehrenfels wrote that “higher *Gestalten* are those in which the product of the unity of the whole and the multiplicity of the parts is greater”.\(^{18}\) To obtain such a “higher *Gestalt*”—which, in legal terms, is best described by constitutionalism—is precisely the principal challenge

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16 See C. VON EHRENFELS, “On ‘Gestalt Qualities’”, in B. SMITH, *Foundations of Gestalt Theory*, Wien, Philosophia, 1988, pp. 82-117, at p. 90; distinguishing the melody or tonal *Gestalt* from the sum of individual tones on the basis of which it is constituted.

17 In the legal sphere, the potential significance of smell is reflected in the registration of an olfactory mark—“the smell of fresh cut grass” for goods; namely, tennis balls—as a trademark; see Office for the Harmonisation in the Internal Market (OHIM), Case R 156/1998-2, *Vennootschap onder Firma Senta Aromatic Marketing*, Decision of the Second Board of Appeal, 11 Feb. 1999.

that the global legal order faces today. In the absence of such *Gestalt* or a coherent global legal order, friction, conflicts and injustice will not only prevail but also intensify.

With regard to the establishment of such an order, there exists another important elucidation, this time coming from the field of music. The one formulating and accomplishing it was Arnold Schönberg; who, according to his own account, did not so much revolutionise music as evolve the underlying techniques. He wrote in 1930 in relation to the perception entering the brain through the auditory passage that:

> “Consonances are easier to understand than dissonances; and though dissonances are harder to understand, they are not incomprehensible—as the history of music indeed proves—so long as they occur in the right surroundings; then, nobody will be able to dispute them”.¹⁹

Comprehensibility is thus the keyword in the process of giving sense to information coming to our senses. It is also the key to numerous conflicts we are facing today, either individually or collectively, and which can almost exclusively be reduced to dissonances in human perception or else misunderstandings caused by them. An important obstacle in the process of enhancing our comprehensibility about the self, the other and the environment appears to be precisely the better understanding of the dynamics of the dualist structure of the human mind which, by and large, creates meaning by reference to contradictory concepts. This duality has been defined by Mircea Eliade in the following words:

> “Human existence therefore takes place simultaneously upon two parallel planes; that of the temporal, of change and of illusion, and that of eternity, of substance and of reality”.²⁰

This paradox can be taken as a point of departure for the closer consideration of human perception and its implication for the sphere of law, which leads us back to the conception of law as a mnemonic system.

**III. LAW AS MNEMONICS**

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1. **A. Law and the mind**

“Celui qui n’agit pas comme il pense, pense imparfaitement”.\(^{21}\)

The mind as the origin of our actions being preceded by a process including perception, memory and change is the greatest challenge for law. This becomes visible when we confront our mind with general concepts that usually convey a simple and comprehensible meaning. In so doing, they disclose a remarkable truth, but we are usually unable to see their implications for our personal life. As if in a state of paralysis, we can say that, once the wave, sound or light, that carried the content of such a concept has faded out eternally in time and space, we are no longer capable of bringing the identical semantic content back to our conscious state of mind and apply it to another context's new reality. Hence, our consciousness—as opposed to our subconscious—lacks kinetic continuity. It is static and, thus, suffers from the remarkable inability of linking obvious information to the implication it brings about in a different and particularly wider context; i.e., in a different place at a different time.

To be able to link knowledge to reality—that is, to attribute sense to a certain kind of information invading our senses and to foresee the implications this information brings about in the context of life—means to understand. In contrast to this, mere knowledge without understanding often yields fear or expresses itself in the form of suffering or misery. Understanding is applied knowledge and knowledge alone is insufficient to serve as a safe tool of orientation in the tidal flow of life. A similar distinction can also be found in the Stoic philosophy of mind, and especially in Zeno’s analogy of the hand, reflecting the different stages of understanding from a mere sensual *stimulus* (perception) to a more firm grasp or more integrated forms of knowledge.

Understanding in the form of applied knowledge is still insufficient to guide us safely through life. For understanding to cope with the major outcome of the steady flux of life—namely, with our general ignorance about future events—it needs to be wisely applied. Wise application here describes the ability to discern between the various origins of information that flood our mind to analyse each of them first, and to synthesise them afterwards before an action can take place. I have said that insufficient understanding with regard to our life is expressed in general ignorance about future events and this is the principal cause for friction in our perception of the evolutionary flow of time. We experience such friction

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as serious conflicts, numerous difficulties or mere discomfort caused by the occurrence of all kinds of two or more events at the same time. However, this fatal flaw, it seems, has only seized our consciousness, and not our mind as a whole.

There are strong indicators for the existence of a further element of understanding. This element is a second feature of our mind, usually referred to as the unconscious. This unconscious part of the mind - as we experience it in our ideas and dreams - disposes of the kind of kinetic continuity that enables us to bridge the gap between related or else antagonistic general concepts in various contexts. We transcend all sorts of antagonistic concepts, such as those of time and space, and watch them coexist in harmony. Attempts to describe such harmony even in the conscious world are expressed in concepts such as polyvalent thinking or "fuzzy logic"; 22 which is more frequently accommodated in Chinese philosophies and, in particular, the concept of koan in Zen Buddhism, which denominates a riddle leading us to the boundaries of rational thinking alone. 23 Nevertheless, it is a harmony to which - from the point of view of Aristotelian logic representing the conscious - we convey a surreal character; i.e., in the world of facts in the waking state. However, the unconscious part of the mind lacks the stability and security of its conscious counterpart. Therefore, for an even more advanced form of wise understanding, which I shall call 'intuition' here, the borders between these two parts of our mind must be transcended, and be led slowly via a mutual gradual approach towards their union. Only through the bridging of the dual structure inherent in the human mind will we be able to reach the kind of understanding termed 'intuition'. Intuition is a form of understanding that helps to mitigate the friction and the conflicts that occur in the process of transforming the world of our ideas into the world of our deeds. This is the stony path, or the conflicting struggle between the conscious and the unconscious that is highly characteristic in the long history of mankind. 24

The principle characteristic of a 'conflict' is that it brings together what belongs together. In other words, it is submitted that a common characteristic of most conflicts is that they arise because one or more of their underlying essential elements are dealt with in isolation instead of

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being discussed or treated together. This is also reflected the original meaning of the Latin term *conflictus* which describes a 'contest'; the equivalent of which, in the legal sphere, usually takes place in the courtroom where the opponents finally meet. Accordingly, the mind is the arena for a contest of a great variety of apparently contradictory *stimuli* of information determining both our actions and perceptions. Since our actions and perceptions again influence the ways we formulate laws, there is also an important point to be made concerning law. This is the point that Gunther Teubner seems to have in mind when he writes about the challenge of a constitutional theory that:

“The point is continually to understand the paradoxical process in which any creating of law always already presupposes rudimentary elements of its own constitution, and at the same time constitutes these only through their implementation”.  

Another manifestation of this basic challenge in the process of law-making is the relation between the laws as they are, *de lege lata*, and the laws as they ought to be, *de lege ferenda*. This challenge is also at the heart of the problem of the precautionary principle, or the question of *ex ante* or *ex post* legislative action, especially in areas in which science is incapable of determining the consequences. In accordance with this distinction, I shall refer to the former category as *mnemonic traces*, as transmitters of experiences gained in the past; and the latter as *mnemonic devices*, as the tools that function as guidelines for actions taken in order to determine the future. Both instances are of great importance for the way the legal universe expands in correlation with the transcendences of reality through the human mind.

2. *From mnemonic traces to mnemonic devices?*

> “God hath spoken once; two-fold is what I heard”. 

Like an encephalograph recording the electrical activity of the brain, the understanding of laws as *mnemonic traces* marks an attempt to use the evidence of the past law-making processes to display the continuous expansion of the human mind through the incessant oscillation between two different poles. This is to contribute to the understanding of how the mind perceives its living environment and tries to tackle the problems that

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it inevitably brings about. The purpose of this analogy is to improve the understanding of the present moment through a recollection of past events in order to be better prepared for the challenges that are bestowed on us in decisions that we have to take in the process of shaping the future. It is aimed at assessing to what extent we are capable of learning or, in legal terms, understanding the basic dynamics that transform the many laws’ mnemonic traces into mnemonic devices.

a. **Sources of law: Decisive points on flowing lines of distinction?**

> “**Crossing the lines depends on where you draw them**.”

The evolution of law reveals itself as a central conflict in the human brain, which becomes manifest in a clash between the perceived constant flow of time and the desire for certainty and predictability. This conflict is likely to be rooted in the dual mode of functioning of the human mind, often referred to by the distinction of a conscious and an unconscious part of the mind.

In expression of the static part of the mind that seeks certainty and stability in a life governed by growing complexity, our present understanding of legal science lies in the still widely prevailing trend of general fragmentation of science in different systems, disciplines, faculties and institutes. Legal science has also become sharply divided into many different categories. Many of these categories, however, no longer correspond to the practical needs and logical implications that a specific factual problem brings about today. They do, however, express the inborn desire of humans for certainty, security and predictability of life. This desire was described generally for the diversity of legal systems by John Henry Merryman with the following words:

> “In some cases, the desire for convergence of legal systems merely expresses a yearning for simplicity. It responds to popular discontent with complexity and seeks to impose order where there is untidy diversity. This approach to legal diversity would hardly merit recognition and discussion, since it is little more than an expression of frustration at the fact that the world is complicated, disorderly and uncertain, were it not so firmly rooted in human psychology. It is closely related to an exaggerated demand for

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27 The statement “crossing the lines depends on where you draw them” was written on the poster of the Canadian film *Kissed* (1996–1997), directed by Lynne Stopkewich.
This desire partly explains the distinguishing lines that were established between categories such as civil law, criminal law, public—both administrative and constitutional—law, and more recently between European or public as well as private—international law and municipal law. Further examples are taxonomic distinctions between the legal families, such as civil law, common law, Talmudic law, Islamic law, or Asian and African legal traditions, inhabiting the globe.29

So much for the conscious approach to law. However, this represents only one ‘side of the coin’. Subconsciously, the need for a proper consideration of the kinetic fluidity inherent in life was felt by human psychology and, therefore, also found its expression in law. In the dialogue between the conscious and the subconscious, the desire for certainty, reached through a proper understanding of the situation one is confronted with, also seized the subconscious and found its most widely recognised expression in the Roman legal principle of *vis maior*. Besides *vis maior*, the Romans used a great variety of terms—such as *vis extraria, casus maior, damnum fatale, vis divina, fatum, or fatalitas*—in order to designate the ‘major force’ inherent to life and derived from it the unpredictability, irresistibility and, last but not least, the uncertainty of life.30 Yet another example of the dialectics between the conscious and the subconscious mind as expressed in the dual desire inherent in law—namely, for eternal certainty, on one hand, and the challenge of omnipresent uncertainty, on the other—is found in the general principles of *pacta sunt servanda* (pacts must be respected) and the *clausula rebus sic stantibus* (‘provided that things remain as they are’); i.e., a clause that says that a treaty/contract can be ruled non-applicable in light of a fundamental change of circumstances that occurred with regard to those existing at the time of the conclusion of a treaty.31

In brief, these examples reflect on the one hand the desire to determine the clear scope of a phenomenon for regulation and for the purpose of legal certainty and security. On the other hand, they give evidence of the fluidity that governs human evolution. This conflict will be central in the

following sections which will discuss two kinds of opposite pairs that
derive from this paradox intrinsic to the mind. Perhaps, these examples
will allow for the conclusion that a new way of legal conflict-prevention
and solution is underway or will at least help to slowly bridge the gap
between the conscious and the unconscious parts of the mind by way of
introducing a more fluid conception of laws which portrays laws as static,
so-called ‘decisive points’, on dynamic -i.e., flowing- lines of distinction.

b. The ‘life-death’ dichotomy

“No te mueras sin decirme adónde vas".32

_Habeas corpus_ -literally, “you must have the body”- designates not only the
title of an important early draft of a human rights document, but it also
means the initial link of our body when it is confronted with what we call
‘life’. It is always around us, as daily life, from the beginning to the end. But
where exactly does it begin and where does it end? Usually, in trying to
define or grasp life, we either fall prey to tautology, or we immediately
confront it with its semantic counterpart, the notion of ‘death’. It is true
that more than tautology, the confrontation of life with death, its opposite
notion, seems to bring us closer to the meaning of life. We see persons’
odies motionless, eventually become cold, or in the process of decay and
finally disappear. We observe the same phenomenon in animals, plants and
under a microscope in even mineral life form when its radiation fades
away. Nonetheless, does this phenomenon that we see or sense really mean
‘death’? Here, Hubert Benoit has found the right words when he calls
death the “illusory ‘enigma’” and observes that we know about death only
because we see other people die.33 What we do not know, is what the dying
person experiences. In our dreams though, we continue to communicate
with the dear that we think lost forever. It is just like with friends or
beloved ones that we meet and then eventually lose sight with but
continue to miss and love them although we are separated by oceans or
borders, without necessarily being assured of their living existence.

The uncertainty about the scope of life also translates into the legal
sphere. In law, it becomes equally apparent that it is not only difficult to
draw a line between life and death but also -as indicated in the third
dichotomy discussed here- between one and another individual or even the
sum of individuals. Having said this, let us begin with the way we perceive
the entry into this life; its probable origin. According to the usual
definition of the beginning of life, it was the first outcry that a new-born

32 Compare the title of the film by the Argentine director Eliseo Subielo.
33 H. BENOIT, _Let go: Theory and Practice of Detachment according to Zen_, New York,
child uttered in the hands of a midwife. However, the recorded historical case of Julius Caesar (100-44 ACN), from whom derives the term ‘Caesarean section’, is evidence for the difficulty of drawing a clear line for the beginning of life. The fact of the physical presence of the foetus in her/his mother’s womb approximately nine months before the date of birth was thus definitely known for a long time. Traditionally, we thought of an embryo being conceived following sexual intercourse between a woman and a man. However, compared to the physical aspect, we know far less about the potential implications of spiritual and emotional activity therein.

Since the recent biotechnological revolution, even these last certainties have started to fade away. Already conception as such has -beside the theological controversy about an immaculate conception- become subject of an increasing uncertainty.\textsuperscript{34} In vitro fertilisation -test tube pregnancies-, predetermining the sex of babies, modifying embryos, cloning, etc. raise significant doubts about the exact moment of conception. These uncertainties are, in turn, responsible for the extreme difficulty of distinguishing between life and death as well as between one individual and at least a second one. The combined difficulty surfaces drastically in the abortion debate because abortion is placed exactly at the heart of the problem of drawing a clear-cut line between the end and the beginning of life. The surrounding problems of this controversy are well highlighted in \textit{Roe v. Wade}, the benchmark judgment of the US Supreme Court. Confronted with the question of the admissibility of abortion, the Court speaks in wise terms of judicial self-restraint:

“We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology, are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer”.\textsuperscript{35}

The Court, however, describes the continuous evolution of prenatal life during the normal 266-day human gestation period by distinguishing different stages in the development of the \textit{nasciturus}; beginning with the transformation of the embryo into a foetus, quickening -\textit{i.e.}, the first

\textsuperscript{34} See, \textit{e.g.}, E.C.J., Case C-506/06, \textit{Sabine Mayr v. Bäckerei und Konditorei Gerhard Flöckner OHG}; which concerns the protection against dismissal established by the Directive (92/85/EEC) on the safety and health at work of pregnant workers, in which the Court held that protection cannot be extended to a pregnant worker where, on the date she is given notice of her dismissal, the \textit{in vitro} fertilised ova have not yet been transferred into her uterus.

recognisable movement of the foetus in utero to, finally, birth.\(^{36}\)
Nowadays, birth too has, due to human intervention and progressive scientific development, become itself extremely difficult to determine with great precision.\(^{37}\)

The same uncertainty that surrounds the beginning of life is mirrored in the search for the moment where life ends, or decay begins, which ultimately results in death. The interest in this essential question has occupied people’s minds ever since. Indeed, it lies at the heart of life itself and most animistic or religious cults. The *Egyptian* or *Tibetan Book of Death*, Leonardo Da Vinci’s anatomical research, Edgar Allan Poe’s *The Premature Burial* (1850) or Maria Shelley’s *Frankenstein* are only a few prominent testimonies of a phenomenon that, consciously or subconsciously, occupies everyone’s mind more than once in a while. This occupation corresponds to the particular stage of consciousness or scientific discovery attained which provided useful answers for the given context but not without raising new questions for the future. In strict accordance with this process, the legal classification of death has equally changed throughout the past centuries and keeps throwing its shadow into the far future. In the past, respective stages included stopping to breathe (*apneia*), to the last heartbeat (*cardiac arrest*), which together are known as ‘cardiopulmonary death’; *i.e.*, the irreversible cessation of heart and lung functions indicated by the absence of pulse and a flat-line electrocardiographic response.\(^{38}\)

With the emergence of new means for the artificial maintenance of heart, lung and nourishment functions, this definition has been gradually superseded by the, now widely accepted, brain-based approach. The brain-based approach follows either the ‘whole brain’ or ‘brainstem’ formulation; which, in the first case, means the irreversible cessation of all functions of the entire brain, including the brain stem, whereas in the latter only consciousness and the cognitive functions exercised by the brainstem are irreversibly lost.\(^{39}\) The brain death approach is, nonetheless, called into


\(^{37}\) For instance, in February 2002, in Tuscany, a baby was born and survived after only twenty-seven weeks of gestation, measuring twenty-five centimetres and weighing only 285 grams; see M. FRANCESCO, “Firenze, un parto difficile avvenuto quattro mesi fa: La forza della bimba piu’ piccolo; Ora sta benem alla nascita pesava solo 285 grammi”, *La Stampa*, 25 May 2002, p. 15.


question by new scientific and technological advances.\textsuperscript{40} In addition, the dark mystery of life itself further aggravates the issue; for instance, the fact that hair and nails keep growing for around forty-eight hours after death has been medically stated. Be it ‘miracle’, false diagnosis or insufficient knowledge, return from coma, pregnancy of a person in coma —whether conception happened before or during coma— and necrophilia are factual problems and not only the topics of fictitious movie scripts; such as Eliseo Subiela’s \textit{No te mueras sin decirmе adónde vas}, Lynne Stopkewich’s \textit{Kissed} or Pedro Almodovar’s \textit{Hable con Ella}. These movies are, at least, inspired or even built on actual facts, in the tradition of the search for the mystery of the apparent ‘point of no return’.

Again, another problem that reflects the difficulty of how to approach death is found in the case of euthanasia. Euthanasia may occur in an active or a passive form. The first means an act of killing a patient without pain at its own request, whereas the latter is described as the ending of medical assistance to the patient. Aside from the Hippocratic oath, the respective legislative approaches determine whether a doctor has duly fulfilled his professional duty or committed homicide.

Moreover, apart from the usual legal questions related to death, such as those belonging to the law of succession, more specific problems may occur. The male nurse in \textit{Hable con Ella}, who has sexual intercourse with the female dancer in coma, has either committed the felony of rape or the misdemeanour of necrophilia. It may be of little difference with regard to the possible infamy of the perpetrator’s deed but definitely matters in terms of the duration of imprisonment. The same question arises in \textit{Kissed}, where a young woman working in a morgue has intercourse with a (presumably) dead person. In the frame of law, and particularly of criminal law, it is equally important to render due consideration and leave room for benevolent behaviour which is not intended to and factually does not cause a specific harm to another. There is a need for general caution in the legislative and judicatory approach to matters of essential importance but about which we have insufficient factual evidence and certainty. If, for instance, one day the love story in the movie \textit{No te mueras sin decirme adónde vas} became true and a married inventor created a device, a sort of video recorder, which enabled him to record dreams in which he meets his wife from a past life who subsequently came to live with him, first as a ghost and then as a mortal human being, would he be charged with bigamy?

A real case, which is not part of a film but arose in a British Court,

concerns the issue of copyright for a book. In this case, the judge was asked to determine the ownership of a literary work, *The Chronicle of Cleophas*, which was written by a woman journalist – the plaintiff – in the course of ‘psychic’ séances. The judge, leaving aside the ‘supernatural’ character of the claim, decided that the copyright rests with the plaintiff and describes in poetic language his dilemma with the supernatural:

“The conclusion which the defendant invites me to come to in this submission involves the expression of an opinion I am not prepared to make, that the authorship rest with someone already domiciled on the *other side of the inevitable river*. That is a matter I must leave for solution by others more competent to decide than I am. I can only look upon the matter as a terrestrial one, of the Earth earthy, and I propose to deal with it on that footing” [emphasis added].

Perhaps we are not there yet or, in the future, we will gain other insights in the nature of life and death, but our existent legislation may well not do justice to the persons involved. In any case, the evidence that life is limited to physical existence is decreasing, and instead hints are growing in number that there exists a close link in the life/death dichotomy. Like affection or love for others, which does not end with their passing away, so perhaps death does not put an end to life but only to our current perception thereof. In combination with the ever present possibility of catastrophic judicial error, this evidence marks the strongest argument against the practice of capital punishment still prevailing in large parts of the world. Strong evidence exists in scientific, cultural and religious contexts that life does not end where we usually believe it to end. This is a prime example of the many contradictions we fall prey to and, consequently, of the need of judicial self-restraint based on our limited knowledge and understanding, as put forward by law as a mnemonic system.

The above mentioned scenarios reflect the overlap of dichotomies – in particular, the ones between life and death or spirit and matter – but are in no way exhaustive. On the contrary, numerous further dichotomies can be located in the human mind as a result of the binary mode prevalent, such as the dichotomy between the individual and the collective.

c. The ‘individual-collective’ dichotomy

“Nous sommes une partie qui doit imiter le tout”.42

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41 High Court (Chancery), *Cummins v. Bond*, 1927, L.R. 1 Ch. 167.
After the ‘life-death’ dichotomy, the second dichotomous pair discussed is the one that deals with the presumed relationship between the individual and the collective or the perception of the complex intertwining between the ‘I’ and the many others. In this field, an almost explosive increase in such dichotomous pairs reflecting our dual perception of existence takes place. In law, this phenomenon is translated in the continuous process of juridification—or juridicisation—of practically all spheres of life. While the life-death dichotomy touches upon a limited area of the law, primarily dealing with so-called ‘private’ issues, the individual-collective dichotomy includes the entirety of each single ‘private’ issue forming the so-called ‘public’ domain. This is why due consideration of the nexus between private and public law is situated at the heart of a universal science of law.

To begin with the individual, law regulates the coming into the world and passing away of every human being, from the birth to the death certificate. It also covers rights and obligations of the persons with the closest connections to the persons in question, the so-called ‘relatives’—ascending and descending—, including spouses. Law also recognises bonds beyond kinship, found for example in an expansion of (certain of) these rights and obligations to common law spouses, adoptive parents or even others, such as tutores and curatores. Equally, the institution of the legacy allows the testator to hand over certain objects and rights to persons of her/his free choice, extending the interaction of a single person to every other natural or (even) moral person.

Law is replete with examples which reflect the attempt to cope with various challenges deriving from the permanent interaction between a single individual and the collective community s/he lives in. This is, for instance, reflected in the realm of fundamental rights; which, first and foremost, mention the right to life, liberty and security of a person as its point of departure. From the right to life, in connection with the principle of equality, derives a larger set of rights that a person enjoys alone in relation to her/his fellows—e.g., the ban on slavery or torture—as well as together with a certain number or even all of them—e.g., the right to a family, assembly or a culture, and universal rights. A similar struggle between the individual and the collective is found in the realm of international criminal law where sanctions for crimes are classified differently depending on the number of perpetrators, on one hand and the number of victims on the other. This is also recognised in the dual function of criminal law found in the combination of special and general prevention. Civil law too knows this conflict if we think about unilateral, bilateral (synallagmatiques) or standardised contracts.
The area of international economic law displays a similar conflict of interests between the individual and the collective. In this area, the struggle can be best seen in the ideological controversy between capitalism and communism as the dominant economic system. As a matter of fact, neither capitalism nor communism has ever existed in pure form, but the two systems have merely represented two different ways of looking at the same issue. Intellectual property rights also deal with the competing interest of the individual author in remuneration for her/his intellectual effort and the collective interest in the advancement of art or technology. Finally, a higher form of legal expression dealing with the instant paradox is found in the realm of constitutional law. It is important to note that the term constitutional is usually closely tied to the state, but it has a considerably wider impact. The spectrum goes from the ‘constitution’ of a human being to various levels of political organisation, such as the constitutional laws of local -e.g., medieval city states-, provincial -e.g., the German Länder-, or nation states -e.g., the Indian Constitution. The term also appears in the supranational -e.g., the European Union- and the global context -e.g., the UN Charter or the WTO Agreements. Regardless of whether we apply the term ‘constitution’ to a human being or to a juridico-political entity, the primary role of the constitution rests on the fact that it is the condition sine qua non for something to constitute something or somebody; that is, to have a Gestalt or to come into existence and remain alive.

In partial deprivation of the philosopher’s stone, past generations chose to set as the threshold between the known and the unknown origin of the constitution either the level of natural law or of the so-called ‘hypothetical’ Grundnorm (basic norm). In my reading, what is hypothetical is not so much the existence of the norm as our accurate knowledge of it. Without going deeper into the matter, it suffices to state the constitution’s privileged role due to its location where the fountain of human life and law springs. The term ‘constitution’ thus stands for an early stage of a process and is necessary for something to ‘constitute’ something; whether we think of the life of a single individual or the birth of a state. Mostly, a constitution usually has the privilege of providing the Gestalt or, in other words, a unitary and coherent set of laws or norms from which all further legal sources derive. This privileged role of constitutional law explains not only the vast amount of literature dedicated to constitutionalism in the field of legal philosophy but is also explanatory of the many paradoxes it gives rise to besides that of the individual and the collective.

Every constitution is usually located amidst a great multitude of paradoxical situations, caused particularly by the concepts of diversity and change. For diversity, the constitution is created to avoid or solve conflicts
between the entirety of its constituent parts. Such a conflict-solving role may entail various combinations between two extremes, ranging from a single individual to the sum of all individuals forming the population. In legal terms, this task is translated into the common evaluation of public and private laws in the light of the higher constitutional norms. Accordingly, this task may include a case brought before the constitutional court concerning a state’s alleged illegal intrusion into the sphere of a single individual on the basis of a decision, as much as a case involving a larger number—on the basis of an act or a law found ‘unconstitutional’ (vertical effect).

Often constitutions foresee referenda when it comes to important legislative projects or fundamental changes to the constitution itself. There is, however, a lack of consistency and coherence in the regulatory role and scope of constitutional law, a lacuna that overshadows the task of good mitigation between the various conflicts situated on the almost endless levels of relationship of a single citizen to the state as a whole. The lacuna consists in what is termed the debate about the extent to which fundamental rights may develop effects for third parties and, consequently, bind individuals in relation to their fellow citizens (horizontal effect).

Having shortly outlined some issues raised by the individual-collective dichotomy from the individual to the state level under a constitution, it is necessary to also look at issues that go beyond statehood.

i. L’état, c’est moi: The nation state
The fusion of the identity of each single individual, whether young (nasciturus) or old (moriturus), with the state constituted an important achievement in the long search for an acceptable foundation for life in a collective entity or ‘polity’. From the dark beginnings of history, across the ancient Greek republics, the Roman or Ottoman Empire, and medieval Italian city states, to the Treaty of Westphalia, and perhaps even to the adoption of the UN Charter, the search was marked often by a painful and bloody process of trial and error, bringing about both evolution and revolution. A look at today’s world map reveals an almost seamless grid of modern states, separated and bound together by pseudo-geometrical lines called ‘frontiers’ with little regard for the natural topography of our planet. The current state of affairs is, as will be shown, not the end of the story.

The rich repertory nourished from historical experiences of different forms of statehood has left as mnemonic traces the basic features that determine the existence of a state in international law. The trace that contains the major features for the determination of the existence of a state is found in the 1933 Montevideo Convention on the Rights and
Duties of States. The said convention is widely held to codify the requirements of statehood under customary international law. According to Article 1, a state as a subject of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other states. Each of these four pillars of statehood is, nevertheless, subjugated to effects stemming from the flow underlying the time and space framework. None of these characteristics, however, is fixed and immune to changes.

For example, citizenship as an expression of a permanent population is a mere fiction and the two main approaches of *ius sanguinis* or kinship and *ius soli* or birth in the territory each highlight their insufficiency for a due legal consideration of human existence. While kinship is insufficient due to the involvement of two different nationals in the birth of a new citizen who will hold two or more passports, the territorial approach may disregard the fact that people travel without necessarily settling down and planning to move their central interest of life to the state in question. As said before, to confine a human being to a limited territory stands not only in stark contrast with the spherical shape of the planet but also the most inner nature of the human spirit.

Like people, territories are subjugated to the flux of time, as well as to the movement of the soil; and this not only since Galileo Galilei. What the double rotation of the planets stands for in our solar system is found on Earth in the constant movement observed in the tectonic or continental shift of land, or the tides at sea. In even smaller categories, the artificially drawn political or legal boundaries are often powerless against the force of nature. Roman lawyers responded to this problem with several legal institutions; such as *alluvio* -i.e., the formation of new land by the movement of the sea or a river- and *avulsio* -i.e., a sudden removal of land by a flood, etc. to another person’s property. An example is found in the repeated eruptions of the *Piton de la Fournaise* which make the Reunion Island gradually expand its territory into the width of the Indian Ocean. Precisely in the case of islands, or countries with an access to the sea, the evolution of the law of the sea reveals the flowing transition from land to water, marked by concepts such as the continental shelf, the territorial sea up to twelve nautical miles, the contiguous zone of twenty-four nautical miles, an exclusive economic zone of two-hundreds miles, the continental shelf -e.g., ranging from five miles in the coast of California to seven-hundreds fifty miles in the case of the Barents Sea-; which serve as points of reference for the delimitation of the high seas open to all states,
whether coastal or land-locked.\textsuperscript{43}

The same problem of the exact confinement of a territory appeared in the question of sovereignty over the presumed infinite air and outer space above a country. The question of exclusive state sovereignty over air space reveals the close tie between an expanding perception and technological and scientific progress and the subsequent political and legal adaptation to each new situation. The scientific and technological progress was fostered by the eternal human desire to overcome gravity and to climb the ladder of ever higher spheres, reflected in Ovid’s \textit{Deidalus and Icarus}, Da Vinci’s flying machines or the first launch of the Earth satellite \textit{Sputnik I} in 1957. Accordingly, with each successful achievement in the conquest of the air, the jurisdictional boundaries were pushed further away from Earth, first inside and then outside the atmosphere, deeper and deeper into space. Particularly, the advent of space travel and the potential use of outer space for military and peaceful purposes, such as direct satellite broadcasting, caused a fear of the loss of exclusive sovereignty among most nation states. Their exclusive sovereignty developed as a rule of customary international law and was codified in the 1944 Chicago Convention on International Civil Aviation.\textsuperscript{44} The proposed criteria for the delimitation of air sovereignty vary from effective control to the criterion of aerodynamic lift \textit{-i.e.}, the highest point to which a conventional aircraft can ascend (around 20 miles)-, the atmospheric space \textit{-i.e.}, any space where air is found which may be the case up to 10,000 miles-, the exosphere \textit{-i.e.}, the outermost part of the atmosphere of a planet which for Earth lies at approximately 1000km above the surface-, the gravitational balance criteria \textit{-i.e.}, the line of gravitational balance between the Earth and neighbouring celestial bodies which for the Moon is found at around 300,000 km from Earth- and, finally, to the maybe absurd \textit{usque ad fuitim}.\textsuperscript{45} Similar to the case of the high seas, where the gradual horizontal transition from the territory of a single state to the openness of the high seas runs through several stages, the vertical transition from air sovereignty pierces several spheres until it reaches the sphere of outer space which, like all the celestial bodies, is considered the “province of all mankind”.\textsuperscript{46}

We all know and experience that government too is subject to change,

\textsuperscript{43} 1982 Montego Bay Convention on the Law of the Sea, Articles 2-3, 33, 55, 76 and 87.
\textsuperscript{44} 1944 Chicago Convention on International Civil Aviation, Article 1.
\textsuperscript{45} For a discussion of the delimitation of air sovereignty, see J.F. MCMAHON, “Legal Aspects of Outer Space”, \textit{British Yearbook of International Law}, 1962, pp. 339-399.
\textsuperscript{46} 1967 London Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies.
regardless of the respective form it adopts. For the different forms of government, Max Weber has classified different kinds of domination (Herrschaft), of which he considers only three as legitimate; legal, traditional and charismatic domination. Common to all forms of government is the struggle to find the right balance between the single individual and the collective as a whole. In this struggle, the spectrum runs roughly from the extreme forms of a single ruler to the other extreme of direct political participation of the mass. The first extreme is characterised by the view of unrestricted freedom of all single individuals, who organise their lives in absence of a state or anarchy; which may lead either to harmony and peace, or social disorder and chaos.

The other extreme that still emphasises the individual is found in those forms of government that place the centre of power vis-à-vis the rest of the population in the hand of a single person. These forms are known under various terms, such as tyrannical autocracy, despotism or dictatorship, as well as absolute monarchy. They all have in common the hardly humble perception of being either on a higher or at least the same footing with the rest of the population that constitutes the state. This kind of perception is reflected in Louis XIV (1638-1715), the sun king’s well known statement “l'état, c'est moi”, as well as Napoleon’s similar “la France, c'est moi”. First careful tendencies towards a greater equilibrium between the single individual and the masses is found in the person of the enlightened monarch who saw her/himself as the ‘first servant’ of a country placed in the position by the grace of god. Generally, the changes in perception translated themselves into the practical political situation of a parliamentary monarchy which opened political decision-making to a wider circle of people. Other political systems involve more than a single sovereign and are known as the states that are governed by a few people or oligarchies. In all these cases, stronger emphasis is put on the individual element inherent in the human being.

Half-way-through between the two poles, the form of political participation that comes closest to the equilibrium between the needs of an individual and the collective as a whole is arguably democracy. Democracy has many faces and knows even more definitions. Its proximity to an equilibrium may be read from the, perhaps ideal or idealistic, but definitely paradoxical definition of democracy as the ‘identity of the rulers and the ruled’. Nonetheless, I believe that the relative success of

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democracy around the globe – recently referred to as the “end of history”.49 is not only the appeal of economic modernisation but precisely its inherent contradiction, that best takes into account human nature and its long term struggle towards equilibrium.50 In the past, democracy has mainly proved to be the most dynamic form of governance, by allowing for rapid change in the established matrix of relationships that always tends to reflect the best mode of mitigating between the interests of a single or a certain number of individuals and the rest of a community.

In contrast to this relative equilibrium, there also exist tendencies towards the other pole – the so-called ‘rule of the mass’ or, more generally, forms of governments involving a large part or the majority of the members of a community. First signs of a deviation from the equilibrium are found in the attempts to value the will of the majority higher than that of the minority. Forms of government moving away from the equilibrium in the centre and laying stronger emphasis on the expression of the communitarian element in human nature are found in various concepts from (democratic) socialism and communism to the extremist movements of fascism and National Socialism.51

Finally, the last precondition for the existence of statehood, the capacity to enter into relations with other states is of major importance here because it indicates the dynamic element inherent in the ‘life’ of a state. The analogy between a state’s and a person’s life is adequate and knows numerous precedents in history.52 All the paradox situations mentioned in the beginning also apply to states. Like human beings, new states emerge and old ones disappear (vertical relations). The process of becoming and passing away of a state is itself controversial, as the debate about the nature of recognition as either declaratory or constitutive shows. Moreover, the end of one state sometimes means the emergence of one or more new states and vice versa. The difficulty of distinguishing clearly the birth and death of states is reflected in the many ways by which a state can

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49 See F. FUKUYAMA, *The End of History and the Last Man*, New York, Avon, 1992; note that the term ‘end of history’ was used before extensively by Karl Marx and Gottfried Hegel.
51 See, e.g., B. MUSSOLINI, “Fundamental Ideas”, in S.E. BRONNER, *Twentieth Century Political Theory: A Reader*, New York, Routledge, 1997, pp. 191-194, at p. 192; who writes that, “anti-individualistic, the Fascist conception of life stresses the importance of the state and accepts the individual only in so far as his interests coincide with those of the state, which stands for the conscience and the universal will of man as a historic entity”.
come into existence or disappear: discovery of *terra nullius*, cession meaning the transfer of sovereignty over state territory by the owner-state to another state; dissolution putting an end to a state’s legal personality; extinction which means dissolution through merger with another state, or the break-up into two or more new states, as well as subjugation or annexation by another state; the split of one or the unification of at least two states are modes by which states come into being or are wiped from the map. In this process, states succeed each other (state succession) like generations of people follow each other. The customary international law regulating state succession, understood as the act by which one state replaces another in the responsibility for the international relations of territory, is found codified in the 1978 Vienna Convention on Succession of States in respect of Treaties.

ii. Nation states at crossroads: The European Union; Discordia Concors?

“Von einem hohen und fernen Standpunkt aus, wie der des Historikers sein soll, klingen Glocken zusammen schön, ob sie in der Nähe dissonieren oder nicht: *Discordia concors*.53

The next stage concerns the gradual transition from the state to so-called ‘supra-national’ forms of organisation. The supra-national level is where the political organisation between the national level and the international level intersects. Such intersection means the gradual expansion of the whole of inter-individual experiences comprised in the polity of one to another (nation) state induced by real and factual daily practice. Hence, it is more a process of increase in awareness than a loss of factual relevance, often denounced as the demise of the nation state.54

At the supra-national level, the European Union is one of the most interesting but complex creations which the human mind has achieved through the formulation of ideas, their subsequent transformation into laws, and their projection into the material world. It is clear that many


such projects exist around the globe and they are all of equal importance in their respective context. What makes the European Union an interesting playground for the search of mnemonic traces is first and foremost the almost seamless legal documentation of its becoming, from its origin, the subsequent development, until our present days. Moreover, the European Union has—in terms of its legal development—achieved an unprecedented degree of communication between the two planes that underlie human existence. Already the notion of the European Union reveals a paradox situation as a *discordia concors*, or the unity of its diverse components.

As such, the EU has attained a relatively coherent framework that takes well into account both of the binary elements of the human mind, as notably expressed in the individual and the collective nature of the human being. This framework not only combines each of the original six, and the twenty-seven current, member states’ individual experiences, but also the sum of all the combined collective experiences at the state level together. Secondly, the drafting style of its primary and secondary legislation is sometimes better understood as a response to the challenges posed by the profound dynamism inherent in nature as perceived through the binary mode of thinking of the mind and experienced later in the material world. The outcome of this effort becomes visible in the permanent development and constant updating of the *acquis communautaire* as the EU’s most comprehensive mnemonic trace. Last but not least, the meanwhile holistic vocation of the EU expressed in the wide scope of these achievements make it an outstanding example of the mnemonic stage obtained in the gradual coming together of the two minds in the evolution of mankind.

With regard to the first strong asset of the EU’s system, the dense network created between the individual and various collective organisational levels, the issue of political participation is worth mentioning. Despite an often denounced democratic deficit, the legal framework establishing the EU grants a wide array of rights to individuals. This fact is particularly astonishing if one considers the initial foundation of the then European Economic Community based on classical instruments of public international law.

Since the 1992 Maastricht Treaty, every national of an EU member state is at the same time an EU citizen. The status of EU citizen confers on such individual not only the right of access to the various levels of political

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55 Other projects of economic integration, such as NAFTA, APEC, or MERCOSUR, have thus far only achieved modest results on the political and social level when compared to the European Union; see generally A. DE MESTRAL, *The North American Free Trade Agreement: A Comparative Analysis*, The Hague, Nijhoff, 2000.
decision-making process foreseen by the constitution of her/his member state but, in addition, it also grants to every individual who is residing in the territory of another member state the right to vote and to stand as a candidate in municipal elections (active and passive right to vote).\textsuperscript{56} Beside, every EU citizen residing outside her/his own member state enjoys the active and passive right to vote for elections to the European parliament. Finally, EU citizenship includes a right to petition, the possibility of application to the European ombudsman and, when residing outside the EU’s territory, and in case there is no diplomatic representation of the citizen’s original member state, protection by the diplomatic and consular authorities of any other member state. Thus, Union citizenship adds another form of identity beyond previously existing identities; such as a local, provincial or national citizenship.

The same innovative character governs the question of access to the judiciary for the review of the legality of acts adopted by the European institutions. The Treaty Establishing the European Community stipulates any natural or legal person’s right to institute proceedings against a decision.\textsuperscript{57} Given the beginnings of the EU as an international organisation, private persons’ access to the European Court of Justice is a considerable innovation, which still has not found many imitators.

Innovation also marks the principal freedoms granted by the treaties: the freedom of movement of goods, services, capital and persons across the member states’ boundaries.\textsuperscript{58} For the realisation of these freedoms, a neo-functional approach that implements the provisions only gradually and step-by-step was chosen (spill-over effect). The basic rationale underlying this approach was the understanding of the state as not the sole actor on the international stage, as was shown above, and particularly the assumption of the interconnectedness of the economy.\textsuperscript{59} For instance, the strategy of the Single European Market was coined in the mid ’80s and the 1st of January 1993 was set as the date for its completion. In 1993, however, it was clear that the achievement of the single market can only be realised gradually and particularly depended on further developments towards economic and monetary integration. In turn, the European Monetary Union itself developed progressively from its inception in 1969 and during three distinct stages, to end up with the final introduction of Euro notes.

\textsuperscript{56} EC Treaty, Part II - “Citizenship of the Union”, Articles 17-22.
\textsuperscript{57} EC Treaty, Article 230.
\textsuperscript{58} EC treaty, Titles I and III; see, on people’s right to move and reside freely within the EU territory, Article 18.
and coins in January 2002. This approach to the legislative process can be regarded as in line with the gradual expansion of the human mind following the available perceptive possibilities.

The novel principles governing the dynamism of such a novel approach to economic, as well as political, integration is also reflected in a different drafting style of legislation. The most dynamic provision in the legal framework of the EU is probably found in Article 1 of the 1992 Treaty on the European Union and states that “this treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen”.

The text of this provision is often criticised for its lack of precision and ought to be replaced by a fixed catalogue of competences. Perhaps, though, this is exactly because of the deep truth that life is in constant flux, which is found reflected in this provision and incites such vivid criticism. Hence, such realism clashes with the deeply rooted human desire not only for simplicity but also for certainty. Nonetheless, as emphasised at the beginning of this note, partial ignorance about the future is humanity’s fate and the expansion of understanding only proceeds gradually. The same truth seems to be reflected in the evolution of EU law.

Another interesting institution is found in the so-called ‘integration’ or ‘cross-section’ clauses. They are six in number and cover the areas of culture, public health, industry, social and economic cohesion, environment, and development cooperation. They are reminders of the pursuit of the principal objectives, like road signs along a highway, and pave the way to a more holistic interpretation of life in general and particularly the treaties of the EU. Each of them has a role of outstanding importance to play but the most interesting clause in this context is the provision on culture. The interest stems from the elastic nature of the concept of ‘culture’, which being practically impossible to define bears only a few principal features. The first feature worth being mentioned here is the multilevel presence of culture. Like T.S. Eliot remarked, culture can be described as a gradual scale ranging from the individual, to a group

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60 The first stage started in July 1990, the second in January 1994 and the third in January 1999; see EC Treaty, Articles 116 and 121 § 4; Directive 88/361, O.J., 1988, L 178/5.
or class, and up to a whole society. In addition, everybody is part of several cultural identities. A second important feature is found in the dynamic - because evolutionary - character inherent in the concept expressed in the etymological meaning of 'cultivation', consisting of the refinement of originally the soil (cultura agrī) and later of the mind (cultura mentis). In so far as this refers to refinement, we are talking of a process rather than a mere fact. This last point, the close link between the mind and the mysterious institution of language, as it is pointed out by studies in linguistics and semiotics, also supports the mind-law analogy. Finally, language is equally involved in and responsible for the concept’s intrinsic dynamism and elasticity, which bring a general ability to host diversity and spontaneity. Given these features, let us now compare their basic elements with the formulation of Article 151 § 1 of the EC treaty, which states that “the Community shall contribute to the flowering of the cultures of the member states, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”.

It is quite impressive to see how dense but at the same time complete the information contained in this paragraph is. Every single element of the basic feature mentioned above is considered and reproduced. For instance, “national and regional diversity” carefully points to the multilevel requirement, while making explicit as well as implicit reference (“cultures”) to the diversity element and the recognition of multiple identities. Moreover, the character of life as a process or flow of experiences is circumscribed with botanical language as “flowering” and “bringing to the fore”. This last point also takes into consideration the contradictory element inherent in both the concept of culture as well as the human being (“diversity” and at the same time “common cultural heritage”). The wording strongly reflects inspiration by the principle of discordia concors and is in line with the main principles underlying Gestalttheorie.

66 Note that the EU’s motto ‘united in diversity’, as previously mentioned in Indent 4 of the Preamble to Part I and Article 1-8 of the 2004 Treaty Establishing a Constitution for Europe, is no longer mentioned in the 2007 Lisbon Treaty, except for a declaration on the symbols of the European Union signed by sixteen member states; see O.J., C 306/1, p. 267.
Other examples highlighting the new perception of reality as it is enshrined in primary and secondary European law which can not be discussed in depth are found in the surge of new apparently paradoxical situations, such as in the concepts of positive and negative integration, competition law, or intellectual property. These concepts all have in common a certain element of contradiction by the deliberate juxtaposition of binary pairs of opposites. The tendency to link two contradictory notions appears to be the result of the growing persuasion of the mind in its attempt to adapt to the needs and requirements imposed by reality.

Ultimately, a more dynamic approach to law, however, is well reflected in the original text with which it all began more than fifty years ago. It is in the Preamble of the Treaty Establishing the European Coal and Steel Community; in which its signatories, the founding fathers of the Union, were “considering that world peace can only be safeguarded by creative efforts commensurate with the dangers that threaten it”.\(^6\) This deep insight clearly contains a plea for a dynamic view of law, advocating its adaptation to the constant changes in the perception of our environment. In addition, it issues a critical warning and contains an obligation to ponder not only the causes of actions but also to consider their effects.

To sum up, European law—and notably the law of the European Union—provides a rich repertory of attempts to mitigate between the human desire for stability and certainty in life through the legal enactment of norms, and the constant flux which is the root cause for change and the inability to know and predict the path of future events. In these numerous attempts, the *acquis communautaire* reflects thus far a dense web of connections between numerous dichotomies from which the one of the individual and the collective stands out. Moreover, these attempts are marked by a new style of drafting using a double, because at the same time static and dynamic, style of drafting. This language underlying the respective legal texts also reflects a more complete, even holistic, vocation of the entire integration project, which better takes into account the complex but hermetic nature of human existence. In terms of coherence, open-ended dynamism and the careful parallel consideration of the *Gestalt* as a whole and its constituent parts, the body of European law presently comes close to the basic needs and traits of human existence and 'order' as described by Simone Weil.

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\(^6\) 1951 Treaty Establishing the European Coal and Steel Community, Preamble.
iii. The world community: “The clash of institutions and the remaking of the global legal order”

“Nevertheless, we have every day before us the example of a universe in which an infinite number of independent mechanical actions concur so as to produce an order that, in the midst of variations, remains fixed.”

From the perspective of the mind as the primary source of normativity, it is hardly a surprise that at the global level too we have been (and are still) facing the same challenges deriving from our fragmented perception. Despite our improving knowledge of the globe we inhabit, from Galileo Galilei’s “e oppure se muove” to Immanuel Kant’s “globus terraqueus”, and the accelerated process of juridification or juridicisation of the international sphere during the past century, a global consciousness beyond the territorial nation state is still inadequately developed. As at any stage in the evolution of mankind, the incomplete picture of the environment and the forces behind it continues to pose a great danger for humanity as a whole and threatens the peaceful existence of every single global citizen.

The incomplete image of global reality is manifest in the use of the misleading and obsolete term ‘international law’ for the description of global legal relations. In law, a more complete image is only slowly being drawn, such as by the introduction of notions such as ‘trans-national’ or ‘global’, as well as ‘world law’. A direct consequence of both the incompleteness of our perception and the inadequacy of the legal concepts in use is a fragmented global legal order, which is prone to inconsistencies and incoherence. Probably the most infamous example of such a fragmentation today is the lost status of the UN Charter as a ‘constitution for the world community’, although supported by its Article 103. These noble aspirations, however, were soon to become undermined by the failure to bring the sphere of international trade –GATT/WTO- under its umbrella and to avoid conflicts or the unnecessary duplication of the activities of the GATT/WTO system and the proliferating number of UN specialised agencies. Today, the fragmentation between the UN on one side and the WTO on the other is well reflected in the so-called ‘trade

linkage debate’ or trade and [...] problems—i.e., a debate which not only tries to reconcile trade policies with other policy areas of public interest but also points at a deeply rooted institutional flaw, the cause of which must ultimately be sought in our fragmented world view.

To give another example, the same problem of fragmentation is manifest in the area of global human rights protection. Beginning with the positive example of an important mnemonic trace at the global level, the Universal Declaration of Human Rights (henceforth “UDHR”) was solemnly proclaimed in 1948 with the intent of paving the way for the protection of human rights by the rule of law. Although it initially only had a declaratory character, this unique legal document has most probably achieved a legally binding, normative status in the meantime. Notwithstanding this achievement, its noble objectives have nonetheless been watered down by a concomitant trend towards fragmentation, best reflected in the 1966 split of inalienable and indivisibly rights in two separate covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

There is no doubt that many more examples of such fragmentation of the global legal order and legal conflicts between different legal instruments or international organisations exist both vertically and horizontally. Hence, we can state that the wide absence of unity in the interaction between the few existing legal instruments distorts the true image of human life on this planet. Unity in this context, however, must not be confused with uniformity, because unity—as opposed to uniformity—postulates the great diversity of its constituent parts. In this context, the absence of unity means a simple friction expressed in conflicts of all sorts between the

74 See D.J. HARRIS, Cases and Materials on International Law, 5th ed., London, Sweet and Maxwell, 1998, p. 636; M. WA MUTUA, “The Ideology of Human Rights”, Virginia Journal of International Law, 1996, pp. 589-658, at p. 591; stating that the legal character of the UDHR is at least recognised for some of the rights it protects and that, in particular, “those that implicate state action against personal security, such as freedom from torture, slavery, illegal detention, and disappearances, have achieved the status of customary international law”.
various experiences codified in international legal texts. These legal instruments are like mnemonic traces left behind as evidence from the past insufficient conceptual understanding of reality. Among this plethora of often conflicting instruments, however, there are more positive examples, which serve as mnemonic devices. One such instrument is the 1969 Vienna Convention on the Law of the Treaties, which helps to mitigate some of the problems arising from inconsistencies among treaties and from lacunae in international law. More precisely, by providing several conflicts-of-laws rules, it plays an important gap-filling role and helps to coordinate different legal sources and systems while respecting legal pluralism. Moreover, it provides a good example of the possibility of curbing the creeping expansion of the embarrassment de richesse and the preservation of legal pluralism in this world by providing objective criteria for the selection of relevant legal texts or competent international organisations.

Eventually, the global legal order is not the highest form of the mind’s normative expression. At a level higher than our legal thinking—namely, in the world of archetypes and beliefs—, the same fragmentation of our perception is noticeable. The three monotheistic religions of Judaism, Christianity and Islam, their respective principal messengers, Moses, Jesus and Mohammed, and their major written sources, the Old Testament (Hebrew Bible), the New Testament (Christian Bible) and the Last Testament (Koran), indicate a temporal flow expressed in the progressive development of understanding. Once in place though, the information revealed in these decisive points poses a challenge to the understanding of the prevalent mind-set at a given time. Moreover, once the information is used for application to daily life, it is distorted by reason of the mind’s underlying dual nature; which is, for instance, manifest in the struggle between the conscious and the subconscious or between spirit and matter. This dichotomous struggle of the mind in the development of legal norms deriving from religious sources is common to all religious systems. The temporal path from religious considerations to their legal embodiment usually becomes manifest in the form of schisms, or divisions along orthodox as opposed to reformist, or esoteric to exoteric lines. From a more dynamic perspective, there appears to exist a clear golden thread in the chronological development of the various religious revelations, such as from Judaism via Christianity to Islam. This continuous process is reflected particularly in the recognition by each of its predecessor(s) but equally in the strong resistance towards its successor(s). Moreover, all of them are composed of many different movements, sects, or writings; a direct result of the struggle between the static and the kinetic modes of thinking, representing various attempts at further linkage in order to synthesise partial knowledge into a common understanding. In all cases,
where religious sentiments result in a fundamentalist movement - in the sense that they claim a monopoly on the interpretation of divinity and, hence, deprive other religious communities of their right to existence -, they further contribute to fierce clashes between the competing views as well as to a further fragmentation, obstructing the perception of the picture as a whole.

Hence, many conflicts perpetuate themselves for the sole reason that religious systems, not unlike the global legal order, lack a coherent and consistent interpretation; a fact caused by an insufficient consideration of the dual nature of human existence, a fragmented perception of reality and the failure to integrate various sources of information into a more encompassing and higher Gestalt.

IV. CONCLUSION

“The mind loves the unknown. It loves images whose meaning is unknown, since the meaning of the mind itself is unknown”.76

Things are not always what they appear to be, especially at first sight, and without due consideration of the dynamic underlying all expressions of life and matter. As a possible remedy, ‘law as mnemonics’ is based on the central argument that many of the changes brought about by technological innovations have altered and actually enhanced our modes of perception. This is, for instance, well documented in the critical discourse preceding and following important changes brought about by the invention of the motion picture and subsequent developments from the invention of television to the creation of the internet and the more recent convergence of content based on digitisation.

The overall trend of these developments was described by reference to the “acceleration of history” caused by an increase in stimuli to our mind and, more particularly, to our memory. According to Paul Nora, this “acceleration of history” entails the “increasingly rapid slippage of the present into a historical past that is gone for good, a general perception that anything and everything might disappear; these indicate a rupture of equilibrium”.77 In addition to this acceleration and the danger of a rupture of the previously established equilibrium, these enhanced modes of perception also provide the basis for future technological innovation to take place, thereby further accelerating the initial process.

76 A quote by René G. Magritte.
77 Cf P. NORA, “Between Memory and History”, supra note 10, p. 7.
Law is situated in this entangled circular process of communication between mind and reality and follows a similar path. In the legal context, this acceleration in perception effectively touches upon the fundamental problem of law; namely, the question of how to preserve its integrity over time and space. In this context, we can sense a widespread feeling of people losing faith in values and laws and we must fear that this process is likely to get worse in the future.

This is why an improved understanding of the role and nature of laws is of great importance. Its importance lies in the shift of interest from the periphery closer to the centre from where not only law and normativity but also many practical problems truly emanate; namely, the human mind as the centre of our perception and origin of our action. For that matter, past and present laws record and contain the essence of various individual and collective experiences or, in other words, provide a database or sourcebook of the collective memory where valuable information about the nature and dangers of life is being incessantly stored. This database is written in the form of so-called ‘mnemonic traces’—i.e., legal documents of various kinds—and provides us first with some useful guidance in the challenges that life poses on a daily basis.

From an even broader perspective, these mnemonic traces also allow for some broader considerations about the nature of life and our perception of it. These considerations can be retrieved from a brief look at the evolving understanding, as recorded in the various stages of legal development, of the regulation of aspects related to life and death, as well as to the complex relationships between the individual and the collective in various societies. These considerations are essentially contained in the critique of the still dominant understanding of law as a rigid set of laws based on a strictly dualist thinking along the lines of the legal principle expressio unius est exclusio alterius (the choice of one part of an alternative excludes the other). This critique concentrates especially on the widely prevailing premise of the exclusivity, instead of the complementarity, of two apparently antagonistic or contradictory concepts.

In the current era of ever faster change, the reliance of laws on the duality of the human mind is problematic, because the frequency with which our mind is—like a pendulum—oscillating between conflicting concepts is increasing. From this derives a serious danger for the integrity and efficiency of laws. Here, reliance on processes rather than on fixed results

is essential. For that matter, the vicious cycle needs to be broken and countered by new ideas and creative methods of problem-solving, confronting the underlying causes and not merely mitigating the symptoms of our unease. This is supported by the fact that, according to our perception, the time available for reflection is getting shorter and shorter and our anterior knowledge of regulatory subjects is decreasing; which may bring about serious dangers for either individuals or society as a whole. Hence, it is even more important to accept that our knowledge is limited and to call for caution in the formulation and enforcement of laws. Therefore, law as mnemonics advocates an understanding of law as forming the base for the development of a communicative and coordinative framework that links all subjects within the society it is supposed to serve. Accordingly, our understanding of law should shift from one of coercive force to one of persuasive authority, and replace punishment by incentives or sticks by carrots. Finally, the reference to law as mnemonics equally means that law is a tool for guidance and constant learning and it encapsulates the recognition that change in the nature of laws begins, like all other reality, in our minds.
I. INTRODUCTION

In the harbour of Rotterdam, the Dutch government decided to install a special ship to detain illegal immigrants. My parents lived in a flat, overlooking that harbour; the boat was 500 meters from their window. We were often amazed about the silence on that boat. You hardly saw anybody there, although the newspapers had reported that the ship was overcrowded. Sometimes, when I stood on the balcony overlooking the harbour, a habit that I had formed since my childhood, I tried to picture how these people lived there. Did they see me? Could they see the pots of flowers on our balcony? Our balcony was so close, but so utterly beyond their reach. It is at these moments that one can literally feel the strength of a space, different from the physical one, and yet all the more real. When I think of the concept ‘normative space’, I cannot help thinking of the distance between my mother’s pots of geraniums and the boat in that harbour.

That space has always existed. It is what Hernando the Soto called the legal bell jar.¹ Those who are in it have no difficulty legalising their financial transactions, properties and enterprises. Those who are out of it have to wait 14 - 20 years in order to take all the necessary steps to give their property a legal form which enables it to turn into capital, and to expand. The frontiers of this legal space divide those who are entitled to preserve their life, liberty and property from those who are denied that privilege. Rights are only natural and considered self-evident by those living within the bell jar, who have no idea that there are people outside that space. My parents’ balcony testifies to the fact that no one can any longer assume such naïveté.

In this article I would like to argue that in the European Union the bell jar takes on a different form. Whereas it used to cover the relations between people, it now proceeds to prescribe desirable states of affairs. The legal bell jar expands in the sense that it covers terrains that had hitherto escaped legal formalisation. But at the same time it shrinks in the sense

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that it excludes people as subjects to whom one relates. The exclusion of people by establishing non-places such as immigrant ships is not the result of immigrant policies, or of increasing hostility towards Islam. It is the other way round: these fears and policies are the result of the changing bell jar.

In order to sustain that claim I would like to distinguish between two types of normative discourse: a discourse revolving around *relations*—rights, duties and the corresponding institutional arrangements—and a discourse that revolves around *goals* to be pursued. I will argue that what used to be seen as a ‘relational’ issue—a question of how we define our relations to things and persons—tends to be redefined and reconstructed as an issue that has to do with goals to be reached as more or less ‘objective’ states of affairs. Finally, I will sketch the way in which the legal systems of the European countries are affected by that redefinition.

II. DISTRIBUTION VERSUS WIN-WIN

In his frequent pleas in favour of independent non-majoritarian institutions as a panacea to the indecisiveness and inefficiency of the European Union, Giandomenico Majone draws a distinction between what he calls ‘distributive’ matters and ‘positive sum games’.\(^2\) Distributive issues are issues that have to do with the distribution of burdens and benefits. They are conflict ridden and should therefore be handled by majority rule in order to be solved in a legitimate way. ‘Positive sum games’, on the other hand, are not dependent on democratic decision-making. They are in the interest of all and should therefore be dealt with efficiently, swiftly and without the paralysis brought about by the bureaucratic inertia of formal democracy and the petty power games of member states.

The distinction also referred to as a distinction between ‘value-claiming’ and ‘value-creating’ can only be maintained if we do not want to allow for a discussion on the relative values of the various positive sum games. If we think of a ‘clean environment’, a ‘competitive economy’ or ‘good education’ as values in themselves, they are all worthwhile and noble aims to pursue and no one would like to contest their value. But since life is short and resources are scarce, we have to choose between them. We have to discuss whether we should prioritise a clean environment or a competitive economy. These discussions are blocked from our view by Majone’s distinction. He presents the whole issue as a matter of baking the cake and

then dividing it. This is a misrepresentation, for all we have is a couple of ingredients in short supply, and we have to decide whether to bake a cake, an apple-pie or muffins. That choice, in Majone’s view, should be entrusted to a couple of expert, independent committees and agencies.³

The boundaries between distributive matters and win-win situations are permeable. Issues of ‘value-creation’ are just as liable to discussions about distribution and value-claiming as, for instance, tax policies. Yet, although there are no firm lines to be drawn and although every win-win situation has a darker side which involves losses as well, we should not dismiss Majone’s distinction too light-heartedly. The fact that he defines a large part of political discourse as revolving around issues that are in the interest of all is in itself revealing and deserves closer attention. It favours a self-definition of the EU as striving towards a number of valuable and honourable shared goals and purposes, none of which can reasonably be contested. The EU is not alone in this. A large part of present day political discourse has increasingly become goal-oriented. The UN formulates millennium goals, the individual institution formulates mission-statements, whereas an abundant amount of more concrete targets should be reached by private and public institutions alike, including the judiciary. The idea that we should start from goals to be reached, in whatever activity we engage in, from lecturing to researching, from curing patients to exhibiting pieces of art, is just a corollary of Majone’s concept of issues that we should pursue simply because it is in the interest of all.

How should we understand this emphasis on win-win situations, on goals that are in the common interest of all to pursue? It is easy to downplay the firmness of the boundaries between ‘value claiming’ and ‘value creating’, but the fact that goals talk is dominant nowadays calls for an explanation. Whereas redistributive matters tend to be reconstructed as positive sum games, the reverse can only rarely be witnessed, if at all. Is this a matter of reformulation? Is goals talk only a way of preventing potential conflict from breaking out by simply claiming it to be non-existent? Or is there more to it than that and has the distinction a ‘deeper’ meaning?

III. PARTNERS VERSUS PIRATES

Although the choice between goals is just as liable to strife and conflict as distributive issues, there is certainly a difference between the two. That difference can intuitively be grasped in an example provided by Hugo Grotius. In his chapter on contract, Grotius relates how Dutch shipping

companies -large and small ones- had united forces by establishing a naval association, the Admiralty. They did so in order to be better able to defend ships and cargo against pirates during their long voyages, although, Grotius adds, ‘less worthy motives’ also played a role. The partners, although not being equal in force, strength and wealth had consented to an arrangement in which gains and losses were allocated on the basis of the criterion of risk. According to Grotius, their internal arrangement thus combined inequality with fairness.

It seems as if we have a clear example here of Majone’s distinction. Fighting the pirates is a goal shared and supported by all: it is even the raison d’être of the entire association. Without pirates there would be no association. Furthermore, the goal is a clear example of value-creation -or, more accurately, prevention of value-loss- so that, indeed, the distributive issues come in only after the cake has been baked. It seems as if the dividing line between value creation and value claiming, between distributive matters and positive sum games, presents itself on a silver tray here; innocent and self-evident.

It seems then that we have good reason to distinguish between what I would like to call institutional arrangements -e.g., serving the allocation of resources- and enterprises or goals like fighting the pirates. Yet, the boundaries between enterprise or goal and institutional arrangement are to a large extent drawn on the basis of a prior decision about who should be the insider and who is to be regarded as an outsider. The pirates are not participating in the negotiations among partners. They merely form an external threat; the enemy to be fought. Institutional arrangements and relations are only established within the bell jar; the partnership of the shipping companies. That is why it is possible to combine inequality with fairness. The inequalities that exist within the in-group can be dealt with fairly because these are inequalities between partners, deserving equal respect.

IV. ‘How’ and ‘What’

One might be tempted to think that insiders -those within the normative bell jar- are dealt with fairly, whereas outsiders are treated unfairly. This is a mistake. Insiders can be treated both fairly and unfairly; whereas, to outsiders, terms such as fairness and unfairness, reasonableness and unreasonableness, equality and inequality do not even apply. (Un-)fairness and (in-)equality are terms that can only be sensibly used in the discourse that is conducted within the in-group because they denote properties of relations. These terms do not apply to pirates, simply because we do not have any relations with pirates. And obviously, the same applies to
relational terms such as ‘duties’ and ‘obligations’.

This does not mean that once people are excluded they cannot be converted into insiders. Koskenniemi drew attention to the fact that one and the same problem can be construed as belonging to different (legal) regimes: what counts at one moment as anti-terrorist law is, at another, redefined as a human rights issue. This change reflects a *rite de passage* from outsiders to insiders. I only want to stress that as soon as an issue is construed as an external enterprise, it is no longer seen as something with which we have a *relation*. Goals are states of affairs to be reached; an outside world that has to be changed. We are not dealing with goals. We only want to *realise* them. Once pirates, terrorists or immigrants are defined as a problem to be solved, a threat to be avoided, these people cease to be persons to whom one relates.

This not only applies to people, but also to activities. It sounds a bit artificial but I think one can say that there is a relation between me and the activity I am now engaged in; writing. Like all relations, it has a rhythm of its own which is partly but not entirely under my control. My writing may develop in an unexpected way, and often the unexpected views generated by writing are more important than the ideas I had in mind when I started writing. The connection between me and my writing is severed as soon as I start with a ready made end-product in mind. Then, writing turns into routine activity, a series of steps that should be taken in order to arrive at the end-product.

The difference between the two kinds of writing, a relational one and a result-oriented kind of writing is discernible in nearly all activities. We are ready to distinguish between ‘genuine’ painters and those painters who assemble at the *Place du Tertre* in order to copy Monet’s water lilies for tourists. The moral philosopher Scanlon made some very wise remarks on the difference between objective states of affairs to be promoted and things with which we entertain a relation, and mentions music as an example. Beethoven’s late quartets played in the elevator of an office building illustrates, he says, that “understanding the value of something often involves not merely knowing that it is valuable or how valuable it is, but also *how* it is to be valued” [my emphasis]. Goal talk systematically ignores the importance of the question of what our *attitude* should be towards the valuable goods that are presented to us as such goals.

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These are deep insights, maybe a little too deep for our present purpose, but they may alert us to the possibility that to talk of one's activities, relations, and attitudes in terms of preliminary steps to achieve well-defined results leads to a reification of these activities, attitudes and relations. There is no longer room for the question how we would like to relate to these persons/things/activities. Instead, attention should be given to what we would like to produce or to bring about, rather than how we should deal with it.

The difference between ‘how’ and ‘what’ - between relations and goals - should not be exaggerated. As we have seen, a relational discourse can be (and is often) converted into a goal-oriented discourse and vice versa. The two discourses reflect two perspectives and gestalt-switches often occur, by means of which women are converted from lust objects into political voters, or immigrants into a terrorist threat. But the ease with which the two discourses alternate should not mislead us. They are really different ways of seeing and conceptualising the world.

V. The states of affairs that ought-to-be

One might be tempted to think that the moment a relation is conceptualised as a problem to be solved or a goal to be reached, legal discourse stops and a different discipline like criminology, economy or psychology enters the stage. Legal discourse is usually seen as revolving entirely around human relations. Where relations come to an end, there seems to be no room anymore for entitlements, wrongful acts, duties, obligations, rights or liabilities. Those outside the bell jar are denied not only citizenship but also legal personality.

I think that this is changing. To be sure, law still revolves around relations; but it is at the same time expanding. Nowadays it tries to encompass the world of goals as well. Law no longer confines itself to guiding and regulating relations, but tries to regulate the achievement of goals as well. It no longer formalises relations, but tries to formalise what the desired state of affairs should look like.

This may call for further clarification, and I can think of no better example than the trivial but all pervasive detailed rules that reach us either directly

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from Brussels or through national implementation, and which specify the sizes of the meshes in fishing nets, the appropriate sizes of tiles at municipal playgrounds, or the required temperature in the cool-boxes of groceries. These rules do not specify relations. They specify the state of affairs to be reached. They do not prescribe how people should relate to each other, but what the world should look like. They are *ought-to-be* norms rather than *ought-to-do* norms. For want of better terms I will differentiate between OTB-norms and OTD-norms. My claim is that many OTD-norms are converted into OTB-norms.

There are concrete OTB-norms such as those on meshes and tiles, but there are also more abstract ones. These more abstract norms can be found in the many framework directives that are issued at the European level. Framework directives require member states to further or to promote a certain state of affairs and to issue appropriate legislation in order to reach/further/promote that state of affairs. These goals may be highly abstract like the protection of the Antarctic or reasonably concrete like the specification of a maximum amount of emission allowed. But all OTB-norms, whether abstract or concrete, have in common that they prescribe states of affairs to be reached.

The amount of freedom allowed to devise the means may vary. In the more abstract OTB-norms that figure in framework directives it is often left to the member states to determine how the prescribed goals should be reached. The more concrete ones specify the goals to be reached to such an extent that room for choice is limited, and at the most concrete level, the desirable state of affairs is prescribed in such great detail that there is no room left for deciding between alternative means. But this is all a matter of degree. The abstract prescription to ‘further the protection of the environment’ allows more room for choice than the prescription to reduce emission of toxics by two percents and this latter prescription leaves more room for choice than the requirement to install adequate filters, but what all these prescriptions have in common, abstract as well as concrete, is that they prescribe a certain *state of affairs* to be reached.

VI. NO COMPLIANCE BUT PERFORMANCE

One may question to what extent these OTB norms differ from ordinary rules. For, obviously, goals should be *furthered*, results should be *obtained* and the required state of affairs should be *brought about*. In this sense, all OTB-norms are equally OTD-norms. They necessarily refer to acts that

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should be done or refrained from in order to achieve the goals prescribed.\(^8\)

However, there are certain characteristics that justify a distinction between OTB- and OTD- norms. The first is that OTB-norms emphasise the results that should be obtained rather than the means to be adopted. The verbs used—‘further’, ‘take measures’, ‘promote’, ‘bring about’—are unspecific and wholly subservient to the state of affairs that should be promoted and realised. That is why most OTB-norms leave room for a choice of means. Legislatures of the member states are free whether to opt for express legislation, a system of licenses or for private certification as long as they succeed in bringing about the desired situation. As I noted above, more concrete OTB-norms leave less freedom of choice, but here there is also a discernible tendency to leave the means unspecified by formulating them in a purposive way. Norm addressees are not required to install filters of a specific prescribed type and size but to install filters that effectively reduce the emission of toxics. Even these detailed rules reveal their OTB character; only results count, no matter how they are brought about.

Since OTB norms do not require acts to be carried out but results to be obtained, one can only be said to have complied with an OTB-norm if one has successfully realised the prescribed state of affairs. The requirement to take measures in order to further good labour conditions, for instance, should not be read as a requirement to take measures. It is a requirement to do whatever is appropriate and useful in order to bring about a world with good labour conditions. There is no obligation here to conform but to perform. Even to perform successfully. It is not enough that member states make an effort; they should succeed in bringing closer the prescribed goal. On the other hand, if some (advanced) member states have already realised the prescribed world, they are to be considered as having brought about a state of affairs that is in conformity with the goals prescribed, even if that member state cannot be said to have acted in conformity to the norm. Compliance therefore collapses into performance.

This entails a third difference. OTB-norms hold people liable for an (undesired) situation, instead of for non-compliance. If this difference may sound enigmatic, one should think of the difference between the OTD-norm ‘do not smoke’ and the OTB-norm ‘provide for a smoke-free room’. The OTD-norm can only be violated by actually smoking. The OTB-norm, on the other hand, extends liability: the norm addressee is liable for a

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situation, even where that situation is adversely affected by factors beyond one’s control. That means that the OTB-norm is violated if other people smoke heavily or if there is a chimney nearby. That is why the formulation of OTB-norms often entails a development towards risk liability. The question of whom the situation should be brought about by is only relevant in so far as it is necessary to determine who can be held liable in case of non-performance.

VII. Formalisation of End-states

OTB-norms play a crucial role in formalising goals. They fix the states of affairs to be reached, and they attach a norm to that fixed states of affairs by requiring that measures should be taken and, more importantly, that reports should be delivered about the steps that were taken. But in order to fulfil this duty to report it is necessary to know the relevant parameters and criteria by means of which one can actually show that some progress has been made. Consequently, the institutions themselves, or else the numerous committees and supervisory agencies working in the regulated field are all heavily involved in formulating performance indicators by means of which progress to the desirable goals can be gauged and assessed.

These performance indicators can be regarded as more concrete OTB-norms; often highly detailed prescriptions of the component parts of the desired states of affairs. The ‘good and reliable care’ that is required of health care institutions is for instance defined as consisting of a patient-oriented atmosphere, high professional standards, and transparent procedures. These three items are then in turn specified to ever finer requirements. In addition, levels and standards are developed in order to determine to which degree the procedure should be transparent or to what extent the patient should be informed about his illness. These standards are developed by means of benchmarking and may be raised to higher levels of performance the moment other and comparable institutions perform better. The goals are thus in the process of being constantly analysed, formalised, standardised and adjusted to ever higher levels of performance.

OTB-norms enhance the formalisation of goals, turning them into legal objects. But by whom are they issued and enforced? It may be tempting to approach this matter in traditional hierarchical terms. In such an account, the EU issues framework directives, which are then fulfilled by national legislatures, and these legislatures in turn issue national equivalents of framework-directives to institutions, and so on all the way down to shop floor level. That is how I initially thought of the process as well. But this is only partly true. (Local) experts are often at the cradle of EU framework
directives," whereas many transnational standards are set by international (professional) institutions without the intervention of formal bodies at all. The hierarchical picture of norm creation and enforcement no longer matches reality.\textsuperscript{10}

Neither is it possible to think in terms of ‘rule makers’ and ‘rule followers’. As we have seen, abstract OTB-norms often require those who are addressed by the norm to \textit{make} rules, not just to follow them. Those who issue OTB-norms \textit{outsource} the activity of rulemaking by requiring others to draft rules in order to achieve a certain goal. Moreover, those who receive an OTB-norm usually do not actually proceed to produce the required state of affairs, but mirror the strategy: they just prescribe (a more concrete version of) the state of affairs in an OTB-norm and outsource further rule making to others. The process of outsourcing of legislation and enforcement \textit{does not stop} at a certain point, but is spreading (as it were) by analogy, to all kinds of institutions. All these institutions formulate states of affairs to be reached, either in terms of abstract goals or in terms of concrete targets. At a certain point, of course, there are no others left to whom one can delegate the actual realisation of the prescribed goals. Down at the level of professionals the work should finally be done. But even here, this actual fulfilment of tasks is constantly accompanied by explicit formulations of the required end-products.

\textbf{VIII. Legislating one’s own doings}

If this sounds improbable, the reader is advised to think of his own profession. University lecturers are not only urged to deliver a certain output of articles, but are also constantly urged to devise standards and criteria for what counts as output. I spent many hours, together with my colleagues, trying to determine the wisdom of requiring only quantitative or also qualitative output and, since the latter course is embarked upon, many more hours debating whether Journal X is better than Journal Y and on which criteria. Teaching activities are regulated in the same way. It is no longer enough to teach in an inspiring way. One should formulate end-terms. Many additional hours were spent by me and the same colleagues trying to determine whether a certain course merely aimed at ‘familiarising’ students with a certain topic, or was meant to ‘provoke independent thinking’.

There is much to be said about this phenomenon, but I would like to confine myself here to two observations. The first is that there is no end to this kind of activity. One can go on indefinitely because there are always many more criteria to be developed. Once determined that it should be a journal of ‘outstanding quality’, the question immediately arises what the terms ‘outstanding’ and ‘quality’ are supposed to mean. This is not because there is any defect in the law. The burdens of overregulation are not brought about by the fact that legal regulation is always cumbersome and inefficient. The problems are brought about by the subject-matter of regulation. It is because here, attempts are made to formalise goals or desirable states of affairs. And there is literally no end in describing and prescribing desirable states of affairs.

The second observation is that since all those who engage in an activity are drawn into the regulation of their own activity, which under a system of OTB-norms involves the description of desirable end-states and end-products, people tend to be cut loose from their own activities and to see them as merely instrumental in getting the required outcomes and end-products. All of us, and not just the managers whom we appointed in order to carry out these tasks, are in the process of becoming the kind of painters I alluded to earlier. Painters who paint for the sake of arriving at a picture that conforms to pre-established descriptions and blueprints, devised beforehand by others or by ourselves. The activities we engage in are no longer valuable as activities or in virtue of the way we carry them out, but are only regarded as necessary steps in order to arrive at an objective and approved state of affairs. That means that all activity is converted into production.

IX. Absolute claims

A certain amount of artificiality or, more accurately, of sub-optimality is intrinsic to all forms of legalisation and formalisation. Explicit contracts are needed if tacit understanding is lacking. Legal arrangements are only a (poor) substitute for a flourishing social life. As Hume wrote, if men were angels, they would not need law at all. And were all judges Hercules, they could have done without explicit formalised rules. In the same vein, one could argue that the formalisation of goals is a necessary evil. Just as the contract comes in where tacit understanding has been lost, the explicit goal-prescription is needed in a world where people fail to realise these goals by their own accord.

But I wonder whether this comparison holds true. We should keep in mind that it is not ways of doing that are formalised, but end-states. And the formalisation of end-states seems to generate less advantage than the
formalisation of ways of doing. The difference between the two may be clarified by a trivial example. Let us think of someone who would like to improve her physical condition. She knows only too well her weak character and undisciplined disposition, so she imposes on herself the OTD-rule that from now on she will be at the rowing machine every morning for half an hour. Although some mornings—when she is ill, tired, and generally ill disposed—the rule is not doing her any good at all, the rule works out very well in general. Not only does the regular exercise improve her physical condition, but she is relieved of the heavy burden of deciding each and every morning whether she will do her exercises or not. She simply no longer needs to think and deliberate. In the words of Joseph Raz, the rule is an exclusionary reason for her not to act on the balance of reasons in favour of, or against, rowing. This exclusionary reason does not exclude all deliberation: if some urgent situation arises, like a sick child, she may decide incidentally to break the rule, but generally the rule does not allow for regular deliberation. These are the well-known advantages of rules.

But these advantages are only attached to the OTD-norms that tell you how to act. Let us now suppose that one morning the rowing woman decides to abandon this OTD-norm and to substitute an OTB-norm. She will then probably enter into some complex calculations concerning the kind of physical person she would like to become and will spend much time determining blood pressure, heartbeats per minute, required waist sizes and required weight. The ideal figure will haunt her from now on. She will see it before her eyes all day. Every minute which is not spent on the rowing machine is a lost minute, since it slows down progress towards the ideal she has in mind. If she has to divide her attention between different goals like good health, children and work, the ideal figure at the back of her mind will tear her into pieces. All three goods, measured and formalised to the highest degree, will fight continuously for her undivided attention. This kind of rule does not guide her actions and does not relieve her from continuous deliberation but instead urges her to deliberate at all times and causes her to chase her goals in a frenzy, alternating between them.

What can she do? One morning she will sit down, and will try to strike a balance. If all three goals should be satisfied to some degree, she will try to devise a way in which all three can reasonably be pursued without sacrificing one to the other. But at the moment she strikes such a balance, she will probably do so by means of an OTD-norm that tells her how to act

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in order to satisfy all three goals to a reasonable degree. The OTB-norms telling her what to pursue will then be abandoned.

X. FRAGMENTATION

For an individual person OTD-norms are valuable as time- and energy saving devices that enable one to pursue in a consistent manner a variety of equally valuable goals. At the collective level, OTD norms bring about consistency and predictability in social life and thereby facilitate cooperation and coordination between people’s actions. These tasks cannot be performed by OTB norms. They sketch and specify the end-states to be reached, leaving it to the various institutions how to combine the different regulations that are derived from several, often conflicting, more abstract OTB-norms. Hospitals have to pursue ‘efficient management’, to ‘improve labour conditions’, and to provide for ‘reliable care’ while guaranteeing a ‘sustainable environment’. All goals are specified to a high degree and demand full and undivided attention. The more these goals are split up and divided, the more committees will be established in order to define them even further. There is no level at which actions can be coordinated. Such rules are the very opposite of time-saving devices.

The loss of coordination is enhanced by the fact that OTB-norms tend to particularise, to specify and to differentiate. This is in stark contrast to the generalising capacity of OTD-norms. The kinds of ideals we have in mind, and the kinds of efforts required in order to get at that ideal state of affairs, differ from person to person, from institution to institution. We cannot expect a part-time university teacher who has been pregnant to deliver the same scientific output as her male, unmarried and fulltime working colleague. We cannot expect a small factory to put the same effort into reducing toxic emission as Shell. This means that although OTB-norms are in themselves basically indifferent as to by whom they should be fulfilled, their practical application requires constant differentiation of classes of norm-addressees. If we want to get criteria on what can reasonably be expected from X, we should compare X with others who share the same relevant characteristics. In fact, OTB-norms invite further refinement of benchmarking categories.

Refinement of benchmarking, in turn, leads to the formulation of an extended set of OTB-norms differentiating desirable states of affairs as well as classes of norm addressees. This problem is intrinsic to OTB-norms. Whereas acts and efforts can be generalised —e.g., no smoking—,

12 B. ZHAO, Principles and the Rule of Law in China, Dissertation, Groningen, University of Groningen, forthcoming.
desirable states of affairs cannot. If a ‘discrimination-free space’ has to make sense at all, we should differentiate between such space in municipalities, schools or factories. In each of these institutions the desired state of affairs means something else, and has different ingredients. That means that the principle of equality only surfaces as a principle of differentiation, in the form of the second part of Aristotle’s maxim; that unalike cases should be treated unalike.

As I noted above, law is always a necessary evil. It is suboptimal in various ways and for various reasons. Traditionally, these vices were compensated for by some important virtues of rules. Not only are rules time- and energy-saving devices, they also embody fairness to the degree that everyone is subjected to the same rules and no exceptions are made without sufficient reason. Rule-based decision making is more reliable than ad hoc decisions because they do not presuppose a wise decision maker.\textsuperscript{13} By subjecting human behaviour to rules, arbitrariness is limited.

But the entire rationale of a rule of law instead of men is undermined in a system in which OTB-rules prevail. In such an OTB-based legal system, arbitrary decisions are not prevented but required. Frequently, rule makers—and keep in mind that under a regime of OTB-norms most of us are rule makers—have to ask themselves at what point and for what reason a different rule should be made for a different norm addressee.

XI. Citizenship as a Goal

It is time now to return to the immigrants in the Rotterdam harbour. I asserted right in the beginning that we do not expel immigrants and create non-legal spaces because we adopt certain policies towards immigrants or Islam, but that it is the other way round: we adopt these policies because the legal space has acquired a different character and form.

I argued that legal discourse, although still to a large extent revolving around human relations, increasingly tends to regulate the achievement of goals; desirable states of affairs. But I also remarked that the demarcation line between ‘relations’ and ‘states of affairs’ is permeable. Something which is initially merely conducive to an external goal, like earning money, can turn into a valuable activity which gives meaning to one’s life. And conversely, activities to which one relates in a meaningful sense (teaching) can turn into a production process, mere steps towards a desired end-state like the graduation of a fixed amount of students. This does not only apply

to activities, but to people as well. The history of suffrage shows how people tended to become included in the political process and how various classes and races were converted into partners. Nowadays most people seem to cross that border in the opposite direction: the first Turkish girl who entered my primary school in the sixties was an interesting foreigner whom we taught our language. She and her children are now a problem to be solved and their integration a goal to be reached.

Whether or not to exclude people from the legal bell jar is not only a political choice. The choice between goals like expulsion or integration may be political. But both expulsion and integration are goals to be reached, states of affairs which dictate the policies to be pursued. And the more the internal frontiers between national states in the European Union break down, the more need there is to put immigrants outside the bell jar, where they are turned into objects of policy rather than subjects with whom one relates.

One may object to this that integration is a different kind of goal, since it aims at turning these people into partners, who are within the legal bell jar. Integration is a temporary goal, not an end-state; the end-state being full inclusion in the legal bell jar. But we should be careful here. The aim to turn people into citizens all too clearly reveals the assumption that citizenship should be deserved by these people. The obligation to follow a course that qualifies one for citizenship is in this sense just as disheartening as downright expulsion. In order to be fully included in the legal bell jar, legal personality should be considered self-evident, not something one may deserve by following a course. Citizenship is not something that should be taught but presupposed.

The tendency to view issues as problems to be solved in order to arrive at certain desirable states of affairs seems to spread by analogy. I am not sure about its beginnings, but we may suppose that in the kind of welfare-states that were established in the seventies, several ‘problems’—e.g., environment, unemployment—were identified and goals were formulated, which then proved to be fruitful starting points for joint enterprises and sustained international collaboration. At that time, not everything was yet considered as an external problem to be solved. The Moluccans who hijacked Dutch trains in the seventies were not considered terrorists at all, but citizens who had been cheated into collaboration by the Colonial administration. They were considered partners rather than pirates. But gradually, the habit of identifying threats and opportunities, of engaging in problem solving and goal achievement, then spreads to new areas as well.

Goal talk has become so dominant that it is now applied to fellow citizens
as well. In the Netherlands many reports are issued concerning the political education of one’s own citizens. We read in those reports that democracy should be ‘learned’ and democratic attitudes and virtues instilled.\textsuperscript{14} The same citizen should be taught the values and merits of a democratic constitutional state.\textsuperscript{15} This is the ultimate form of goal thinking. For, of course, the constitutional and democratic state is nothing more or less than the embodiment and institutionalised form in which citizens relate to each other. To see that arrangement as a topic of education and to view one’s fellow citizens as students of that topic, dramatically reveals how dominant goal talk has become. It is no longer self-evident that citizens live under the rule of law; they can only ‘deserve’ that treatment by proving to be a good student.

\textbf{XII. \hspace{2em} Border Posts of the Bell Jar}

If we want to realise fully what it means if citizenship is considered a goal, a state of affairs rather than the arrangement of human relations, it is instructive to think once more of Grotius’ example of the naval association that had formed itself in order to defend itself against the pirates. We might imagine two kinds of discussion to take place in the 17th century version of the association that Grotius had in mind. The first probably revolved around the proper distribution of gains and losses. The criterion of risk that had been adopted was one amongst many. Other criteria like labour and swiftness of the fleet could have been chosen as well. So a discussion concerning the proper criteria for distribution is conceivable. The second kind of discussion refers to the enterprise for which they had come together. We can imagine that the shipping companies, after having dealt with the pirates in a successful way, discussed the possibility of focussing more on the slave trade. Discussions concerning the choice between various potential enterprises are therefore conceivable as well.

But how would they have fared under a regime of OTB-norms? Much, if not most, discussion would probably have revolved around the best and most efficient way to beat the pirates. The pirate-less state of affairs for which they had joined forces would have been the guiding ideal that tends to concretise itself in more modest aims, such as a reduction of 10 percent of pirates for the coming year. They would have felt the need to call upon experts telling them how this target could be reached. That would have

\textsuperscript{14} Raad voor Maatschappelijke Ontwikkeling, \textit{Vormen van democratie: Een advies over democratische gezindheid}, Amsterdam, SWP, 2007.

\textsuperscript{15} See: Commissie Uitdragen kernwaarden van de rechtsstaat, \textit{Onverschilligheid is geen optie: De rechtsstaat maken we samen}, The Hague, Justice Ministry, 2008; on fundamental principles of the rule of law.
resulted in the formulation of many complex rules, concerning the proper rigging of the ships, the equipment that should be on board, the amount of men to be employed, the kind of steers and sails to be used, and so on. Sooner or later, the complexity of the rules and the trouble to meet the requirements would have resulted in a discussion as to whether it is advisable to lower standards for smaller and poorer shipping companies. If experts had advised against such a policy, saying that this type of rigging and guns was absolutely necessary to effectively reduce piracy, the elaborate set of concrete and detailed OTB-norms would have led to the exclusion of the small companies who could no longer meet the requirements without going bankrupt. Some of them would from then on have been expelled from the partnership and would probably have become pirates themselves in order to earn a living. Others would merge and form bigger companies that could live up to the required standards.

One thing is certain: discussions about the proper (technical) standards would have prevailed, including within the individual shipping companies. This is not only because meeting these standards effectively reduces piracy, but because by meeting these standards one deserves to be included in the legal bell jar as an insider. The OTB-norms not only prescribe a desirable state of affairs, but also draw firm lines between insiders and outsiders. Seemingly innocent, technical and neutral, they are the frontiers of the legal bell jar. Only when these border posts are passed can discussions about proper shares or even about the proper goals to be pursued come within reach.

XIII. Conclusion: Goals as guides

The emphasis on goals to be reached leads to the formulation of rules which prescribe the attainment of an objectified and reified state of affairs. This relatively new kind of rule should not be seen as just an extra. The discourse revolving around goals is not only added to the discourse in which human relations and activities are central. The way people relate to each other is permeated by considerations concerning the degree to which these desirable states of affairs are realised. I think that it is not exaggerated to say that the goal-oriented discourse is parasitic on the relation-oriented one.

This is already visible at the individual level. We are all like the judge who avoids notoriously ‘hard cases’ because they prevent him from reaching his target of verdicts to be reached, and the scientist who refrains from

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16 Commissie evaluatie modernisering rechterlijke organisatie, Rechtspraak is kwaliteit, The Hague, Justice Ministry, 2006; on the reorganisation of the judiciary.
investigating an uncertain path for fear of losing subsidies. It is also apparent at the collective level, where the proliferation of specific OTB-rules undermines the generality of law and where people and institutions struggle to conform to standards for fear of losing recognition and a position as an insider.

The expansion of law into the realm of problems to be solved and goals to be reached should not only be seen as an extension of law. The increase of the legal bell jar in terms of goals is accompanied by a decrease of the same bell jar where it deals with persons and activities to which one relates. Where differentiation is called for in the pursuit of goals, there is less scope for a rule of general and non-arbitrary law. Where compliance is rated as less important than performance, or where results are deemed more important than acts, something valuable is lost as well.

Does this mean that we should abstain from all goal-thinking? Of course not. If we pause for just one moment to think of Grotius’ Admiralty, it is immediately clear that shared, or at least common, goals and enterprises are vital to any form of society. The shipping companies would not even have dreamt of coming together without the danger of piracy. To think of society as merely a set of relations, governed by distributive arrangements, as Rawls did to a certain extent, is in all probability fallacious.

But we should conceive of goals in a different way. We should not think of them as states of affairs to be promoted and to be reached but as something that we should keep at the back of our mind in forming and establishing relations. The society we strive after should not be seen as a state of affairs to be reached at the final bus-stop of our journey, but as something which may inspire that journey and may turn the journey itself into a worthwhile experience. We should not be misled to think of goals as the entire raison d'être of living together. The relation should be the reverse. No one phrased the proper relation between means and ends more accurately than John Dewey who remarked that “men do not shoot because targets exist, but they set up targets in order that throwing and shooting may be more effective and significant.”

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I. INTRODUCTION

Gary Ulmen’s recent translation of Carl Schmitt’s *The Nomos of the Earth* has not only furthered scholarly interest in Schmitt’s legal theory,¹ but has also granted the geographical concept of space its proper place in legal studies. Schmitt shows how a “poetics of space” has actually created, recreated, and continuously creates the world map.² Myths and symbols create normative spaces and boundaries that make regulation possible.³ The poetics of space is inherent in boundary-marked social relationships and political identities, and manifests itself in the *nomos*. For Schmitt, “nomos is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process; here, measure, order and form constitute a spatially concrete unity⁴. The *nomos* of modernity, the first *nomos* of the Earth, is ultimately revealed in the original (constitutional) act of spatial ordering according to the *ius publicum Europaeum*, the embodiment of Westphalian legality designed for the pacification of Europe’s reformation. In other words, the distinctively modern ‘space of normativity’ is based on the myth that only sovereign states can select their political enemies, wage wars and end their wars through the symbolism of their legal treaties.

For Schmitt, the political future of Europe lay beyond Westphalia and its sovereign state, yet he did not find an alternative *nomos* to the “Westphalian poetics of space”. Schmitt insists that regulation is only possible within a concrete territorial order like the Westphalian state; which implies that the borderless post-Westphalian alternative of ‘spaceless universalism’ is an unregulated and, hence, at least in Schmitt’s dark vision, a very violent state of affairs. The cosmopolitan *nomos* destroys the spatial sense and, thus, abolishes territorial order and concrete political orientation. Any effort to safeguard the rule of law against the capricious will of men is therefore an effort to find some concrete earth-bound space

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for the law; Schmitt’s effort indeed. My aim is to try to reconstruct the
poetics of two competing spaces – namely, Attica and Westphalia – in
Europe. I shall, thereby, unveil the displayed symbolisms and myths
through which they are built as political and legal alternatives. At the same
time, it will become clear how these two different spaces create, sustain
and require two forms of rule of law.

In my reconstruction work of Attic and Westphalian poetics of space, I
borrow Schmitt’s perspective of space as being poetically created and
sustained. I fully agree with him that Europe’s rule of law is part of a
common intellectual and moral heritage that not only defined modern
normativity (Westphalia), but also prefigures the shape of future
legislation in Europe. To find out the distinctive character of the modern
nomos, I seek to find out: what the role of the term ‘law’ is, in Westphalian
mythology of modern normativity; how the modern nomos coheres with
sovereignty, through a comparison with Attic poetics; and how the
modern nomos affects our views on actors, institutions, and constitutions.
By making a comparison with Attica, my argument is that it is not
fallacious to speak of different spaces of normativity. I do not share
Schmitt’s unconditional admiration for the Westphalian normative space.
I, therefore, provide in the final paragraph, some suggestions, based on
recent scholarly insights, of what the post-Westphalian alternative may be.

II. ATTIC AND WESTPHALIAN POETICS OF SPACE

The role of ‘law’ in a theory of modern normativity can be most clearly
understood by comparing it with that of ancient normativity. Such a
comparison enables us to think in terms of legal alternatives; no legal order
can be taken for granted. There is a tendency, a modern bias indeed, in
legal thought that ‘law’ is the political will of the sovereign; hence, the
identity of ‘law’ is fixated, in an eristic fashion, as Westphalian. My
argument is that such a distinctively modern normativity makes legal
studies blind to the poetics of space of which ‘law’ is a part. In Attic
poetics, for instance, there is no such thing as sovereignty and the
Athenian state is not a sovereign state. From an Attic angle, sovereign will
is not so much ‘law’ as arbitrary will or lawlessness. In Westphalian poetics,
the role of ‘law’ is the equivalent of the role of the sovereign; which is, as
Schmitt like Bodin teaches, to contain Europe’s creedal civil wars. In Attic
poetics, the role of ‘law’ is the role of ‘reason’ (nous) itself; the highest
faculty of human nature, which enables human beings to search for truth,
law and self-understanding, as citizens, within the spatial boundaries of the
city-state.

Throughout the ages, Attica and its Athenian city-state has been identified
as Europe’s most important space of normativity. Since the Persian Wars, Golden Athens has been mythologised as the city of reason, from which the distinctively European, yet not modern, ‘rule of law’ as rule of reason has developed. Socrates, the mythical personification of reason, held that unless human conduct is regulated by reason, there can be no law, but only arbitrary will. The Attic space is shaped by the myth of telos; that attributes a share, responsibility and end of life to each rational animal or city-state citizen. The role of Attic law is to preserve and enforce this mythologised cosmological order. Breaking law in Attica, in other words, is breaking the rule of reason put in legislated forms, which is ignorance; ignorance of the self, of one’s due end. Socrates did not disobey law that unjustly condemned him to death for corrupting Athens’ youth. He could only realise his due end within the spatial boundaries of the Athenian polis. This political man of reason died in honour of Attic law that guides each citizen to his fulfilment as a dependent rational or political animal. His art of dying implies that it is better to die as an Athenian citizen than to live elsewhere as an Athenian stranger.

Schmitt emphasises that the Greek polis, as Europe’s political community of thought and action, “lacked the idea of a common spatial order encompassing the whole Earth”. In Attic poetics, indeed, the world is divided between Europe and Asia. This division of the world in Europe and Asia was divinely ordained, as a distinction between (lawful) freedom and (lawless) despotism. Attic poets provided the tragic displays of Asiatic law-breaking, particularly in family life, and aroused horror of incest, parricide, human sacrifice, the killing of children, etc. Though such lawless practices were not uncommon among the Greeks themselves – the Olympian gods themselves were lawless, while Agamemnon had sacrificed his daughter to get advantageous winds for his expedition to Troy, they were identified with tribal barbarism and Asiatic despotism. A daring Alexander the Great was able to cross borders only because he was imperially deified. His entry into Asia meant the destruction of the polis. The rule of Alexander destroyed the Attic rule of law as a rule of reason.

As it has been mentioned earlier, Attic poetics of space is constitutive for the European legacy and the rule of law sui generis, also in modernity. Max Horkheimer claims that the only valid rule of law for Europe is Attic rule of law and, therefore, seeks to transpose Athens’ rule of reason to the

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5 Ibid., p. 55.
modern space of normativity. The “democratic state,” Horkheimer says, “should be like the idea of the Greek polis without slaves.”8 Thus understood, the democratic state is based on Attic spatial ordering, not on a modern or national nomos of the Earth. For Horkheimer, the democratic state is the city of reason opened to let in the slaves and the barbarians, and transform them into law-seeking rational animals and citizens. In other words, the democratic state is a political and intellectual aspiration rather than a reality. For, the Greek polis and Attic spatial ordering -and, hence, reason and justice- can exist only because of slavery. Luciano Canfora insists that Europe’s Attic rule of law may make the Europeans free but not democratic. It makes Europe free only by denying freedom to its Other; Asia and the Third World. In the European battle between Greek freedom and democracy, Canfora notes, “freedom has won -in the rich world- with all the terrible consequences this has, and will continue to have, for the rest; democracy is postponed to some other era”.9

The myth of an Athenian (democratic) polis without slaves may be defined as unreal, but the Attic aspiration is nevertheless real in its consequences. If Horkheimer finds the mimetic representation of the modern democratic state in the city-state without slaves, he refuses to separate the role of law and the spatial ordering of the Attic heritage. But, that separation is precisely fundamental for Westphalian poetics of space and its nomos of the Earth. In Westphalian poetics, the role of law is to pacify the revolts and creedal civil wars of the reformation. In Westphalia, law is no longer telos, discovered in the polis; instead, it is imposed will power. The political end of life is now peace and prosperity; security, like the other animal species. While, in Attica, the greatest danger is self-delusion, for that is lawlessness, in Westphalia, the law is self-preservation in a chaotic, violent world that is filled with duals, feuds, vengeance, and plunder of warlords, robbers, bandits, pirates, rebels, and terrorists.10 The political purpose of the sovereign state is to master such violence, contain civil war and enforce legal order in Europe.

Westphalia is the narrative of the politically imagined community of nationhood, the modern nomos and space of the sovereign state.11 The image of the nation is mythologised by the sovereign king or people as the space of his own political will to contract peace and prosperity, which

11 M. DEAN, “A Political Mythology of World Order”, o.c., p. 11.
alone is law. In Westphalia, the rule of law becomes embodied in the national Rechtsstaat. Through this legal institution, the sovereign offers his subjects legal protection against the potential barbarism of their fellow subjects. The sovereign grants them the legal entitlements that enable them to acquire their own property and become economically independent of their masters. In his farewell to Attica, Thomas Hobbes claims that, given the horrific realities of Europe’s creedal civil wars, such is the distinctively modern meaning of freedom in Westphalia. Free is the legal subject who is bound to the political will of his sovereign alone and is independent of his fellow subjects or alternative authorities.  

III. NATURE AND NOMOS

In contrast with Attic poetics, in Westphalian poetics of space, the concepts of nomos and sovereignty cohere intimately. The nation is the spatial ordering of goods and people of the sovereign state; which shapes a distinctively modern political and moral orientation towards the world and its inhabitants. Sovereign governments build nations, through their laws, policies and regulations, as spaces of peace and prosperity, as safe havens for legal subjects. Sovereignty, as a legal concept, replaces the ancient (mythical) quest for natural (organic) telos or due end of life by the modern quest for security, for making peaceful and prosperous spaces. The Attic space is not peaceful, prosperous and safe. Attica was not wealthy, almost conquered by the Persians, defeated by the Spartans and actually conquered by Alexander the Great and the Romans. The Attic spatial ordering and othering implied, for city-state citizens, that they could realise their due end of life only if they would be rational enough to transcend their (slavish) vice of fear (of the Persians) in the polis by virile courage, so desperately needed in war. In the Westphalian space, this civic virtue is made redundant since the sovereign is responsible for beginning and ending war and peace.

In the modern poetics of space, it is believed that all earthly blessings are owed to the great sovereign; which discredits in advance any alternative principle of state building, such as subsidiarity or sphere sovereignty. If an alternative principle does get the benefit of the doubt, then it is somehow combined with the sovereign rule, leading to an impossible marriage. The distinctive feature of sovereignty is that the state is

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constitutionally independent from other communities, including foreign states, the Church, families or dynasties, language communities and corporate enterprises. Sovereignty, John Loughlin stresses, “represents the autonomy of the political and, hence, provides the foundation of public law”.

Sovereignty is a legal doctrine that is originally grounded on the view of nature as a space of frightening savagery and barbarism, of fearful war and poverty. Such a portrait of nature, horror, indeed, alone justifies the birth of the sovereign state. For, only this monster (Leviathan) is able to tame wild animals that are called human beings and to keep them safely out of nature, in civilised conditions.

Given the Westphalian portrait of nature, reason is made dependent upon the sovereign and, thus, loses its Socratic meaning of truth or telos searching. In Attic poetics of space, reason tries to discern hidden laws that are cosmologically given. These laws are meant to govern Athenian citizens to take, allot, assign, share, divide and distribute land, to give each fellow citizen his due -his goods- in a spatially settled city-state. In Attic poetics, Athenians are believed to be citizens by nature, bound to their land, their fatherland. The Athenian polis, that alone enables them to fulfil their political animalty, is not outside but inside nature. The task of the legislator is to perfect human nature. The purpose of law is to assist citizens in exercising their civic virtues; which are, in the end, mimetic representations of the nous. In Attica, only virtuous action is rational; knowledge informed action. Thereby, the rule of law enables citizens to play their proper role in the city-state. Carl Schmitt describes the Earth as the “mother of law”, as in her fecundity, mother nature contains an inner measure of justice. Mother nature, he suggests, contains law within herself as a reward for labour. She manifests law upon herself in fixed boundaries and sustains law above herself as a public sign of justice.

In a similar way, Alexis de Tocqueville provides an Attic, rather than Westphalian, narrative of American democracy. In his poetics of space, the puritan township is portrayed as a modern version of the Athenian polis. The township, as a legislative body, is therefore mythologised as

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17 C. SCHMITT, The Nomos of the Earth, o.c., p. 42.
‘natural’ and not the creation of sovereign will. Tocqueville mythologises the township as breathing “an air of antiquity and a sort of biblical perfume”. The township is “the sole association that is so much in nature that everywhere men are gathered, a township forms by itself [...]; it is man who makes kingdoms and creates republics; the township appears to issue directly from the hands of god”.

What is at stake here is that, in the Attic poetics of space, the justice of a communal order, including the democratic order of the New World, depends on the cosmology of a given (teleological) nature. Tocqueville, as the above quote shows, relies, not unlike Plato or Augustine, on theological symbolisation.

Schmitt notes that “all concepts of modern state theory are secularised theological concepts”. This includes the rule of law, spatially bound to the Attic nomos of the puritan township. Every nomos is “based on sacred orientations”. The ground motive of all nomos and any rule of law is religious, not national, although constitutions may be devoid of religious symbolism.

In Westphalian poetics, on the other hand, the state is founded on the myth of the state of nature. Nature is no longer a liberating force of truth but, on the contrary, it is oppressive. The political program of the Westphalian state is to get out of nature, to master nature, through conventions. In the modern space of normativity, called nationhood, reason is no longer a divine gift or nous that is ‘naturally’ able to discover which constitution is best by ‘nature’, but reason is a technical or bureaucratic instrument for mastering brutal nature and its wild peoples. Hence, the sovereign state is the embodiment of reason, for it alone is able to prevent citizens from collapsing into their deplorable natural condition of poverty and violence. In Westphalian poetics, citizens are portrayed as the sovereign’s legal subjects living within the national territories; the safe havens of civilisation. Again, in the modern space of normativity, the rule of law cannot exist independently of the sovereign’s will to peace and prosperity.

In Westphalian poetics, the symbolism of nature does not disappear altogether. Though the fecundity of mother Earth does not attract the

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21 C. SCHMITT, Politische Theologie: Vier Kapitel zur Lehre der Souveränität, Berlin, Duncker and Humblot, 1979, p. 49.
22 C. SCHMITT, The Nomos of the Earth, o.c., p. 70.
23 H. DOOYEWERD, Reformation and Scholasticism in Philosophy, o.c.
agrarian admiration that is symbolically represented \((\textit{mimesis})\) in, say, Virgil’s \textit{Georgics}, sovereigns are irresistibly attracted to sea and air by maritime destinies and air forces.\(^{24}\) The Westphalian belief that on sea there is no law but only piracy is the domain for Grotian mythology. Sovereign powers develop into commercial empires that fight their ‘trade wars’ on the sea; thereby, abiding by the law, the \textit{ius publicum europaeum}, that states that no prosperous city may be destroyed.\(^{25}\) For Schmitt, it is a meaningful sign that, in Westphalian poetics, the sovereign lawmaker is mythologised as Job’s sea monster, the \textit{Leviathan}.\(^{26}\) In Schmitt’s Westphalian tragedy, sovereign states are able to pacify the domestic chaos and civil wars of Europe’s reformation only through the mastery of the seas, the new discoveries and conquests of newly discovered lands. Sovereign states were able to abide by the \textit{ius publicum europaeum} only because their lust and violence found expression outside Europe.\(^{27}\)

\section*{IV. Autos and Nomos}

The modern Westphalian \textit{nomos} of nationhood affects our views on actors, institutions and constitutions. In Westphalian poetics of space, nature and \textit{nomos} are divorced. The sovereign creates the \textit{nomos} that is meant to supersede the barbarous violence that is identified with the state of nature. This violence includes the political passions and civic activities of political animals who are portrayed as monsters; if the \textit{Leviathan} is the metaphor for the sovereign state, it is not only the sovereign government or regulator but also the citizens or legal subjects who are monstrous. Therefore, in Westphalian poetics—and, hence, also for Schmitt—, (wo)man is naturally violent, selfish, vicious or sinful and, therefore, a dangerous being.\(^{28}\) Accordingly, the purpose of Westphalian law, defined as the sovereign’s will, is to control the devil existing in both government and citizen.\(^{29}\) The sovereign is the actor that tames citizens by emancipating them from their battling communities; thereby, isolating their dangerous political animality. In the sovereign state, citizens withdraw from the polis and restrict their participation to the \textit{oikos} or the family household that, in Westhalian poetics, is the domestic seat of self-control and discipline. It is within the \textit{oikos} that naturally brutal beings become civilised. Also, it is in the \textit{oikos} that the public idol of prosperity, a most important condition for

\begin{footnotes}
24 C. Schmitt, \textit{The Nomos of the Earth}, \textit{o.c.}, p. 43.
25 Ibid., p. 203.
26 M. Dean, “A Political Mythology of World Order”, \textit{o.c.}, p. 12.
28 M. Ojakangas, “A Terrifying World without an Exterior”, \textit{o.c.}, p. 211.
29 M. Koskenniemi, “International Law as Political Theology”, \textit{o.c.}, p. 504.
\end{footnotes}
the perpetual peace of Westphalia, is generated and sustained.

Because the sovereign acts to individualise or privatise citizenship, the relationship between the sovereign state and the humanist and civil value of autonomy is intimate. The sovereign controls his legal subjects by granting them autonomy from their communal authorities in the institutional form of legal rights that, in the sovereign state, are defined as entitlements or claims, usually valid within the space of nationhood. The first legal entitlement that the sovereign provides to his subjects is, of course, the right to own private property; which is the legal prerequisite for all autonomy from hierarchy. Thus, John Locke explains that “every man has a property in his own person” and that “the laws regulate the right of property”. In the sovereign state, the laws regulate the rights of property, because the sovereign wills “the direction of a free and intelligent agent to his proper interest”. In Westphalia, the proper interest –that is, rationality- is peace and prosperity that the nation owes to its sovereign. As has been mentioned above, in the sovereign state, reason, identifying the ‘proper interest’, is always coeval with the sovereign’s will to master the state of nature.

In Attic poetics, on the other hand, reason is not autonomous. Reason is developed through civic participation in the Greek polis, not through civil participation in the oikos, which is primarily the domain of slaves. Because the polis is not a convention but is inherent in (teleological) nature, Attic nomos is not independent of the myth of telos. The Athenian state's purpose is to imitatively represent ‘nature’. This mimesis includes fighting just enemies, such as Cyrus and the barbarians, whose cosmology represents the unnaturalness of despotic lawlessness and falsehood. Attic institutions, such as Athenian legislation, festivals and sacrifices, are the symbolic participation in the cosmos, in nature. Such cosmological symbolism portrays Attic spatial ordering. The city-state is the mimetic representation of nature, which the Athenians seek to safeguard against their just enemies, the barbarians who misrepresent nature in untruth and lawlessness.

In Westphalian poetics, nature is portrayed as a brutal condition devoid of wisdom. Because of this image of nature, reason loses its meaning of the nature-given truth seeker. In contrast with the Attic state, the sovereign

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state is not based on the myth of telos; meaning that citizens do not have to search for ‘nature’ or for things that are ‘best by nature’, as such reason is not able to stop Europe’s slaughter. Reason, thus divorced from the myth of nature, becomes a technical attribute of violence control. In Westphalian space, reason is portrayed as a weapon used in the war against nature. Modern reason is personified in the autonomous subject who is able to make war upon his or her own lusts and vices rather than fighting others, who manages to subject his or her oikos activities to the ‘proper interest’ that the sovereign represents. The autonomy that the sovereign grants to his out-of-nature and out-of-community subjects is self-rule without nature-given laws, which is expressed in the self-ownership and civil participation in prosperity-generating oikos life.\[^{33}\]

Autonomy requires the rational capacity to choose and, hence, awareness of options available in the oikos. In Westphalian poetics, these options are advertised in the modern oikos of civil society and the marketplace; ultimately the social domain of the bourgeois, the anti-citizen.\[^{34}\] Civil society and the marketplace are portrayed as the peaceful and competitive spaces of autonomy, in which rule-abiding civilised subjects associate and negotiate with one another contractually and exercise their legal rights, to live together comfortably, safely and peacefully, in a legally secured enjoyment of their private properties. Ernst Troeltsch reconstructs the modern myth that such civil self-realisation in self-chosen associational options and struggles for self-recognition is what modern freedom in the Westphalian land is all about.\[^{35}\] In Troeltsch’s essay, German freedom is oikos freedom. It is a freedom that is realised through contractual association within the spatial ordering of nationhood, which becomes the object of pious devotion in the oikos acts of self-realisation. In the Westphalian poetics of space, chapters mimetically representing this autonomous ‘non-political man’, like the reflections of Thomas Mann, are constantly added.

The Westphalian poetics of space is highly effective in firmly establishing autonomy as its ruling myth. As autonomy is essentially a legally controlled will act, reason becomes a domestic(ated) oikos affair and, thus, deprived of its wider political city-state relevance. Westphalia turns political action,


including constitution-making, into a technical or administrative matter for the sovereign. In the policy documentation of Europe’s sovereign governments, this pacification strategy is clearly visible in the slogan-like rhetoric of ‘freedom of choice’. In the Westphalian space of normativity, the *liberum arbitrium* does not refer to the political choice between good and evil or to the rational choice for civic virtue. Instead, Westphalia limits the freedom of choice to the more profane activities of the non-political *oikos* man who chooses to act in accordance with the will of the sovereign; for instance, with a view to personal health, the Earth’s environment or the alleviation of global poverty.36

V. A POST-WESTPHALIAN EPISODE

The comparison between Attic and Westphalian poetics of space suggests that it is not fallacious to speak of different spaces of normativity. Distinguishing between Attic and Westphalian spaces is a useful heuristic device for uncovering the spatial dimensions of *nomos*. If Carl Schmitt teaches anything, then it must be that such dimensions—the *nomos* that creates territory, defines locality, marks places, separates backyards and defines households—are the groundwork of any constitution.37 Any rule of law assumes spatial dimensions of political boundaries and demarcating borders, like territorial control or division between Greeks and Persians, Romans and barbarians, EU and migrants, friends and enemies of freedom. Space, indeed, is exclusive and it is precisely this exclusiveness of being Greek, Roman or European, which gives the political life of the state and ultimately political freedom or self-government, its concrete and intense territory-bound significance of a lived experience of constitutional state building. Schmitt asks urgently whether there is “any space left for the rule of law after Westphalia”.

Since the collapse of the *ius publicum Europaeum* in Congo 1885, and the resulting horrific realities of the world wars, the sovereignty principle has been discredited.38 In the aftermath of the greatest war ever, Jacques Maritain offered his Attic alternative of the human rights of the United Nations for reconstructing Europe. Indeed, Maritain concluded that, after the brutal violence of the world wars, sovereignty “must be scrapped”.39 In the past decades of legal scholarship, however, the sovereignty principle

37 M. DEAN, “A Political Mythology of World Order”, o.c., p. 7.
38 C. SCHMITT, The Nomos of the Earth, o.c., p. 239.
has been more often contested by sovereignists themselves, but this has not led to its rejection. Instead, it has been “reinvented”, “revisited”, or “transformed”.\footnote{J. BARTELSION, “The Concept of Sovereignty Revisited”, European Journal of International Law, 2006, pp. 463-474.} Thus, the rationalisations of the peace and prosperity programme, the \textit{Wirtschaftswunder}, can continue under a new post-national \textit{nomos} of the Earth. In this new episode of space-making, the Westphalian myth eclipses.\footnote{A. OSIANDER, “Sovereignty, International Relations, and the Westphalian Myth”, International Organization, 2001, pp. 251-287.} Yet, its normative premises concerning the rule of law as sovereign will are far from dead and its consequences are still active in political and \textit{oikos} life. Sovereignties are in transition towards “post-Westphalia”;\footnote{R. FALK, “Revisiting Westphalia, Discovering Post-westphalia”, Journal of Ethics, 2002, pp. 311-352.} borders of nations are being reconstructed.

Schmitt admires Westphalian poetics for its geo-political boundary work of limiting space and excluding from territory. Through the sovereign’s spatial ordering, the friend-enemy dualism is preserved and political life is kept vibrant. In the new episode of the Westphalian poetics of space, however, the exclusivist myth of the European nation is replaced by the myth of an all-inclusive humanity. In this all-inclusiveness, the enemy and, hence, political vibrancy disappear. Schmitt makes it clear that the so-called post-Westphalian transcendence of the friend-enemy dualism in institutions like human rights is in fact a new \textit{imperial} symbolism of Westphalian poetics. It is an imperialism that annihilates the enemy, the European other. For, in post-Westphalia, humanity is “\textit{European humanity}”;\footnote{C. SCHMITT, \textit{The Nomos of the Earth}, o.c., p. 228.} human rights are European rights.\footnote{A. PAGDEN, “Human Rights, Natural Rights, and Europe’s Imperial Legacy”, Political Theory, 2003, pp. 171-199, at p. 172.} Schmitt claims that “he who invokes humanity wants to cheat”. Attic poetics is destroyed when Alexander the Great crosses the line that separated Greece and Persia to rule the world. Westphalian poetics of space, including its \textit{ius publicum Europaeum}, has destroyed the conciliation between borderless \textit{cosmos} and \textit{polis}.

In Attic poetics of space, the \textit{nomos} of spaceless universalism, represented in world citizenship and shaped by Stoic cosmopolitanism, destroys the political life of the city-state and transcends Athens to reach Alexander the Great’s \textit{cosmopolis} and the \textit{imperium Romanum}.\footnote{E. VOEGELIN, \textit{The New Science of Politics}, o.c., p. 91.} Post-Westphalian cosmopolitanism replaces Westphalian nationalism to legitimise sovereignty transfers to a new empire, the European Union, which is
powerful enough to cross national borders. Robert Cooper identifies the European project as a kind of voluntary imperialism that is compatible with human rights and cosmopolitan values. Ulrich Beck and Edgar Grande point out that “in the European Empire the concept of sovereignty is itself being transformed; i.e., that sovereignty is developing into complex, cosmopolitan sovereignty”. Namely, in post-Westphalia, the European nation-states transfer their sovereignty to the European Union to make their collective presence felt in the world. Jan Zielonka insists that this empire is not some “neo-Westphalian super-state” but a post-Westphalian “neo-medieval empire”. The neo-medieval symbolism of post-Westphalia refers to spatial dimensions like polycentric regulation, overlapping jurisdictions, soft and flexible borders, multiple identities, various loyalties, diverse rights and duties, and divided sovereignty.

Supra-national hierarchies naturally have taken a keen interest in the subsidiarity principle and reinterpret it in a post-Westphalian fashion. Originally, the subsidiarity principle is an Attic principle of hierarchy, which dictates that higher authorities are to provide subsidiary assistance to lower authorities, in order to enable each citizen to fulfil his or her telos, rational or political nature, in the Athenian polis. The subsidiarity principle reflects the Attic cosmology of a hierarchically ordered nature, including the city-state. It is a teleological principle that enables Athenian citizens to govern themselves towards their given natural station, as discovered by the nous, through the exercise of the civic virtues in the polis. Thereby, their political nature finds its fulfilment in the Attic values of freedom or self-government and reason. The subsidiarity principle dictates that government belongs by ‘nature’ to the superior in mind; which means that the barbarians are naturally subjugated by means of superior thinking. The Westphalian state, on the other hand, cannot exist with such teleological or natural hierarchies. That state is mythologised as Job’s sea monster, born to stop Europe’s creedal civil wars.

The Leviathan may or may not divide sovereignty within his own state body. The sovereign may be responsible towards other communities and may even protect them. He may empower his subjects with his legal rights or transfer his sovereignty to other actors. But the sea monster only acts in such ways to materialise his will to peace and prosperity. His will alone is law. In Westphalian spaces governed by such will power, the Attic

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meaning of subsidiarity and its relationship to a specific cosmology, including political nature, is obscured. In the Westphalian space of normativity, subsidiarity is reinterpreted as a bureaucratic tool or judicial formula for redistributing or (de-)centralising sovereign power. As Merin Scattola and Paolo Carozza explain, “subsidiarity and sovereignty are antagonistic principles”. Hence, (Attic) reason dictates that “the idea of subsidiarity leaves no room for sovereignty as such”.

In sum, distinguishing between Attic and Westphalian spaces of normativity reveals that the current “sovereignties in transition” of post-Westphalia are mythologised within a distinctively Westphalian space of normativity, even though the Attic language of subsidiarity is often employed. It is through Westphalian poetics that the sovereignty principle is rethought within the global context of post-Westphalian empire-building and de-territorialised geopolitical reconfiguration. Thus, when Zielonka stresses that “Westphalian solutions are largely inadequate for coping with an enlarged EU” and that “it is time to recognise the neo-medieval reality and make it work”, he does seek to enter a new (neo-medieval) space of normativity and yet refuse to scrap the concept of sovereignty that is bound to the Westphalian nomos. Instead, he urges his audience to finish the Westphalian chapter and drop their Westphalian measure or criteria of judgement — to borrow Benno Teschke’s words, to “abandon the fixation on ‘Westphalia’” to enter the new post-Westphalian episode in the Westphalian poetics of space making; the cosmopolitan neo-medieval turn in the building of a super multi-headed Leviathan.

VI. A NEW POETICS OF SPACE?

The post-Westphalian episode transforms sovereignty, rather than transcending it. The rephrasing had to take into account the modern fact that there is no more a no-man’s land or more precisely a ‘no-European’

52 J. ZIELONKA, Europe as Empire, o.c., p. 191.
land where battles can legitimately be fought, where the thirst for power can be quenched. In the post-Westphalian narrative, sovereignties are sustained thanks to wars fought on a worldwide scale for the sake of humanity and human rights. America’s total war against the enemies of humanity—state or non-state actors, barbarians—appears in the post-Westphalian consciousness of spaceless universalism to be a perfectly reasonable and even laudable policy.55 The poetics of post-Westphalia delocalises the rule of the law by negating the normativity of established spaces. The Westphalian appropriation of newly discovered land is replaced by the spaceless seizing of newly discovered markets, where lethal acts are justified in pursuit of desire.56

In Europe, a new poetics of space is being written as a radical alternative to America’s post-Westphalian foreign policy of universal wars anywhere in the world, which follows from its self-understanding as the guardian of the worldwide oikos. Thus, Jürgen Habermas and Jacques Derrida picture a European space of normativity, safeguarded by the political community of the European Union, as the American or transatlantic post-Westphalian alternative of total war and market.57 In most explicit terms, Alain Badiou points out that a radically new poetics of space must be understood as “a moment of resistance to the barbarous reign of the pure economy that supports a politics of war and fuels the devastation of consciousness”.58 Europe’s new poetics of space is mimetically represented in an alliance between France and Germany, the so-called ‘core’ Europe; which seeks to safeguard, through their rich philosophical and literary traditions, the European heritage and the rule of law, in a hostile world that is dominated by hegemonic corporate and military power. Ultimately, Europe’s moment of resistance to American seizure is resistance, in thought and in action, to the conquests of universal markets, merciless slaughter and annihilation of enemies.

Badiou believes that the writing of a new poetics of space has become

54 C. SCHMITT, The Nomos of the Earth, o.c., p. 296.
possible because a new historical or dialectical moment for negating (post-)Westphalian poetics has arisen. The moment of resistance to post-Westphalia’s total war and market alternative is a dialectical opportunity for bringing into the world a strikingly new spatial order; that is to say, for creating “the cultural renewal of European space”.

Badiou’s new poetics of European space is, first of all, a story about constructing a new political unity without spatial sovereignty. The “cultural renewal of European space”, thus, demands a radically new understanding of the concept of ‘rule of law’. This “newness”, Badiou suggests, is what supports a dialectic of thought—primarily a dialectic between French and German philosophies and poetries—that, in his view, alone is able to negate and transcend the post-Westphalian episode towards a radically new pluriversal spatial order and corresponding nomos. Badiou urges his audience to supersede their desires for security, to de-mythologise the Westphalian state of nature, kill their Leviathan and find themselves a radically new monster; “let’s start with a new animal, a new historical animal, something that would not exactly be a nation, but would be anything other than a nation”.

Badiou suggests that the new and extraordinary violence of global terrorism and the Al-Qaeda myth may give birth to a new poetics of space in Europe. The total war on spaceless de-territorialised and invisible terrorism reveals that there are other wars than interstate wars. Moreover, these post-Westphalian wars cannot be concluded through the legal institution of the peace treaty. As one result, the total war on terrorism, as Alain de Benoist articulates so clearly, is a war that does not seek to defeat and unarm but annihilate the enemy, through distinguishing between terrorist bestiality and (civil) humanity, protected by prosperity and weapons of mass destruction. In post-Westphalia, then, the distinction between war and peace becomes blurred. Post-Westphalian total war provides the image of the continued and omni-presence of the dehumanised or bestialised enemy. The enemy of civil humanity cannot be treated civilly, with Westphalian pacifying tolerance and civil respect for legal rights. The presence of the Guantanamo Bay camp is a mimetic representation of this impossibility of civility and legality in the war-zone of the Earth.

The tragic human history seems to teach that each era needs and creates its tyrant. In Attic poetics, Heraclites teaches that war is the father of all, 

59 Ibid., p. 120.
60 Ibid., p. 126.
61 Ibid., p. 130.
and king of all, because Attica could only be free through the enslavement of others, through being victorious in war. Only by excluding the conquered from the Greek *polis*, and including them in the *oikos*, is it possible for the victorious Athenians to achieve their given *telos* in citizenship, despite their human, all too human, limitations. In Westphalian poetics, creedal civil war is the father of all and its pacifier is king of all. Only by unlimited land-appropriation outside European territorial space, Schmitt teaches, is it possible to transform continental war into maritime rivalry in a sea or air battle. In the post-Westphalian episode, the total war on terrorism is the father of all and this war can no longer be concluded by defeating the enemy. A new poetics of space must give birth to a new monster and a new *nomos* and, thereby, scrap sovereign statehood, invent a new rule of law and change the identity of legal studies. Perhaps an enlarged European Union could become that new monster and ‘core’ Europe that new space of normativity.
I. INTRODUZIONE

“Nessuno qualificherebbe come estradizione la cooperazione tra un giudice del Land Baviera ed un altro della Bassa Sassonia in vista della consegna di un imputato, ovvero l’assistenza tra un giudice della Comunità autonoma di Catalogna ed un giudice dell’Andalusia, motivo per cui non si può parlare di estradizione neppure qualora l’assistenza venga prestata all’interno dell’Unione europea”.

L’accostamento, invero un poco forzato, è dell’Avvocato generale Jarabo Colomer, nel suo estremo tentativo di tracciare una linea di demarcazione quanto più netta possibile tra il mandato d’arresto europeo, strumento preciamente giuridico, di cooperazione giudiziaria in materia penale tra gli stati membri dell’Unione europea e la procedura di estradizione, di impronta prettamente intergovernativa ed a vocazione politica, prevista da varie convenzioni internazionali ed europee, quest’ultime adottate a norma dell’articolo K 3 del Trattato di Maastricht e tutte sostituite, a partire dal 1 gennaio 2004, dalla disciplina prevista dalla decisione quadro 2002/584/GAI relativa, per l’appunto, al mandato d’arresto europeo.

Linea di demarcazione che non deve essere invece risultata così evidente...
alle Corti costituzionali e supreme di Varsavia, Karlsruhe e Nicosia se nel 2005, con le pronunce, rispettivamente, del 27 aprile,\(^4\) del 18 luglio\(^5\) e del 7 novembre\(^6\) annullavano le normative nazionali polacca, tedesca e cipriota di recepimento della decisione quadro 2002/584 in quanto contrastanti con i rispettivi divieti costituzionali di estradizione all’estero dei propri cittadini.

La quarta corte costituzionale che, in ordine cronologico, si è pronunciata sulla conformità tra la normativa nazionale di recepimento della decisione quadro e il sistema costituzionale interno è stata quella di Brno\(^7\) che, in evidente controtendenza rispetto agli orientamenti appena ricordati, il 3 maggio 2006 decideva di rigettare la questione di costituzionalità sollevata a riguardo, dichiarando le disposizioni del codice di procedura penale ceco introdotte a seguito della trasformazione in diritto interno della normativa comunitaria istitutiva del mandato d’arresto europeo non in contrasto con l’articolo 14 § 4 della Costituzione a norma del quale “nessun cittadino ceco può essere obbligato a lasciare la patria”.

\(^4\) Cf Tribunale costituzionale polacco [Trybunals Konstytucyjny], sent. 27 aprile 2005 (P 1/05), reperibile, con in inglese, www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf.

\(^5\) Tribunale costituzionale federale tedesco [Bundesverfassungsgericht], sent. 18 luglio 2005 (2236/04), in Diritto&Giustizi@, 20-7-2005, con sintesi in inglese.

Accelerazioni e brusche frenate al processo d'integrazione comunitaria nel terzo pilastro, riluttanza degli stati membri a cedere segmenti di sovranità in materia penale, effetto e vincolatività delle decisioni quadro adottate a norma dell'articolo 34 § 2 (b) TUE, modalità di risoluzione di eventuali conflitti tra la portata normativa di dette decisioni ed i principi costituzionali degli stati membri sono soltanto alcune delle problematiche emergenti dal quadro appena delineato.

Diventa quindi imprescindibile una disamina più approfondita delle questioni soltanto abbozzate, iniziando con l'evoluzione e lo stato dell'integrazione comunitaria nel terzo pilastro, per poi passare ad approfondire, in un'ottica interordinamentale e sotto un profilo giurisprudenziale, dopo aver brevemente descritto gli obiettivi e le novità più rilevanti della decisione quadro 2002/584 istitutiva del mandato d'arresto europeo, le delicate questioni di compatibilità costituzionale che il recepimento di tale decisione ha comportato in diversi stati membri, per concludere infine, dopo aver messo a fuoco la lettura che di tali problemi ha dato la Corte di giustizia delle Comunità europee, tentando di contestualizzare gli orientamenti giurisprudenziali esaminati nel quadro più generale che delinea lo stato attuale del costituzionalismo europeo.

II. EVOLUZIONE DELL'INTEGRAZIONE COMUNITARIA IN MATIERA PENALE: DAL NULLA AL TRATTATO DI AMSTERDAM

Tra i primi a parlare di una cooperazione tra gli stati membri anche in materia penale fu l'allora presidente della repubblica francese Valery

8 La primissima volta in cui, nel quadro europeo, si è fatto riferimento ad una cooperazione in materia penale è stato in concomitanza, nel 1975, con l'istituzione del Gruppo di Trevi, un foro intergovernativo finalizzato ad aumentare il livello di cooperazione interstatale nella lotta al terrorismo all'interno delle Comunità europee.

Giscard d’Estaing, allorché, nel 1977, nella sua celebre dichiarazione al Consiglio europeo di Bruxelles, faceva emergere la necessità di dar vita ad uno spazio giuridico europeo di giustizia e sicurezza, sottolineando come, sebbene il “Trattato di Roma non facesse, nella sua logica economic oriented, nessun riferimento a tali temi, fosse in ogni caso non più procrastinabile, al fine di salvaguardare l’effetto utile delle quattro libertà fondamentali alla base della costituzione economica europea, specialmente quella relativa alla libera circolazione delle persone, realizzare, all’interno dello spazio giuridico europeo, adeguate condizioni di sicurezza e di giustizia uniformi ed accessibili a tutti”.

Contemporaneamente la Commissione proponeva misure comuni per fronteggiare le frodi comunitarie e la corruzione dei funzionari.

L’unico prodotto di rilievo di quei primi anni fu l’accordo di Dublino del 4 dicembre 1979, relativo all’applicazione tra gli stati membri della Comunità della Convenzione europea di Strasburgo del 27 gennaio 1977 per la repressione del terrorismo.

Gli anni seguenti furono segnati da una battuta d’arresto delle iniziative riguardanti la cooperazione penale fra gli stati membri: il dibattito sul punto riemerse solo nella metà degli anni ottanta, quando, con l’Atto unico europeo, si prevedeva, seppure a livello meramente intergovernativo, un piano di cooperazione politica europea.\(^\text{10}\)

Se l’emersione di un autonomo pilastro, il terzo, alla base della costituenda Unione europea, dedicato alla cooperazione tra stati membri in materia di giustizia ed affari interni (GAI) avviene con il Trattato di Maastricht, nel 1992, è solo con il Trattato d’Amsterdam, nel 1997, che lo stesso pilastro, ridenominato “cooperazione di polizia e giudiziaria in materia penale”, viene dotato dell’appropriata base giuridica, attraverso la modifica dell’articolo K 1 (l’attuale articolo 29) TUE, per consentire l’adozione di iniziative comuni anche nel settore, per l’appunto, della “cooperazione giudiziaria in materia penale”, attraverso una collaborazione più stretta fra le forze di polizia, le autorità doganali e quelle giudiziarie e un

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ravvicinamento -se necessario- delle norme di diritto penale degli stati membri in modo da “fornire ai cittadini un livello elevato di sicurezza in uno spazio di libertà e giustizia”. Obiettivo, questo ultimo, che viene ufficialmente inserito tra gli scopi dell’Unione europea enunciati dall’articolo 2 TUE.

Il Trattato d’Amsterdam, in altre parole, innova decisamente rispetto al Trattato di Maastricht laddove, in primo luogo, affianca alla cooperazione intergovernativa quella giudiziaria tra gli stati membri in materia civile e penale ed, in secondo luogo e special misura, laddove è per la prima volta contemplato, tra gli strumenti ammessi per la realizzazione di “un elevato livello di libertà in uno spazio di sicurezza, libertà e giustizia in cui sia assicurata la prevenzione della criminalità e la lotta contro questa ultima”,11 anche “il riavvicinamento della normativa degli stati membri in materia penale”.12 Riavvicinamento che, ai sensi dell’articolo 31 (e), può concretizzarsi, tra l’altro, “nella progressiva adozione di misure per la fissazione di norme minime relative agli ordinamenti costitutivi dei reati ed alle sanzioni, per quanto riguarda la criminalità organizzata, il terrorismo ed il traffico illecito di stupefacenti”.

Anche sul piano delle fonti adottabili dalle istituzioni comunitarie nell’ambito del terzo pilastro il Trattato d’Amsterdam apporta delle novità rispetto alla situazione prevista da Maastricht. Le generiche e poco incisive risoluzioni previste dal Trattato di Maastricht sono sostituite da un’articolata gamma di possibili fonti, tra cui spiccano le decisioni quadro previste dall’articolo 34 (b) TUE, che hanno lo scopo preciso di riavvicinare le disposizioni legislative e regolamentari degli stati membri anche in materia penale.

Si ritornerà più avanti sulla natura giuridica e sugli effetti della decisione quadro che costituisce, tra l’altro, il nomen iuris dell’atto che ha dettato la disciplina relativa al mandato d’arresto europeo.

Terza novità assai rilevante prevista dal Trattato d’Amsterdam è rappresentata dalla possibilità, concessa per la prima volta alla Corte di giustizia, di poter esercitare la propria attività d’interpretazione anche nel campo della cooperazione in materia penale.

In questo quadro risalta la nuova competenza, funzionale ad alimentare il dialogo tra corti europee e corti nazionali anche in materie costituzionalmente sensibili come quelle oggetto dell’area di sicurezza, giustizia e libertà, che si sostanzia nella attribuzione alla Corte di giustizia,

11 TUE, Articolo 3.
12 TUE, Articolo 29.
facoltativa da parte degli stati membri,\textsuperscript{13} del potere di pronunciarsi in via pregiudiziale sulla validità e l'interpretazione delle decisioni quadro adottate ai sensi dell'articolo 34 TUE.

E attraverso tale procedura che la normativa comunitaria in materia d'arresto europeo è stata portata “all'attenzione” della Corte di giustizia, come si vedrà in via più approfondita più avanti quando la nostra analisi verterà specificatamente sulla decisione, del maggio scorso, di “risposta” dei giudici comunitari al quesito pregiudiziale sollevato dalla Cour d'Arbitrage belga.

Se si volesse cercare un filo conduttore nel susseguirsi spesso disordinato delle misure di implementazione delle esigenze alla base del terzo pilastro, la costante che sembra potersi identificare è quella relativa all'emergere ed al consolidarsi di un securitization ethos.

Un tale trend, che ovviamente ha subito un'accelerazione esponenziale a seguito della svolta dell'11 settembre 2001,\textsuperscript{14} ha visto il progressivo emergere delle ragioni attinenti alla tutela della sicurezza intracomunitaria affermatasi, in un primo tempo, come esigenza funzionale alla migliore realizzazione delle quattro libertà fondamentali ed, in un secondo tempo, specialmente a partire dal Trattato di Maastricht, come telos autonomo dell'Unione europea che, una volta realizzato l'obiettivo della creazione del mercato unico, ha messo in agenda priorità di natura più spiccatamente politica relative, in una prospettiva esterna, al conseguimento di una credibilità sulla scena internazionale e, in una dimensione interna, alla realizzazione di uno spazio giuridico comune in cui alla mobilità di merci, capitali, persone e servizi si affiancasse la lotta alla criminalità organizzata mediante un passo avanti nella cooperazione tra le autorità giurisdizionali degli stati membri e del riconoscimento reciproco delle decisioni.


gli giudiziarie ed un passo indietro dei rapporti interstatali di natura politica e di forte impronta intergovernativa.

### III. DISCIPLINA E FINI DEL MANDATO D'ARRESTO EUROPEO

Gli eventi dell'11 settembre hanno quindi drasticamente messo in luce l'esigenza di realizzare tali priorità nel più breve tempo possibile.

L'accelerazione è stata evidente: il Consiglio dell'Unione europea a meno di un anno dagli stessi eventi, e dopo anni in cui alle dichiarazioni della diplomazia europea\(^\text{15}\) non seguivano iniziative del legislatore comunitario, adottava, precipitosamente, sulla base dell'articolo 34 TUE, e dopo un assai limitato dibattito in seno tanto ai Parlamenti nazionali quanto a quello europeo,\(^\text{16}\) la decisione quadro relativa al mandato d'arresto europeo e alle procedure di consegna fra gli stati membri, con l'intento dichiarato di sostituire, all'interno dello spazio giuridico comunitario, tutti i possibili strumenti in materia di estradizione.\(^\text{17}\)

Ai sensi dell'articolo 1 dell'appena citato testo normativo il mandato d'arresto è una decisione giudiziaria emessa da uno stato membro in vista dell'arresto e della consegna, da parte di un altro stato membro, di una persona ricercata ai fini dell'esercizio di un'azione penale o dell'esecuzione di una pena o una misura di sicurezza privativa della libertà.

Si tratta dunque di un meccanismo di cooperazione di carattere strettamente giudiziario, che non esclude la possibilità di avvalersi dell'assistenza, d'ordine esclusivamente pratico-amministrativo, prestata dagli organi esecutivi degli stati membri;\(^\text{18}\) ma che instaura, in sostanza, un regime di libera circolazione delle decisioni in materia penale, che si fonda su un sistema di fiducia reciproca tra gli ordinamenti degli stati membri.\(^\text{19}\)


\(^{16}\) V. MITSILEGAS, “The Constitutional Implications”, o.c., p. 1283.


\(^{18}\) Decisione quadro 2002/584, Considerando 9 ed articolo 7.

\(^{19}\) Decisione quadro 2002/584, Considerandi 5, 6 e 10 ed articolo 1 § 2.
Traduzione giuridica di tale *mutual trust* è il principio del riconoscimento reciproco alla base -ai sensi dell'articolo 1 § 2 della decisione quadro-dell'obbligo per ciascun stato membro di dare esecuzione al mandato d'arresto emesso da altro stato dell'Unione europea.

È stato osservato come, “*given its adoption as a response to the 9/11 events, a striking feature of the European Arrest Warrant is that its scope is non limited to terrorist offences*”.\(^{20}\)

In effetti, il mandato d'arresto può essere emesso per qualsiasi condotta punita dalle leggi dello stato membro emittente -il mandato- con una pena o una misura di sicurezza privativa della libertà della durata massima non inferiore a dodici mesi oppure, se è stata disposta la condanna a una pena o è stata inflitta una misura di sicurezza, per condanne pronunciate di durata non inferiore a quattro mesi.

Lo stato d'esecuzione può subordinare la consegna alla condizione che i fatti per i quali è stato emesso il mandato costituiscano reati anche ai sensi del suo ordinamento giuridico. Tale facoltà di applicare la regola della doppia incriminazione non opera però, ed è questo uno dei profili più innovativi ed allo stesso tempo più problematici della disciplina in esame, in riferimento ad un *numerus clausus* di trentadue reati elencati dall'articolo 2 § 2 della decisione quadro, per i quali è sufficiente che essi siano previsti dalla legislazione penale dello stato emittente il mandato d'arresto, a patto che gli stessi siano puniti con una pena detentiva di almeno tre anni di reclusione.\(^{21}\)

Altra novità rilevante della disciplina, su cui si sono concentrati i *constitutional complaints* di molti stati membri, è l'ammissibilità dell'emissione di un mandato d'arresto anche nei confronti del cittadino dello stato membro d’esecuzione, a fronte della prassi generalmente riconosciuta, e da molte costituzioni di paesi dell’Unione europea espressamente codificata, per cui lo stato sovrano non consente l’estradizione del proprio cittadino.\(^{22}\)

Nella decisione quadro, al contrario, la possibilità, riconosciuta allo stato di esecuzione del mandato, di ostacolare la consegna di un cittadino o residente è relegata nell’angusto spazio riservato alle eccezioni, più


specificatamente all’ articolo 4 § 6, ove si prevede che “l’autorità giudiziaria di esecuzione può rifiutare di eseguire il mandato d’arresto se questo ultimo è stato rilasciato ai fini dell’esecuzione di una pena o di una misura di sicurezza privativa della libertà, qualora la persona ricercata dimori nello stato membro di esecuzione, ne sia cittadino o vi risieda, se tale stato si impegni a eseguire esso stesso tale pena o misura di sicurezza conformemente al suo diritto interno”. In assenza di tale impegno, il regime vigente è evidentemente quello dell’obbligo di consegna gravante sullo stato membro d’esecuzione del mandato.

Ulteriore conferma di tale logica derogatoria alla base della possibilità per gli stati membri di escludere la consegna del proprio cittadino si trova in un’altra sezione della decisione quadro, e più precisamente all’articolo 5 che, specificando quali debbano essere le garanzie che lo stato emittente debba fornire in casi particolari, prevede espressamente delle garanzie aggiuntive nel caso in cui “la persona oggetto del mandato d’arresto ai fini di un’azione penale sia cittadino o residente nello stato membro di esecuzione”.

E innegabile, come ha ricordato anche l’Avvocato generale Ruiz-Jarabo Colomer nelle sue conclusioni alla decisione sul mandato d’arresto prima citata, che vi siano delle differenze sostanziali tra estradizione e mandato d’arresto europeo.

Con l’estradizione entrano in contatto due stati sovrani: il primo invoca la cooperazione dell’altro che decide, caso per caso, di prestarla o meno, in considerazione di motivi che trascendono il contesto strettamente giuridico, addentrandosi nell’ambito delle relazioni internazionali il cui principio di opportunità politica gioca un ruolo rilevante.

Al contrario, il mandato d’arresto s’inserisce in uno scenario istituzionale ove l’assistenza viene chiesta e prestata nell’ambito di un sistema giuridico integrato a carattere sovra-nazionale, all’interno del quale gli stati,

23 Nel caso di specie le garanzie aggiuntive si concretizzano nel poter subordinare la consegna alla condizione che la persona, dopo essere stata ascoltata, sia rinviata nello stato membro di esecuzione per scontarvi la pena o la misura di sicurezza privativa della libertà eventualmente irrogate nei suoi confronti dallo stato membro richiedente.

24 Per un’accurata analisi della caratterizzazione dell’istituto della estradizione ad un livello tanto nazionale quanto internazionale, M. PLACHTA, “(Non-) Extradition of Nationals”, o.c., p. 77. L’Autore in particolare rileva come “the justification of the rule of non extradition of nationals largely derives from a Jealousy guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially unfair treatment”; ibid., at pp. 99-100.
rinunciando parzialmente alla loro sovranità, trasferiscono le proprie competenze ad organi ad essi estranei dotati anche di poteri normativi.

Un tale meccanismo, aggiunge l’Avvocato generale, “tipico del primo pilastro dell’Unione, opera anche nell’ambito del terzo pilastro, che, pur avendo carattere intergovernativo, rivela una spiccatà vocazione comunitaria, come ha dimostrato la sentenza Pupino, trasferendo all’ambito delle decisioni quadro talune categorie appartenenti al primo pilastro e alcuni parametri caratteristici delle direttive”.

Nonostante tali differenziazioni sottolineate dalla dottrina più attenta ed emergenti anche da alcune delle normative nazionali di recepimento della decisione quadro, non può non rilevarsi come ambedue gli istituti servano al medesimo scopo di consegnare una persona accusata o condannata alle autorità di uno stato membro, affinché tale persona venga processata o sconti la condanna che le è stata inflitta.

Molti stati membri hanno voluto escludere che ciò possa avvenire per un proprio nazionale, tanto è vero che prima dell’adozione della decisione quadro, tredici degli (allora) venticinque stati membri prevedevano delle disposizioni costituzionali che proibivano o, in ogni caso, limitavano l’estradizione dei propri cittadini.

Non stupisce quindi che le innovazioni presenti nella normativa istitutiva

25 Conclusioni Avvocato generale, § 44.
27 Come sottolinea lo stesso Avvocato generale nelle conclusioni citate, il preambolo della legge spagnola del 14-3-2003 sul mandato d’arresto europeo e sulle modalità di consegna (BOE n. 65 del 17-3-2003, 10244) evidenzia come “il mandato d’arresto europeo introduca nella classica procedura di estradizione modifiche talmente sostanziali che possiamo affermare senza riserve che questo ultimo istituto è ormai scomparso dall’ambito delle relazioni tra gli stati membri dell’Unione europea in materia di cooperazione e giustizia”.
28 Nella versione pre-modifica dei rispettivi testi costituzionali l’esclusione dell’estradizione nei confronti dei cittadini era sancita dalle Costituzioni tedesca (articolo 16 § 2 austriaca (articolo 12 § 1), lettone (articolo 98), slovaca (articolo 23 § 4), polacca (articolo 55) slovena (articolo 47), finlandese (articolo 9 § 3), cipriota (articolo 11 § 2) ed, in termini meno perentori, da quella ceca (articolo 14 della Carta dei diritti e delle libertà fondamentali) e portoghese (articolo 33).
29 Altri testi costituzionali prevedono come unica eccezione al divieto d’estradizione che sia diversamente disposto da un trattato internazionale (articolo 36 § 2 Cost. estone, articolo 26 § 1 Cost. italiana, articolo 13 Cost. lituana).
del mandato d’arresto europeo abbiano comportato delle inevitabili “turbolenze costituzionali” al momento del loro recepimento\textsuperscript{30} in diritto interno in molti stati dell’Unione europea.

Alcuni di essi hanno giocato d’anticipo, come Portogallo,\textsuperscript{31} Slovacchia,\textsuperscript{32} Lettonia\textsuperscript{33} e Slovenia,\textsuperscript{34} che hanno proceduto alla revisione del parametro costituzionale rilevante prima che le rispettive corti costituzionali fossero chiamate a pronunciarsi sulla presunta incostituzionalità della normativa di recepimento, come è invece successo in Polonia, Repubblica Ceca e Cipro, con le conseguenze che si vedranno subito.


\textsuperscript{31} Costituzione portoghese, articolo 33 § 3, successivo alla revisione; “the extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant state’s legal system enshrines guarantees of a just and fair trial”.

\textsuperscript{32} L’articolo 23 § 4 prima della revisione del 2001 prevedeva il diritto del cittadino slovacco “a non lasciare la propria patria, a non essere espulso ed a non essere estradato in un altro stato”. Con la revisione è stato eliminato il riferimento al diritto a non subire un’estradizione.


\textsuperscript{34} Costituzione slovena, articolo 47, nella sua versione originaria, prevedeva un divieto assoluto di estradizione per i cittadini sloveni. Successivamente alla revisione, avvenuta con il Constitutional Act 24-899/2003, è stata aggiunta la nozione di consegna (surrender) come autonomo concetto costituzionale rispetto a quello di estradizione. Oggi l’articolo 47 della Costituzione slovena prevede testualmente che “nessun cittadino della Slovenia può essere estradato o consegnato –in esecuzione di un mandato d’arresto europeo–, a meno che la fonte dell’obbligo d’estradizione o di consegna sia un Trattato internazionale attraverso il quale la Slovenia abbia trasferito parte dei suoi poteri sovranali ad un’organizzazione internazionale”.

Anomalo il caso della Germania, ove l’aver modificato la Costituzione\textsuperscript{35} poco tempo prima l’adozione della decisione quadro 2002/584, al fine di consentire, in determinati casi, l’estradizione, prima assolutamente esclusa,\textsuperscript{36} di un proprio cittadino, non ha evitato l’intervento caducatorio del Tribunale federale di Karlsruhe\textsuperscript{37} nei confronti della normativa di attuazione della decisione quadro.

IV. L’ACCELERAZIONE DI PUPINO

Prima di soffermarsi sulle implicazioni interordinamentali emergenti dalle decisioni delle corti costituzionali anzidette, è d’uopo fare un riferimento all’accelerazione inaspettata che il processo d’integrazione europea nell’area di sicurezza, libertà e giustizia ha subito di recente a seguito del portato di una decisione della Corte di giustizia che, forzando non poco il dato testuale superprimario ed accorciando le distanze tra il primo ed il terzo pilastro dell’Unione europea, ha reso, se possibile, ancor più stridente l’attrito interordinamentale di livello costituzionale in occasione del recepimento negli stati membri della disciplina europea relativa al mandato d’arresto.

Si fa ovviamente riferimento al caso Pupino,\textsuperscript{38} che ha avuto origine nella richiesta che un pubblico ministero italiano faceva al giudice per le indagini preliminari di raccogliere le deposizioni di otto bambini - testimoni e vittime del reato di abuso dei mezzi di disciplina e lesioni aggravate, per il quale la signora Pupino era indagata - attraverso un incidente probatorio diretto all’assunzione anticipata della prova non previsto dalle disposizioni del codice di procedura penale in ordine ai fatti quali quelli contestati all’indagata.

\textsuperscript{35}La Costituzione tedesca, nella sua formulazione originaria, proibiva nel modo più assoluto l’estradizione di un cittadino tedesco. La quarantasettesima revisione della legge fondamentale operata il 29-11-2000 ha aggiunto all’incondizionato divieto previsto dall’articolo 16 § 2 la disposizione per cui “deroghe al divieto sono ammesse in caso di estradizione ad uno stato membro dell’Unione europea o nei confronti di una Corte internazionale, a patto che siano rispettati i principi dello stato di diritto (Rechtsstaatliche Grundsätze)”.

\textsuperscript{36}L’articolo 16 della Carta fondamentale prima della revisione del 2000 era piuttosto univoco; “nessun cittadino tedesco può essere estradato all’estero”.

\textsuperscript{37}Decisione 18-7-2005.

Il giudice dell’udienza preliminare, pur del parere che, essendo l’incidente probatorio uno strumento processuale di tipo eccezionale che non ammette applicazioni in ipotesi diverse da quelle previste dalla legge, la richiesta del pubblico ministero dovesse essere respinta, sottolineava come la limitazione all’applicazione della procedura dell’incidente probatorio speciale da parte del diritto italiano potesse violare le disposizioni della decisione quadro 2001/220 GAI del Consiglio relativa alla posizione della vittima nel procedimento penale, adottata ai sensi dell’articolo 34 del TUE –stessa base giuridica a fondamento della decisione sul mandato europeo– che prevede, allorché si tratti di vittima particolarmente vulnerabile, che questa possa beneficiare di un trattamento specifico che risponda in modo ottimale alla sua situazione (articoli 2 § 2 e 8 § 4 della decisione quadro).

A detta del giudice italiano che interpellava la Corte di giustizia ai sensi dell’articolo 35 § 1 TUE, tale trattamento sarebbe dovuto concretizzarsi nella deroga alla regola principale secondo la quale soltanto le testimonianze rese in fase dibattimentale possono acquisire efficacia probatoria, ed, in definitiva, nell’attribuzione al giudice, contrariamente a quanto espressamente previsto dalla normativa italiana, della possibilità di poter sempre escludere la testimonianza in pubblico quando ciò possa avere conseguenze negative per la vittima nella veste di testimone.

Se il contrasto tra la disciplina europea e quella italiana era evidente, non è meno esplicito l’articolo 34 b TUE nello statuire che la decisione quadro “non ha efficacia diretta”.

A detta della Corte di giustizia, anche nell’ambito del terzo pilastro ed in riferimento alle decisioni quadro, sarebbe possibile enucleare, sulla base del disposto dell’articolo 1 TUE,39 “essendo la formulazione dell’articolo 34 § 2 (b) TUE, strettamente ispirata a quella dell’articolo 249 § 3 CE”, un obbligo in capo ai giudici nazionali di interpretare la normativa interna in modo conforme ai contenuti della disciplina europea, sulla falsariga di quanto la Corte di giustizia ha da tempo individuato nell’ambito del primo pilastro,40 facendo leva sul principio di leale cooperazione tra Comunità e stati membri enunciato dall’articolo 10 CE.

A ben vedere non si tratta altro che di una coraggiosa applicazione analogica, da parte dei giudici europei, nell’ambito delle dinamiche

39 A norma del quale “il presente Trattato segna una nuova tappa nel processo di creazione di un’unione sempre più stretta tra i popoli dell’Europa, in cui le decisioni siano prese nel modo più trasparente possibile e il più vicino possibile ai cittadini”.
40 C.G.C.E., Causa C-14/83, Van Colson, 1984, ECR, I-1891.
La Saga del Mandato d’Arresto Europeo

intergovernative proprie del terzo pilastro, della giurisprudenza comunitaria del primo pilastro che ha previsto in capo ai giudici nazionali un obbligo di interpretazione conforme del diritto interno alle direttive che non godono di effetto diretto.\textsuperscript{41}

Il tutto con l’aggravante’ di un’espressa previsione del Trattato UE che nega alle decisioni quadro qualsiasi efficacia diretta.

I giudici di Lussemburgo aggiungevano anche, quasi a controbalanciare tale formidabile apertura, come “il principio d’interpretazione conforme non possa servire da fondamento ad un’interpretazione contra legem del diritto nazionale” (§ 47).\textsuperscript{42}

Nonostante fosse abbastanza evidente il contrasto tra normativa europea e normativa nazionale, i giudici comunitari non erano del tutto convinti che nel caso di specie fosse impossibile un’interpretazione del diritto nazionale in conformità a quanto previsto dalla decisione quadro, e per questo richiedevano al giudice italiano di rinvio uno sforzo ermeneutico ulteriore per accertare la possibilità di una lettura della normativa italiana in accordo con quella europea.

E ovvio che una decisione del genere possa aver scatenato le critiche di chi ancora credeva che il pilastro intergovernativo sarebbe stato immune dalle mire attivistiche della Corte di giustizia, che in tal modo ha di molto riavvicinato la natura delle decisioni quadro a quella delle direttive e ha, di conseguenza, notevolmente ridotto il margine di discrezionalità in capo agli stati membri nella fase di recepimento della disciplina europea, il tutto mentre detti stati si accingevano, per l’appunto, a recepire la controversa disciplina relativa al mandato d’arresto che, come si è visto, si fonda sul principio di fiducia reciproca tra gli stessi stati nell’area della cooperazione giudiziaria in materia penale. E per l’appunto tale principio che non viene accolto appieno da alcune corti -costituzionali o supreme-\textsuperscript{43} degli stati

\textsuperscript{41} C.G.C.E., Causa C-106/89, Marleasing, 1990, ECR, I-4135.

\textsuperscript{42} Le obiezioni a tale orientamento avanzate da parte dei Governi italiano, inglese e svedese intervenuti nella causa in oggetto si sostanziano nella considerazione secondo la quale, nell’ambito del Trattato UE mancherebbe una disposizione come quella prevista dall’articolo 10 del Trattato comunitario in tema di leale collaborazione tra stati membri e Comunità che, per costante giurisprudenza della Corte di giustizia, è condizione necessaria ai fini dell’enucleazione del principio di interpretazione conforme della normativa nazionale alle disposizioni di diritto comunitario. Cf V. BAZZOCCHI, “Il caso Pupino”, o.c., p. 886.

\textsuperscript{43} Può forse essere interessante ricordare come, nonostante la sua fama di giudice euroscettico, la House of Lords britannica abbia sin da principio accolto il portato di Pupino -citando tra l’altro espressamente nelle sue argomentazioni la pronuncia della
membri che, come il Tribunale di Karlsruhe e quello di Varsavia, dichiareranno la normativa interna attuativa della decisione quadro incostituzionale.

Pur se la decisione polacca del 27 aprile 2005 anticipa di qualche mese quella tedesca del 18 luglio 2005, si è ritenuto opportuno avviare l’analisi giurisprudenziale da questa ultima, in quanto la pronuncia dei giudici polacchi sembra prestarsi ad un esame in parallelo con la decisione, che a parametri costituzionali simili giunge a conclusioni opposte, della Corte costituzionale ceca (decisione del 3 maggio 2006).

V. IL CASO TEDESCO

Come si è accennato, poco prima dell’adozione della decisione quadro istitutiva del mandato d’arresto europeo, l’articolo 16 § 2 della Costituzione tedesca era stato “profeticamente” revisionato.

La nuova disposizione ammette che una deroga al divieto d’estradizione di un cittadino tedesco possa essere prevista per consentire la consegna di questo ultimo ad uno stato membro dell’Unione europea od ad una corte internazionale a condizione che i principi fondamentali alla base della rule of law siano rispettati.

Il fatto che non fosse ancora stata emanata nel 2003 la norma attuativa del nuovo disposto dell’articolo 16 § 2 della Costituzione tedesca e che quindi si fosse costretti ad applicare la versione antecedente di tale articolo che, come più volte sottolineato, vietava incondizionatamente l’estradizione del cittadino tedesco, era stato alla base del rifiuto che il Ministro della giustizia aveva apposto alla richiesta di estradizione in Spagna avanzata appunto nel 2003, dalle autorità di polizia spagnola nei confronti di un soggetto, di nazionalità siriana–tedesca, indagato dalle autorità spagnole per reati, perpetrati in territorio spagnolo, di associazione a gruppi

Corte di giustizia- dichiarandolo cogente per tutti i giudici interni. In particolare nel caso assai recente Dabas (appellant) v. High Court of Justice (madrid) (Respondent) – UKHL, del 28-2-2007, Lord Bingham of Cornhill precisava che, in relazione alle modalità di recepimento di una decisione quadro “a national authority may not seek to frustrate or impede achievement of the purpose of the decision, for that would impede the general duty of cooperation binding on member states under Article 10 of the EC Treaty”. Alla luce di tali considerazioni, la Corte suprema inglese aggiungeva come, seppur il giudice nazionale non possa, come d’altronde la pronuncia chiarisce, arrivare ad interpretare contra legem il diritto nazionale; “he must do as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34 (2) (b) EU”. È a supporto di tali affermazioni che, nel richiamato passaggio argomentativo, è espressamente citato il caso Pupino della Corte di giustizia.
terroristici.

All’indomani del recepimento della decisione quadro 2002/584 da parte dello stato tedesco attraverso l’europaishes haftbehlsgetestz del 21 luglio 2004, le autorità giurisdizionali d’Amburgo accordavano la consegna dello stesso soggetto alle autorità spagnole sulla base della nuova normativa europea che, come anticipato, non esclude i cittadini di uno stato membro dall’applicazione della disciplina.

Dopo aver inutilmente impugnato tale decisione davanti alle corti nazionali competenti, il cittadino tedesco destinatario del mandato d’arresto ricorreva alla Corte costituzionale facendo valere la presunta violazione, inter alia, del disposto, più volte ricordato, dell’articolo 16 § 2 della Carta fondamentale.

In particolare il ricorrente sosteneva come l’atto interno di trasposizione della decisione quadro 2002/584 mancasse di legittimazione democratica, in quanto immetteva nell’ordinamento una normativa che prevedeva delle potenziali lesioni della libertà personale e del principio di certezza del diritto, come ad esempio la previsione di possibili deroghe al principio della doppia incriminazione, senza che i parlamenti nazionali fossero stati minimamente coinvolti nel processo di adozione della disciplina comunitaria.

Il Governo federale interveniva affermando come il ricorso fosse da considerarsi infondata, non fosse altro che per il carattere obbligatorio e vincolante delle decisioni assunte sulla base del Trattato dell’Unione europea che, ed il punto colpisce non poco se evidenziato dal Governo tedesco, “devono avere la precedenza incondizionata nei confronti del diritto nazionale, principi costituzionali compresi”. Convinzione di tale prevalenza incondizionata che emerge chiaramente allorché lo stesso Governo sottolineava, da una parte, come la decisione quadro innovasse rispetto alla disciplina della estradizione regolata dall’articolo 16 § 2 della Costituzione, per il fatto di prevedere, senza particolari limitazioni, la consegna anche dei cittadini degli stati membri, e, dall’altra, argomentava come tale innovazione rendesse inapplicabile l’articolo 16 § 2 nelle vesti di parametro di costituzionalità della decisione quadro e del suo atto di recepimento.

In secondo luogo, il Governo federale sottolineava come, in caso di dubbio interpretativo, fosse sempre possibile per il Tribunale federale fare ricorso allo strumento, che fino ad ora si è sempre guardato bene di utilizzare, del rinvio pregiudiziale.
I giudici costituzionali tedeschi sono di tutto altro avviso, ritenendo perfettamente applicabile il parametro costituzionale previsto dall'articolo 16 § 2 alla normativa nazionale di recepimento che viene dichiarata incostituzionale in quanto il legislatore tedesco, a detta dei giudici di Karlsruhe, “non si è conformato al disposto previsto dalla stessa disposizione a norma della quale l'estradizione di un cittadino tedesco è ammissibile soltanto a patto che siano rispettati i principi alla base della rule of law”.

L'esordio del reasoning è dedicato alla ratio storica del parametro costituzionale in esame.

A detta della Corte, “il diritto ad essere giudicato nel proprio paese d'origine, inscindibilmente connesso alle disposizioni a tutela della cittadinanza, è fondato, tra l’altro, sulla tragica esperienza della recente storia tedesca in cui, dopo il colpo di stato del 1933, la dittatura nazional-socialista ha cominciato ad escludere dalla tutela accordata ai cittadini tedeschi, con provvedimento formalmente in accordo con la normativa vigente, tutti i cittadini di religione od origine ebraica”.

La revisione del 2000 dell’articolo 16 § 2, e la conseguente ammissione dell’estradizione di un cittadino tedesco, aggiunge il Tribunale federale, “si è resa necessaria per adeguare l’ordinamento interno, da un lato, alle recenti evoluzioni del processo di integrazione del terzo pilastro dell’Unione europea e, dall’altro, alle esigenze di conformità alle richieste provenienti dalla Corte internazionale delle Nazioni Unite”.

Nonostante tali aperture i giudici tedeschi sottolineano a chiare lettere come in nessun modo le dinamiche intergovernative alla base del terzo pilastro dell’Unione europea possano essere fatte rientrare nel metodo comunitario caratterizzante il primo pilastro, ricordando come l’esplicita previsione nel Trattato UE dell’assenza di effetto diretto in capo alle

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decisioni sia dovuta al fatto che “gli stati membri in questo modo hanno voluto escludere la possibilità che la Corte di giustizia potesse anche per queste fonti enucleare la dottrina dell'effetto diretto che ha caratterizzato l'interpretazione delle direttive comunitarie”.

A rafforzare il concetto i giudici costituzionali aggiungono come, nonostante l'avanzato stato di integrazione, “l'Unione europea costituisca pur sempre un sistema giuridico parziale che è ancora da farsi rientrare nel settore del diritto pubblico internazionale”.

Corollario di tale affermazione è l'esigenza costituzionale, fatta direttamente discendere dall'articolo 16 § 2 della Legge fondamentale, che sia condotta una scrupolosa analisi caso per caso al fine di accertarsi che il cittadino estradato non si veda riconoscere una garanzia minore dei propri diritti fondamentali rispetto a quella che si vedrebbe attribuito in Germania, fatto salvo l'inevitabile peggioramento della sua situazione dovuto alle difficoltà linguistiche ed alla mancata conoscenza del sistema penale nel paese di destinazione.

In altre parole, come gli stessi giudici sottolineano, il fatto che l'Unione europea sia vincolata al rispetto dei diritti fondamentali dall'articolo 6 TUE “non giustifica il convincimento che le strutture costituzionali alla base del principio della rule of law nei differenti stati membri debbano coincidere e che, di conseguenza, un'analisi caso per caso del livello di garanzia apprestate dal singolo paese emittente sia superflua”.

Ciò che sembra contraddistinguere l'intero apparato argomentativo della decisione è quel senso di malcelata sfiducia nei confronti della tutela del soggetto indagato apprestate dai sistemi penali degli altri stati membri, ragione per cui si imputa al legislatore tedesco di aver violato il principio di proporzionalità nel recepimento della decisione quadro per non aver preferito, tra le varie opzioni di attuazione possibile, quella che limitasse meno il diritto del cittadino tedesco di essere giudicato e di scontare la condanna nella sua patria, non valorizzando in questo modo in misura adeguata lo speciale legame che i cittadini tedeschi hanno nei confronti del proprio ordinamento interno.

In particolare, il legislatore tedesco non avrebbe sfruttato al massimo le possibilità che la stessa decisione quadro concedeva ai singoli stati di rifiutarsi di eseguire il mandato d'arresto laddove esso riguardasse reati “che dalla legge dello stato membro d'esecuzione siano considerati commessi in tutto od in parte nel suo territorio od in un luogo assimilato al suo territorio oppure che siano stati commessi al di fuori del territorio dello stato emittente, se la legge dello stato membro d'esecuzione non
consente l'azione penale per gli stessi reati commessi al di fuori del suo territorio”.45

In tali circostanze emerge, a detta dei giudici tedeschi, un significativo domestic connecting factor e la conseguente esigenza che “la fiducia che i cittadini tedeschi hanno nutrito nei confronti del proprio ordinamento sia tutelata” (§§ 86-87).

Sotto un altro profilo emerge piuttosto distintamente dalla lettura della pronuncia come, dietro il tentativo di identificare una responsabilità del legislatore tedesco nell’opera di trasposizione, effettivo obiettivo del tribunale federale sia stato quello di porre un freno alla temuta accelerazione, a seguito dell’adozione della decisione quadro sul mandato d’arresto, del processo di integrazione europea del terzo pilastro che, a detta dello stesso tribunale, “non può andare oltre, alla luce del suo carattere prettamente intergovernativo, le dinamiche istituzionali caratterizzanti un sistema di diritto pubblico internazionale”.

A questo proposito i giudici di Karlsruhe aggiungono come, sotto il profilo della tutela del principio di sussidiarietà,46 “la cooperazione penale istituita nell’ambito del terzo pilastro sulla base di un limitato riconoscimento reciproco degli atti giudiziari, non solo non deve tendere ad un’armonizzazione della disciplina penale dei singoli stati membri, ma è anzi un modo per difendere l’identità nazionale e la statualità nell’ambito di uno spazio giuridico europeo sempre più uniforme” (§ 77).

E stato giustamente fatto notare47 come la parola chiave di questo cruciale passaggio argomentativo sia l’aggettivo “limitato”, con cui il Tribunale costituzionale tedesco ha posto, per l’appunto, un limite all’”ottimismo” dei giudici comunitari che, in occasione dalla prima pronuncia48 in cui

45 Decisio 2002/584, articolo 4 § 7.
46 Principio di sussidiarietà che, come notato da Francesco Palermo, nel caso di specie i giudici costituzionali considerano rispettato, disinnescando così una bomba pericolosa “in quanto il mancato riconoscimento del carattere sussidiario e dunque necessario di una disciplina europea sul mandato d'arresto l'avrebbe affossata per sempre. Invece secondo i giudici la partecipazione della Germania alla cooperazione giudiziaria europea consente di meglio affrontare le esigenze di giustizia in un contesto integrato, ed è quindi non solo possibile ma anche auspicabile”. Cf F. PALERMO, “La sentenza del Bundesverfassungsgericht sul mandato d’arresto europeo”, o.c., p. 899.
affrontavano di petto la questione relativa al livello di integrazione esistente nel terzo pilastro, dichiaravano espressamente come “il principio del ne bis in idem implica necessariamente che esista una fiducia reciproca degli stati membri nei confronti dei loro rispettivi sistemi di giustizia penale e che ciascuno di questi ultimi accetta l’applicazione del diritto penale vigente negli altri stati membri, anche quando il ricorso al proprio diritto nazionale condurrebbe a soluzioni diverse” (§ 33).

Qualsiasi tentativo d’emulazione del metodo comunitario in un settore così costituzionalmente sensibile e per definizione parte (rimanente) di quel nucleo duro di sovranità ancora in capo agli stati membri, è questo il messaggio inequivocabile proveniente da Karlsruhe, non sarebbe stato tollerato dai giudici di Solange.

Una replica neanche tanto velata, seppure la pronuncia della Corte di giustizia del 16 giugno 2005 non venga mai espressamente citata dalla maggioranza del collegio alla accelerazione per le vie del terzo pilastro tentata da Pupino trenta giorni prima.

VI. IL CASO POLACCO E QUELLO CECO A CONFRONTO

Per comprendere appieno le implicazioni interordinamentali che il recepimento della decisione quadro sul mandato d’arresto europeo ha generato in Polonia e Repubblica Ceca e le conseguenti reazioni giurisprudenziali delle Corti costituzionali di Varsavia e Brno, non può non farsi riferimento, facendo un passo indietro, al processo costituente che ha portato all’approvazione della Costituzione ceca del 1992 e polacca del 1997, entrambe caratterizzate da una presenza di clausole volte a proteggere la ritrovata sovranità dopo decenni di assoggettamento di fatto al regime sovietico e che differenziano, come accade nei documenti costituzionali della maggior parte dei paesi dell’Europa centro-orientale, il profilo interno di tale sovranità da quello esterno, che coincide con l’indipendenza dello stato da poteri esterni.


50 Vedi, per quanto concerne i riferimenti all’indipendenza, Costituzione ceca, preambolo; Costituzione polacca, articoli 26 e 130. Sul versante dell’enfatizzazione del carattere sovrano dello stato vedi invece Costituzione ceca, articolo 1;
A ciò si aggiunga l'approccio minimalista, che ha caratterizzato in generale tutti i paesi dell'Europa centro-orientale, in riferimento alle modifiche costituzionali prodromiche l'ingresso nell'Unione europea.

Pur se da certa parte della dottrina, a questo riguardo, si è voluto distinguere la posizione della Repubblica Ceca da quella della Polonia, qualificando ampio il livello di adeguamento costituzionale della prima e medio quello della seconda,\(^5^1\) in entrambi i paesi, anche a causa della contrarietà di gran parte dell'opinione pubblica all'allora imminente adesione all'Unione europea, le modifiche dei parametri costituzionali rilevanti sono state, almeno per quanto riguarda il delicato problema del rapporto tra primato del diritto comunitario e la supremazia della Costituzione, le minime possibili da parte dei legislatori costituzionali che, in questo modo, hanno passato alle “rispettive” corti costituzionali l'ingrato fardello di risolvere gli inevitabili conflitti interpretativi che la vaghezza dei parametri superprimari rilevanti non poteva non alimentare.\(^5^2\)

Prova ne è il fiorire di pronunce, negli anni immediatamente successivi all'adesione all'UE dei paesi dell'Europa centro-orientale, da parte delle rispettive corti costituzionali in tema di rapporti tra ordinamento

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\(^{52}\) Per quanto riguarda la Repubblica ceca, è stata introdotta, nella revisione del 2001, all'articolo 10 a una clausola di apertura, indifferenziata e generica, alle organizzazioni internazionali, senza fare emergere in alcun modo il carattere peculiare dell'ordinamento comunitario né tantomeno precisare come il carattere supremo riconosciuto alla Costituzione si possa combinare con la dottrina del primato del diritto comunitario su tutto il diritto interno, enucleata ormai qualche decennio fa dalla giurisprudenza della Corte di giustizia e che, come tutto il resto dell'*acquis* comunitario, tutti i Paesi dell'Europa centro-orientale si sono impegnati a recepire al momento della stipula, nel 2003, del Trattato di Adesione di Atene. Per certi versi analogo discorso va fatto per la Costituzione polacca del 1997, la più recente tra quelle dei Paesi dell'Europa centro-orientale, e per questo *ab origine* già inclusiva delle clausole europee. In particolare l'articolo 91 § 3 fa, a differenza dell'approccio internazionalistico caratterizzante la Costituzione ceca, espresso riferimento all'ordinamento comunitario ed in particolare al diritto europeo derivato, specificando come esso goda di un'efficacia diretta ed abbia la prevalenza sulla legislazione ordinaria nazionale. Anche in questo caso però nulla si dice esplicitamente sul rapporto tra la costituzione ed il diritto comunitario, specialmente primario.
La Saga del Mandato d'Arresto Europeo

La società ed ordinamento interno.\(^{53}\)

A voler provare a fare una sintesi degli orientamenti emergenti, sembra potersi sostenere come, contrariamente alle previsioni più pessimistiche,\(^{54}\) ci giungano dalle corti dell’est, nonostante *reasonings* a volte caratterizzati da toni aspri e certamente non *euro-friendly*,\(^{55}\) segnali per lo più incoraggianti circa l’alimentazione di quel dialogo giudiziale multilevel così essenziale al mantenimento del delicato equilibrio alla base del virtuoso circuito di mutua alimentazione tra il livello nazionale e quello sopranazionale.

Per quanto riguarda specificatamente la questione relativa alla asserita illegittimità costituzionale della normativa interna di recepimento della decisione quadro sul mandato d'arresto europeo, a pronunciarsi direttamente sono state, come detto, le Corti costituzionali di Varsavia e Brno.

La normativa di recepimento nei due ordinamenti non presentava differenze di rilievo. Anche i parametri costituzionali rilevanti, relativi al divieto d’estradizione di un proprio nazionale, erano assai simili.

Lapidaria la Costituzione polacca; ai sensi dell’articolo 55, “l’estradizione di un cittadino polacco è vietata”.

L’articolo 14 § 4 della Carta dei diritti e delle libertà fondamentali, che


contiene il catalogo di diritti e libertà tutelati costituzionalmente in Repubblica Ceca, prevede, più in generale, che “nessun cittadino ceco può essere forzato a lasciar la madre patria”.

Ciò che è stata sicuramente differente nei due ordinamenti è l’intensità del dibattito relativo all’opportunità di modificare le due disposizioni sopra indicate in vista dell’allora imminente adesione all’Unione europea.

Se in Repubblica Ceca, l’argomento non ha mai rappresentato una questione prioritaria, in Polonia, al contrario, parte della dottrina aveva suggerito una revisione dell’articolo 55 della Costituzione, evidenziando come un divieto assoluto di estradizione dei propri nazionali potesse potenzialmente costituire un ostacolo al processo di integrazione europea nell’ambito del terzo pilastro che, in occasione dell’entrata in vigore del Trattato d’Amsterdam, aveva subito, come accennato, una repentina accelerazione. Altra parte della dottrina aveva suggerito che il conflitto potesse in ogni caso essere risolto in sede interpretativa.

Alla fine si decise per la seconda opzione, trattandosi di una disposizione, come quella dell’articolo 55 della Costituzione, dall’alto valore simbolico, alla base di quei valori di appartenenza e identità profondamente radicati nella visione di un demos a vocazione etnocentrica, con rigurgiti anche nazionalistici, qual è quella dominante in Europa centro orientale.

Fatte tali precisazioni potrebbe essere ora interessante ripercorrere in parallelo i reasonings delle Corti costituzionali di Varsavia e di Brno attraverso cui quest’ultime, a parametro costituzionale simile ed oggetto di giudizio praticamente equivalente, hanno raggiunto due esiti interpretativi antitetici, nel primo caso annullando la normativa interna, nel secondo non ravvedendovi alcuna illegittimità costituzionale.

I giudici polacchi partivano dal presupposto per cui la nozione di consegna (surrender) rilevante ai sensi del mandato d’arresto europeo potesse essere considerata come una forma di estradizione che, come anticipato, è espressamente proibita dall’articolo 55 § I della Costituzione se operante nei confronti di un cittadino polacco.

In altre parole, a detta della Corte di Varsavia, il significato costituzionale

57 Una delle prime analisi della decisione in commento è di S. SILEONI, “La Corte costituzionale polacca, il mandato arresto europeo e la sentenza sul trattato d’Adesione all’UE”, Quaderni Costituzionali, 2005, pp. 894-897.
d’estradizione avrebbe una portata così ampia da includere anche l’operazione della consegna (\textit{surrender}) di un cittadino polacco, necessaria per attivare la procedura del mandato d’arresto europeo che, come anticipato, ha, almeno nelle intenzioni della decisione quadro, invece come obiettivo principale quello di sostituirsi, all’interno dello spazio giuridico europeo, alle dinamiche intergovernative e necessariamente bilaterali caratterizzanti la procedura di estradizione.

Una volta riavvicinati fino a farli rientrare nella stessa nozione costituzionale i due concetti di consegna ed estradizione, il secondo passaggio argomentativo della Corte costituzionale polacca è stato quello di sottolineare come la previsione da parte della decisione quadro dell’ammissibilità della consegna di un proprio nazionale mortificasse la \textit{ratio} ultima del divieto previsto dall’articolo 55 della Costituzione polacca, ossia quella di garantire al cittadino polacco il diritto ad essere giudicato da una corte penale del proprio paese.

L’adesione della Polonia all’Unione europea, a detta dei giudici di Varsavia, ha cambiato decisamente le cose. In particolare, l’ingresso non solo giustifica ma rende necessaria una revisione dell’articolo 55 della Costituzione in modo da conformare il dettato costituzionale alla disciplina comunitaria. Revisione che però, aggiungono i giudici costituzionali, non può avvenire in virtù di una interpretazione dinamica e manipolatrice del parametro costituzionale rilevante, ma richiede un intervento \textit{ad hoc} del legislatore.

La pronuncia \textit{Pupino}, che valorizza, come si è visto, l’obbligo di interpretazione conforme della disciplina interna, da parte del giudice nazionale, a quanto previsto dalle decisioni quadro adottate ai sensi dell’articolo 34 (b) TUE, non era stata ancora adottata dalla Corte di giustizia. Le conclusioni ad essa preliminari dell’ Avvocato generale Kokott, alle quali la stessa pronuncia si è rifatta nella sua impostazione argomentativa, erano però già state pubblicate.\footnote{Conclusioni Avvocato generale Kokott per la causa C.G.C.E., Causa C-105/03, \textit{Pupino}, 2005, \textit{ECR}, I-5285.}

I giudici costituzionali polacchi, pur non facendone espresso riferimento, prendono in esame la possibilità di un obbligo d’interpretazione conforme escludendo che esso possa trovare applicazione nel caso di specie in quanto, la stessa Corte di giustizia, a detta del Tribunale di Varsavia, avrebbe limitato la portata di tale obbligo, nel caso di un possibile peggioramento della situazione giuridica di un individuo, specialmente nel
campo della responsabilità penale.\textsuperscript{59}

Com’è stato però recentemente fatto notare,\textsuperscript{60} i giudici polacchi non hanno fatto alcun riferimento a decisioni specifiche della giurisprudenza comunitaria a supporto di tale affermazione di principio. La pronuncia rilevante a questo riguardo cui i giudici polacchi avrebbero dovuto rinviare, il caso \textit{Arcaro} del 1996,\textsuperscript{61} se è vero che al § 42 enuncia il principio ai sensi del quale “l’obbligo del giudice nazionale di far riferimento al contenuto della direttiva nell’interpretare le norme rilevanti del suo diritto nazionale incontra un limite qualora tale interpretazione comporti che ad un singolo venga opposto un obbligo previsto da una direttiva non trasposta ovvero, a maggior ragione, qualora abbia l’effetto di determinare o aggravare, in forza della direttiva e in mancanza di una legge emanata per la sua attuazione, la responsabilità penale di coloro che ne trasgrediscono le disposizioni”, non è invero del tutto applicabile alla tematica del mandato d’arresto, in quanto quest’ultima pertiene al profilo procedurale della consegna di un individuo su cui grava una richiesta di mandato d’arresto da parte dello stato di fronte al quale esso è responsabile penalmente. Tale responsabilità rimane del tutto inalterata, non viene cioè né aggravata né attenuata a secondo che la richiesta di mandato d’arresto sia accolta o meno.

D’altronde, a detta degli stessi giudici costituzionali, se è vero che l’obbligo gravante in capo all’ordinamento interno di recepire la normativa secondaria dell’Unione europea ha il suo fondamento nell’articolo 9 della Costituzione, non può ammettersi, \textit{sic et simpliciter}, una presunzione di conformità della normativa interna di recepimento alle norme costituzionali.

A parametro costituzionale invariato, non è difficile per i giudici polacchi argomentare come le disposizioni interne attuative della decisione quadro, consentendo che un cittadino polacco possa essere giudicato da una corte penale straniera, arrechino una \textit{deminutio} alle garanzie apprestate dalla Costituzione al cittadino polacco e per questo non possono che essere dichiarate incostituzionali.

Nonostante l’acclarata incostituzionalità della disciplina oggetto di giudizio, la Corte di Varsavia rileva come un mero annullamento della normativa si sarebbe scontrata con il portato dell’articolo 9 della Costituzione polacca a norma del quale “la Polonia deve rispettare il diritto

\textsuperscript{59} Tribunale costituzionale Polacco, sent. cit., Part III, § 3.4.
\textsuperscript{60} J. KOMAREK, “European Constitutionalism and the European Arrest Warrant”, \textit{o.c.}, p. 16.
\textsuperscript{61} C.G.C.E., Causa C-168/95, \textit{Arcaro}, 1996, \textit{ECR}, I-4705, § 42.
internazionale per essa vincolante”, nel cui ambito di applicazione i giudici fanno rientrare anche gli obblighi nascenti in capo all'ordinamento polacco successivamente all'adesione all'Unione europea. Ai fini dell'adempimento di tale obbligo i giudici costituzionali non escludono, accanto alla modifica della normativa interna di recepimento della decisione quadro, anche l'ipotesi della revisione costituzionale dell'articolo 55 della Costituzione, in modo che sia espressamente prevista la possibilità, in deroga al generale divieto di estradizione dei propri cittadini, di poter consentire la loro consegna ad altri stati membri dell'Unione europea in esecuzione di un mandato d'arresto europeo.

Nel frattempo la Corte, in attesa dell'intervento del legislatore costituzionale, avvalendosi del disposto dell'articolo 190 § 3 della Costituzione, congelava gli effetti dell'annullamento della normativa impugnata, che continuava quindi ad essere provvisoriamente vigente, concedendo al legislatore un periodo non superiore a diciotto mesi, per la modifica della normativa impugnata, od, in alternativa per la revisione della Costituzione in senso conforme a quanto previsto nella decisione quadro sul mandato d'arresto europeo.62

I giudici costituzionali cehi, poco più di un anno dopo, impostano il loro reasoning su basi argomentative assai differenti.

Questi, infatti, dopo aver ricordato la loro decisione in cui, appena due mesi prima (8 marzo 2006), avevano operato un espresso revirement della propria giurisprudenza alla luce della interpretazione differente che richiedeva l'applicazione del principio di uguaglianza così come interpretato dalla Corte di giustizia delle Comunità europee,63 affrontano lo spinoso problema del livello di vincolatività, e del conseguente margine di discrezionalità in capo al legislatore, da attribuire alle decisioni quadro adottate norma dell'articolo 34 UE in tema di cooperazione giudiziaria in materia penale.

Dando un ulteriore prova d'apertura alle ragioni del diritto comunitario e, prima ancora, di conoscenza approfondita di questo ultimo, i giudici cehi fanno ampio riferimento alla pronuncia Pupino, più volte richiamata, della

62 E stata questa ultima la via seguita dal legislatore polacco. Gli emendamenti all'articolo 55 sono stati apportati entro il limite temporale previsto dalla decisione e, a partire dal 7 novembre 2006, la Polonia acconsente alla esecuzione di un mandato d'arresto europeo nei confronti di un proprio cittadino alle due condizioni, che sembrano per altro non essere del tutto conformi al dettato della normativa europea, che il fatto di reato sia compiuto fuori dal territorio polacco e che esso sia comunque previsto dalla legge penale polacca come fattispecie criminosa.

63 O POLLICINO, “Dall'Est”, o.c., p. 819.
Corte di giustizia, il cui portato, a dire il vero, interpretano in via piuttosto riduttiva, sottolineando come l'obbligo che da tale giurisprudenza si fa discendere in capo ai giudici nazionali di interpretare, as far as possible, il diritto interno in conformità al dettato delle decisioni quadro adottate ai sensi del III pilastro, lascerebbe impregiudicata la questione, che da molta parte della dottrina\(^{64}\) è stata invece considerata inestricabilmente connessa all'obbligo di interpretazione conforme, relativa all'eventuale applicazione al medesimo atto normativo del principio di primazia del diritto comunitario su (tutto) il diritto interno.

La Corte di Brno, prendendo atto del dubbio interpretativo riguardo la natura e la portata della decisione quadro, prende seriamente in esame la possibilità, dimostrando ancor a una volta\(^{65}\) la disponibilità al dialogo con il supremo organo giurisdizionale comunitario, di proporre un rinvio pregiudiziale a Lussemburgo, per poi scartare tale ipotesi prendendo atto del fatto che la Cour d'arbitrage belga, come anticipato,\(^{66}\) aveva già interpellato la Corte di giustizia sulla stessa questione.

I giudici cechi, ponendosi il problema se sospendere il giudizio di costituzionalità in attesa della “risposta” della Corte di giustizia o adottare comunque una pronuncia sul punto, si decidono per questa seconda ipotesi sforzandosi, e questo è il profilo ermeneutico più rilevante ai nostri fini, di ricercare, tra le varie interpretazioni possibili del parametro costituzionale rilevante, costituito, come anticipato, dall'articolo 14 § 4 della Carta ceca dei diritti fondamentali, quella che fosse in grado di non scontrarsi con i principi del diritto comunitario e con il portato della legislazione derivata del diritto europeo.

In particolare i giudici evidenziano come l'enunciato linguistico significante della disposizione in esame, a norma del quale, lo si ricorda, nessun cittadino ceco può essere costretto a lasciare la patria, senza il


\(^{65}\) L'aveva già fatto a più riprese nella decisione PI US 50/04, 8-3-2006; cf O. POLLICINO, “Dall'Est”, a.e., p. 819.

supporto di uno sforzo interpretativo non chiarisca appieno\(^\text{67}\) se vi sia un divieto costituzionalmente sancito che un cittadino ceco sia consegnato, per un determinato periodo di tempo, ad uno stato membro dell’Unione europea, in esecuzione di un mandato d’arresto.

Due sono, a detta della Corte ceca, le interpretazioni possibili.

La prima, quella letterale, se è vero che potrebbe fare rientrare tale divieto all’interno dell’ambito d’applicazione del disposto costituzionale, avrebbe almeno due inconvenienti.

Innanzitutto non terrebbe conto dell’”impeto storico” alla base dell’adozione della Carta dei diritti fondamentali in generale, e dell’articolo 14 § 4 in particolare. La Corte infatti sottolinea come un’interpretazione storica della parametra in oggetto chiarisca che, nel momento in cui i redattori della Carta, tra la fine del 1990 e l’inizio del 1991, formulavano il divieto che il cittadino ceco fosse in qualsiasi modo costretto a lasciare la patria, lungi dall’avere in mente gli effetti derivanti dall’applicazione dell’istituto dell’estradizione, avevano chiara memoria “dell’esperienza recente dei crimini del comunismo” ed, in particolare, della “demolition operation” con cui il regime comunista aveva costretto con l’uso della forza ad abbandonare il paese tutti coloro che potevano costituire un ostacolo alla istanze egemoniche del regime stesso.

In secondo luogo un’interpretazione del genere comporterebbe una violazione del principio, per la prima volta enucleato così compiutamente dai giudici costituzionali, secondo cui tutte le fonti di diritto interno, compresa la Costituzione, debbano essere interpretate, per quanto possibile, alla luce e in accordo con le risultanze dell’evoluzione del processo di integrazione europea.

Obbligo d’interpretazione conforme del disposto costituzionale alla luce del diritto europeo che i giudici costituzionali ricavano dal combinato disposto dell’articolo 1 § 2 della Costituzione, aggiunto in vista dell’adesione all’Unione europea, in forze del quale “la Repubblica Ceca ha l’obbligo di rispettare gli obblighi provenienti dal diritto internazionale” con l’articolo 10 del Trattato CE che, com’è noto, enuncia il principio di leale cooperazione tra Comunità europea e stati membri.

\(^{67}\) Come invece faceva, a detta dei giudici cechi, il portato del corrispondente Costituzione slovacca, articolo 23 § 4, che prima della revisione costituzionale del 2001, espressamente prevedeva il divieto assoluto di estradizione per il cittadino slovacco.
Sulla base di tale preorientamento assiologico, i giudici cehi procedono ad individuare, guidati da un approccio interpretativo a forte connotazione teleologica, quella che può essere l’interpretazione del parametro costituzionale rilevante in grado di garantire la conformità non solo dell’atto di recepimento interno, ma della stessa decisione quadro 2002/584 alla Costituzione polacca.

Non stupisce che la Corte sia riuscita a trovare per quasi tutte le disposizioni più problematiche della decisione quadro un appiglio costituzionale.

Si pensi, ad esempio, all’omissione legislativa che aveva fatto decidere i giudici costituzionali tedeschi per l’illegittimità della normativa interna di attuazione di detta decisione, vale a dire il mancato recepimento in diritto interno della possibilità che la stessa decisione quadro concede, all’articolo 4 § 7, di valorizzare il _domestic connecting factor_ per consentire un rifiuto legittimo, da parte dell’autorità giudiziaria di esecuzione, alla richiesta di mandato d’arresto europeo.

A dire il vero, neanche il legislatore ceco aveva tenuto conto della disposizione in oggetto nell’operazione di recepimento. Tale circostanza, però, a detta dei giudici costituzionali, è superabile attraverso un’applicazione (estrema) del principio d’interpretazione conforme, arguendo come, nonostante l’omissione legislativa, l’ordinamento ceco non possa permettersi di deludere la fiducia dei propri cittadini nei confronti del sistema interno di giustizia penale, il che porta gli stessi giudici a concludere, sforzando il confine che porta ad un’interpretazione _contra legem_ della normativa rilevante, che per tutti i casi di condotte criminose del cittadino ceco che si siano consumate all’interno del territorio nazionale si continuerà ad applicare la normativa penale interna. In altre parole è assai probabile che in tali circostanze le autorità giurisdizionali ceche opporranno un rifiuto ad un’eventuale richiesta d’esecuzione di un mandato d’arresto europeo.

Si desume agevolmente da quanto detto come, in tale sforzo esegetico d’interpretazione conforme, il Tribunale costituzionale ceco, alla ricerca del _telos_ del disposto dell’articolo 4 § 3 della Costituzione più in linea con i

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68 Si ricorda quanto già sottolineato in apertura vale a dire che, ai sensi dell’articolo 4 § 7 l’autorità giudiziaria dell’esecuzione può rifiutarsi di eseguire il mandato d’arresto europeo se lo stesso mandato riguarda reati “che dalla legge dello stato membro di esecuzione sono considerati commessi in tutto od in parte nel suo territorio od in un luogo assimilato al suo territorio oppure che sono stati commessi al di fuori del territorio dello stato emittente, se la legge dello stato membro di esecuzione non consente l’azione penale per gli stessi reati commessi al di fuori del suo territorio”.
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contenuti della normativa europea, abbia di fatto forzato non poco il dato testuale tanto della stessa disposizione costituzionale, quanto della normativa oggetto di giudizio, fondandosi sull’assunto per cui, ove il parametro di costituzionalità fosse stato letto nel senso di proibire la consegna di un cittadino ceco ad un’autorità giurisdizionale di un altro stato membro ai fini della sua sottoponibilità ad un giudizio penale per un crimine commesso in quello stato, sarebbe venuto meno il presupposto principe alla base dell’intera decisione in esame, che è stato tra l’altro duramente criticato in una delle due opinioni dissenzienti, vale a dire l’equivaleenza del livello di protezione dei diritti fondamentali offerta negli stati membri dell’Unione europea che si riflette anche in una sostanziale convergenza tra le varie discipline nazionali di diritto penale sostanziale e processuale. Il che non poteva che portare, quale ulteriore conseguenza, alla accettazione da parte dei giudici cecchi del principio, rifiutato invece dai colleghi tedeschi, di mutual trust nei sistemi penali degli altri ordinamenti degli stati membri, peraltro con un espresso riferimento nella pronuncia in esame alle decisioni della Corte di giustizia Gözütok e Brügge, il cui portato, come si è visto, è stato invece messo in discussione dall’approccio “sospettoso” dei giudici di Karlsruhe.

VII. L’ATTESA DECISIONE DELLA CORTE DI GIUSTIZIA SUL MANDATO D’ARRESTO EUROPEO

Anche per l’eco significativa delle decisioni esaminate delle corti costituzionali tedesca, polacca e ceca, l’attesa della decisione della Corte di giustizia, interpellata, a norma dell’articolo 35 TUE, dalla Cour d’arbitrage belga circa la validità della decisione quadro 2002/584 sul mandato d’arresto europeo era diventata quasi spasmodica.69

Come ha sottolineato l’Avvocato generale nelle sue conclusioni,70 il giudice di rinvio nutriva dubbi sulla compatibilità della decisione quadro con il Trattato UE in merito a due aspetti, l’uno formale l’altro sostanziale.

Con riguardo al primo aspetto il giudice nazionale metteva in discussione il fondamento normativo utilizzato dal Consiglio per adottare tale decisione, interrogandosi sull’idoneità dello strumento prescelto. In particolare, a detta del giudice di rinvio, la decisione quadro sarebbe stata invalida in quanto la disciplina del mandato d’arresto europeo avrebbe dovuto essere adottata con una convenzione e non con una decisione quadro. Nel caso in

69 C.G.C.E., Causa C-303/05, Advocaten voor de Wereld VZW c. Leden van de Ministerraad, 2007, ECR, I-3633.
questione, infatti, si sarebbe fuori l’area materiale che può essere regolata, a norma dell’articolo 34 § 2 (b), con una decisione quadro, ossia quella del riavvicinamento delle disposizioni legislative e regolamentari degli stati membri.

Con riguardo al secondo aspetto, quello sostanziale, il giudice nazionale si domandava se la disciplina assai innovativa contenuta nella decisione quadro relativa alla possibilità, operante in determinate circostanze, di poter procedere all’esecuzione del mandato d’arresto europeo anche nel caso in cui i fatti non costituiscano un reato nello stato d’esecuzione del mandato fosse compatibile con i principi di uguaglianza e di legalità in materia penale, e quindi con l’articolo 6 § 2 TUE.

Più specificatamente, a detta del giudice di rinvio, il principio di uguaglianza sarebbe stato violato in quanto la disciplina europea per una serie di trentadue fattispecie di reato, previste dall’articolo 2 § 2 della decisione quadro, avrebbe disatteso senza un’obiettiva e ragionevole giustificazione il requisito della doppia incriminazione, mentre lo stesso requisito verrebbe mantenuto per gli altri reati.

Il principio di legalità sarebbe invece stato leso a causa della mancata chiarezza e precisione nella configurazione delle fattispecie di reato previste dalla decisione quadro, per cui, a detta della Cour d’arbitrage, lo stato membro che si trovasse a decidere sull’esecuzione di un mandato d’arresto europeo, non disporrebbe di informazioni sufficienti per accertare se i reati per cui viene perseguito il ricercato, e per i quali gli è stata inflitta una pena, rientrino effettivamente in una delle categorie identificate dalla decisione quadro.

L’Avvocato generale nelle sue conclusioni, già richiamate in precedenza, non aveva dubbi sul carattere fondamentale del quesito che, a suo dire, si inseriva, anche alla luce delle pronunce giurisdizionali di Polonia, Germania, Cipro e Repubblica Ceca, “in un dibattito di notevole importanza che riguarda possibili punti di collisione tra le costituzioni nazionali ed il diritto europeo; dibattito al quale la Corte di giustizia deve partecipare, svolgendo il ruolo da protagonista che le spetta, allo scopo di collocare l’interpretazione dei valori e dei principi ispiratori del suo ordinamento entro parametri analoghi a quelli che reggono le strutture nazionali” (§ 8).71

71 Dello stesso avviso e tra l’altro espressamente richiamato dalle conclusioni dell’Avvocato generale è ALONSO GARCIA, Justicia constitutional y Union Europea, Madrid, Civitas, 2005.
In tanti, alla prima lettura della decisione sono rimasti delusi: la Corte di giustizia non avrebbe interpretato il ruolo da protagonista che l’Avvocato generale la invitava ad assumere. Non vi è dubbio che i giudici di Lussemburgo si siano tenuti ben lontano da allettanti protagonisti, ma non vi è neanche dubbio che, vista l’alta tensione costituzionale che aveva preceduto la decisione, niente fosse più auspicabile che un profilo basso nell’occasione per la Corte europea che, attraverso reasoning sobrio, stringato e finanche, a tratti, apodittico, arriva alla conclusione che non sarebbe emerso alcun elemento idoneo ad inficiare la validità della decisione quadro.

Il primo dubbio, relativo alla inidoneità dello decisione quadro a disciplinare la materia dell’arresto europeo, è risolto dai giudici comunitari sottolineando come le disposizioni del Trattato UE non possano essere interpretate nel senso di autorizzare l’adozione di una decisione quadro esclusivamente nei settori di cui all’articolo 31 § 1 (e) TUE.  

E vero, aggiunge la Corte, che il mandato d’arresto avrebbe potuto essere disciplinato con una convenzione ai sensi dell’articolo 34 § 2 (d) ma “tuttavia rientra nella discrezionalità del Consiglio di privilegiare lo strumento giuridico della decisione quadro quando, come in questa fattispecie, siano presenti le condizioni per l’adozione di tale atto”.

In riferimento alla presunta violazione del principio di legalità nella elencazione delle trentadue fattispecie di reati per i quali, a norma dell’articolo 2 § 2 della decisione quadro, viene abbandonata la regola della doppia incriminazione, i giudici comunitari osservano come la decisione quadro non sia volta ad armonizzare i reati in questione per quanto riguarda i loro elementi costitutivi e le pene di cui sono corredati e, di conseguenza, anche se gli stati membri, in occasione della attuazione della decisione quadro, dovessero riprendere letteralmente tale elencazione, la definizione stessa di tali reati e “le pene applicabili sarebbero quelle risultanti dal diritto dello stato emittente”.

A questo proposito i giudici comunitari non perdono l’occasione di

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72 Ossia in relazione alla progressiva adozione di misure per la fissazione degli elementi costitutivi dei reati e delle sanzioni, per quanto riguarda la criminalità organizzata, il terrorismo ed il traffico illecito di stupefacenti.

73 Ai sensi dell’articolo 2 § 2 della decisione quadro, i reati elencati in tale disposizione “se (nello) stato membro (emittente) il massimo della pena o della misura di sicurezza private della libertà è pari o superiore a tre anni”, danno luogo a consegna in base al mandato d’arresto europeo indipendentemente dal fatto che il fatto di reato sia costitutivo di una fattispecie penale tanto nello stato membro emittente che in quello di esecuzione.
sottolineare come il principio di legalità, così come quello di non discriminazione, rientri tra i parametri superprimari per l'accertamento della validità di un atto di diritto comunitario derivato non solo attraverso la consueta “metamorfosi” dei principi costituzionali degli stati membri in tradizioni costituzionali comuni prima e principi generali del diritto comunitario dopo, ma anche in forza dell'espresso riconoscimento della fondamentalità di tali diritti operato dagli articoli 49, 20 e 21 della Carta dei diritti fondamentali, che per la terza volta è espressamente richiamata in una pronuncia dai giudici di Lussemburgo (§ 46).

In riferimento al terzo profilo di presunta problematicità della disciplina del mandato d'arresto, vale a dire quello relativo alla presunta violazione del principio di non discriminazione e di uguaglianza, a causa della asserita ingiustificatatezza della differenziazione prevista tra i reati elencati dall’articolo 2 § 2, per i quali, come si è detto, è assente il requisito della doppia incriminazione e tutti gli altri reati, ove la consegna è invece subordinata alla condizione che i fatti per i quali il mandato d'arresto è stato spiccato costituiscano un reato ai sensi dello stato membro di esecuzione, la Corte di giustizia ricopre, per un solo passaggio argomentativo, quel ruolo di protagonista invocato dall’Avvocato generale nelle conclusioni richiamate.

La stessa corte, infatti, per motivare la ratio della differenziazione richiamata fa espresso riferimento a quel mutual trust tra gli stati membri che è la base assiologica di riferimento per qualsiasi iniziativa nel terzo pilastro - e che era stata invece, come si ricorderà, apertamente messa in discussione nella decisione del Tribunale federale tedesco- affermando come in riferimento all’elencazione di cui all’articolo 2 § 2; “il Consiglio ha ritenuto, in base al principio del mutuo riconoscimento e considerato l’elevato grado di fiducia e di solidarietà tra gli stati membri [...] che le categorie di reati di cui trattasi rientrasero tra quelle che arrecanno all’ordine ed alla sicurezza pubblica un pregiudizio tale da giustificare la rinuncia all’obbligo di controllo della doppia incriminazione”.

VIII. APPROCCI GIURISPRUDENZIALI COMPARATI: UN DOPPIO PROFILO D’INDAGINE

Volendo tirare le fila conclusive degli assestamenti costituzionali provocati dalle turbolenze interordinamentali innescate dalla saga del mandato

d’arresto europeo, probabilmente non ancora giunta al suo atto finale,\textsuperscript{75} debbono analizzarsi distintamente almeno due versanti che hanno risentito di tali assestamenti: il primo è quello prettamente comunitario, il secondo è quello interordinamentale all’incrocio tra la dimensione europea e quella costituzionale degli stati membri.

Sul versante comunitario uno dei problemi più immediati che si pone oggi è quello relativo alla possibilità di estendere il requisito del primato del diritto comunitario del primo pilastro anche alle norme di diritto derivato del terzo pilastro ed, in particolare, alle decisioni quadro che, come si è avuto modo di notare, a norma dell’articolo 34 (b) TUE, non hanno un effetto diretto.

Ma è plausibile che detta assenza d’efficacia diretta impedisca alle corti nazionali di dare la prevalenza a tali atti in caso di conflitto degli stessi con una normativa nazionale, anche successiva?

In effetti non si vede perché effetto diretto e primato del diritto comunitario dovrebbero costituire un binomio inscindibile.

Il fatto che l’elaborazione del primo principio da parte dei giudici comunitari abbia anticipato non solo cronologicamente,\textsuperscript{76} ma anche

\textsuperscript{75} Nel più ampio quadro della cooperazione giudiziaria in materia penale sembra affiancarsi alle dinamiche conflittuali interordinamentali di direzione verticale tra stati membri e sistema comunitario una competizione di natura orizzontale, tutta interna al sistema europeo, tra il primo ed il terzo pilastro dell’Unione. Tale competizione vede contrapposti la Commissione al Consiglio in ordine alla identificazione della più appropriata base giuridica per adottare normative volte al riavvicinamento dei sistemi penali degli stati membri in relazione ad aree di competenza, come ambiente e trasporti, tipicamente comunitarie. A questo proposito si possono citare le decisioni della Corte di giustizia del 13-9-2005 e del 23-10-2007 che hanno annullato due decisioni quadro adottate ai sensi dell’articolo 14 § 2 (n) TUE in quanto la base giuridica più adeguata per regolare la disciplina ivi prevista, a detta della Corte di giustizia, era da rintracciare all’interno delle competenze attribuite al I pilastro comunitario. Sul punto appare assai significativo quanto la Corte ha avuto modo di chiarire nella seconda delle pronunce menzionate, allorché ha specificato come “se è vero che, in via di principio, la legislazione penale, così come le norme di procedura penale, non rientrano nella competenza della Comunità (in tal senso, sentenze C.G.C.E., Causa C-203/80, \textit{Casati}, 1981, \textit{ECR}, I-2595, § 27; C.G.C.E., Causa C-226/97, \textit{Lemmens}, 1998 ECR I-3711, § 19), resta nondimeno il fatto che il legislatore comunitario, allorché l’applicazione di sanzioni penali effettive, proportionate e dissuasive da parte delle competenti autorità nazionali costituisce una misura indispensabile di lotta contro danni ambientali gravi, può imporre agli stati membri l’obbligo di introdurre tali sanzioni per garantire la piena efficacia delle norme che emana in tale ambito”.

concettualmente, l’identificazione, l’anno successivo, del secondo non sembra una ragione sufficiente, così come non lo è mai stato per gli atti di diritto derivato del primo pilastro, per poter argomentare che soltanto una norma comunitaria avente un effetto diretto possa godere dell’attributo del primato che la stessa giurisprudenza di Lussemburgo ha riconosciuto a tutto il diritto comunitario, con o senza effetto diretto, ed indipendentemente da quale sia il pilastro rilevante.

Della stessa opinione chi ha fatto recentemente notare:

“To the extent that a national measure is inconsistent with the EC law, it cannot be allowed to apply over EC law. But if we take inconsistency seriously, there is no need for identifying whether a provision confers rights on individuals. The only thing that matters is that EC Law, and by extension EU law, puts forward an identifiable result which cannot be thwarted by incompatible national measures.”

Conferme di quanto sostenuto possono anche aversi muovendosi da una dimensione esclusivamente comunitaria ad un’altra interordinamentale in cui, di fronte alle corti costituzionali degli stati membri, il sistema giuridico europeo si trova a confrontarsi con quello costituzionale degli stessi stati.

Si considerino in particolare le decisioni della Corte costituzionale ceca e

77 C.G.C.E., Causa C-6/64, Costa/ENEL, 1964, ECR, I-1141.
79 L’articolo I-6 dell’ormai defunto Trattato costituzionale di Roma prevedeva generalmente che il diritto adottato dalle istituzioni dell’Unione dovesse prevalere su quello degli stati membri. Le circostanze che tale disposizione sia stata “affondata” insieme a tutto il trattato dai referendum francesi ed olandese e che nella bozza del Trattato di Lisbona la stessa disposizione non sia stata riproposta non sarebbero in grado di far venire meno rilevanza ed attualità a quanto previsto dall’ex articolo I-6 se ci si ricordasse che la dichiarazione sull’articolo I-6 annessa al Trattato costituzionale sottolineava come tale disposizione non facesse altro che riflettere il portato della giurisprudenza rilevante sul punto del Tribunale di primo grado e della Corte di giustizia.
di quella polacca sul mandato d’arresto prima esaminate, ove, a ben vedere, si hanno due espressioni differenti della medesima accettazione, al di là delle riserve di stile, del primato del diritto del diritto europeo del terzo pilastro, non direttamente efficace, rispetto a tutto il diritto interno, Costituzione compresa.

Nel primo caso, quello ceco, la tecnica decisoria per rendere operativo il primato è stato il ricorso, come si è visto, all’interpretazione conforme, accompagnata da una manipolazione dell’enunciato linguistico significante rilevante, l’articolo 14 § 4, in modo che lo stesso fosse in grado di dare copertura costituzionale ad un mandato d’arresto europeo emesso nei confronti di un cittadino ceco.

Nel secondo caso, invece, il giudice costituzionale polacco, “costretto” da un parametro costituzionale che non lasciava spazio né ad equivoci né a tentativi d’interpretazione creatrice, ha assicurato il primato del diritto comunitario chiedendo al legislatore di modificare la Costituzione in modo da adeguare il parametro rilevante –che non sembra eccessivo far rientrare nel nucleo dei principi fondamentali del sistema costituzionale– a quanto richiesto dalla disciplina comunitaria.

Ovviamente, se la regola del primato del diritto dell’Unione europea sul diritto interno può essere teorizzata guardando esclusivamente alla dimensione comunitaria, il suo concretizzarsi nella dimensione interordinamentale dipende dall’accettazione che di essa fanno le singole corti costituzionali ed, in ultima analisi, dalla apertura di quest’ultime alle ragioni del diritto comunitario.

Se abbiamo visto che le due corti dell’est nelle decisioni esaminate hanno dimostrato, con modalità ed intensità diverse, una disponibilità di fondo a tale apertura, lo stesso non sembra potersi concludere guardando al portato finale ed al reasoning della decisione della Corte costituzionale tedesca sul mandato d’arresto europeo.

Riguardo al portato finale i giudici di Karlsruhe, pur avendo a disposizione un parametro costituzionale rilevante che, vista la sua apertura alla dimensione sovranazionale ed internazionale, avrebbe sicuramente consentito un approccio salvifico della normativa interna attuativa della decisione quadro, hanno annullato tale normativa identificando, cosa che è stata assai criticata, un rapporto di regola/eccezione tra il primo ed il secondo periodo dell’articolo 16 § 2 della Costituzione tedesca.81

81 Lo si ricorda, la recente revisione costituzionale dell’articolo 16 § 2 ha aggiunto al divieto di estradizione nei confronti del cittadino tedesco la possibilità di derogarvi
Un tale approccio caducatorio incondizionato non può non rappresentare un'espressione di una ferma convinzione, da parte dei giudici tedeschi di non considerare il diritto comunitario - né tanto meno nello specifico il diritto europeo del terzo pilastro - in grado di poter prevalere in alcun modo sul proprio dettato costituzionale interno.

Un tale esito non dovrebbe stupire più di tanto: il Tribunale costituzionale tedesco è in buona compagnia, in Europa, quanto alla riserva dei controllimiti, al cui coro hanno preso parte recentemente anche, seppur con tonalità differenti, le corti costituzionali dei paesi dell'Europa centro-orientale.\(^8\)

Ciò che invece colpisce, comparandolo a quanto è emerso dall'analisi degli approcci interpretativi dei giudici polacchi e cechi nelle decisioni esaminate, è invece il reasoning attraverso cui i giudici tedeschi sono pervenuti all'annullamento della normativa oggetto di giudizio.

Innanzitutto, il Tribunale federale ha relegato il portato del secondo alinea dell'articolo 16 § 2 introdotto a seguito della revisione del 2000 e che, come si è visto, prevede la possibilità, a determinate condizioni, di poter eseguire l'estradizione nei confronti di un cittadino tedesco, nello spazio angusto riservato alle eccezioni della regola, in questo caso, rappresentata dalla enunciazione della “freedom of extradition”, ai sensi del primo alinea dell'articolo 16 § 2, garantita a tutti i cittadini tedeschi.

Com'è recentemente stato notato,\(^8\) la clausola prevista dal secondo alinea dell'articolo 16 § 2 è invece significativamente differente dalle altre clausole derogatorie presenti nella Legge fondamentale tedesca. Mentre, infatti, queste ultime assolvono esclusivamente una funzione autorizzatoria di

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83 C. TOMUSCHAT, “Inconsistencies”, o.c., p. 212.
tassative restrizioni di diritti fondamentali, la prima è in grado di rappresentare uno strumento per la realizzazione degli obiettivi previsti dalla clausola europea dell’articolo 23 § 1 della Costituzione.\(^8\)

Il nesso assiologico che lega l’alinea aggiunto all’articolo 16 § 2 nel 2001 all’apertura condizionata alla dimensione sovranazionale codificata, nella Legge Fondamentale, nel 1993, al primo comma dell’articolo 23 è, per l’appunto, il grande assente nel \textit{reasoning} dei giudici tedeschi che hanno invece preferito concentrarsi su un altro nesso, quello intercorrente tra “i tedeschi ed il loro ordinamento interno” (§ 67) e sull’esigenza “di preservare identità nazionale e la statualità nell’ambito dello spazio giuridico europeo” (§ 77).

Riferimento ai valori dell’identità e statualità che caratterizza l’intero impianto argomentativo della pronuncia e che serve a comporre una nozione monolitica ed omogenea di \textit{demos} fortemente intrisa di elementi identitari, ed a tratti etnocentrici, non nuova peraltro ai giudici di Karlsruhe,\(^8\) in cui il \textit{distrust} nei confronti del livello di protezione dei diritti dell’individuo apprestato dai sistemi penali degli altri ordinamenti dell’Unione europea si combina alla ferma convinzione che il diritto ad una tutela nei confronti di quanti, tra detti ordinamenti, non possano garantire in modo adeguato le situazioni giuridiche dell’indagato, sia una prerogativa esclusiva del cittadino tedesco.

La distanza con i valori alla base dell’istituzione, da parte dell’Unione europea, del mandato d’arresto non poteva forse essere maggiore.

In primo luogo, in riferimento alla sfiducia, in quanto, come si è visto, tanto la decisione quadro quanto la lettura che di essa ne ha fatto la Corte di giustizia hanno identificato proprio nell’esigenza di una fiducia reciproca e finanche di una solidarietà tra stati membri la base assiologica

\(^8\) Ai sensi del quale “per la realizzazione di un’Europa unita la Repubblica federale di Germania collabora allo sviluppo dell’Unione Europea che è fedele ai principi federativi, sociali, dello stato di diritto e democratico nonché al principio di sussidiarietà e che garantisce una tutela dei diritti fondamentali sostanzialmente paragonabile a quella della presente Legge fondamentale. La Federazione può a questo scopo, mediante legge approvata dal \textit{Bundesrat}, trasferire diritti di sovranità. Per l’istituzione dell’Unione Europea, per le modifiche delle norme dei trattati e per le regolazioni analoghe, mediante le quali la presente Legge fondamentale viene modificata o integrata nel suo contenuto oppure mediante le quali tali modifiche e integrazioni vengono rese possibili, si applica l’articolo 79, secondo e terzo comma”.

fondamentale per proseguire lungo il percorso della cooperazione europea in materia penale.

In secondo luogo, per quanto riguarda l’esclusività della protezione offerta al cittadino tedesco, l’impostazione della disciplina sovranazionale, fondata su un concetto di cittadinanza aperto e pluralistico, è nel senso di apprestare maggiori garanzie a chi, a prescindere dalla nazionalità, abbia un legame privilegiato con lo stato di esecuzione del mandato d’arresto europeo, come è testimoniato dal già richiamato articolo 5 della decisione quadro che, specificando quali debbano essere le garanzie che lo stato emittente debba fornire in casi particolari, prevede espressamente delle garanzie aggiuntive nel caso in cui “la persona oggetto del mandato d’arresto ai fini di un’azione penale sia cittadino o residente nello stato membro di esecuzione”, 86 nonché dall’articolo 4 § 6 della stessa decisione.87

IX. MODELLI DI RISOLUZIONE DEI CONFLITTI INTERORDINAMENTALI A CONFRONTO E CONSIDERAZIONI CONCLUSIVE

Volendo quindi ricondurre a sistema le differenze tra l’approccio dei giudici costituzionali tedeschi, polacchi e cechi, sembra potersi sostenere come le tre decisioni esaminate siano espressione di tre differenti possibilità di confrontarsi delle corti nazionali, specie costituzionali, con la delicata questione d’ordine interordinamentale relativa al rapporto tra diritto comunitario e diritto costituzionale degli stati membri.

86 Nel caso di specie le garanzie aggiuntive si concretizzano nel poter subordinare la consegna alla condizione che la persona, dopo essere stata ascoltata, sia rinviata nello stato membro di esecuzione per scontarlo la pena o la misura di sicurezza privativa della libertà eventualmente pronunciate nei suoi confronti nello stato membro emittente. Può non essere superfluo notare come l’apertura ad un concetto di cittadinanza aperto e pluralistico sembra essere condiviso anche da alcuni ordinamenti dell’Europa centro-orientale, a dispetto delle forti componenti etnocentriche ed identitarie che, come si è detto, influenzano non poco l’idem sentire nell’Europa dell’est. Basti pensare, a conferma di quanto sostenuto, all’articolo 411 § 6 (e) del codice penale ceco così come modificato a seguito del recepimento della decisione quadro sul mandato d’arresto europeo, ove, tra le varie ipotesi in cui è ammessa possibilità per le corti nazionali di rifiutare la richiesta di esecuzione del mandato d’arresto europeo, è inclusa, insieme ad altre condizioni, quella per cui il soggetto indagato “sia un cittadino ceco od un residente in Repubblica ceca”.

87 Ove si prevede, come già richiamato in precedenza, che «l’autorità giudiziaria d'esecuzione può rifiutare di eseguire il mandato d'arresto se questo ultimo è stato rilasciato ai fini dell'esecuzione di una pena o di una misura di sicurezza privativa della libertà, qualora la persona ricercata dimori nello stato membro di esecuzione, ne sia cittadino o vi risieda, se tale stato si impegna a eseguire esso stesso tale pena o misura di sicurezza conformemente al suo diritto interno”.
Con la loro decisione sul mandato d’arresto europeo i giudici tedeschi si confermano essere i campioni dell’approccio definito da Mattias Kumm di “democratic statism”, ossia “a normative conception of a political order establishing a link between three concepts; statehood, sovereignty and democratic self-government”.88

In effetti statualità e sovranità89 costituiscono il leit motiv alla base dell’intero apparato argomentativo della decisione.

Ed una decisione fondata su tali capisaldi non poteva non avere come esito scontato la boicottatura non solo della normativa interna attuativa della decisione quadro sul mandato d’arresto europeo, ma anche, più in generale, come è emerso dall’analisi della pronuncia in esame, di qualsiasi progetto di “comunitarizzare” quel settore europeo che riflette in misura maggiore sovranità e statualità degli stati membri, ovvero la cooperazione in materia penale prevista dal terzo pilastro dell’Unione.

In questa visione statocentrica del processo d’integrazione comunitaria, la Costituzione non può non rappresentare la normativa suprema da cui tutte le altre fonti derivano la loro validità: anche i Trattati e le altre fonti comunitarie, attraverso, in particolare, la codificazione della giurisprudenza Solange all’articolo 23 della Legge fondamentale.90

La focalizzazione sul concetto di Staatvolk in cui emergono objective etnic factors91 come base di legittimazione della supremazia della Costituzione non può non avere, peraltro, delle ulteriori ripercussioni, oltre che sull’asse Germania-UE, anche nell’ambito della dimensione orizzontale che connette i differenti stati membri dell’Unione europea.

90 Assai critico nei confronti della decisione del Tribunale federale tedesco è anche Julio Baquero Cruz, laddove evidenzia come “the German Constitutional court saw the case through the exclusive prism of German Constitution, misinterpreting the framework decision”; J. BAQUERO CRUZ, The Legacy of the Maastricht Urteil Decision and the Pluralist Movement, EUI Working Paper, No 2007/13.
La più evidente di queste si concretizza in quel senso di mal celata sfiducia che permea l'intera pronuncia nei confronti nel livello di protezione dei diritti fondamentali del processo penale apprestata da altri ordinamenti. Unica garanzia per il cittadino tedesco è quella di essere, per quanto è possibile, giudicato, e del caso condannato, da Corti di Casa.

La Corte costituzionale polacca, a ben vedere, ha fatto quello che il comunitarista più integralista si augura che possa avvenire in caso di contrasto ineludibile tra una normativa comunitaria ed una norma costituzionale. La decisione quadro si contrae con il dettato della Costituzione di uno stato membro? Bene, si suggerisce come opzione praticabile quella della revisione della Costituzione e nell'attesa la decisione di annullamento della normativa interna attuativa della decisione stessa non spiega i suoi effetti.

Diritto comunitario 1, diritto costituzionale 0 e game over.

Non a caso la dottrina polacca non ha mancato di notare come la richiesta al legislatore costituzionale di revisionare la costituzione e la contestuale sospensione degli effetti della decisione di annullamento della disciplina interna attuativa della decisione quadro fino al momento della entrata in vigore di detta revisione sia una dimostrazione del fatto che:

“The Constitutional Tribunal in fact recognized the supremacy of EU law. [...] It thus accepted that the constitution itself was no longer an absolute framework for control – if it hinders the correct implementation of EU law, it should be changed. [...] It seemed that in this judgment the Tribunal went further than the existing practice – it implicitly accepted the supremacy of EU law over constitutional norms”.

Ad uno sguardo più attento, i due approcci adesso considerati, quello tedesco e quello polacco, pur così lontani nella identificazione della fonte suprema di riferimento, nel primo caso la Costituzione, nel secondo la normativa comunitaria, hanno qualcosa in comune: il fatto, per l'appunto, di preoccuparsi di identificare una fonte suprema.

In altre parole tutta la partita in entrambe le decisioni si gioca sul campo della teoria delle fonti, delimitato dalla individuazione di rapporti gerarchici predefiniti ed immutabili tra gli atti normativi in gioco. Una tale visione dei rapporti tra diritto comunitario e diritto costituzionale è allo

92 K. KOWALIK-BANCZYK, “Should We Polish It Up?”, o.c., p. 1360.
stesso tempo statica e poco incline al confronto.

Statica perché si fonda su rapporti di forza delineati una volta per tutti, che guidano l’interprete nella risoluzione del conflitto rilevante.

Poco incline al confronto perché tende a risolvere i conflitti guardando esclusivamente al proprio constitutional landscape.

Non è un caso che nelle decisioni polacche e tedesche: non si citi giurisprudenza rilevante della Corte di giustizia, non si faccia riferimento a decisioni che altre corti costituzionali in Europa hanno adottato tentando di risolvere conflitti analoghi, non si sia neanche preso in considerazione la possibilità di dialogare con la Corte di giustizia utilizzando la procedura del rinvio pregiudiziale.93

Tutti e tre tali elementi invece sono presenti nella decisione della Corte ceca e costituiscono indizi precisi e concordanti per poter provare che i giudici di Brno abbiano deciso di giocare la partita relativa alla risoluzione dei conflitti tra ordinamento interno ed ordinamento comunitario non sul campo, prescelto invece dai colleghi di Karsrhue e Varsavia, della teoria delle fonti ma su quello diverso della teoria dell’interpretazione.94 Campo di gioco caratterizzato, da un punto di vista sostanziale, da un accoglimento dell’idea di constitutional pluralism come parametro guida per la risoluzione dei conflitti interordinamentali e, da un punto di vista metodologico-procedurale, dall’applicazione di una teoria comunicativa e

93 A dire il vero la Corte costituzionale di Varsavia non avrebbe in ogni caso potuto servirsi della procedura pregiudiziale prevista dall’articolo 35 UE, in quanto il governo non esattamente euro-friendly dei gemelli Kaczynski non aveva, ovviamente, operato la dichiarazione di attribuzione (facoltativa) di tale competenza alla Corte di giustizia prevista dal medesimo articolo del Trattato di Maastricht. L’atteso cambio di rotta promesso dal leader di Piattaforma Civica Donald Tusk vincitore delle ultime elezioni politiche polacche dello scorso ottobre si fa ancora attendere.

dialogica del diritto intercostituzionale.

Sotto il primo profilo, quello sostanziale, la Corte ceca pur non rinunciando, in alcuni passaggi, a impostare il proprio reasoning secondo lo stile classico del trasferimento limitato di sovranità all’ordinamento sovrnazionale e dell’applicazione della teoria dei contro-limiti (§ 53), ha tentato di fare convergere verso una base comune assiologicamente caratterizzata, senza gerarchizzazioni di sistema, da una parte la ratio ultima della normativa europea sul mandato d’arresto e, dall’altra, gli interessi costituzionalmente protetti dal parametro superprimario rilevante per concludere come il fatto che, in determinati casi, la decisione quadro non applichì la regola della doppia incriminazione, non viola il principio costituzionale di legalità delle legge penali in quanto l’assenza di detta regola non inficia tale principio “in relationship among the Member states of the EU, which have a sufficient level of value approximation and mutual confidence that they are all states as having democratic regimes that adhere to the rule of law and are bound by the application to observe this principle”.95

L’accertamento della conformità a Costituzione della normativa interna recettiva della disciplina europea non è quindi condotta né sulla base di un’applicazione rigida della regola monolitica del primato del diritto comunitario su tutto il diritto interno, né alla luce del principio di supremazia incondizionata della Costituzione su qualsiasi altra fonte giuridica, ma avendo come criterio guida l’identificazione della soluzione migliore per realizzare “the ideals underlying legal practice in the European Union and its member states”.96

Sotto il secondo profilo, quello di metodo, la Corte ceca inserisce le proprie argomentazioni all’interno di un quadro più ampio rispetto a quanto sembra permettergli una interpretazione letterale del parametro costituzionale rilevante e, attraverso le sue citazioni testuali della giurisprudenza comunitaria e costituzionale comparata e la disponibilità ad un dialogo con la Corte di giustizia per mezzo del rinvio pregiudiziale, dà prova, rifiutando approcci erme neutici di autoreferenziale “arroganza costituzionale”, di voler prendere parte a quel progetto di cooperative constitutionalism che sembra rappresentare, tra le possibili ipotesi di risoluzione dei conflitti interordinamentali tra sistema comunitario e sistemi costituzionali degli stati membri, non forse la più facile da realizzare ma molto probabilmente la sola che possa assicurare un’armonia

96 Ibid.
tra diversi.\footnote{V. ONIDA, “Armonia tra diversi e problemi aperti: La giurisprudenza costituzionale sui rapporti tra ordinamento interno e comunitario”, Quaderni costituzionali, 2002, pp. 549-557.}

Progetto, quello del \textit{cooperativism constitutionalism}, al quale non vi è dubbio che abbia aderito da tempo la \textit{Cour d'arbitrage} belga, dimostrando un'effettiva volontà di interazione con la Corte di giustizia, attraverso il ricorso, nel caso che si è commentato, al meccanismo istituzionale di dialogo rappresentato dalla procedura di rinvio pregiudiziale, ad oggi utilizzato da troppe poche corti costituzionali degli stati membri.\footnote{Oltre alla \textit{Cour d'arbitrage}, soltanto la Corte costituzionale austriaca, \textit{VfGH}, 10 marzo 1999, B 2251/97, B 2594/97, e quella Lituana (sent. 8 maggio 2007), si sono servite della procedura prevista dall'articolo 234 TCE e 35 TUE.}

Dialogo che, come dimostrato dalla vicenda del mandato d'arresto europeo, può avere anche toni accesi, se la corte costituzionale di rinvio, come ha fatto la \textit{Cour d'arbitrage}, mette in discussione la validità di una normativa comunitaria, ma che in ogni caso, e forse specialmente nel caso in cui si siano divergenze di opinioni tra corte nazionale e corte europea, alimenta quel circuito di mutua alimentazione tra il livello interno e quello sovranazionale, su un piano prima culturale che giuridico, essenziale per la creazione di un effettivo spazio giuridico comune europeo.

Concludendo sul punto non può non osservarsi come i timori di molte corti costituzionali di perdere il “diritto all'ultima parola”, alla base del mancato utilizzo del canale di comunicazione “istituzionale” con i giudici comunitari fornito dallo strumento previsto dall'articolo 234 TCE, si rivelino, ad un’analisi più attenta, eccessivi tanto nel merito, sotto un profilo tecnico, quanto nel metodo, alle luce di una riflessione di carattere più generale relativa alle forme di interazione multi-level tra le corti in Europa nel nuovo millennio.

quanto la definitiva soluzione della questione, applicando il metodo utilizzato dalla Corte suprema danese, rimarrebbe comunque in capo alle corti stesse che potrebbero sempre, nel caso in cui l'opinione dei giudici di Lussemburgo non fosse convincente, applicare in concreto la teoria dei contro-limiti, invalidando in parte de qua la norma del Trattato su cui si fonda l'atto comunitario lesivo.

Per quanto riguarda il secondo profilo, quello di metodo, sembra potersi sostenere, confortati da dottrina autorevole, come, a monte, la stessa preoccupazione dei giudici costituzionali di riservarsi “il diritto all’ultima parola” sia espressione di un approccio metodologico non del tutto corretto, in quanto espressione della ricerca, nelle interazioni giudiziali, di un “potere ultimo” e della “competenza delle competenze”, concetti che si riferiscono ad un’epoca, quella della ricerca a tutti costi di unità finalizzata alla conquista di un centro esclusivo, destinata a lasciare il passo ad una rete molto più complessa di relazioni tra corti, perché “multicentrica”, alimentata dal principio di leale collaborazione tra giudici costituzionali e giudice comunitario e refrattaria, per definizione, a qualsiasi gerarchizzazione di sorta. Tutto ciò sembra averlo compreso, finalmente, la Corte costituzionale italiana che, si è decisa, assai recentemente a servirsi, nell’ambito di un giudizio in via principale della procedura pregiudiziale prevista dall’articolo 234 TCE.

Una seconda considerazione è relativa alla circostanza per cui, in tempi di judicial globalisation e di European Community of Courts sembra emergere

102 Corte costituzionale, No 102/2008, 15-4-2008
una crescente divaricazione, nell’ambito delle relazioni interordinamentali tra i diversi livelli di governo, tra il grado di apertura alle ragioni del diritto sovranazionale offerto dal parametro costituzionale rilevante e il livello di accettazione del processo di penetrazione del diritto comunitario nel diritto interno che invece risulta dalle pronunce dei giudici costituzionali in materia.

Provando ad essere meno oscuri, si applichi tale considerazione di principio alla vicenda del mandato d’arresto europeo.

A volersi soffermare soltanto sul piano statico dei parametri costituzionalmente rilevanti, si è avuto più volte modo di sottolineare come, ad una valutazione ex ante, la disciplina europea sul mandato d’arresto, ed in particolare l’obbligo da parte dello stato di esecuzione, salvo ipotesi tassativamente previste, di consegna di un proprio cittadino allo stato membro richiedente, sembrava avere più possibilità di non scontrarsi con la disposizione della Legge fondamentale tedesca in tema di estradizione rispetto alle chances di conformità con la disciplina corrispondente prevista dalla Carta ceca dei diritti fondamentali.

Ancora, più in generale, restando pur sempre sul piano del parametro costituzionale rilevante, guardando al complesso delle disposizioni costituzionali che identificano il livello d’apertura di un ordinamento rispetto alle esperienze sovranazionali ed internazionali, non c’è dubbio che, alla luce di quanto si è detto in precedenza, il carattere “sovranista” delle costituzioni dei paesi dell’Est, e di Polonia e Repubblica ceca in particolare, lasciassero molto meno spazio a “slanci” europeistici da parte delle rispettive corti costituzionali rispetto a quanto teoricamente consentito al tribunale costituzionale tedesco dalle disposizioni rilevanti della Legge fondamentale che, non si caratterizza, anche alla luce del contesto storico in cui ha preso forma, per una vocazione particolarmente

sovranista. Si aggiunga poi che la clausola europea introdotta in occasione della ratifica del Trattato di Maastricht nel 1993 ha reso ancor più incline la Costituzione tedesca ad adeguamenti provenienti dall'esperienza internazionale ed europea.

Nonostante sul piano statico della caratterizzazione del parametro costituzionale rilevante, quindi, l'ordinamento tedesco partisse avvantaggiato rispetto ai sistemi giuridici dell'Europa centro-orientale, e di Repubblica ceca e Polonia in particolare, riguardo al raggiungimento di posizioni di allineamento con le risultanze del processo di integrazione comunitaria, lo “scatto” delle Corti costituzionali di Brno e Varsavia, che si è commentato nelle pagine precendenti, non solo ha annullato tale vantaggio originario, ma ha addirittura permesso che le giurisprudenze costituzionali polacca e ceca, almeno per quanto riguarda la vicenda del mandato d'arresto europeo, nonostante un parametro superprimario che “remava” contro, mostrassero un’accettazione delle (non soggezione alle) ragioni del diritto comunitario ben maggiore di quanto sia emerso dalla decisione più volte menzionata del Tribunale federale tedesco.

In altre parole sembra che si vadano affermando in questa nuova stagione del costituzionalismo europeo rotte non battute in tema di tecniche argomentative e d’interazione giudiziale tra corti nazionali e corti europee che seguono sentieri inconsueti, “fuori pista” rispetto ai percorsi tracciati dalle opzioni interpretative suggerite dai parametri costituzionali rilevanti.

Un’ultima considerazione. Se alcune corti costituzionali per un verso, lo si è visto, sembrano percorrere strade parzialmente diverse rispetto alle opzioni assunte dai rispettivi legislatori costituzionali che hanno forgiato i parametri superprimari di riferimento, non può negarsi come le stesse corti richiedano, sempre più frequentemente, una maggiore collaborazione tanto da parte del legislatore ordinario, nella fase di recepimento della normativa comunitaria, quanto da parte dello stesso legislatore costituzionale, nella fase di adeguamento del sistema interno al portato dell'esperienza sovranazionale.

Se si esclude, infatti, il caso della Corte di Brno che, facendo ricorso (estremo) al metodo dell’interpretazione conforme, è riuscita ad essere autosufficiente chiudendo il cerchio all’interno dell’esclusivo ambito dell’interpretazione costituzionale, tanto i giudici polacchi quanto quelli tedeschi hanno invece posto un ponte verso la dimensione legislativa, tanto a livello costituzionale ex post, quanto a livello ordinario ex ante. I primi, infatti, hanno espressamente richiesto al legislatore costituzionale di modificare, entro un periodo non superiore a diciotto mesi, il parametro costituzionale di riferimento in modo da far sì che potesse rientrare nel suo
ambito di applicazione la parte più discussa della normativa comunitaria.

I secondi, invece, si sono rivolti in via principale non tanto al legislatore costituzionale, quanto al legislatore ordinario, “punendolo” attraverso l’annullamento della normativa ordinaria di recepimento della decisione quadro, per non aver utilizzato tutte le possibilità che la stessa decisione offriva per valorizzare il “domestic factor” che collega il cittadino tedesco alla sua casa.

Quale tendenza più generale può tentare di captarsi dall’osservazione di tali dinamiche questa volta orizzontali che coinvolgono il giudiziario ed il legislatore degli stati membri?

Forse che è finito il tempo in cui era possibile immaginare un avanzamento del processo d’integrazione comunitaria soltanto attraverso l’attivismo dei giudici nazionali e comunitari, inversamente proporzionale all’inerzia del legislatore, sia esso nazionale –ordinario o costituzionale– od europeo.

Gli stessi giudici, infatti, ben consapevoli non soltanto delle difficoltà di successo, ma anche dell’inefficienza –e perché no, non democraticità– di un avanzamento del progetto europeo trainato esclusivamente da un governo delle corti, richiedono sempre più spesso una discesa in campo dei legislatori nella nuova stagione del costituzionalismo cooperativo in Europa.

Ma scendere in campo a volte per il legislatore non è sufficiente. Come dimostra infatti la saga del mandato d’arresto europeo, le corti costituzionali degli stati membri sembrano sempre più attente non solo all’and dell’intervento legislativo nelle materie di rilevanza comunitaria, ma anche al quomodo dell’intervento stesso che, come il caso tedesco fa emergere chiaramente, non può tradursi in una mera e passiva “ritrasmissione telegrafica” della normativa europea nell’ordinamento nazionale.

In attesa di tale salto qualitativo, intanto a livello comunitario, due anni e mezzo dopo il knock out costituzionale dei referendum francese e olandese, il processo di riforma dei trattati europei, seppur nella sua macchinosa e pachidermica formazione intergovernativa, ha ripreso a muoversi ed il 13 dicembre scorso è stato firmato dai ventisette stati membri a Lisbona il nuovo Trattato di riforma.\footnote{J. ZILLER, Il nuovo Trattato europeo, Bologna, Il Mulino, 2007. Il Trattato, a patto che sia ratificato in tutti gli stati membri (soltanto l'Irlanda dovrebbe prevederne l'approvazione tramite referendum) entrerà in vigore a partire dal 1 gennaio 2009.}
Per quanto riguarda lo spazio di libertà, sicurezza e giustizia le novità non sono di poco conto. Sono infatti state recepite tutte le innovazioni già contenute nel naufragato Trattato costituzionale di Roma, a cominciare della soppressione della struttura a pilastri e dall’estensione dell’applicabilità nell'area della cooperazione giudiziaria in materia penale degli strumenti normativi contemplati dal primo pilastro in sostituzione delle decisioni quadro e delle convenzioni attualmente previste.

Il vantaggio più rilevante di tale innovazione è quello relativo ad una probabile maggiore effettività del principio di tutela giurisdizionale, non solo perché la competenza pregiudiziale della Corte di giustizia sarà obbligatoria e non più facoltativa per gli stati membri, ma anche perché la Commissione nel settore della cooperazione giudiziaria in materia penale disporrà della possibilità, al momento negatale, di attivare una procedura di infrazione nei confronti degli stati membri in caso di mancata o cattiva trasposizione, per esempio, di una decisione quadro.\footnote{J. ZILLER, Il nuovo Trattato, o.c., at p. 60.}

Questa la bella notizia. La cattiva è non solo che al Regno Unito non si applicheranno le nuove regole relative alla competenza pregiudiziale della Corte di giustizia ed al ruolo della Commissione di guardiana dei trattati nell’area della cooperazione giudiziaria in materia penale, ma anche che tali regole non saranno applicabili a tutti gli altri stati membri immediatamente, a partire dall’auspicata entrata in vigore del Trattato, prevista per il 1 gennaio 2009,\footnote{A causa del no degli irlandesi al Trattato di Lisbona espresso in occasione del referendum tenutosi il 12 giugno 2008, è di fatto sfumata la possibilità che questo ultimo possa effettivamente entrare in vigore il 1 gennaio 2009.} ma soltanto molto dopo, a partire da gennaio 2014.
L'état moderne se construit, mais ne se déconstruit pas. Il intègre de nouveaux modes d'organisation territoriale et de coopération entre états, créant des institutions dotées de compétences diverses, sans pour autant faire table rase des structures préexistantes. De tels systèmes génèrent inexorablement des empilements institutionnels et normatifs complexes. Paradoxalement, l'européanisation et les nombreuses décentralisations n'ont pas nécessairement engendré une diminution de l'intervention des autorités nationales. Leur rôle de coordinateur demeure primordial pour assurer non seulement une certaine cohésion entre les autorités régionales locales, mais également une application homogène du droit de l'Union.1 L'effectivité du droit de l'Union pâtit pourtant de la présence de certaines complexités. Le développement de son application directe poursuit un objectif de rationalisation juridique parfois antinomique avec les réalités politiques.

Adapting à la CEE la théorie des traités internationaux self-executing,2 Léontin-Jean Constantinesco est l'un des premiers juristes à établir une séduisante summa divisio entre les normes communautaires parfaites, considérées d'application directe, et celles qui sont incomplètes, et requièrent donc une transposition nationale.3 La distinction entre norme ‘d'applicabilité directe’ et norme ‘d'application directe’ apparaît fondamentale. Est ‘directement applicable’ la norme susceptible d’être ‘directement appliquée’ sous certaines conditions. Les règlements et les décisions sont, par définition, ‘d'applicabilité directe’.4 Il en va de même pour les dispositions “inconditionnelles et suffisamment précises” des directives5 et des traités. Cela ne signifie pas que ces normes sont

1 Doctorant en Droit, European University Institute in Florence.
1 Le Traité de Lisbonne du 3 décembre 2007, qui devrait entrer en vigueur au 1er janvier 2009, supprime toute référence aux ‘Communautés européennes’ et substitue le terme ‘de l'Union’ à celui de ‘communautaire’.
3 L.-J. CONTANTINESCO, L'applicabilité directe dans le droit de la CEE, Bruylant, 1970.
4 Traité sur le fonctionnement de l’Union européenne, Article 249.
directement appliquées. Pour devenir ‘d’application directe’, une norme doit aussi être complète. Selon le Professeur Constantinesco, “une obligation imposée aux états membres par le Traité, juridiquement parfaite quant à son but, son contenu et son échéance, est immédiatement applicable parce que self-sufficient; en effet, avant de produire des effets en droit interne et avant d’atteindre les particuliers, cette obligation communautaire doit être exécutée, mise en œuvre ou transformée en droit interne par une action des états membres”. C’est-à-dire, outre sa validité et sa conformité, la ‘complétude’ d’une norme s’évalue également en fonction de la détermination de son organe d’application et de sa sanction; caractéristiques dont sont dépourvues la plupart des normes de l’Union.

Le développement de l’applicabilité directe a permis à la Cour de justice des Communautés européennes peut-être, demain, de l’Union européenne, suivie par les juridictions nationales, d’inviter fermement les états à éviter une systématisation des transcriptions nationales ou fédérales. Parallèlement, les autorités régionales et locales passent de plus en plus souvent au crible les actions en manquement de la CJCE, dans des domaines vastes et variés, embrassant des politiques européennes transversales telles que fonds structurels, aides d’état, marchés publics, ainsi que des politiques sectorielles telles que l’environnement, l’énergie, les transports, l’agriculture et la pêche, etc.

L’enchevêtrement des compétences européennes et décentralisées a

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6 Ibid., p. 10.
conduit les autorités nationales à redéfinir leurs missions. Introduite en juillet 2006, la réforme du fédéralisme allemand s’inscrit dans cette logique et renforce la cohésion entre droit de l’Union et répartition interne des compétences. Les Länder allemands supportent désormais la charge financière des éventuelles violations de leurs obligations communautaires. Bien que moins respectueuses des impératifs bruxellois, l’organisation des services préfectoraux français et les importantes dévolutions de Westball aux régions écossaises et galloises n’y sont pas non plus totalement indifférentes.

La reconnaissance d’un droit de l’Union d’application directe par les autorités régionales et locales modifie nécessairement l’intervention normative des organes, aussi bien nationaux que territoriaux, dans les domaines simultanément transférés aux institutions européennes et aux autorités décentralisées, à l’instar des transports locaux et régionaux.

I. LE FONDAMENT DIRECT DES AUTORITÉS RÉGIONALES ET LOCALES SUR LE DROIT DE L’UNION ÉCARTE LA LÉGISLATION NATIONALE

Les jurisprudences européenne et nationales reconnaissent la possibilité pour les autorités régionales et locales (dorénavant, “ARL”) d’appliquer directement le droit de l’Union; c’est-à-dire, de l’appliquer sans transcription nationale préalable systématique. Un tel leitmotiv paraît cependant moins évident à soutenir dans les états unitaires qu’au sein des états fédéraux. Un des premiers développements ressortait des conclusions de l’avocat général Lenz dans une affaire opposant l’entreprise italienne

11 Bundestag et Bundesrat ont approuvé, respectivement les 30 juin et 7 juillet 2006, la révision de vingt articles de la Loi Fondamentale (16/813), ainsi que la réforme du fédéralisme (16/814), http://www.bundestag.de/parlament/gremien/foederalism/index.html.


Fratelli Costanzo à la commune de Milan. Cette dernière avait procédé à un appel d’offres restreint pour des travaux d’aménagement d’un stade de football en vue des épreuves du championnat du monde de football de 1990. Le décret-loi sur lequel elle se fondait pour fixer le critère d’adjudication s’opposait aux dispositions d’une directive relative aux marchés publics de travaux. Rappelant la primauté du droit communautaire, la CJCE établit que, “lorsque sont remplies les conditions requises par la jurisprudence de la Cour, […] tous les organes de l’administration, y compris les autorités décentralisées, telles les communes, sont tenus de faire application” du droit de l’Union.

En affirmant cette applicabilité directe par les autorités décentralisées, l’évolution jurisprudentielle a modifié l’ordonnancement juridique des états membres.

En premier lieu, la Cour a développé une argumentation relative au concept d’« applicabilité directe » du droit communautaire en fixant comme principal objectif le respect des droits créés au profit des personnes concernées, tant morales que privées. Il s’agit là de la théorie de l’effet direct. Il faut lui adjoindre l’impératif d’uniformité normative. Selon la Cour, “les règles du droit communautaire doivent déployer la plénitude de leurs effets, d’une manière uniforme dans tous les états membres, à partir de leur entrée en vigueur et pendant toute la durée de leur validité”.

Elle en déduit que le moyen le mieux à même d’y répondre consiste à rendre ces dispositions “source immédiate de droits et d’obligations” pour tous ceux qu’elles concernent et invite les entités décentralisées à fonder leur réglementation directement sur les normes communautaires.

Le principe d’autonomie institutionnelle, qui interdit à la Communauté…

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16 Ibid., pt 32.
17 Issue de la jurisprudence Van Gend en Loos, aff. 26-62.
19 La CJCE considère que l’application du droit communautaire doit se faire “dans le respect des formes et procédures du droit national” et que “la question de savoir de quelle façon l’exercice de ces pouvoirs et l’exécution de ces obligations peuvent être confiés par les états à des organes déterminés relève du système constitutionnel de chaque état”. Ou encore, plus récemment, que “le droit communautaire n’impose aux états membres aucune modification de la répartition des compétences et des responsabilités entre les collectivités publiques qui existent sur leur territoire”. Voir: CJCE, 11 février 1971, Norddeutsches Vieb und Fleischkontor/Hauptzollamt Hamburg St Annen, aff. 39/70, Rec., p. 49; CJCE, 15 décembre 1971, International Fruit
de s’ingérer dans l’organisation territoriale des états membres, a longtemps empêché la CJCE de donner des injonctions directes aux administrations régionales et locales en cas de non respect des obligations communautaires. Mais l’accroissement des disparités territoriales lié aux vagues de décentralisations a introduit de nouvelles problématiques à cet égard. Par exemple, comment ‘déployer la plénitude’ du droit de l’Union de manière ‘uniforme’ alors que les organisations territoriales présentent une géométrie variable ? Une jurisprudence plus récente, qui vise expressément les autorités décentralisées, a pour but de rendre le droit de l’Union plus effectif. A cet effet, elle suggère d’écarter l’intervention normative nationale en faveur d’une application directe du droit communautaire par les entités décentralisées.

En second lieu, cette mise à l’écart de la norme nationale s’avère problématique dans la mesure où elle n’est inscrite nulle part dans les textes :

“Lors de son application directe en droit interne, la norme communautaire viendra en conflit avec des lois nationales et déploiera d’autres effets. Elle commencera par se substituer à la loi nationale antérieure. Ensuite et en principe elle devra bloquer la compétence législative de l’état national dans le domaine considéré. Enfin, si toutefois l’état membre élabore une loi ultérieure contraire, c’est le problème de la priorité du droit communautaire qui se posera. Tous ces effets doivent être reliés aux effets produits par une disposition directement applicable en droit interne”.

La loi tombe en désuétude dès lors qu’une norme de rang normatif supérieur légifère dans le même domaine. L’hypothèse de conflits entre

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20 CJCE, 12 juin 1990, *RFA c/ Commission*, aff. 8/88, pt 13; “il incombe à toutes les autorités des états membres, qu’il s’agisse d’autorités du pouvoir central de l’état, d’autorités d’un état fédéré ou d’autres autorités territoriales, d’assurer le respect des règles du droit communautaire dans le cadre de leurs compétences”.


22 Le Professeur Pfersmann a démontré que cette approche renverse la hiérarchie des normes. Intervenant dans le même domaine de validité, la norme communautaire va s’imposer sur la norme nationale de rang inférieur. En nommant cette ‘supériorité à l’envers’ “le paradoxe de la concrétisation”, il explique que “si aucune autre règle n’intervient pour corriger ce résultat, la norme ayant le degré de concrétisation plus élevé va prévaloir sur celle ayant un haut degré d’abstraction et de généralité”. À ce titre, il se pose les questions suivantes: “dès lors que l’on crée des normes, deux problèmes se posent: comment éliminer celles dont on ne veut plus? que faire lorsque
législation communautaire et législation nationale demeure élevée.\textsuperscript{23} Se référant au principe de primauté du droit communautaire, l’arrêt \textit{Simmenthal} \textsuperscript{24} souligne que les normes communautaires “directement applicables ont pour effet, dans leurs rapports avec le droit interne des états membres, […] de rendre inapplicable de plein droit du fait même de leur entrée en vigueur toute disposition contraire de la législation nationale existante”.\textsuperscript{25} Plus qu’une simple application de la norme communautaire, la jurisprudence exige sa concrétisation en éliminant toute norme opposée.

Les jurisprudences nationales se sont par la suite alignées sur cette approche. La Cour constitutionnelle fédérale allemande - \textit{Bundesverfassungsgericht}, considère que ces collisions constituent un corollaire du fait que “l’ordre juridique des états membres et l’ordre juridique communautaire ne demeurent pas isolés l’un à côté de l’autre, mais sont à divers points de vue concernés l’un par l’autre, réciproquement limités et ouverts à des influences mutuels”\textsuperscript{26} Un tel phénomène est voué à croître avec l’extension des compétences de l’Union.\textsuperscript{27} En France, le Conseil d’Etat en a tiré les conséquences logiques; “lorsque la disposition communautaire est directement applicable, elle n’a pas besoin d’être reprise par une disposition d’ordre interne pour s’imposer”.\textsuperscript{28} Il reproduit


\textsuperscript{25} CJCE, \textit{Simmenthal}, ibid., pt 17.

\textsuperscript{26} BVerfGE 73, \textit{Solange II}, 339/368; “Kollisionen zwischen EG-Recht und nationalem Recht sind notwendige Folge der Tatsache, dass die mitgliedsstaatliche Rechtsordnung und die Gemeinschaftsrechtsordnung nicht unvermittelt und isoliert nebeneinander stehen, sondern in vielfältiger Weise aufeinander bezogen, miteinander verschränkt und wechselseitigen Einwirkungen geöffnet sind”.

\textsuperscript{27} Voir, en ce sens, M. ZULEEG, “Deutsches und europäisches Verwaltungsrecht wechselseitige Einwirkungen”, \textit{VVDStrRL} 53 (1994), S. 154 (158).

en ce sens de nombreuses décisions, tant européennes\textsuperscript{29} qu’allemandes\textsuperscript{30} ou françaises\textsuperscript{31} qui confirment cette conception et refusent de voir dans les normes nationales des ‘écrans’ entre la législation communautaire et son application par les organes compétents. À ce titre, une loi française du 23 décembre 2007 de simplification du droit introduit une disposition qui ne devrait pas être dénuée de conséquences, en énonçant l’obligation pour toute “autorité administrative […], d’office ou à la demande d’une personne intéressée, d’abroger expressément tout règlement illégal ou sans objet, que cette situation existe depuis la publication du règlement ou qu’elle résulte de circonstances de droit ou de fait postérieures à cette date”\textsuperscript{32}. Des positions similaires émergent progressivement au sein de chaque système juridique, afin de réguler la production accrue de normes juridiques.

La question reste cependant de savoir qui doit décider de la mise à l’écart de la norme nationale? Il paraît délicat de laisser ce pouvoir d’appréciation aux entités décentralisées, alors même que leur réglementation est généralement subordonnée à la législation nationale. Une coopération approfondie entre les différents niveaux concernés s’avère par conséquent indispensable.

## II. Des structures de coordination indispensables à une redéfinition de l’intervention des autorités nationales

Les autorités nationales ne disposereraient plus de la compétence d’appliquer le droit communautaire dans les domaines transférés, mais seulement d’un pouvoir de coordination des politiques communautaires et de contrôle des autorités décentralisées. Comme le soulignait la Commission européenne, en 2001, “l’existence et surtout le bon fonctionnement d’un système centralisé de coordination des divers ministères et/ou des différentes instances régionales et locales concernés est une condition essentielle de la bonne application du droit communautaire par les états membres”\textsuperscript{33}.

\textsuperscript{29} CJCE, Costanzo, op.cit., aff. 103/88; CJCE, 29 avril 1999, Erich Ciola/Land Vorarlberg, aff. C-224/97; CJCE, 13 janvier 2004, Kühne & Heitz NV/Productschap voor Pluimvee en Eieren, aff. C-453/00.

\textsuperscript{30} BverfGE 73, 339/368.


\textsuperscript{33} Rapport sur l’application du droit communautaire par les états membres et sur le contrôle de celle-ci par la Commission, contenant des recommandations en vue de les
Cette redéfinition constitue une transposition logique du fait que “l'intégration européenne, en agissant sur les droits nationaux, génère des effets sur les institutions représentant l'état au niveau local”. 34 Les autorités nationales, en tant que représentantes de l'état membre, demeurent responsables du respect des obligations communautaires. Leur intervention normative ne s'avère pas toujours requise, mais la coordination nationale des obligations communautaires et le contrôle administratif de leur respect demeurent indispensables. En Allemagne et en Grande-Bretagne, des moyens juridiques ont été mis en place pour assurer une certaine coordination dans l’application du droit communautaire. Par contre, en France, il n’existe pas de structure comparable.

Il ne faut cependant pas se tromper d’objet. Cette implication régionale ou locale ne dépend pas exclusivement de la nature législative ou réglementaire du pouvoir -legislation ou subordinated legislation-, dans la mesure où le droit communautaire ne prend pas en considération les différentes formes juridiques propres à chaque état membre. L’application du droit de l’Union “ne vient pas uniquement à prendre en considération les droits législatifs des échelons national et régional mais également [...] des villes, des communes et des régions dans le cadre de l’autonomie locale et régionale”. 35 L’intérêt doit surtout se porter sur l’étendue des domaines de compétences territoriales et sur la capacité des collectivités à les mettre en œuvre. Les décentralisations française, 36 écossaise 37 et galloise 38 ont attribué une autonomie régionale et locale dans des blocs distincts de compétences.

La coopération entre le Bund et les Länder est consubstantielle à la République fédérale d’Allemagne. De prime abord, la répartition des compétences fédérales et fédérées 39 assure une certaine autonomie des

39 GG, Articles 70–sv.
Länder dans leur gestion des questions européennes.\(^{40}\) Au même titre que la fédération, dans leurs domaines respectifs, les états fédérés jouissent d'un pouvoir législatif excluant toute ingérence fédérale; notamment dans les infrastructures routières, l'économie régionale, l'organisation scolaire et universitaire, la planification du Land, la politique urbaine et l'administration du Land. La responsabilité des Länder peut désormais être engagée dans l'hypothèse où la fédération aurait à supporter des sanctions prononcées par la CJCE.\(^{41}\)

Ensuite, soulignons l'importance de la participation des Länder, par la voie du Bundesrat, aux affaires européennes en vertu de l'article 23 alinéas 2 et 3 de la Loi fondamentale (Grundgesetz - GG), de la loi relative à la coopération entre la fédération et les Länder dans les affaires intéressant l’Union européenne (EUZBLG)\(^{42}\) et de la Convention Fédération-Länder (BLV)\(^{43}\) du 29 octobre 1993. Vis-à-vis des entités décentralisées au Royaume-Uni et en France, cette distinction est considérable dans la mesure où les Länder disposent d'un certain pouvoir en amont de l'élaboration du droit communautaire.

La coopération interne entre la fédération et les Länder s’exerce au sein des treize conférences ministérielles ainsi que des “missions communes”,\(^{44}\) qui permettent d’élaborer une coordination dans l’application des compétences respectives; “particulièrement en ce qui concerne les aides économiques et la politique des structures agricoles”.\(^{45}\) Le chancelier réunit autour de lui, plusieurs fois par an, les seize Minister-Präsidenten qui dirigent les exécutifs des Länder, afin de se concerter sur des problèmes économiques et sociaux importants et d’assurer une certaine cohésion de l’activité législative des Länder.

Si l’homogénéité du droit de l’Union a souvent été citée comme un moyen pour la fédération de fédéraliser certains domaines, la structure fédérale allemande assure une répartition claire des compétences respectives. Des problèmes similaires aux états à modèle centralisé se posent au sein-même des Länder à l’égard des communes (Gemeinden) et de leurs groupements (Kreisen). Celles-ci demeurent souvent soumises à l’organisation du Land, de manière à exclure toute applicabilité directe du droit de l’Union par les autorités communales.

\(^{40}\) Cf C. HASLACH, Die Umsetzung von EG-Richtlinien durch die Länder, Lang, 2001.
\(^{41}\) Article 104, alinéa 6 de la Loi fondamentale.
\(^{42}\) Europäische Zusammenarbeit von Bund und Länder Gesetz.
\(^{43}\) Bund-Länder Vertrag.
\(^{44}\) GG, Article 91.
Au Royaume-Uni, les *Devolution Acts* de 1998 et de 2006, qui accordent notamment des pouvoirs législatifs restreints à l’Écosse et au Pays de Galles, n’ont pas été suivis de règlements d’application mais d’actes politiques indispensables à la compréhension du système. Un *Memorandum of Understanding* (MOU),\(^46\) assorti d’une série de vingt-trois concordats, coordonne les relations entre l’Écosse, le Pays de Galles et Westminster. Ce principe sans portée juridique “*is of central importance for establishing the relations between the bodies to whom power has been devolved and Westminster*”.\(^47\) En effet, le MOU organise la communication et la consultation entre les différentes administrations, la coopération dans les domaines d’intérêts mutuels et l’échange d’informations. D’autre part, “ce memorandum est une déclaration d’intention et ne doit pas être interprété comme un texte obligatoire” puisqu’hui “il ne crée pas d’obligations légales”.\(^48\) Son alinéa 19 prévoit une implication étroite et complète des autorités régionales dans la coopération en matières européennes.

Les concordats, quant à eux, contiennent des principes procéduraux susceptibles d’assurer la stabilité des relations. En tant que documents dépourvu de force légale obligatoires “*non legally binding*”, ces instruments de travail\(^49\)/\(^50\) ne se constituent pas des contrats dont on pourrait demander l’exécution forcée. Cependant, la doctrine majoritaire en Grande-Bretagne, à l’instar des Professeurs Himsworth et Munro de l’Université d’Edimbourg,\(^51\) considère qu’un concordat pourrait être invoqué à l’appui d’une action en *Judicial Review*. Le raisonnement emprunté trouve sa source dans le principe de confiance légitime. En l’espèce, si les exécutifs écossais et gallois ne respectent pas les procédures décrites par un concordat, ils peuvent faire l’objet d’un recours sur le fondement de cette attente légitime. Présentée à l’occasion des travaux parlementaires de 1998,\(^52\) cette hypothèse n’a pas donné lieu à application. Ainsi, le *Concordat on co-ordination on European Union policy issues* s’attache à

\(^{46}\) *Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee*, Cm 5240, 2001.


\(^{48}\) MOU, § 2; “*this memorandum is a statement of political intent, and should not be interpreted as a binding agreement; it does not create legal obligations between the parties. It is intended to be in honour only*”.

\(^{49}\) MOU, § 3; “*concordats are not intended to be legally binding, but serve as working documents*”.

\(^{50}\) J. BELL, *RDP*, 2000, p. 425.


rendre cohérente la politique européenne entre les ministères britanniques et les entités décentralisées. Une section de ce concordat s’intéresse plus particulièrement à l’application du droit de l’Union. Elle précise premièrement que lorsqu’ils ont pris connaissance de nouvelles obligations communautaires, les ministères de Whitehall se doivent de notifier aux administrations dévolues les devoirs qui concernent leurs domaines de compétences, mais également les mesures qui sont adoptées par Westminster ou Whitehall dans les domaines non dévolus et qui peuvent affecter les entités décentralisées.

Enfin, le concordat dispose que si la législation européenne prévoit directement, dans les matières dévolues, l’adoption de mesures locales prises par l’Ecosse ou le Pays de Galles, le département ministériel compétent doit préalablement être consulté pour s’assurer de l’existence (ou non) d’une politique britannique plus étendue. En outre, dans les matières non dévolues mais ayant des effets sur les responsabilités régionales, un Joint Ministerial Committee (JMC) se réunit une fois par an autour des sujets relatifs à l’Europe, la santé et l’économie; ce qui “constitue une reconnaissance institutionnelle du fait que la dévolution crée plus une situation d’interdépendance que de séparation des pouvoirs”.

Ce cadre de coordination entre les entités dévolues et l’état central institue des procédures d’application du droit communautaire, même si les mesures qui les régissent n’apparaissent pas comme des normes de droit. Cette softlaw permet de placer hors du droit une partie du système de devolution. Cela permet aux autorités centrales de reprendre les commandes en cas de conflit de compétence en revenant aux seules normes juridiques qui disposent que le Minister of the Crown peut intervenir à tout moment pour assurer l’application du droit de l’Union.

En France, l’instauration récente d’une Conférence nationale des exécutifs locaux (CNE) pourrait laisser augurer le développement d’efforts en la

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53 B3. 16 à B3. 18.
54 “It will be the responsibility of the lead Whitehall Department formally to notify the devolved administrations at official level of any new EU obligation which concerns devolved matters and which it will be the responsibility of the devolved administrations to implement in Scotland, Wales or Northern Ireland (although the arrangements for policy formulation and negotiation described above should ensure that the devolved administrations are already aware of new obligations).”
55 B3. 19.
56 MOU, §§ 22–25.

En l’état actuel du droit, seul le préfet détermine “les orientations nécessaires à la mise en œuvre [...] des politiques nationales et communautaires” dans les territoires. Ses compétences de mise en œuvre de la politique de l’état dans des domaines aujourd’hui transférés à l’Union européenne –culture, emploi, santé publique, cohésion économique et sociale– évolue inexorablement avec le droit dérivé. Les services déconcentrés qu’il dirige opèrent une lente mutation d’une exécution vers une animation et une coordination des obligations communautaires. Chargé “des intérêts nationaux, du contrôle administratif et du respect des lois”, le préfet exerce un pouvoir de contrôle de légalité a posteriori qui...
lui permet notamment de saisir le tribunal administratif pour une décision qu’il estime contraire à la légalité; voire même, a priori, un pouvoir de substitution à l’action communale dans des cas extrêmes d’ilégalité.\textsuperscript{63} Prenant l’exemple de l’expérimentation de la gestion des fonds structurels,\textsuperscript{64} le Professeur Michel soutient que “cette organisation est bouleversée en raison du droit interne et non du droit communautaire, de sorte que les prérogatives du préfet risquent d’être modifiées”\textsuperscript{65} et orientées vers un rôle de coordination. La modernisation actuelle du contrôle de légalité des préfets\textsuperscript{66} et la réforme de l’administration territoriale de l’état\textsuperscript{67} doivent aussi mettre l’accent sur ces perspectives communautaires.

III. L’EXEMPLE DE L’APPLICATION DIRECTE DU DROIT COMMUNAUTAIRE DANS LE DOMAINE DES TRANSPORTS LOCAUX ET RÉGIONAUX

Fruit de la politique commune des transports,\textsuperscript{68} et substantiellement renforcé à de nombreuses reprises dans un contexte d’ouverture progressive des marchés à la concurrence,\textsuperscript{69} le règlement 1191/69 relatif à l’action des états membres en matière d’obligations inhérentes à la notion de service public dans le domaine des transports constituait jusqu’à peu “une source d’insécurité juridique qui se traduit déjà par une augmentation des contentieux”.\textsuperscript{70} Renuméroté 1370/2007,\textsuperscript{71} ce règlement

\textsuperscript{64} Article 44 de la loi 2004/809 du 13 août 2004 relative aux libertés et responsabilités locales JORF, 17 août 2004.
\textsuperscript{65} V. MICHEL, \textit{ibid}.
\textsuperscript{66} Circulaire du 17 janvier 2006 du ministre de l’intérieur et de l’aménagement du territoire relative à la modernisation du contrôle de légalité.
\textsuperscript{68} Titre V du traité CE.
\textsuperscript{69} Notamment modifié par les règlements No 101/73, 3572/90, 1893/91 (JO L 169 du 29.6.1991), 103/94.
\textsuperscript{71} Règlement (CE) N° 1370/2007 du Parlement européen et du Conseil du 23 octobre 2007 relatif aux services publics de transport de voyageurs par chemin de fer et par
(CE) définit la manière dont les états membres doivent garantir la fourniture de services d’intérêt général de transports de voyageurs - principalement par voies de chemins de fer et de bus- “de meilleure qualité que ceux que le simple jeu du marché aurait permis de fournir” et, ainsi, les conditions dans lesquelles ils octroient une compensation aux opérateurs. Il encadre ainsi l’intervention normative des autorités organisatrices des transports, au nombre desquelles figurent majoritairement les autorités régionales et locales. Définissant notamment les notions d’autorité locale compétente, d’obligation de service public, d’opérateur interne et de ‘services intégrés’, le règlement 1370/2007 fixe certaines règles de procédure de passation des marchés, généralise le principe de contractualisation - que l’opérateur soit public ou privé - et reconnaît la légitimité des compensations de service public reprise de la jurisprudence Altmark, tout en imposant des obligations de service public, tels que des services d’informations, un environnement sécurisé, une indemnisation des retards, et la qualité des prestations. Dans la plupart des états membres de l’UE, un système de concurrence régulée permet à l’autorité compétente d’attribuer un droit exclusif pour une période déterminée suite à un appel d’offres fixant le niveau de service, les normes de qualité et les tarifs. En tant qu’autorités organisatrices des transports, les entités décentralisées peuvent opter soit pour l’attribution directe à un ‘opérateur interne’, soit pour la mise en concurrence par appel d’offres.

Les négociations entre institutions ont longtemps buté sur ce point: la Commission souhaitait imposer une mise en concurrence obligatoire de tous les marchés de transports de voyageurs, tandis que le Conseil...
En reprenant les différents points exposés précédemment, on part du double constat suivant: d’une part, ce règlement est, par définition, directement applicable par les autorités compétentes; d’autre part, les autorités principalement compétentes en la matière s’avèrent être les autorités régionales et locales, à l’instar des collectivités territoriales françaises, des régions galloise et écossaise et des Länder allemands. Ceci amène la Commission à rappeler que “le principe de libre administration des collectivités locales, leur reconnaît le droit de choisir souverainement le mode de gestion de leurs services de transports collectifs”. Si les autorités nationales ont préalablement déterminé les pouvoirs des entités décentralisées conformément au principe d’autonomie institutionnelle, son intervention dans le cadre de ce règlement ne paraît, en l’espèce, pas nécessaire. Et toute législation intervenant sur la base d’autres dispositions internes dans le domaine des transports qui est contraire à cette réglementation doit être écartée. La finalité normative communautaire s’applique ainsi directement au niveau territorial. La jurisprudence Altmark de 2003 a exposé cette articulation de l’application

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78 Ce règlement n’entrera en vigueur qu’au 3 décembre 2009, laissant d’ici là le règlement 1191/69 modifié applicable, et des périodes de transition s’étalant jusqu’à 2019 sont également prévues pour certaines dispositions; ce qui atténue fortement son caractère immédiat.

79 Articles 14-1 (schéma régional des infrastructures et des transports), 21-1 (compétences régionales dans le domaine des services ferroviaires régionaux de voyageurs), 27 à 28-4 (transports urbains de voyageurs), 29 et 30 (transports non-urbains de voyageurs) de la loi No 82-1153 du 30 décembre 1982 d’orientation des transports intérieurs, JORF du 31 décembre 1982; article 34 (schéma régional d’aménagement et de développement du territoire) de la loi No 83-8 du 7 janvier 1983 à la répartition de compétences entre les communes, les départements, les régions et l’état.


81 Bien que le 1998 Scotland Act (SA) ne contiennent pas de liste précise de compétences dévolues, une étude plus approfondie des annexes permet de déduire les larges compétences dont dispose le parlement écossais (Scottish Parliament) dans le domaine des transports.

82 Article 73 de la Loi fondamentale au titre des compétences concurrentes.


84 Si cet arrêt est plus connu pour sa définition des compensations de service public, il a également confirmé que les compensations en faveur des transports publics locaux relèvent du règlement 1191/69. Les états membres qui n’appliquent pas ces règles manquent à leur obligation de veiller à la bonne application du droit.
directe de ce règlement aux entités décentralisées en imposant une détermination claire des obligations de services publics à la charge de l'entreprise bénéficiaire, sur la base de paramètres objectifs et transparents permettant de calculer raisonnablement la compensation nécessaire pour couvrir tout ou partie des coûts du service public. Lorsqu'il n'y a pas eu recours à une procédure de marché public, la compensation doit être déterminée sur "la base d'une analyse des coûts qu'une entreprise moyenne, bien gérée et adéquatement équipée [...] aurait encourus pour exécuter ces obligations". Des contentieux risquent néanmoins d'émerger lors des prochains renouvellements de contrats par les entités décentralisées, vu que la dernière version du règlement, combinée à la jurisprudence de la CJCE, impose des conditions de délivrance des contrats de service public plus rigoureuses.

**IV. Conclusion**


L’engouement pour la contractualisation de ces rapports a abouti, dans le domaine précédemment abordé des transports urbains de voyageurs, à la

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86 Cf considérants 89 à 95 de l’arrêt Altmark.

87 Un affaire actuellement pendante devant la CJCE s’inscrit dans cette continuité; Demande préjudicielle présentée le 19 novembre 2007 par le Supremo Tribunal Administrativo (Portugal), aff. C-504/07.

88 Article 12; Offrire trasporti pubblici efficienti sia sotto il profilo economico che del servizio prestato obiettivi generali e azioni.
signature d'une convention tripartite\textsuperscript{89} entre la Commission européenne, le Gouvernement italien et la région de Lombardie.\textsuperscript{90} Cependant, aucune suite ne lui a été donnée. En effet, contractualiser les actuels rapports de subordination entre l'UE, les états membres et leurs autorités subnationales n'est guère à l'ordre du jour dans les capitales européennes. La tendance penche plutôt en faveur d'une consolidation de la hiérarchie des normes européennes, nationales et territoriales, et d'une responsabilité collective accrue des intervenants.

\textsuperscript{89} Les contrats et conventions tripartites, introduits en 2002, font actuellement l'objet d'une révision pour les remplacer par des pactes territoriaux européens destinés à corriger les lacunes des premiers. D'une part, les états fédéraux ne voyaient pas la nécessité de les mettre en œuvre dans la mesure où les entités fédérées participent déjà, conformément à leur système constitutionnel, à l'élaboration et à l'application du droit communautaire. D'autre part, dans les états de tradition unitaire, le niveau national demeure réticent à accorder plus de pouvoirs aux entités décentralisées.

\textsuperscript{90} Voir: The European Commission, Italy's government and the Region of Lombardy, have signed the first ever Tripartite Agreement in Milan on 15 October 2004, \url{http://ec.europa.eu/governance/whatsnew_en.htm}. Son fondement juridique était néanmoins critiquable; Communication de la Commission du 11 décembre 2002 sur un cadre pour des contrats et des conventions tripartites d'objectifs entre la Communauté, les états et les autorités régionales et locales, COM (2002) 709 final.
**AUSWEITUNG DER PARTEIAUTONOMIE UND OBJEKTE ANKNÜPFUNG IM ERBKOLLISIONSRECHT**

Christian Nick

**I. EINLEITUNG**

In neuerer Zeit wird das Internationale Privatrecht auf europäischer Ebene in bisher nicht gekanntem Umfang vereinheitlicht. Damit ist die Gelegenheit verbunden, das in Bezug auf auslandsbezogene Sachverhalte räumlich beste Recht mit Rücksicht auf die Natur der zu regelnden Rechtsverhältnisse neu festzulegen. Der Gedanke, dass nicht ein gewisser territorialer Bezug des zu beurteilenden Sachverhalts, sondern der Wille des oder der Betroffenen ausschlaggebend für die Bestimmung des anwendbaren Rechts sein soll (Parteiautonomie), scheint allgemein an Bedeutung zu gewinnen. Zwar kamen bei der Reform des Internationalen Vertragsrechts nur inkrementelle Veränderungen in Betracht, zumal die parteiautonome Wahl des anwendbaren Rechts bereits de lege lata zum Kern der in Rede stehenden Materie zählt. Doch wird der subjektiven Anknüpfung nicht nur im Rahmen der koordinationsrechtlichen Beurteilung außertraglicher Schuldverhältnisse etwa im Vergleich zur bisherigen deutschen Rechtslage mehr Raum gegeben. ¹ Auch im Bereich des Internationalen Personen-, Familien- und Erbrechts, wo die Rechtswahlfreiheit innerhalb Europas traditionell gering ausgeprägt ist, zeichnet sich ein Trend zur Ausweitung der Parteiautonomie ab.

Im Folgenden sollen zunächst einschlägige Meinungen zur Neugestaltung des Internationalen Erb- und Familienrechts einen Ausgangspunkt bilden (II). Danach werden wesentliche Eigenschaften der subjektiven und objektiven Anknüpfung beleuchtet; auch mit Blick auf die Frage, inwieweit ein Zusammenhang zwischen der Ausweitung der Parteiautonomie und einer Neugestaltung der objektiven Anknüpfung im Erbkollisionsrecht bestehen könnte (III). Der Beitrag widmet sich darüber hinaus dem Hintergrund des gegenwärtigen Ausbaus der professio iuris, zu dem nicht nur Auffassungen über das Verhältnis von Sach- und Kollisionsrecht zählen (IV), sondern auch Interpretationen gemeinschaftsrechtlicher

II. AUSPRÄGUNGEN DER TENDENZ ZU MEHR PARTEIAUTONOMIE

1. Internationales erbrecht

Auf der Suche nach konsensfähigen Ansätzen zur Lösung der Problematik einer grenzüberschreitenden Nachlassplanung und -abwicklung unterbreitete die EU-Kommission in ihrem Grünbuch zum Internationalen Erbrecht² weitreichende Vorschläge und vor allem Fragen, unter anderem Frage 5; “Sollte dem Erblasser (im Rahmen einer testamentarischen oder gesetzlichen Erbfolge) die Möglichkeit zugestanden werden, das Erbstatut mit oder ohne Zustimmung seiner mutmaßlichen Erben zu wählen? Sollte diese Rechtswahl auch den Erben nach Eintritt des Erbfalls zugestanden werden?” Sie begründete ihr Vorgehen mit dem Schutz der berechtigten Erwartungen der Beteiligten, wenngleich die meisten Mitgliedstaaten der Europäischen Union eine Rechtswahl des Erblassers oder der Erben beim Erbstatut nicht zulassen würden.³

a. Das Verhältnis von objektiver und subjektiver anknüpfung

Internationale Reaktionen auf das Grünbuch lehnen eine Einbeziehung der (mutmaßlichen) Erben in den Kreis der Wahlberechtigten, soweit ersichtlich, überwiegend ab; teils wegen der Schwierigkeit, die mutmaßlichen Erben zu bestimmen, teils mit Blick auf die Testierfreiheit des Erblassers. ⁴ Die Beachtlichkeit einer begrenzten Wahl des

³ Siehe Punkt 2 (4) des unter der vorangehenden Fußnote erwähnten Grünbuchs. In der Tat kann zum Beispiel der deutsche Erblasser erst seit der Reform des Kollisionsrechts aus dem Jahre 1986 lediglich für sein im Inland belegenes unbewegliches Vermögen deutsches Recht als Erbstatut wählen, Artikel 25 Absatz 2 EGBGB.


b. Wähbarkeit nichtstaatlichen rechts?


festlegen, so kann in einem solchen Rechtsakt vorgesehen werden, dass die Parteien entscheiden können, diese Regeln anzuwenden".13


2. Internationales familienrecht

Der Parteiautonomie breiteren Raum geben Maßnahmen im Bereich des Familienrechts. Der am 17 Juli 2006 vorgelegte und vom Rat inzwischen grundsätzlich gebilligte16 Vorschlag für eine Verordnung des Rates zur Änderung der Verordnung (EG) No 2201/2003 (Brüssel II a) im Hinblick auf die Zuständigkeit in Ehesachen und zur Einführung von Vorschriften betreffend das anwendbare Recht in diesem Bereich ("Rom III") hält die Einführung einer Wahlmöglichkeit für erforderlich, die auf bestimmte Rechtsordnungen beschränkt ist, zu denen die Ehegatten einen engen

14 Europäischer Wirtschafts- und Sozialausschuss, Stellungnahme, supra note 7, auf S. 2.
Bezug haben.\(^{17}\) Die Kommission begründete ihre Initiative damit, dass für das Prinzip der Parteiautonomie in Ehesachen derzeit wenig Platz sei,\(^ {18}\) obwohl sich Bürger eng mit einem Mitgliedstaat verbinden fühlen könnten, dessen Staatsangehörigkeit sie nicht besitzen. Ferner könne es von Vorteil sein, wenn sich Ehegatten untereinander einigen könnten.\(^ {19}\)

Darüber hinaus hat die Kommission am 15. Dezember 2005 den Vorschlag für eine Verordnung des Rates vorgelegt, welche unter anderem das anwendbare Recht in Unterhaltsachen regeln soll.\(^ {20}\) Darin wird unter Artikel 14 in gewissen Grenzen eine auf bestimmte Rechtsordnungen beschränkte Wahlfreiheit verankert.\(^ {21}\) Auch diese Initiative ist bislang - soweit ersichtlich - nicht beanstandet worden.\(^ {22}\)

Was schließlich das Grünbuch zum Güterrecht betrifft, so ist hier die Rechtswahlfreiheit ebenfalls von Bedeutung, was aber im Hinblick auf die bisherige Rechtslage in den meisten Mitgliedstaaten keine Neuerung darstellt.\(^ {23}\)

III. PARTEIAUTONOMIE UND OBJEKTE ANKNÜPFUNG

1. Vorüberlegung

Trägt nun die oben beschriebene Tendenz zur Ausweitung der


\(^{18}\) *Ibid.*, S. 4; So würden die einzelstaatlichen Kollisionsnormen in der Regel nur eine Lösung für einen bestimmten Fall vorsehen und in dieser Hinsicht zum Beispiel die Anwendung des Rechts eines Staates vorsehen, dessen Staatsangehörigkeit beiden Ehegatten gemeinsam ist, oder die Anwendung des Rechts des Gerichtsstandes.


\(^{21}\) Siehe dazu auch den Erwägungsgrund 16; anders hingegen bisher das deutsche Recht, welches einer Parteiautonomie im Zusammenhang mit Artikel 18 EGBGB keinen Raum gibt.


Parteiautonomie eher dem Bedürfnis einer zunehmend mobilen Gesellschaft nach Voraussehbarkeit des anwendbaren Rechts Rechnung oder steht vielmehr die “Emanzipation” des einzelnen im Vordergrund? Handelt es sich mit anderen Worten bei der Aufwertung der professio

iuris mehr um eine “Verlegenheitslösung” 24 zur Korrektur einer unzureichenden objektiven Anknüpfung oder geht es darum, die Selbstbestimmung des Individuums zurückzuverlangen?25 Letzteres könnte im Bereich des Erbrechts mit Blick auf die (Grenzen der materiellrechtlichen) Testierfreiheit des Erblassers problematisch sein. So wird beispielsweise im deutschen Recht der Mangel an Parteiautonomie im Erbkollisionsrecht damit begründet, dass eine grenzenlose Rechtswahlmöglichkeit wegen der Existenz von Rechtsordnungen, die keine Pflichtteils- oder Noterbrechte kennen, zur Umgehung der deutschen Schranken der Testierfreiheit führen könnte.26

Die aufgeworfenen Fragen nach dem “roten Faden”, dem die gegenwärtige Europäisierung des Kollisionsrechts zu folgen gedenk oder folgen sollte, wird den Gang der nachstehenden Abhandlung ebenso begleiten wie die Entwicklung möglicher Folgerungen in Bezug auf die Neugestaltung der objektiven Anknüpfung.

2. Rechtfertigung der parteiautonomie
a. Äußere und innere rechtfertigung

Der Gedanke, dass nicht räumliche Gegebenheiten, sondern der Wille der Parteien ausschlaggebend für die Bestimmung des anwendbaren Rechts sein soll, scheint sich schlecht mit den heute noch beachteten, auf objektiver Lokalisation von Rechtsverhältnissen beruhenden klassischen kollisionsrechtlichen Theorien zu vertragen. 27 Doch war auch die Parteiautonomie schon in den Konzepten der Mitte des 19. Jahrhunderts wirkenden “Klassiker” angelegt.28 Rechtfertigen lässt sie sich zum einen

durch ihre Verankerung im geltenden staatlichen Recht (äußere Rechtfertigung): Nur das maßgebende Kollisionsrecht könne die Wahl der anzuwendenden Sachnormen dem Ermessen der Beteiligten anheimstellen, nicht aber umgekehrt die Freiheit des einzelnen als erster Ausgangspunkt für die Bestimmung der maßgebenden Rechtsordnung dienen.\textsuperscript{29} In diesem Zusammenhang mag die Funktion von Anknüpfungsregeln von Bedeutung sein: Kollisionsnormen sollen einerseits den Eigenheiten des Einzelfalls Rechnung tragen, andererseits aber eine voraussch manuscriptable Antwort auf die Frage der Rechtsanwendung geben, das heißt Rechtssicherheit gewährleisten.\textsuperscript{30}

Die innere (rechtspolitische) Berechtigung der freien Rechtswahl wird mitunter aus dem Grundsatz in dubio libertas hergeleitet: Wenn der Gesetzgeber sich nicht entschließen könne, den Beteiligten ein bestimmtes Statut aufzuzwingen (durch Festlegung einer nicht manipulierbaren Anknüpfung) oder überhaupt eine Anknüpfung vorzuschreiben, gebe er ihnen die Freiheit der Rechtswahl.\textsuperscript{31} In diese Richtung weist ferner die Ansicht, dass die Anknüpfung an objektive Merkmale (dazu unten C) stets unter dem Dilemma leide, entweder zu rigide oder zu vage zu sein.\textsuperscript{32} Außerdem wüssten die Parteien in der Regel selbst am besten, welches Recht ihnen fromme.\textsuperscript{33} Als Argument für die Rechtswahl ist unter anderem auch vorgebracht worden, dass sie das Verfahren vereinfache. Die für die objektive Anknüpfung maßgeblichen Umstände müssten nicht mehr festgestellt werden. Die Nachlassabwicklung werde für Gerichte, Behörden, Notare und Erben leichter, schneller und billiger sein.\textsuperscript{34} Schließlich wird ausgeführt, dass die Rechtswahl in einer globalisierten Welt in idealer Weise die

\textsuperscript{32} D. MARTINY, in K. REBMANN, F.J. SÄCKER und R. RIXECKER, \textit{Münchener Kommentar zum Bürgerlichen Gesetzbuch}, 4 Aufl., supra note 30, EGBGB Artikel 27 II § 1 (a).
\textsuperscript{33} So vor allem in Bezug auf das Internationale Vertragsrecht S. LEIBLE, “Parteiautonomie im IPR”, supra note 24, auf S. 487 mit weiteren Argumenten und Nachweisen.
\textsuperscript{34} Siehe dazu H. DÖRNER et al., “Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht”, supra note 6, auf S. 5.
Verwirklichung von Identitätsinteressen und Anpassungsprozessen ermögliche.\textsuperscript{35}

b. Rechtswahl als konsensfähige Lösung

Die verschiedenen Kollisionsrechte der EU-Mitgliedsstaaten kennen unterschiedliche Wege zur objektiven Bestimmung des anwendbaren Rechts. Die vielfältigen Möglichkeiten an objektiven Anknüpfungsmomenten erklärt die Notwendigkeit einer konsensfähigen Lösung auf europäischer Ebene. Als “Eckpfeiler” dieser Lösung kann im Prinzip die Festschreibung der Rechtswahlfreiheit fungieren. Denn die Aufgabe traditioneller Rechtsvorstellungen wird den betreffenden Mitgliedsstaaten leichter fallen, wenn es einem Erblasser wenigstens freisteht, die traditionell geltende Anknüpfung im Wege der Rechtswahl wiederherzustellen.\textsuperscript{36}

Wie gespalten Europa in puncto objektive Anknüpfung des Personalstatus tatsächlich ist, dokumentiert die Geschichte der Abkommen, die im Rahmen der Haager Konferenz entwickelt wurden: Als zu Beginn des zwanzigsten Jahrhunderts die ersten fünf internationalprivatrechtlichen Konventionen abgeschlossen wurden, konnte noch von einer Dominanz der Anknüpfung an die Staatsangehörigkeit (Staatsangehörigkeits- oder Heimatrechtsprinzip) gesprochen werden.\textsuperscript{37} Bereits im Jahre 1977 bemerkte man aber im Schrifttum, dass sich das Staatsangehörigkeitsprinzip seit etwa zwei Jahrzehnten auf dem Rückzug befinde.\textsuperscript{38} Heute wird der “Abschied vom Staatsangehörigkeitsprinzip”\textsuperscript{39} von vielen in Betracht gezogen oder befürwortet.\textsuperscript{40} Vor allem im neueren -wohl durch die Aktivitäten auf

\textsuperscript{35} Siehe S. LEIBLE, “Parteiautonomie im IPR”, supra note 24, S. 501 mit weiteren Nachweisen.
\textsuperscript{36} H. DÖRNER \textit{et al.}, “Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht”, supra note 6, S. 5.
europäischer Ebene beflügelten Schrifttum finden sich Darstellungen, die ausführlich den gegenwärtigen Stand der Diskussion um die Anknüpfung an die lex patriae zusammenfassen. Die allmähliche Umstellung von der Staatsangehörigkeit auf den gewöhnlichen Aufenthalt scheint ihren ersten entscheidenden Impuls durch den Beschluss der Haager Konferenz von 1928 erhalten zu haben, das Anknüpfungskriterium “gewöhnlicher Aufenthalt” für Staatenlose zu verwenden; sie wurde später namentlich durch die weitgehend auf dem Aufenthaltsprinzip fußenden Übereinkommen über den Unterhalt und den Minderjährigenschutz gestärkt.


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Auch in internationalen Reaktionen auf das erwähnte Grünbuch der Kommission zum Erb- und Testamentsrecht ist die objektive Anknüpfung umstritten, doch findet der Ort des gewöhnlichen Aufenthalts, den die Kommission als im Vergleich zum Heimatrechtsprinzip “modernere Lösung” bezeichnet, als Anknüpfungskriterium breite Zustimmung.

3. Grundlagen der objektiven anknüpfung

a. Das Ziel des räumlich besten rechts


Dreh- und Angelpunkt der objektiven Anknüpfung sind die Anknüpfungskriterien oder -momente. Bei ihnen handelt es sich um rechtliche Merkmale, welche dem im Tatbestand einer Verweisungsnorm

46 S. die Einführung zu dem supra note 2 genannten Grünbuch Erb- und Testamentsrecht.
51 Y. NISHITANI, Mancini und die Parteiautonomie, supra note 25, auf S. 337.

b. Merkmale denkbarer anknüpfungskriterien

Die Problematik der objektiven Anknüpfung lässt sich also nicht durch ein einzig richtiges Anknüpfungskriterium lösen, was die europaweit unterschiedlich gefassten Kollisionsnormen und der geschilderte Aufstieg und Fall des Staatsangehörigkeitsprinzips verdeutlichen (siehe dazu oben III B 2). Dieser Umstand gibt nun Raum für eine einheitliche Strategie. Denn die in Betracht kommenden Anknüpfungsmomente können, wie die folgenden Ausführungen zeigen werden, einmal mehr der Rechtssicherheit dienen und einmal mehr mit einer bestimmten Willensbildung zusammenhängen. Besteht einmal Klarheit über die erwähnte Richtschnur hinsichtlich der gegenwärtigen Ausweitung der Parteiautonomie, ließe sich durch entsprechende Gestaltung der objektiven Anknüpfung eine in sich widerspruchsfreie, kohärente und konsequente Gesetzgebung verwirklichen.

i. Staatsangehörigkeit

Es entspricht dem in Artikel 2 Ziffer 1 UN-Charta verankerten Grundsatz der souveränen Gleichheit aller Staaten und geltendem Völkerewnętrohnheitsrecht, dass jeder Staat zur Regelung seiner

54 Die Frage der Vorzugswürdigkeit eines dieser Kriterien stellte sich jüngst in Deutschland in Bezug auf die vom deutschen Bundesverfassungsgericht für erforderlich gehaltene Neuregelung des Transsexuellengesetzes, siehe J.M. SCHERPE, “Antrag auf Namensänderung ausländischer Transsexueller”, supra note 41, passim.
Staatsangehörigkeit allein berufen ist.\textsuperscript{56} Kollisionsrechtlich hat dies zur Konsequenz, dass sich die Frage der Staatsangehörigkeit einer Person grundsätzlich nach dem Recht des in Anspruch genommenen Staates beantwortet.\textsuperscript{57} Je nach der Politik eines nationalen Gesetzgebers beruht die Staatsangehörigkeit auf höchst unterschiedlichen Kriterien, was bei Zugrundelegung des Heimatrechtsprinzips zu einer unterschiedlichen kollisionsrechtlichen Gewichtung führen kann.\textsuperscript{58} Auch haben die Fälle zugenommen, in denen eine Person mehrere Staatsangehörigkeiten besitzt.\textsuperscript{59}

Die mit dem Vertrag von Maastricht aus der Taufe gehobene Unionsbürgerschaft hat die von der Staatsangehörigkeit vermittelte Bindung der Bürger an die Mitgliedstaaten nicht in Frage gestellt. Gemäß Artikel 17 Absatz 1 EG-Vertrag ist der Status des Unionsbürgers zur Staatsangehörigkeit der Mitgliedstaaten hinzugerechnet, ohne diese zu ersetzen.\textsuperscript{60} Die Unionsbürgerschaft wird allein durch die Staatsangehörigkeit der Mitgliedstaaten vermittelt.\textsuperscript{61}

Den Menschen steht es mithin nicht frei, jederzeit die gewünschte Staatsangehörigkeit zu erwerben. Bald entscheidet über die Staatsangehörigkeit die Eingliederung in eine Familie durch Abstammung, Adoption oder Eheschließung, bald ein räumliches Moment (wie Geburts- oder Aufenthaltsort); dabei wird der eigene Wille des Betroffenen in sehr unterschiedlichem Maße beachtet.\textsuperscript{62}

Inwieweit das Heimatrechtsprinzip der Rechtssicherheit dient, hängt vom Standpunkt des Betrachters ab, wobei vor allem zwischen dem Parteiinteresse und demjenigen des Verkehrs zu unterscheiden ist: Da die Staatsangehörigkeit im Allgemeinen nicht nur stabiler, sondern auch


\textsuperscript{57} Ibid.


\textsuperscript{59} Ibid.


\textsuperscript{61} EG-Vertrag, Artikel 17 Absatz 1 Satz 2.

\textsuperscript{62} J. KROPHOLLER, Internationales Privatrecht, 5 Aufl., supra note 40, auf S. 268.

**ii. Wohnsitz**

Der normative, verrechtlichte Wohnsitz des deutschen Sachrechts ist vor allem durch folgende drei Merkmale gekennzeichnet. Erstens kann eine Person gleichzeitig an mehreren Orten einen Wohnsitz haben (§ 7 Absatz 2 Bürgerliches Gesetzbuch - im Folgenden “BGB”). Der Wohnsitz wird zweitens durch einen Willensakt begründet und wieder aufgehoben (§ 7 Absatz 1 und 3 BGB). Drittens hat ein Kind einen von dem Wohnsitz des Personensorgeberechtigten abgeleiteten Wohnsitz (§ 11 BGB) und kann - wie andere Personen, die nicht voll geschäftsfähig sind - ohne den Willen seines gesetzlichen Vertreters einen Wohnsitz weder begründen noch aufheben (§ 8 Absatz 1 BGB). Der Wohnsitzbegriff divergiert von Land zu Land stark. Im Kern stimmen jedoch die meisten Rechtsordnungen darin überein, dass zum selbständigen Erwerb eines Wohnsitzes factum und animus gehören, das heißt der tatsächliche Aufenthalt am

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66 C. STERN, *Das Staatsangehörigkeitsprinzip in Europa*, *supra* note 41, auf S. 42 ff.
betreffenden Ort und der Wille, dort für lange Zeit – wenngleich mit möglichen Unterbrechungen – zu bleiben.\textsuperscript{72}

iii. Der ort des gewöhnlichen aufenthalts

Eine international verbindliche Definition des gewöhnlichen Aufenthalts existiert nicht.\textsuperscript{73} Auch im Römischen EWG-Übereinkommen über das auf vertragliche Schuldverhältnisse anzuwendende Recht (nachstehend “EVÜ”)\textsuperscript{74} und der Verordnung (EG) No 44/2001 des Rates vom 22 Dezember 2000 über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (“EuGVO”)\textsuperscript{75} wird der Begriff “gewöhnlicher Aufenthalt” lediglich vorausgesetzt.\textsuperscript{76}

Nach Empfehlungen des Europarates sind für die Frage, ob ein Aufenthalt als gewöhnlicher anzusehen ist, die Dauer und die Beständigkeit sowie andere Umstände persönlicher oder beruflicher Art zu berücksichtigen, die dauerhafte Beziehungen zwischen einer Person und ihrem Aufenthalt anzeigen.\textsuperscript{77} Eine Analyse der kollisionsrechtlichen Literatur und Rechtsprechung verschiedener europäischer Länder kommt darüber hinaus zu dem Ergebnis, dass im Wesentlichen zwei unterschiedliche Auffassungen darüber bestünden, wie der Begriff des gewöhnlichen Aufenthalts zu verstehen sei:\textsuperscript{78} Nach dem einen Interpretationsstrang sei der Begriff allein durch das Kriterium der zeitlichen Länge und Regelmäßigkeit des Aufenthalts zu bestimmen.\textsuperscript{79} Nach der anderen Ansicht soll es für die Begründung eines gewöhnlichen Aufenthalts in

\textsuperscript{72}\textit{Ibid.}, auf S. 278.
\textsuperscript{73} D. BAETGE, \textit{Der gewöhnliche Aufenthalt im internationalen Privatrecht}, Tübingen, Mohr 1994, S. 149.
\textsuperscript{75} \textit{Amtsblatt der Europäischen Union}, 16 Jan. 2001, L12, S. 1.
\textsuperscript{78} Siehe dazu D. BAETGE, \textit{Der gewöhnliche Aufenthalt, \textit{supra} note 73}, S. 149 ff.
erster Linie auf die tatsächliche Bindungen der Anknüpfungsperson zum Aufenthaltsort ankommen (Integrationsfaktor).


Im Ergebnis handelt es sich beim gewöhnlichen Aufenthalt um ein flexibles Anknüpfungskriterium. Die Konkretisierungsbedürftigkeit der üblichen Definitionen mag bei den Verfassern des EVÜ Zweifel in Bezug auf die Tauglichkeit des fraglichen Kriteriums geweckt haben. Sie sollen sich schließlich gegen eine Ersetzung des Wohnsitzes durch den gewöhnlichen Aufenthalt unter anderem mit der Begründung ausgesprochen haben, dass letzterer nicht sicher genug definierbar und ein zu flüchtiges Anknüpfungsmoment sei.

Was die gewisse “Willensarmut” des in Rede stehenden Anknüpfungsmoments betrifft, so besteht diese zwar insofern, als ein Wille, den Aufenthaltsort zum Mittelpunkt oder Schwerpunkt der Lebensverhältnisse zu machen, für die Begründung eines gewöhnlichen Aufenthalts nicht erforderlich ist. Andererseits ist der relevante Daseinsmittelpunkt anhand von Indizien zu bestimmen, die zeitliche wie vor allem integrationsbezogene Umstände einschließen dürften. Dabei wird in Bezug auf letzteren Aspekt insbesondere der Wille, auf Dauer am Aufenthaltsort zu verweilen, als wesentliches Indiz in Betracht zu ziehen sein.

iv. Domicile

80 Urteil des Bundesgerichtshofs (nachstehend “BGH”), Rs. IV ZR 103/73, 5/2/1975, Neue Juristische Wochenschrift, 1975, S. 1068.
82 J. KROPHOLLER, Europäisches Zivilprozessrecht, supra note 76, Artikel 59 Rn 2.
84 D. BAETGE, Der gewöhnliche Aufenthalt, supra note 73, S. 151; ähnlich C. VON BAR und P. MANKOWSKI, Internationales Privatrecht, 2 Aufl., supra note 70, S. 566; Der Daseinsmittelpunkt einer Person lasse sich kaum rein objektiv, also ohne Bedachtnahme auf deren Willen, ermitteln.

Der Rechtssicherheit dient nicht nur der Umstand, dass jede Person nur ein Domizil haben kann. Der englische Domizilbegriff ist ähnlich starr wie die Staatsangehörigkeit: Jeder Mensch hat ein domicile of origin, das nur selten durch ein domicile of choice ersetzt wird, weil an dessen Begründung strenge Anforderungen gestellt werden. Es ist im Allgemeinen auch leichter, den Wechsel von einem Wahldomizil zum

86 L. COLLINS et al., Dicey and Morris on the Conflict of Laws, 13 Aufl., supra note 85, Rn 6-004-ff; “domicile is an idea of law”.
90 L. COLLINS et al., Dicey and Morris on the Conflict of Laws, 13 Aufl., supra note 85, Rn 6-005.
92 C.M.V. CLARKSON und J. HILL, The Conflict of Laws, 3 Aufl., supra note 85, S. 23 m. w. N.

IV. VERHÄLTNIS VON SACH- UND KOLLISIONSREcht

1. Das verhältnis im allgemeinen


Im Schrifttum wird ein Einklang von europäischem Sach- und

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93 Ibid.
94 Ibid., auf S. 41.
95 L. COLLINS et al., Dicey and Morris on the Conflict of Laws, 13 Aufl., supra note 85, Rn 6-123 m. w. N.
Kollisionsrecht teils ausdrücklich befürwortet\textsuperscript{99} und auch sonst lassen sich immer mehr Ansätze finden, nach denen materiellrechtliche Wertungen im Rahmen der Anknüpfung herangezogen werden.\textsuperscript{100} In diesem Sinne soll zwar stets eine gesonderte kollisionsrechtliche Wertung erforderlich sein, die aber zwangsläufig auch durch den Inhalt der Sachnorm und die durch sie materiell geschützten Interessen geprägt werde.\textsuperscript{101}

Aktuelle Stellungnahmen zum erwähnten Grünbuch Erb- und Testamentsrecht vermengen entweder Sach- und Kollisionsrecht oder bringen das nötige Problembewusstsein nicht zum Ausdruck. So dürfte beispielsweise ein der Kommission zur Vorbereitung des Grünbuchs Erb- und Testamentsrecht vorgelegtes Gutachten im Sinne einer mehr oder weniger großen Rücksichtnahme auf die materiellrechtliche Testierfreiheit gefärbt sein.\textsuperscript{102} Deutlicher äußert sich in diesem Sinne die Stellungnahme des Deutschen Anwaltvereins.\textsuperscript{103}

2. Rechtfertigung der parteiautonomie, fortsetzung

Was die Frage nach der Rechtfertigung der Parteiautonomie als solche betrifft, so wird teils ein gewisser Zusammenhang zwischen materiellrechtlicher und kollisionsrechtlicher Freiheit gesehen.\textsuperscript{104} Die materiellrechtlichen Wertungen würden in gewissem Umfang auf das Kollisionsrecht durchschlagen: Wo materiellrechtliche Privatautonomie


\textsuperscript{101} M. WANDT, \textit{Internationale Produkthaftung}, \textit{supra} note 50, S. 246 m. w. N.

\textsuperscript{102} H. DÖRNER \textit{et al.}, “Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht”, \textit{supra} note 6, S. 5; “Die von allen Mitgliedstaaten im materiellen Erbrecht gewählte Testierfreiheit würde hier in den Bereich des Kollisionsrechts hinein verlängert”.


bestehe, sei in der Regel auch gegen eine kollisionsrechtliche Parteiautonomie nichts einzuwenden.

Rechtsdogmatisch ließe sich dieser Zusammenhang entweder kritisieren oder damit begründen, dass hier die Maxime der Wertneutralität des Internationalen Privatrechts zu relativieren ist bzw. gar nicht berührt wird. Welcher Meinung man auch immer folgt: Sachs- und Kollisionsrecht sollten im Prinzip nicht nur in rechtsdogmatischer Hinsicht, sondern auch mit Blick auf die nachfolgend genannte Kompetenzfrage (siehe unten unter V.B) sorgfältig auseinander gehalten werden.

3. Berücksichtigung von pflichtteils- oder noterbrechten

Der Umgang des Schrifttums mit den in Rede stehenden Interessen Dritter fällt unterschiedlich aus: Teils wird die rechtstatsächliche Bedeutung des Problems relativiert oder darauf hingewiesen, dass eine Beschränkung der Rechtswahl allein den fraglichen Schutz nicht bewirken könne. Auch könne der Erblasser bei einer objektiven Anknüpfung an den letzten gewöhnlichen Aufenthalt einen unerwünschten Angehörigenschutz durch sein Heimatrecht bereits ohne Rechtswahl dadurch vermeiden, dass er seinen gewöhnlichen Aufenthalt aus seinem Heimat- in einen Mitgliedstaat mit geringeren Beschränkungen der Testierfreiheit verlege und diesen bis zum Tode beibehalte.


105 S. LEIBLE, “Parteiautonomie im IPR”, supra note 24, auf S. 488; Parteiautonomie sei “Ausfluss eines überpositiven Autonomie- und Freiheitsgedankens”.
107 Ibid.
108 Ibid.

Aus deutscher Perspektive ist diese Ansicht allerdings nicht unumstritten. Denn die Rechtsprechung vertrat bislang den Standpunkt, dass die Versagung eines Pflichtteils im ausländischen Recht keinen Verstoß gegen den deutschen ordre public enthalte. An der Richtigkeit dieses Ergebnisses bestehen aber Zweifel, nachdem das Bundesverfassungsgericht eine grundsätzlich unentziehbare und bedarfsunabhängige Mindestbeteiligung der Kinder als von der Erbrechtsgarantie des Artikel 14 Absatz 1 Satz 1 Grundgesetz für die Bundesrepublik Deutschland (nachstehend “GG”) umfasst sieht, und auch das erbrechtliche Schrifttum scheint überwiegend der Ansicht zu sein, das Pflichtteilsrecht der Abkömmlinge und des Ehegatten genieße über Artikel 14 Absatz 1 Satz 1 GG bzw. Artikel 6 Absatz 1 GG verfassungsrechtlichen Schutz, so dass eine vollständige Abschaffung als verfassungswidrig anzusehen wäre.

Schließt man sich der zuletzt genannten Auffassung an, bedeutet dies freilich nicht automatisch die Erfüllung von Artikel 6 EGBGB, obgleich sich dessen Satz 2 explizit auf Grundrechtsverstöße bezieht. Vielmehr bedarf es der weiteren Prüfung, ob das betreffende Grundrecht nach seinem Inhalt und Zweck uneingeschränkt Geltung auch für den konkreten Sachverhalt mit seinen ausländischen Bezügen beansprucht. In diesem Zusammenhang kann es auf die Art des betroffenen

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113 Ibid., Artikel 25 Rn 731.

\section*{V. Gemeinschaftsrechtliche Vorgaben}

\subsection*{1. Abgrenzung: Rechtssicherheit als motiv der vereinheitlichungsbemühungen}

Die Vorschläge für die Vereinheitlichung des europäischen Kollisionsrechts zielen auf eine Stärkung der Rechtssicherheit.\footnote{E. JAYME und C. KOHLER, "Europäisches Kollisionsrecht 2007", supra note 13, auf S. 494.} Dabei ist zwischen verschiedenen Aspekten der Rechtssicherheit zu unterscheiden:


Die Beseitigung von Entscheidungsdisharmonien ist ferner innerhalb der Gemeinschaft schon deshalb erstrebenswert, weil sie dem so genannten forum shopping entgegenwirkt. Denn die in den nationalen Prozessrechten der Mitgliedstaaten, vereinzelt auch in Staatsverträgen anzutreffenden Regeln über die internationale Zuständigkeit in Erbsachen weisen starke Unterschiede auf.\footnote{H. DÖRNER et al., “Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht”, supra note 6, S. 2; Zuständigkeitsbegründend wirken vor allem der letzte Wohnsitz (domicile) bzw. letzte gewöhnliche Aufenthaltsort des} Das Bestehen konkurrierender

Schließlich wurde im Schrifttum bemerkt, dass heute im Binnenmarkt ein internationales Privatrecht mit voraussehbaren, exakten und passgenauen Lösungen erwartet werde. Während sich die letzten beiden Aspekte mehr auf die Klarheit der Kodifizierung beziehen dürften, betrifft das Petitum nach einer Voraussehbarkeit des anwendbaren Rechts auch die Anknüpfungstechnik. Die genannten Argumente stützen eher ein Motiv denn eine gemeinschaftsrechtliche Bedingung der Rechtsvereinheitlichung, so dass sie im Folgenden ausgeklammert werden können.

2. **Begrenzte Kompetenz zur Rechtsvereinheitlichung**


3. Bedeutung der Grundfreiheiten


a. Abriß des Meinungsstandes
i. Neutralität des Kollisionsrechts

Gelegentlich wird die Auffassung vertreten, dass nicht die Anwendung bloßen Rechtsanwendungsrechts, sondern allenfalls die Ergebnisse der Sachrechtsanwendung den Grundfreiheiten entgegenstehen könnten. Das Internationale Privatrecht gehe von der Gleichwertigkeit aller

125 S. LEIBLE und A. STAUDINGER, “Article 65 of the EC Treaty”, supra note 118, S. 252; T. RAUSCHER, “Heimatlos in Europa?”, supra note 85, S. 723 m. w. N.

b. Fehlender binnenmarktbezug einzelner kollisionsnormen
In Bezug auf die Bestimmung des Personalstatuts ist nicht nur die prinzipielle Autorität der Grundfreiheiten fraglich. So wurde im Schrifttum jüngst die Ansicht geäußert, dass die in Rede stehenden Grundfreiheiten nach derzeitigem Verständnis aus strukturellen Gründen auf spezifisch erbrechtliche Vorschriften (einschließlich der kollisionsrechtlichen) nicht anwendbar seien. Dem Erbkollisionsrecht fehle die nötige Marktrelevanz; das Erbrecht regle nicht den Handel mit Nachlassgegenständen, sondern ihre Eigenschaft als solche und ihren Übergang vom Erblasser auf den Rechtsnachfolger. 133 Eine Behinderung der Reisefreiheit durch Erbrechtsunterschiede könne weder in Bezug auf den Erblasser noch die Erben bejaht werden. 134

c. Parteiautonomie als ausfluss des beschränkungsverbots

Nach der These über die Verankerung der Parteiautonomie in den Grundfreiheiten kann aus dem EG-Vertrag ein Gebot der

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129 M. FRANZEN, Privatrechtsangleichung, supra note 127, auf S. 145.
133 Ibid., auf S. 298, 308.
134 Ibid., auf S. 299.


d. Stellungnahme

i. Neutralität des kollisionsrechts?


Was zunächst die grundsätzliche Maßgeblichkeit der Grundfreiheiten betrifft, so verdient die Auffassung Beifall, dass erst das Zusammenspiel von Kollisionsnorm und Sachnorm einer nationalen Rechtsordnung darüber entscheiden, inwieweit der grenzüberschreitende Wirtschaftsverkehr innerhalb der Gemeinschaft diskriminiert oder behindert wird.

ii. Fehlender binnenmarktbezug einzelner kollisionsnormen?

iii. Das beschränkungsverbot und die keck-rechtsprechung
Von der Frage nach dem Bestehen eines hinreichenden Binnenmarktbezugs dürfte ein weiterer Aspekt zu trennen sein, der im genannten Schrifttumsbeitrag lediglich anklingt: Das Erbkollisionsrecht könnte weder den Erblasser noch die Erben unmittelbar am Reisen hindern. Zwar fällt die Kontrolle am Maßstab der Grundfreiheiten infolge ihrer vom EuGH befürworteten Weiterentwicklung zu allgemeinen Beschränkungsverboten relativ weit aus,\(^ {141}\) wobei grundsätzlich auch eine Unterschiedslose Behandlung von Unionsbürgern gegen das Integrationsziel der Gemeinschaft verstoßen kann.\(^ {142}\) Allerdings dürfte es sich nicht um ein “Superbeschränkungsverbot” handeln. Nur wenn eine Regelung in spezifischer Weise die grenzüberschreitende Wirtschaftstätigkeit beschränkt, ist sie rechtfertigungsbedürftig.\(^ {143}\)

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\(^{139}\) Siehe die Präambel zum \textit{supra} note 2 erwähnten Grünbuch Erb- und Testamentsrecht.
\(^{140}\) Europäischer Wirtschafts- und Sozialausschuss, \textit{Stellungnahme}, \textit{supra} note 7, auf S. 2, Punkt 2 (6).
\(^{142}\) P. VON WILMOWSKY, “EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit”, \textit{supra} note 135, S. 2.
\(^{143}\) S. LEIBLE, “Parteiautonomie im IPR”, \textit{supra} note 24, S. 502; Erforderlich sei eine spezifische Beeinträchtigung der verbürgten Freiheitsrechte.
Beschränkungen, die einen Bestandteil des offenen wirtschaftlichen Ordnungsrahmens bilden, unterfallen nicht den Vorgaben der Warenverkehrs freiheit.\textsuperscript{144} In seinem Keck-Urteil\textsuperscript{145} setzte der EuGH einer zu weiten Interpretation von Artikel 28 EG-Vertrag, die auch “Verkaufsmodalitäten” in den Anwendungsbereich der Warenverkehrs freiheit einbezieht, bekanntlich Grenzen. Auch in späteren Entscheidungen wies der Gerichtshof wiederholt darauf hin, dass solche Maßnahmen unbedenklich seien, deren beschränkende Wirkungen “zu ungewiss und zu mittelbar” seien.\textsuperscript{146} Ob Beschränkungen der Rechtswahl freiheit grundsätzlich potentielle Eingriffe in den Schutzbereich der Grundfreiheiten darstellen, wird zu Recht bezweifelt.\textsuperscript{147}

In diesem Sinne weckt das Keck-Urteil auch Zweifel an der Richtigkeit der These von der Verankerung der Parteiautonomie in den Grundfreiheiten. Insbesondere kann die beschriebene Interpretation des Urteils nicht überzeugen: Zum einen werden vom Vertrag nur bestimmte Freiheiten geschützt und nicht die Gleichbehandlung von inländischen und auslandsbezogenen Verträgen als solche.\textsuperscript{148} Die zitierte “Keck-Formel” ist gerade nicht erfüllt, zumal die zu Unsicherheiten führenden und daher für problematisch gehaltenen objektiven Anknüpfungen auch den Absatz inländischer Erzeugnisse berühren, wenn diese in grenzüberschreitende Transaktionen involviert sind.

Des Weiteren dürfte auch die Annahme nicht richtig sein, dass sich die Frage der Rechtswahl freiheit bei reinen Inlandsfällen nicht stelle. Zur deutschen Rechtslage wird teils Artikel 3 Absatz 1 Satz 1 EGBGB als Argument dafür genannt, dass das EGBGB insgesamt unanwendbar sei, wenn der zu beurteilende Sachverhalt nicht bereits ohne die Rechtswahlvereinbarung einen objektiven Auslandsbezug aufweise. Die Beschränkung der Rechtswahlmöglichkeit auf heteronome Konstellationen, die eine Verbindung zu mehreren Rechtsordnungen aufweisen, findet vereinzelt mit der Begründung Zustimmung, dass ein Verweis auf die in Artikel 27 Absatz 3 EGBGB (Artikel 3 Absatz 3 EVÜ) gestattete Rechtswahl nicht stichhaltig sei. Dadurch, dass das Gesetz in diesen Vorschriften die Unabdingbarkeit des sachrechtlichen ius cogens

\textsuperscript{144} Siehe zum Ganzen R. STREINZ, Europarecht, supra note 141, Rn 681.
\textsuperscript{147} So zum Beispiel S. LEIBLE, “Parteiautonomie im IPR”, supra note 24, auf S. 485-503.
\textsuperscript{148} Ähnlich \textit{ibid.}, S. 502; “Denn die Grundfreiheiten garantieren keine allgemeine Handlungs freiheit, sondern sollen nur bestimmte Formen grenzüberschreitenden Wirtschaftens schützen”.
statuier, schließe es eine internationalprivatrechtliche Rechtswahl aus, da eine solche gerade durch die Derogation des zwingenden Rechts gekennzeichnet sei.\textsuperscript{149} Die besseren Gründe dürften jedoch für die gegenteilige Ansicht sprechen.\textsuperscript{150} Aus Artikel 3 Absatz 3 EVÜ (oder ferner Artikel 14 Absatz 3 Rom II-Verordnung) ergibt sich gerade, dass die Rechtswahl im Übrigen, das heißt abgesehen von zwingenden Bestimmungen, zu beachten ist, und das Maß des zur Anwendung ausländischen Rechts notwendigen Auslandsbezugs ergibt sich nicht aus Artikel 3 EGBGB, sondern aus den Tatbeständen der einzelnen Kollisionsnormen.\textsuperscript{151}

4. \textit{Folgerungen aus Artikel 12 EG}\textsuperscript{152}

a. Rechtmäßigkeit der zwingenden anknüpfung an die staatsangehörigkeit

i. Das allgemeine diskriminierungsverbot

Die Frage der Vereinbarkeit des kollisionsrechtlichen Staatsangehörigkeitsprinzips mit Europäischem Gemeinschaftsrecht ist lange Zeit ausschließlich am Maßstab des allgemeinen Diskriminierungsverbotes aus Artikel 7 EWG-Vertrag bzw. Artikel 6 EG-Vertrag (heute Artikel 12 des Vertrags) gemessen worden.\textsuperscript{153} Nach dem Wortlaut des Artikel 12 Absatz 1 EG-Vertrag gilt das Diskriminierungsverbot nur im “Anwendungsbereich” des Vertrages. Da aber die fortschreitende europäische Integration nicht mehr nur den Kern des Wirtschaftslebens erfasst und Artikel 65 b EG-Vertrag wie erwähnt der Gemeinschaft eine erweiterte Kompetenzgrundlage zugesteht, scheidet die Vorschrift nicht schon deswegen aus.\textsuperscript{154} Im Ergebnis wird aber die Frage nach der Existenz einer Diskriminierung überwiegend


\textsuperscript{151} \textit{Ibid.}, bei EGBGB Artikel 3 Rn 2.


\textsuperscript{153} D. BLUMENWITZ, in D. BLUMENWITZ \textit{et al.}, \textit{J. von Staudingers Kommentar, supra} note 56, Anhang I zu Artikel 5 Rn 20 m. w. N.

\textsuperscript{154} \textit{Ibid.}, Anhang I zu Artikel 5 Rn 1001.
Zum Teil wird freilich zwischen mitgliedstaatlicher und europäischer Gesetzgebungsebene unterschieden und eine Diskriminierung für den Fall verneint, dass der EU-Gesetzgeber gleichmäßig für alle Unionsbürger als Kriterium der kollisionsrechtlichen Nähe zu ihrem jeweiligen Heimatstaat verwendet. In der Tat gilt das Staatsangehörigkeitsprinzip im Internationalen Privatrecht grundsätzlich für alle Personen, also Inländer wie Ausländer, und enthält deshalb im Prinzip keine Diskriminierung. Die Staatsangehörigkeit wird nicht als Differenzierungskriterium benutzt, sondern als allgemein geltendes Anknüpfungsmoment.

ii. Parteiautonomie als Ausfluss eines beschränkungsverbots

Zur Absicherung dieser These stützt sich die Arbeit insbesondere auf die Entscheidung des EuGH in Sachen Garcia Avello, der folgender Sachverhalt zugrunde lag: Die Eheleute Garcia Avello beantragten, den Nachnamen ihrer Kinder, in Garcia Weber zu ändern, da sich nach spanischem Recht der Name der Kinder eines Ehepaares aus dem ersten Namen ihres Vaters sowie dem ersten Namen der Mutter zusammensetze. Da die Kinder sowohl die spanische als auch die belgische Staatsangehörigkeit besaßen, konnte die belgische Behörde ihre Zuständigkeit nach belgischem Recht allein auf die belgische

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155 Ibid., Rn 20 m. w. N.
157 Siehe zu dieser herrschenden Meinung J. KROPHOLLER, Internationales Privatrecht, 5 Aufl., supra note 40, S. 275 m. w. N.
158 Ibid.
160 Ibid., S. 235.
161 Ibid.
Staatsangehörigkeit der Kinder stützen. Die beantragte Namensänderung wurde von den belgischen Behörden jedoch mit Verweis auf die bestehende belgische Verwaltungspraxis abgelehnt, nach der in Belgien die Kinder den Namen ihres Vaters führen und aus integrationspolitischen Überlegungen Namensänderungen nur in eng umgrenzten Ausnahmefällen zugestimmt werde, welche in der vorliegenden Konstellation nicht vorliegen würden.

Diese Ablehnung hielt der Gerichtshof für rechtswidrig, da sie gegen Artikel 12 Satz 1 EG verstoße. Zur Begründung führte der EuGH aus:

“Im Gegensatz zu Personen, die allein die belgische Staatsangehörigkeit besitzen, führen diejenigen belgischen Staatsangehörigen, die daneben noch die spanische Staatsangehörigkeit haben, nach den beiden betreffenden Rechtssystemen unterschiedliche Familiennamen. Insbesondere wird in einer Situation wie derjenigen des Ausgangsverfahrens den betroffenen Kindern die Möglichkeit verwehrt, den Familiennamen zu führen, der sich aus der Anwendung des Rechts des Mitgliedstaats ergibt, nach dem der Familienname ihres Vaters bestimmt worden ist. Wie der Generalanwalt [...] ausgeführt hat, kann eine solche Situation unterschiedlicher Familiennamen für die Betroffenen unstreitig zu schwerwiegenden Nachteilen beruflicher wie auch privater Art führen, die insbesondere aus den Schwierigkeiten resultieren können, in einem Mitgliedstaat, dessen Staatsangehörigkeit sie besitzen, rechtliche Wirkungen von Urkunden oder Schriftstücken in Anspruch zu nehmen, die auf den Namen ausgestellt wurden, der in einem anderen Mitgliedstaat anerkannt ist, dessen Staatsangehörigkeit sie ebenfalls besitzen”.

Als rechtswidrige Benachteiligung im Sinne des Urteils zieht die erwähnte Arbeit Nachteile in Betracht, welche bei der Anwendung ausländischen Heimatrechts durch ein Gericht des Aufenthaltsstaates infolge der Schwierigkeiten bei der Ermittlung fremden Heimatrechts entstehen. Insbesondere die Kosten, welche aufgrund der Anwendung ausländischen Rechts zusätzlich entstünden, seien als relevante Einbußen zu qualifizieren, die über einen Nachteil von nur geringem Umfang hinausgehen würden. Schließlich wird hinsichtlich der Rechtsfolgenrechte eines Verstoßes gegen Artikel 12 EG in Verbindung mit Artikel 18 EG die Pflicht, gerade zum Mittel der Rechtswahlfreiheit zu greifen relativiert. Letztere Lösung stelle eine Möglichkeit der Herstellung

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164 C. STERN, Das Staatsangehörigkeitsprinzip in Europa, supra note 41, S. 185.
gemeinschaftsrechtskonformer Zustände dar, sei jedoch nicht zwingend. Als sonstige Lösungen werden die Idee eines fakultativen Kollisionsrechts sowie Ergebniskorrekturen auf der Ebene des Sachrechts genannt, während im übrigen Schrifttum (in Bezug auf die Warenverkehrsfreiheit) auch eine Sonderanknüpfung im Sinne einer Verdrängung des einfachrechtlichen Verweisungsbefehls durch die gemeinschaftsrechtlich gebotene Anwendung der günstigeren Sachnorm diskutiert wird. Zwar folge aus dem Gemeinschaftsrecht nicht die kollisionsrechtliche Regel einer grundsätzlichen Anknüpfung an das Recht, welches die fragliche Freiheit weniger beeinträchtige. Gelange man in einem Fall mit Berührung zu einem anderen Mitgliedstaat der EU über die nach der kollisionsrechtlichen Verweisung anwendbare Rechtsordnung zu einer gemeinschaftsrechtlich beschränkten Sachnorm, so sei zu fragen, ob die andere Rechtsordnung, mit der der Sachverhalt Berührungspunkte aufweise, eine funktionsäquivalente Regelung enthalte. Sei dies der Fall und beschränke diese Regelung den freien Warenverkehr weniger, so sei sie anzuwenden; im Übrigen bleibe es bei der anwendbaren Rechtsordnung.

b. Stellungnahme

Eine Diskriminierung durch die Anknüpfung an die Staatsangehörigkeit dürfte in der Tat ausscheiden. Über die genannten Argumente hinaus lässt sich auch mit etwas Abstraktionsaufwand vorbringen, dass es vom Kollisionsrecht gewollt sei und seinem Gerechtigkeitsgehalt entspreche, dass bei Personen verschiedener Staatsangehörigkeit die Unterschiede in ihrem Heimatrecht zum Tragen kommen.

Was schließlich die Annahme einer unzulässigen Beschränkung betrifft, so besteht auch hier die Gefahr eines Paradigmenwechsels, in dessen Folge

165 Ibid., S. 236.

Freilich ist nicht auszuschließen, dass sich die hier behandelte Problematic im Bereich einer gewissen “Grauzone” des Gemeinschaftsrechts befindet, die nicht „betreten“ werden müsste, wenn die besseren Argumente ohnehin die Zulassung einer (begrenzten) Rechtswahl nahelegen. Inwiefern die zunehmende Mobilität über die Grenzen der Mitgliedstaaten hinweg die Zuordnung einer Person zu der Rechtsordnung eines bestimmtes Staates erschwert und dadurch das Bedürfnis nach einer Korrekturmöglichkeit in Bezug auf die objektive Anknüpfung erhöht, soll unter der folgenden, vorletzten Gliederungsebene behandelt werden.

VI. MOBILITÄT UND IDENTITÄT

1. Fakten und formen der mobilität

Nach einer im Auftrag der Kommission erstellten Studie aus dem Jahre 2006 sind ein Drittel der Europäerinnen und Europäer zumindest einmal in der Vergangenheit aus ihrer Herkunftsregion weggezogen. Von diesen Umzüglern haben sich 24% zumindest einmal in einer anderen Region, 4% in einem anderen Mitgliedstaat und 3% in einem Land außerhalb der EU niedergelassen. Viele EU-Bürger scheinen darüber hinaus zu wissen, dass geografische Mobilität ihre Beschäftigungsaussichten verbessern kann: Auf die Frage, was die EU für sie bedeutet, antworteten 53%: “Die Freiheit, in der EU zu reisen und zu arbeiten”. Was die quantitative Bedeutung der grenzüberschreitenden Nachlassplanung und -abwicklung betrifft, so fallen nach einer im Jahre 2002 im Auftrag der Europäischen Kommission

durchgeführten Studie schätzungsweise jährlich zwischen 50.000 und 100.000 Erbfälle mit Erblassern aus anderen EU-Staaten im Bereich der Europäischen Union an - Zahlen, die sich nach der Erweiterung vom 1 Mai 2004 und dem Beitritt Rumäniens und Bulgariens zum 1 Januar 2007 erhöht haben dürften.\footnote{M. HEGGEN, “Europäische Vereinheitlichungstendenzen im Bereich des Erb- und Testamentsrechts”, supra note 126, auf S. 5.} Nach einer Schätzung der deutschen Banken haben 800.000 bis 1.000.000 Deutsche Immobilienbesitz in anderen EU-Staaten haben (davon circa 300.000 in Spanien und circa 150.000 in Italien und Frankreich).\footnote{H. DÖRNER et al., “Auf dem Weg zu einem europäischen Internationalen Erb- und Erbverfahrensrecht”, supra note 6, auf S. 2.}


2. 

**Wurzeln der Identität in Europa**

Das Internationale Privatrecht wird als eine Materie umschrieben, die nicht nur der Abgrenzung verschiedener Rechtsordnungen dient, sondern

a. Gemeinschaftliche rücksicht auf nationale identitäten?

Dem Geist des EG-Vertrags lassen sich keine eindeutigen Antworten entnehmen. Zum einen wurde die Auffassung vertreten, dass das Staatsangehörigkeitsprinzip innerhalb Europas mit der erhöhten Mobilität seiner Bewohner eher einen integrationsfeindlichen Fremdkörper darstelle. In der Tat dürfte die Grundentscheidung des Vertrags für einen Binnenmarkt ohne Binnengrenzen, in dem der freie Verkehr von Waren, Personen, Dienstleistungen und Kapital gewährleistet ist, das vom deutschen Bundesverfassungsgericht im so genannten Spanier-Beschlusss gebrauchte Argument der größeren Vertrautheit mit dem Heimatrecht

179 Ibid., auf S. 323.
relativieren. Dem Kontinuitätsinteresse steht das Anpassungsinteresse des Unionsbürgers an das Recht seines Wohn- oder Tätigkeitsortes gegenüber.\footnote{D. BLUMENWITZ, in D. BLUMENWITZ et al., J. von Staudingers Kommentar, supra note 56, Anhang I zu Artikel 5 Rn 28 m. w. N.}

Auf der anderen Seite bestimmt Artikel 151 Absatz 4 EG-Vertrag, dass die Gemeinschaft bei ihrer Tätigkeit aufgrund anderer Bestimmungen des Vertrags insbesondere zur Wahrung und Förderung der Vielfält ihrer Kulturen den kulturellen Aspekten Rechnung trägt. Im Schrifttum wird der Schutz der “kulturellen Diversität” nicht zu Unrecht zugunsten der Staatsangehörigkeitsanknüpfung in die Waagschale geworfen.\footnote{T. RAUSCHER, “Heimatlos in Europa?”, supra note 85, auf S. 732.}

\subsection*{b. Demokratische legitimierung als näheindiz?}

Gestaltungsmöglichkeit der Heimatrechtsordnung.\textsuperscript{189}

Indes steht das Wahlrecht nur Volljährigen zu, und die darin liegende Möglichkeit einer Mitgestaltung des Zivilrechts ist allenfalls eine indirekte, abstrakt-theoretische, die kaum Rückschlüsse auf eine Verbindung zu diesem Recht zulassen dürfte.\textsuperscript{190} Zu Recht findet sich der Einwand, dass in Einzelfällen vermehrt engere persönliche Verbindungen zu einem Staat bestehen könnten, dessen Staatsangehörigkeit der Betreffende nicht besitze.\textsuperscript{191} Hierzu mag die zunehmende Mobilität im Zeitalter der Globalisierung beitragen. Insbesondere dürfte das Staatsangehörigkeitsprinzip den Interessen der Assimilierungswilligen keine Rechnung tragen, die sich ihrer Umgebung angepasst haben und sich dadurch vielleicht sogar befreit fühlen.\textsuperscript{192} Unter Umständen kann mithin die lex domicilii vertrauter sein.\textsuperscript{193}

c. \textit{“Ruhepol” als voraussetzung der integration?}

Wenig Klarheit besteht derzeit darüber, inwiefern die beschriebene transnationale Öffnung durch eine stärkere Rückbindung an den Herkunftsstaat aufgewogen wird. Für letztere sprechen etwa die im Allgemeinen erhöhte Mobilität sowie erleichterte Reise- und Informationsmöglichkeiten.\textsuperscript{194} Fraglich ist auch, ob die fortschreitende Globalisierung das Bedürfnis der Menschen nach einer tieferen Verwurzelung in ihrem eigenen möglicherweise mit der Staatsangehörigkeit verbundenen Kulturkreis verstärkt. Menschen, die aus beruflichen Gründen häufig ihren Aufenthaltsstaat wechseln und hierzu durch das Gemeinschaftsrecht berechtigt sind oder sogar ermutigt werden, werden unter Umständen ein noch größeres Bedürfnis nach Fixpunkten haben und ihre persönlichen Verhältnisse der Heimatrechtsordnung unterstellen wollen.\textsuperscript{195} Damit könnte sich das Staatsangehörigkeitsprinzip als Ausprägung einer der Rechtssicherheit zuträglichen Anknüpfungsmethode sogar förderlich auf das

\textsuperscript{190} J. KROPHELLER, Internationales Privatrecht, 5 Aufl., supra note 40, auf S. 268.
\textsuperscript{191} D. BLUMENWITZ, in D. BLUMENWITZ et al., J. von Staudingers Kommentar, supra note 56, Anhang I zu Artikel 5 Rn 14.
\textsuperscript{192} D. HENRICH, “Parteiautonomie, Privatautonomie und kulturelle Identität”, supra note 178, auf S. 323.
\textsuperscript{193} L. RAAPE und F. STURM, Internationales Privatrecht, 6 Aufl., supra note 38, S. 117.
\textsuperscript{195} C. STERN, Das Staatsangehörigkeitsprinzip in Europa, supra note 41, auf S. 239.
Integrationsziel der Gemeinschaft auswirken, da es die betroffenen Personen von der Last befreit, sich wiederholt mit einer neuen Regelung ihrer persönlichen Rechtsverhältnisse auseinanderzusetzen.\textsuperscript{196}

VII. Fazit

Eine Ausweitung der Parteiautonomie dürfte im Sinne des Grundsatzes in dubio pro libertas sein und der Korrektur einer unzureichenden objektiven Anknüpfung dienen.\textsuperscript{197} Versteht man die gegenwärtige Neugestaltung der Rechtswahlfreiheit in diesem Sinne, ist der Wille des Einzelnen eher ein Instrument denn ein Motiv der Regelung. Im Hinblick darauf, aber auch mit Blick auf das Verhältnis von Sach- und Kollisionsrecht\textsuperscript{198} sowie das Prinzip der begrenzten Einzelermächtigung \textsuperscript{199} sollte die (materiellrechtliche) Testierfreiheit cum grano salis nicht im Vordergrund koordinationsrechtlicher Überlegungen stehen.

Die Schwäche der objektiven Bestimmung des Erbstatuts besteht vor allem darin, dass keines der denkbaren Anknüpfungskriterien mit hinreichender Sicherheit die Existenz einer Beziehung indiziert, welche die Anwendbarkeit einer bestimmten Rechtsordnung auf den zu beurteilenden Sachverhalt rechtfertigt. Mit anderen Worten lässt sich die gesuchte engste Verbindung des Sachverhalts schwerlich ex ante abstrakt generell festlegen. Dieser kollisionsrechtliche Aspekt scheint für den beabsichtigten Ausbau der Rechtswahlfreiheit eine größere Rolle zu spielen als gemeinschaftsrechtliche Vorgaben.

Der Grund für die Ausweitung der Parteiautonomie kann auch in Bezug auf deren Grenzen fruchtbar gemacht werden: Was den Kreis wählbarer Rechtsordnungen betrifft,\textsuperscript{200} so mögen sich einzelne Unionsbürger in Zeiten zunehmender Mobilität mehr und mehr mit den gemeinsamen Grundzügen europäischer Erbrechtsordnungen identifizieren. Eine integrationsfreundliche wie identitätsstiftende Lösung würde daher darin bestehen, parallel zum Inhalt der Rom I-Verordnung die Wahlbarkeit eines “fakultativen EU-Instruments”\textsuperscript{201} zum Erbrecht\textsuperscript{202} in Aussicht zu


\textsuperscript{197} D. LEHMANN, “Internationale Reaktionen”, supra note 4, S. 206.

\textsuperscript{198} Siehe dazu supra Abschnitt IV.

\textsuperscript{199} Dazu supra.

\textsuperscript{200} Soweit ersichtlich werden bisher überwiegend die am gewöhnlichen Aufenthalt oder im Heimatstaat geltenden Rechtsordnungen in Betracht gezogen.

\textsuperscript{201} Europäische Kommission, Vorschlag Rom I, supra note 9, auf S. 6.
stellen. Im Übrigen könnte die Ausarbeitung eines solchen Werkes Vorteile mit sich bringen, die allgemein im Zusammenhang mit dem Wert einer Rechtsvergleichung genannt werden.\(^{203}\)

Solange die Wahlbarkeit nichtstaatlichen Rechts im Kollisionsrecht nicht vorgesehen ist, liegt in der Bezugnahme der Parteien auf Rechtssätze, die in keinem Land kraft ihrer staatlichen Autorität gelten, allenfalls eine materiellrechtliche Verweisung. Letztere mögliche Folge bedeutet, dass das in Bezug genommene Regelwerk zum Vertragsinhalt wird. Im Unterschied zur kollisionsrechtlichen Verweisung, welche zu der berufenen Rechtsordnung insgesamt führt und damit auch zur Verdrängung der zwingenden Bestimmungen des “eigentlich” anwendbaren Rechts, können die Parteien im Wege der materiellen Verweisung andere Regelungen an die Stelle des dispositiven Rechts im Vertragsstatut setzen.\(^{204}\)


Ein Anknüpfungskriterium, das ähnlich stabil ist wie die Staatsangehörigkeit,\(^{205}\) andererseits aber der zunehmenden Mobilität und etwaigen Integrationswechseln vergleichsweise mehr Rechnung trägt, ist das domicile nach englischem Recht. Die Staatsangehörigkeit mag sich in der Regel leichter feststellen lassen, doch bringt sie in Zeiten transnationaler Lebensläufe die Bindung der betroffenen Person an ein Recht nicht mit hinreichender Sicherheit zum Ausdruck. Zwar ist

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\(^{204}\) T. RAUSCHER, Internationales Privatrecht, 2 Aufl., supra note 26, auf S. 238.

\(^{205}\) Teils werden beide Anknüpfungen an Staatsangehörigkeit und domicile als Ausprägungen des Heimatprinzips bezeichnet, T. RAUSCHER, “Heimatlos in Europa?”, supra note 85, auf S. 719.
bekannt, dass die englische Rechtsprechung bislang äußerst selten die Existenz eines domicile of choice bejaht hat und Reformbemühungen kaum zu einer Annäherung des Konzepts an den Begriff des gewöhnlichen Aufenthalts geführt haben. Eine europäische Regelung wäre aber autonom auszulegen und möglicherweise weniger restriktiv handhabbar. In gewissem Maße könnte das domicile als Korrekturinstrument innerhalb der objektiven Anknüpfung selbst fungieren.

Demgegenüber mag der vielfach favorisierte gewöhnliche Aufenthalt im Trend liegen. Er entspricht aber den europaweit existierenden Rechtstraditionen kaum und ist ein zu “flüchtiges” Kriterium, zumal er durch eine vergleichsweise kurze Aufenthaltsdauer begründet werden kann. Vor allem letzterer Aspekt erscheint angesichts erheblicher Unterschiede zwischen den Rechtsordnungen einzelner Staaten bedenklich.

Zu beachten ist ferner die Bedeutung des Internationalen Privatrechts für die Bewahrung der kulturellen Identität. Ob man ihr durch ein Abstellen auf den Ort des gewöhnlichen Aufenthalts hinreichend Rechnung tragen könnte, ist zweifelhaft. Denn zumindest nach in Deutschland herrschender Ansicht ist der Wille, den Aufenthaltsort zum Mittelpunkt oder Schwerpunkt der Lebensverhältnisse zu machen, für den gewöhnlichen Aufenthalt nicht erforderlich. Ein aufenthaltsbezogener Wille wird aber in der Regel Voraussetzung dafür sein, dass sich die betroffene Person mit der Kultur ihres Aufenthaltsortes wirklich identifiziert. Auch in dieser Hinsicht erscheint das oben beschriebene domicile als objektives Anknüpfungskriterium vorzugs- würdig.

206 Siehe supra.
207 So nannte die Europäische Kommission als mögliche Anknüpfungskriterien neben der Staatsangehörigkeit den gewöhnlichen Aufenthalt als “modernere‘ Lösung”, die Einleitung zu ihrem Grünbuch Erb- und Testamentsrecht, supra note 2, auf S. 3.
209 Supra II C 2 c.
210 So schließt zum Beispiel das ägyptische Recht ausnahmslos Personen von der gesetzlichen Erbfolge aus, wenn sie nicht der Religion des Erblassers angehören, den Beschluss des deutschen OLG Hamm, supra note 115, auf S. 1705.
211 Siehe zu dieser Aufgabe des Internationalen Privatrechts supra VI B.
I. INTRODUCTION: THE FOUR VISIONS

The present working paper offers a transcript from the symposium “Four Visions of Constitutional Pluralism” held at the European University Institute on 11 January 2008 under the Academy of European Law’s auspices. Four different perspectives on constitutional pluralism were put together and thoroughly discussed by those, who brought them into the scholarly discourse; Julio Baquero Cruz,1 Mattias Kumm,2 Miguel Poiares Maduro3 and Neil Walker.4 The symposium was organised by Matej Avbelj and Jan Komárek, who also moderated the discussion.

Constitutional Pluralism has grown in popularity, especially in the last five years or so. However, it has paid a price for its popularity. The concept has gained so many meanings that often the participants in the debate talk past each other, each endorsing a different understanding of what constitutional pluralism actually means. The core aim of the symposium, therefore, was to clarify the following questions. What is constitutional pluralism? What does it stand for? What is it expected to achieve, contribute to or change in the European integration process? Is it a viable, desirable or perhaps even an indispensable theoretical take on European integration?

But let the transcript speak...

Matej Avbelj: As we really have a unique opportunity to host four key scholars from the field of EU legal and constitutional theory, it would be imperative not to lose any more time and just open the floor. However, as the debate in the next minutes will doubtlessly be extremely dynamic and as not everyone is equally familiar with all the details and intricacies of the four visions that will be outlined, allow me to sketch some background to

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today’s debate; by putting the emergence of EU constitutional pluralism in context and by presenting, if only briefly, some of the key theoretical points our speakers hold.

To my understanding, and the speakers will have a chance to express their agreement or disagreement with it, the theory of constitutional pluralism has developed against a backdrop of what should be best understood as a classical constitutional narrative about the European integration. This is a theoretical perspective of integration, which has for at least two decades, starting in the early 1980s, dominated both the theory as well as the representation of practices of integration.

Following this approach, that all of you are certainly familiar with, the telos of European integration was an ever closer union between the peoples of Europe which required that integration proceeds just one way. Harmonisation, if not even unification, was the main paradigm and all the differences and diversity existing in the integration were perceived as obstacles, originally to free trade and then to the integration as such. They were expected to give way to the supreme Community law requiring uncompromised uniformity of its application across all the member states. The employment of the constitutional narrative was expected to serve exactly this integrationist cause. On the basis of the statist constitutional federal experiences, it was presumed that as constitution confers unity and order in the statist environment the same virtuous affects should occur in the supranational environment as well. The statist origins of classical constitutionalism, if considered and recognised at all, were accordingly not perceived as something contentious or problematic. To the contrary, the formal constitution of integration was explicitly declared to be of a hierarchical nature and literally indistinguishable from that of a federal state. Also in substantive terms, where the economic constitution was to be complemented by a complete political constitution the latter was supposed to mirror, especially in pursuit of appropriate model of democracy and human rights policy, a (federal) state.

However, for various reasons, which will be certainly touched upon during the symposium, this classical constitutional vision came under strain and it appeared to be increasingly descriptively, explanatorily as well as normatively inadequate.

As Julio Baquero Cruz observed, that which had been appreciated as a

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'true world' suddenly turned out to be just a fable.

Our speakers stepped in at this point. Already in 1998, when classical constitutionalism was still dominating the EU legal mindset, Mattias Kumm outlined a more pluralist approach to the integration with a special focus on the uneasy relationships between the national constitutional courts and the ECJ. A couple of years later he presented a detailed jurisprudential account for the resolution or avoidance of constitutional conflicts in integration. Its purpose was to contribute to the coherence of the European legal order as a whole by finding a best fit balance between the national and EU constitutional concerns all things considered. This is how Mattias’ theory of ‘best-fit universal constitutionalism’, as I prefer to call it, has come to life.

He was followed by Miguel Poiares Maduro who has taken up a very similar approach, perhaps transcending a mere-court oriented focus, and developed his own pluralist vision of integration. This could be best captured under the title of ‘harmonious-discursive constitutionalism’. Miguel’s main theoretical concern has, namely, been how to ensure that this admittedly pluralist, heterarchical integration remains in harmony; in a type of contrapunct. The answer is to be found in a discursive practice among all the actors involved whose common basis is to be ensured by a set of contrapunctual principles. The interesting details of how precisely this is supposed to work, will be, I am sure, explained by Miguel.

Neil Walker, on the other hand, has gone even a step further. He connected new developments in European integration with a broader picture of an allegedly declining Westphalian paradigm, accompanied with a simultaneous revival of and unprecedented challenges to constitutionalism that was expected to provide answers to an increasingly fragmenting, multi-level and complex world of social affairs. His theory of epistemic meta-constitutionalism is charged with addressing these points. Neil claims that while legal reality of European integration is marked by a plurality of legal orders existing as different epistemic sites, these can be

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connected through the meta-language supplied by constitutionalism.\textsuperscript{9} How exactly is this to happen, we should learn today.

Finally, Julio Baquero Cruz has resisted the allure of pluralism and has remained on the skeptical side. In his very recent piece, published as a Robert Schumann working paper,\textsuperscript{10} he warned against overly enthusiastic pursuit of pluralist solutions in integration and, in a way very strongly, pointed his critical finger at the ‘pluralist movement’ contending that the latter might well be acting at integration’s disadvantage, rather than vice versa. In his, what I would call, re-vindicated classical constitutional account, he interestingly asks, even if a current reality of European integration is pluralist, why justify it and defend it as such?

The transcript follows the structure of the symposium. In its first part, Julio Baquero Cruz, Miguel Poiares Maduro and Neil Walker discussed the questions that we have set in the introduction. As Mattias Kumm was able to join the symposium only in its second part, we started by asking the other three speakers to formulate questions that his work brought up according to them. After that, there was an open discussion with the other participants of the symposium. The questions collected from the audience are only summarised in this transcript due to technical problems with recording; however, we hope that this summary reflects well the dialogic nature of the whole symposium.

II. WHAT IS CONSTITUTIONAL PLURALISM?

Jan Komárek: There are a lot of labels in the European constitutional discourse. Because we are now talking about constitutional pluralism, the first question would be to the theorists: what do you mean by constitutional pluralism? And this in my view encounters two sub-questions. The first one asks what the constitution is, or perhaps what is behind this talk about constitution. What is a constitutional authority, not in a formal sense, but in some deeper normative sense? The second sub-question wonders what does pluralism mean? Does it really suggest that there are various mutually irreconcilable views of different constitutional perspectives? And is this pluralist view, some would say even radical pluralist view, compatible with the idea of constitutionalism? Can we have constitutional pluralism? This is the first question and I would ask Miguel

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to address it.

Miguel Poiares Maduro: First of all, thanks to Matej and to Jan for organising this and providing us with an opportunity of exercising a kind of psycho-analysis; we are supposed to articulate more clearly and coherently some of the ideas raised in our writings and which we did not fully developed in them. And Matej has made the task more difficult than I had thought at the beginning. When they were organising this I said, jokingly, that they had self-appointed themselves as a kind of apostles of constitutional pluralism and I thought it was actually the role of apostles to furnish deeper explanations while our role should be limited to the labels. Now, it seems they really expect us to dig deeper into the normative foundations of our work on constitutional pluralism what won’t necessarily be an easy task.

Be that as it may, you have asked a series of questions, and the first one that you want us to address is what is constitutional pluralism; what we mean by it and how does it relate with what we mean by constitutionalism in general.

These questions are of particularly interest to me because they feed into the argument that I have been trying to develop, both in my “contrapunctual law”\textsuperscript{11} and “as good as it gets”\textsuperscript{12} pieces, according to which constitutional pluralism should not be seen simply as a solution, be it pragmatic or normative, to the problem of conflicting constitutional claims. Rather it should be conceived of as something which is inherent in the theory of constitutionalism itself. In this way I agree with the invitation inherent in your question to focus on constitutionalism in a deep normative sense, especially as I would define constitutionalism as a normative theory of power. As I have argued before, we can identify three dimensions of constitutionalism comprehended in this normative fashion.

The first one refers to constitutionalism as a set of legal and political instruments to limit power, in short; constitutionalism as a limit to power. The second one regards the role of constitutionalism in creating a deliberative framework for free, informed and inter-subjective rational deliberation in which different competing visions of the common good can be arbitrated and made compatible with each other in a manner that tries


\textsuperscript{12} M.P. MADURO, “Europe and the constitution: What if this is as good as it gets?”, in J.H.H. WEILER and M. WIND, European Constitutionalism Beyond the State, Cambridge, CUP, 2003, pp. 74-103.
to balance democratic concerns in the control of the political process by a few with concerns of the tyranny of the many. The third is the notion of constitutionalism as a kind of repository of prevailing notions of the common good in a particular political community. But I see these three dimensions as a constitutional instrument for the rationalisation of democracy, in the sense of promoting maximisation on one hand of participation, and this has to do with the intensity and the scope of participation, but also and at the same time of representation. However, under the idea of representation I mean something particular in this context. I hold that constitutionalism is also concerned with the fact that politically legitimate decisions should take into account the differentiated impact that different decisions may have on different groups. In my view the underlying purposes and goals of constitutionalism require taking into account the scope and intensity of participation but also the differentiated impact of different decisions on different people. Now this creates immediately inherent tensions and paradoxes in constitutionalism and that is why, in my view, pluralism is inherent in constitutionalism; you can derive in similar situations equally normatively valid competing constitutional claims. In this way, it is inherent in the nature of constitutionalism that there can be no monopoly of constitutional claims and that often these constitutional claims are expressed by different institutions that compete in giving meaning to the Constitution.

Constitutional pluralism in the sense that we have developed in the EU has, however, a broader dimension; it refers to a pluralism of constitutional jurisdictions. Those equally valid normative constitutional claims are now supported or developed by different jurisdictions. That is a new dimension of the constitutional pluralism which, however, is inherent in constitutionalism itself.

What are the expressions of this new constitutional pluralism that we have nowadays? For me there are five of them.

The first one is a plurality of constitutional sources and we see that in the EU. European constitutional law is drawn from different constitutional sources, not from a single constitutional document, and those sources are national and European. The second one is a pluralism of jurisdictions or of different constitutional sites. This is particularly the case regarding constitutional adjudication, it is linked to the more well known aspect of European constitutional pluralism; the Kompetenz-Kompetenz question, in which Matej and Jan have worked on. The third one is an interpretative pluralism if you want. It is a pluralism which is based not only on different sources but on competing interpretations of the same source by institutions that are not organised in a hierarchical manner. Even in
traditional constitutions, in the context of a traditional political community, you cannot say in many instances that there was a clear hierarchy between the political process and courts for example; *i.e.*, a clear monopoly of one of these institutions over the interpretation of the constitution. Traditionally the arbitration between these institutions has been left to courts but that is not a logical necessity and it has varied historically and between political communities. In terms of the normative conception of the constitution you cannot say that courts have or always ought to have a monopoly or final authority of interpretation of the constitution over the political process. And this is linked to this kind of interpretative pluralism. So that leads us to a pluralism of institutions that is something more than simply the pluralism of jurisdictions that has been the dominant concern in the EU context. The fourth expression of pluralism is a pluralism of powers. We increasingly have new forms of public and private power that challenge traditional legal dogmatic categories and raise constitutional questions because they affect the mechanisms of accountability linked to those legal categories. I see this as part of this new constitutional pluralism. And the fifth pluralism is a pluralism of polities. This has two consequences or two dimensions. The first one is that political pluralism in the EU is expressed in a more radical form because different political views of the constitution are supported not simply by different political groups but by different political communities. It is a more radical form of political pluralism than what you normally have at the level of a single political community.

**Neil Walker:** But is that different from pluralism in states?

**Miguel Poiares Maduro:** It is different because what I am talking about is a political pluralism where the different political views are presented as expressing the self-determination of different political communities. The other dimension is mobility between political communities. We do not have only a constitutional pluralism in the EU that is developed on the basis of competing constitutional claims from different jurisdictions or from different political communities. We also have a polity’s constitutional pluralism at the European level because we can also choose between different constitutional modes of organisation by choosing between different political communities. This creates a competition between national constitutional models, if you want.

**Jan Komárek:** Thank you very much for this introduction, setting well the terms of the debate. I would give word to Julio, who is perhaps an opponent of these visions of pluralism and to the suggestions that they could be called ‘constitutional’. Right?
Julio Baquero Cruz: Well, I don’t see myself as an opponent of anything. I just defend my own views and what I think would be best for EU law. What is constitutional pluralism is a complex question. I think the important word is not ‘constitutional’, since we know what it means, but ‘pluralism’ - and how pluralism may affect, enrich or undermine the basic content of constitutionalism. I have three ideas. The first is that our constitutionalism is inextricably linked to modernity, and that it has little to do with ancient and medieval constitutionalism. I agree with Miguel Maduro that it includes all the elements he mentioned, like limits to power, deliberation, etc., but there are other elements which are specifically modern. One of them is *generality*, the idea that a constitutional order covers all aspects of reality. It works against the fragmentation of legal orders which was common currency in European pre-modern history. This was ended by the constitutionalism of modernity, through the centralisation of the administrative state or through the creation of federal structures, in which chaotic fragmentation is replaced by ordered division and coherent interaction. In modern constitutionalism you also have a sense of hierarchy, order and effectiveness.

Pluralism adds a post-modern flavour to constitutionalism. By post-modern, I mean all that is fluid and fragmented. And that is what pluralism tries to reflect, the reality of a fragmented law which is always in flux. Perhaps it is more realistic, if the reality of law is more like that, and not at all like the modern constitutional *ideal*. But there may be a risk in that step. Lawyers have probably been the last to embrace postmodernism. First were the architects, then philosophers, linguists, etc., and a minority of academic lawyers have been the last to embrace it, and perhaps they have done it with a risk to their social role, because they may not be compatible. We renounce to an ideal of constitutional law if we embrace the post-modern view of law which is reflected in radical pluralism, not only in the European Union but also in state constitutional law.

I would finally like to draw a distinction between pluralism *within* a legal order and pluralism *between* legal orders. It is clear that in a pluralist society, law, politics and institutions have to reflect that plurality. Otherwise, the legal order will create great tensions within the social fabric. But I do not know whether the relationships *between* legal orders in complex political systems like the EU may be properly and effectively constructed along pluralist lines. It is fine to have pluralism within legal systems, within institutions, of the sort you already have in the EU, if you look at the composition of the Court, the Council, the Parliament and the Commission, but I don’t know whether the interface between legal orders can be pluralistic. The costs in terms of clarity, certainty and effectiveness
may be too high.

Neil Walker: Thank you. Thanks for organising this. Let me begin by reacting briefly to what Miguel and Julio have said. First, I am interested in Miguel’s reconstruction of his idea of constitutional pluralism. I do not think I have ever heard him saying before that pluralism, as he defines it, is an inherent feature of constitutionalism and that the plurality of constitutional jurisdictions is just one particular manifestation of that inherent reality of constitutional pluralism. I do not disagree with his reasoning in the sense that I think that there are—in the way that he suggests—clearly pluralist aspects within all constitutional orders. However, I would introduce just a definitional caveat to the effect that there is something which is distinctive about pluralism within the European context and the trans-national context more generally; and that distinctiveness does have to do with the pluralism of jurisdictions and everything that implies, which covers not only the pluralism of authority claims but also the pluralism of political communities. I think for analytical purposes it is well worth hanging on to that more particular definition.

Secondly, on Julio’s modernity point, I think it is worth pinning down what we mean by modern and post-modern, because otherwise we will be talking past each other. It seems to me that one way of defining the so called modernist project has to do with a deep sense that the world—the social and political world—is something which we can make over to our own design. Is something that we can design, something that we can control, that we can order rationally, that we can bend and reduce to our collective will. And that is why the state is so central to the modernist project; because the state in some ways is a machine—a mechanism which tried to perfect that reduction, with all of its pathologies as well as the virtues of such an ambition. So the question arises whether it is possible to reconcile constitutional pluralism with modernity. Or is constitutional pluralism already an admission that we have reached a point where there is no possibility and no value in trying to reduce our world to a collective will?

And of course such a conclusion might or might not be welcomed. I tend to think, putting my cards on the table, that modernity was and remains a good thing, insofar that we believe the world of public affairs is something that we can at least in some measure reduce to our collective will. It leaves all sort of the difficult questions about what the collective will is, who gets to represent it, etc., but I am basically for the modernist project. But, by the same token, I am not for sticking my head in the sand and somehow concluding through a process of wishful thinking that the world that we
should still seek to reduce to our collective will is less complex than it is. And that is for me when the problem and the challenge of constitutional pluralism comes in. Because it is precisely in the European context, but not just in the European context - also in many other post-Westphalian contexts - that you no longer have this mutual exclusivity of peoples, territories and jurisdictions which was emblematic of the original modernist Westphalian constitutional form. Instead overlap becomes endemic. The question is, can you have and acknowledge that overlap and somehow still retain the virtues associated with constitutionalism. I think these constitutional virtues are also modernist virtues. In my recent work, to get at this question I tend to define constitutionalism and its virtues in terms of a number of different frames - a number of different ways in which we engage in and acknowledge a collective framing exercise.

There is a frame of the legal order, and a frame of the political or institutional system. There is then a popular frame, the idea of constituent power. And there is also what I call a social frame - the way in which we seek to embed the legal, institutional and popular order within a particular society. Now we all distinguish in rather different ways between a thin and thick constitutionalism. But I would say that most people would agree that what we have had so far at the European level is a thin constitutionalism. And that when some of these same people then ask what all the fuss about the Constitutional Treaty amounts to when we already have a constitution, what they mean is that we have a thin constitution in the sense of the legal order frame and the institutional system frame. But the big question, and the question which was not resolved by the failed Constitutional Treaty, is whether we can or whether we should have a thicker constitution in terms of both the self-authorisation or constituent power frame and the societal embedding frame - the idea of the Constitution as form of social technology which helps embed the society. This social frame, and whether and to what extent it can be constructed through a constitutional process, is a very difficult thing to grasp, but something which we all know is implicitly the case of national constitutional orders. Now, it seems to me what is probably the biggest question of constitutional pluralism is whether these sorts of things - these deep forms of constitutionalism - can exist simultaneously at the national level and at the European level, given the significant overlap between territories, peoples, citizenships, identities, etc., etc. Can these things co-exist, because if they cannot co-exist then it becomes very difficult to understand how that modernist project somehow can be retained and developed and extended in the context of pluralism. So that for me is the pluralist challenge in a nutshell.

III. THE RELEVANCE OF THE MAASTRICHT DECISION FOR THE PLURALIST PARADIGM
Jan Komárek: Thank you. I will move to another question, but it is still connected to what you have just been discussing here, because it puts the idea of constitutional pluralism into a kind of historical perspective; the question of how it has emerged in the European Union. One of the arguments in Julio’s article was that constitutional pluralism emerged only after the German Constitutional Court had delivered its Maastricht decision. That it was an attempt to conceptualise what the constitutional court was trying to put its own right perspective on the European integration. Would you therefore agree that pluralism, as Miguel has just suggested, is a necessary feature of constitutionalism, not even just the European constitutionalism, but constitutionalism as such?

Julio Baquero Cruz: It is clear that pluralism did not start with the Maastricht decision of the German Constitutional Court, and that’s not my point. There had been many judgments before, the Solange cases, the Italian cases, and the classical view of Community law was already in question in those judgments; the classical view of Simmenthal, for example, which was put forward by the Court in indirect conversation with the Italian Corte Costituzionale. But the German judgment of 1993 on the Maastricht Treaty was very important. It was paradigmatic, it was a piece of dogmatics with a well developed reasoning linked to a theory of the state. Immediately afterwards the Danish Supreme Court issued another decision on the Maastricht treaty, and the Maastricht-Urteil has been cited and followed in recent times by a number of constitutional courts around Europe. So it was also a catalyst. We all know the influence that German public law has around Europe, especially in some countries like Spain, Italy or Portugal, and in Central and Eastern Europe.

I also think the Maastricht-Urteil had a great influence with regard to the pluralist movement; Neil MacCormick, who started it, wrote a piece entitled “Beyond the Sovereign state” and also a shorter piece in the European Law Journal reacting to the Maastricht-Urteil. In the second one, he defended the Maastricht-Urteil and argued that it had much to commend it in terms of legal pluralism. The effort of Mattias Kumm, for example, was also prompted by the German decision. It was at bottom aimed at making sense and managing the legal interaction of the EU and national legal orders after the Maastricht-Urteil.

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Neil Walker: Yes. I think here we should draw a distinction between plurality and pluralism. Maybe this is too simple, but perhaps one could argue that the *Maastricht* decision was about the origins of constitutional pluralism, and no longer just constitutional plurality. We already had the existence of overlapping jurisdictions – and so objective plurality – but the way in which they co-existed within a single pluralist unity was not or at least not explicitly, with some exceptions such as the *Solange* decisions, considered by the ECJ or the national courts. Because pluralism has to be defined subjectively, as an attitude which in some way embraces and recognises objective plurality and works with it, that actually wants to maintain it and not to destroy it. That may seem an odd thing to say given the sense of the *Maastricht* judgment as in some ways aggressive, as fairly offensive towards the European order. But it was still a form of recognition, however challenging. It was a shot across the bows, a wake-up call that we live not just within a plurality of adjacent orders, but which some sort of idea of constitutional pluralism. Now, the point about that is that *Maastricht* clearly then was a catalyst, but I think we still have to ask what lay behind it? I recall reading Julio’s article and thinking that while it beautifully describes the catalytic effect of the decision, it does not quite so well capture what lay beneath it, because at the end of the day the *Maastricht* judgment itself was only a symptom of something deeper.

What were the major concerns in the Maastricht judgment? One was, the increasing competence of the EC and the EU, developing a new pillar structure, the monetary union, etc., the growing notion of a generally open-ended process of increasing competences. The second was how there was a disjunction between this increasing competence and the lack of what I described earlier as a thick constitutionalism. So you got increasing competence but without the idea of constituent power and without the idea of societal embeddedness at the European level. And thirdly was the idea of the ensuing danger to some necessary core of the national order. There had to be something which made the national order a national order – something that gave it its identity, its epistemic unity, and that somehow may be under threat by the first two developments. So basically these were perceptions which sprung out of the evolving social and political reality of European integration. Now, they did not have to be articulated as they were in the German constitutional court, but that articulation did not come from nowhere. It was based upon an observation and understanding that we have to recognise the new plural reality, and that we have to give the new pluralism that flows from this a voice, otherwise we might drift into a some kind of constitutional monism at the European level.

Miguel Poiares Maduro: Let me first turn very briefly to the question of modernity v. post-modernity. I certainly do not see the project of
constitutional pluralism necessarily as a post-modern project. And this certainly does not coincide with my vision of constitutionalism. I think that a real question has been raised by Neil; whether we can still have the values of constitutionalism as project of modernity? Including the generality, comprehensiveness and coherence that you [Julio] stress very much in your article as the values of constitutionalism as a project of modernity. In my view, to have them, in the context of constitutional pluralism, does not require an authoritative definition of those values. That is what I think constitutional pluralism tells us and certainly that is what I've tried to argue by developing my meta-principles of constitutional pluralism or the rules of contrapunctual law. These meta-methodological principles aim to secure those values in a context where you do not have an ultimate authoritative source to do that. But certainly, I do not see it necessarily as a post-modern project. To the contrary, since my conception of constitutionalism is deeply embedded by a concern with the rationalisation of the democratic process.

On the question that you pose now. First, as I said before, at a deep normative level I conceive of constitutional pluralism as inherent in constitutionalism itself. Second, I think it was already part of European law, in part because already before Maastricht you had national constitutional courts challenging the authority of EC law. You had the Italian constitutional court and the French Conseil d'Etat, and you had the Solange decision of the German Constitutional Court itself. But, moreover, in many other national courts the constitutional narrative explained the application of Community law at the domestic level by reference to certain national constitutional provisions. In this way, the issue of constitutional pluralism was inherent even in the national constitutional orders where a constitutional challenge to EU law was never as fully articulated as in Maastricht. But that is also the paradox of the Maastricht judgment, because at the same time that it challenges European constitutionalism it engages with it in a way that had never been done before. It even provides some suggestions for a future legitimation of European constitutionalism when for example it discusses the conditions under which the EU could develop as a polity. That is the paradox of the Maastricht judgment.

Now, the academic discourse is, of course, the other level. I think it is more to this that Julio was referring; that the Maastricht decision was what triggered the attention of academics. This is probably true to a large extent. Nevertheless, it was also, in part, inherent in the academic literature that already presented the development of European law as the product a discourse between the European Court of Justice and national courts. I'm referring to the work of Joseph Weiler, for example, and of some other scholars which already contained some elements of
constitutional pluralism. But in a kind of a deeper theoretical manner it was only articulated for the first time in a piece by Neil McCormick and I can accept Julio’s view that Maastricht triggered such academic debate.

IV. CONSTITUTIONAL PLURALISM IN PRACTICE: ARE WE ALL PLURALISTS NOW?

Jan Komárek: Do you think that we are all pluralists now? It seems to me that constitutional pluralism is used as a label in many discourses without even thinking about its consequences. And that is also why we were so much interested in Julio’s paper; he was the one who questioned these perhaps implicit assumptions in pluralism.

The question would then be the one which is based on Mattias’ argument in his article. Pluralism can also be misused in other processes. Mattias provided an example of the German government claiming in the Council negotiations that a particular solution can not be adopted because it would be invalidated by the German Constitutional Court. That makes or adds the political argument to he constitutional dimension. And my question is the importance of constitutional pluralism can be different in different contexts. Constitutional pluralism can mean different things in these different contexts. When lawyers or judges are talking about constitutional pluralism it can mean something else and can also have different consequences then if politicians are using this concept in their negotiations. What do you think?

Miguel Poiares Maduro: Well, judges never talk about constitutional pluralism and in part that is inherent in the theories of constitutional pluralism itself. The actors that operate in the system are expected to adopt the internal perspective of that system. They have to remain faithful to the narrative that results from that internal perspective even if the narrative can be shaped and adapted to fit an external context of pluralism. Constitutional pluralism is necessarily a kind of external theory. So, what you can expect, and what the courts ought to do, is to shape an internal perspective of the system which is informed by constitutional pluralism. They have to be knowledgeable of its consequences, be aware that they live in the world of constitutional pluralism. Therefore I do not want the courts to be institutionally blind. They should rather reason their decisions institutionally aware of the relationships with other actors and other jurisdictions in the context of constitutional pluralism. But I do not expect a court to come and say, well we know that our authority will be challenged by this other court. That I think you can not expect.

Neil Walker: Are we all constitutional pluralists now? I think there is a
certain structural inevitability about constitutional pluralism as I define it. But, I think, it is important again to distinguish between levels, and that there is a dimension of constitutional pluralism to fit each of the aspects that I talked about earlier. I think there is a legal system dimension, there is an institutional dimension, there is a constituent power dimension, and there is a societal or political community dimension. One of the reasons why in some respects constitutional pluralism has got a bad name is that people concentrate too much on the legal order dimension. It then becomes reduced to a question of the big constitutional court clash which never happens, or is partially or narrowly avoided. And so all the efforts and all the intellectual energy goes into looking at that particular dimension of it, but partly that is just a kind of professional deformation. You know that lawyers are going to look at these sorts of things. But, then of course you may end up with a debate which seems ‘academic’ in the pejorative sense. Or you end up –and I know that this is something that Julio objects to quite strongly– somehow legitimating what you see as a kind of ersatz legal order. One may be led to say that the law has no option but to recognise a non-legal answer when it reaches beyond and across the authority of particular legal orders, but is it not a contradiction in terms to suggest that the law recognises non-law in certain situation? So in strictly ‘legal order’ terms constitutional pluralism may be seen as a fairly narrow thing and also a negative and destructive thing. If however you see a whole constitutional debate and practice across all these dimensions as an attempt to grapple with a pluralist reality then I think it becomes a far more constructive inquiry. For my part, I see the whole constitutional debate and the whole post-constitutional debate on the Reform Treaty as about dealing with that pluralist constitutional reality – as a sometimes treacherous and paradoxical attempt to ‘find’ the authority necessary to address the clash of authorities. This goes to a much deeper and more expansive level than the visible part of the iceberg above the sea – where you actually see the big constitutional clash in the courtroom. So I think that constitutional pluralism is important, but we have to understand that it exists simultaneously in all these different dimensions.

Julio Baquero Cruz: There is an aspect of pluralism which is fashionable. But why? Because it is very well adapted to the present political circumstances. Pluralism is very diplomatic. It is not confrontational. It says “we will sort it out informally, we do not need clashes, we do not need an ultimate authority”. I think the idea of an ultimate authority, by the way, is also an essential part of the constitutionalism of modernity. Without it, it would be very difficult to have unity and coherence.

Miguel Poiares Maduro: And that is our key difference. You do not believe that is possible to have unity and coherence without an authoritative
Julio Baquero Cruz: An ultimate authority, an institution that may have the last word.

Let me say something else. I wonder whether constitutional pluralism is really dominant in the academia. Maybe not. Many Community lawyers do not even know that these issues are being discussed. They do not care. And others do not dare to criticise them. There are two discourses talking past each other. In French journals, for example, you never see articles about this. In German journals, *Europarecht*, sometimes, but it is not mainstream. In the College of Europe in Bruges, I do not think students are taught about these things. There is a disconnection.

Miguel Poiares Maduro: Can I just interject there?

Julio Baquero Cruz: Of course.

Miguel Poiares Maduro: Because I think what Julio was saying is very true. I wanted to make that point also. It is not only a point of constitutional pluralism. It is more general. There are entire communities of discourse in European law that totally ignore, not only constitutional pluralism, but many other EU law discourses that we may consider as dominant. European law is still constructed in very isolated communities of discourse on law. Perhaps, in part, because of the language factor that helps insulating those discourses.

But what I think is more important is the spill-over of academic discourse, in this respect, to the practitioners’ discourse, or to the discourse of other legal actors in the system. Our discourse must adapt itself to the different discourses of different legal communities and their respective legal jargons. As an actor of the system I cannot use the same language that I use as an academic in order to be effective. You must adapt to each community of discourse but, while doing it, you can also stretch the boundaries of the language that is normally used by that community. Again, it is the promotion of an internal action informed by the external perception and knowledge of the system.

The challenge is to translate your normative concerns and your theories into something that is operational in the language that is used in that system. And that is what I mean by saying that I want judges to be informed by constitutional pluralism. I do not want them to adopt the language that we normally use when we talk about constitutional pluralism as academics.
Julio Baquero Cruz: I wanted to say something else about the Convention, which was a pluralist exercise without its members knowing it. There are many things in the Constitutional Treaty and in the Lisbon Treaty which are pluralist in nature. And the pluralist discourse has also appeared in a number of judicial pronouncements here and there. For example, I analysed a judgment of the Conseil d’État of 2007 in which I found something very similar to what Mattias Kumm has proposed; that EU law should generally prevail and only in cases involving concrete provisions of the French Constitution which have no parallel in other constitutions or in EU law should a national court consider whether the national constitution may prevail. I do not know whether they have read Kumm. I doubt it. I think they arrived at a similar solution independently.

Neil Walker: Miguel made a point earlier I want to return to. Any particular understanding of the pluralist reality is not going to be as neatly detached as the external ‘alien’ understanding he discusses in his work. Indeed, partly what one is doing by labelling the new European juridical space as pluralist is saying that there is an inherent situatedness about legal authority, and about legal knowledge and perception. And within this overall European space people are in very different and distinctive situations. They are nested either in the national orders or within a supranational order. And pluralism, strong pluralism is precisely premised upon the significant extent to which they understand the world from their own perspective. That would not be a surprise. It would not be an undermining of pluralism, but its vindication. Most of the people most of the time experience the law as being settled, and being settled in terms of an authoritative pedigree they recognise. And the complex architecture which is European law, in the larger sense of European law and national law taken together, has many so-called bridging mechanisms for ensuring the settlement, e.g., the preliminary reference procedure, etc. So one can normally ensure the settlement of first order legal questions without having to put the question of who decides who decides –the question of ultimate authority– at issue. But the fact remains that, reflecting the underlying plurality of legal orders, there may be an occasional fracturing of authority –a broken window somewhere. There may be a breeze coming in somewhere.

Julio Baquero Cruz: A very cold breeze.

Neil Walker: Yes, it is a very cold breeze –it is coming from Scotland– and you know sometimes that cold breeze may be felt in the operation of the law. Somehow, it is affecting, it is structuring it, influencing it.
Miguel Poiares Maduro: Sure, it is a breeze. It is renewing the air.

Neil Walker: It may indeed be a breath of fresh air. So in that sense, part of what we are doing, and part of the more detailed work of the people around this table has been to ask how you relate the inside to the ‘alien’ outside. How do you move from that everyday, taken-for-granted insider perspective to an awareness of the claims of others? How do you make that outside part of your inside without deferring to, without reinventing some sort of hierarchy, some authority? So, these are important questions, but they are not day-to-day questions. They are not quotidian questions. They are questions of the extreme, or questions of the momentous, as in the context of Constitutional Treaty – where the search for some form of resettlement throws everything is up in the air. To repeat, generally speaking that is not how people normally experience their legal world. But it is a fault-line beneath the ground on which they normally stand.

Miguel Poiares Maduro: Can I just say something in this respect, that I think it is important? You are absolutely right, the fact that the courts and other actors decide within the internal logic of their system is the default mode that they have and this is, to a certain extent, a vindication of constitutional pluralism. But it is a vindication of constitutional pluralism as a kind of descriptive theory of that reality. And I think that most of us also defend constitutional pluralism as a normative theory. And in that respect we also claim that those actors similarly have to start informing their action by the notion of constitutional pluralism, by the fact that there are other constitutional sites, that there are other competing claims. And I think this is the real challenge of constitutional pluralism today. In which way should this normative theory develop in terms of a theory of constitutional adjudication for example? Or in terms of a theory of separation of powers? This is the real challenge; in which way can constitutional pluralism reshape traditional dogmatic theories of constitutionalism that, for example, courts use?

Jan Komárek: If I may continue on that line, because I think this is quite important, different perspectives of different actors, and you suggested that constitutional pluralism is in a way an external perspective which looks on different actors acting in their own language...

Miguel Poiares Maduro: From a descriptive perspective yes, but I think it is also a normative theory that ought to be enforced.

Jan Komárek: Yes, and then the point is to what extent you can have this own perspective being informed by pluralism, whether it would not in fact
deny it. The example would be the European Arrest Warrant cases. I think that if we apply your view [Maduro’s] then we would, in a way, deny constitutional courts’ independent action within their own logic. I think that you push the way they should be informed by the principles too far. You in fact oppose constitutional courts’ internal logic. According to your view, they would be acting as if they were European courts, not national courts. So in a way it seems to me that it is not pluralism because your principles deny the very idea of these different perspectives.

Miguel Poiares Maduro: We have had this discussion several times, Jan. I recognise my pluralism is not a radical pluralism. And that is why I have put forward these meta-principles. My notion of constitutional pluralism aims to prevent the consequences that Julio claims pluralism can lead to. There must be some kind of meta-methodological agreement between the actors of the different systems. With some principles; recognising pluralism by recognising precisely the competing claims of each other and by signalling that they are ready to mutually defer but also to establish the conditions for that mutual deference. The idea is that there is a commitment of all these actors to assure coherence while promoting the values of such pluralism. The idea also requires searching for some kind of systemic compatibility. These are all principles that, I know, limit the degree of pluralism. But I think it is necessary not only to have a viable form of pluralism, that, as I’ve put it, it's contrapunctual and not a mere cacophony or dissonance.

Neil Walker: Yes, it seems that we are always simultaneously concerned about the two opposing cliffs that pluralism can fall off. It can fall off the cliff into a form of monism, right. And so in a sense at least implicitly, this is what you [Jan Komárek] fear of Miguel's position, that in the name of pluralism it becomes a new monism. That these principles of consistency, coherence, etc., are just euphemisms for new forms of hierarchy. And of course that is a serious concern if you think back to historical debates about federalism. You get precisely that debate within federalist theory, within federalist literature. Does federalism necessarily display a structural bias towards centralism? By its very nature, because it is talking about the relationship between a centre and the regional parts—an ordered relationship—does that mean that the centre always holds, as the default position is in favour of the centre retaining its integrity as a centre? And some people looking at the long history of federalism would say that is also actually what happens. And when the classical notion of divided federalism

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- of a federalism of separate spheres, gives way to co-operative federalism in the 20th century, what you are actually getting is just a modified version of unitarianism. Now, it may well be that in the EU context, even though we talk about a brave new world of pluralism, that actually what we are doing is just inventing a new vocabulary which in the final analysis will end up pushing us in that federal-but-centralising direction. That is a very, very difficult question to answer.

But, of course, on the other side there is Julio’s fear that unless you have something which is a final authority then there is no other way to guarantee law as a settled practice. So these are the twin fears that preoccupy people, and pluralism is trying to say you do not have to give into either fear - that there is something in the middle. There is a via media between these two possibilities. You need not fall off either cliff. But, one can hope that is the case. One can argue how this fine line might be maintained. But one can not guarantee it.

V. CONSTITUTIONAL PLURALISM AS A DESCRIPTIVE OR A NORMATIVE THEORY?

Jan Komárek: Let us move now to the next question; is constitutional pluralism something which just describes what the European Union is or is it a normative theory we should believe in, we should have in the European Union?

Julio Baquero Cruz: The whole issue is circular. It depends on how you define pluralism. But I also wanted to point to a problem that is normally disregarded, that European law does not work as it should anyway. That it is largely a fiction, in some states a very big fiction, in other states less of it, depending on how their officials, judges and courts abide by or ignore EU law. When I started doing research on this issue and I asked colleagues about their experience, they all gave me many examples of cases in which national courts disregarded European law out of ignorance, out of rebellion, did not refer, etc. This is a major problem. I think the theories of constitutional pluralism have to take this into account, because the judicial system is not really working as it should.

Miguel Poiares Maduro [to Julio Baquero Cruz]: That is one of the paradoxes of what you say, also in the article. If you say that this is a reality and that the reality is actually much more dramatic than what constitutional pluralism actually says, then my question to you is: what do you say it should be done? How can we then secure the conditions which you identify with the rule of law and modern constitutionalism [...] well [...] the main critique your paper makes on constitutional pluralism that I
thought could answer such paradox is that by legitimising this reality constitutional pluralism enhances the risk that there will be ever more evasions. But you are telling us that the degree of evasion is actually much bigger than what we are actually saying. So, my question to you is: what would you tell to national courts? How could you be able to create that kind of coherence and uniformity that you aspire to so much?

**Julio Baquero Cruz:** Well, I think both things are theoretically and practically different. The first issue is that of effectiveness. Is EU law applied properly as and when it should? And the second—that of pluralism—is what happens when there is a fundamental clash of values? The first problem should be solved independently of the second one, because it affects the rule of law. Judges should act as they should and national administration should act as they should, because the EU decision-making system is constructed on the assumption that the law is properly applied. And this is not true all the time, in some member states it is not true most of the time.

Thence to pluralism. Do we have a pluralistic reality? It depends on the country and on the case. Consider the case of the Belgian Conseil d’arbitrage on the European arrest warrant. It was the only national court that referred a question to the European Court of Justice. The Court gave an answer and the Belgian court followed it. We do not have pluralism there, do we? We have normal Community law, with supremacy, uniformity, and certainty. On the other hand, when the German Constitutional Court, in the same issue, did not follow the suggestion of the German government, which strongly pleaded for it to send a preliminary reference to the European Court, and went on to decide the case on its own, some people in this room would say that it was acting as a pluralist court. It rendered its judgment and it did not really pay much attention to EU law, creating a legal mess, because it saw the case from the exclusive point of view of the German Constitution. Is that pluralism at work, or not?

On the normative issue, I would be willing to accept, but only as a second best, a moderate version of pluralism, as long as national constitutional courts and other courts of last resort refer when they have to refer, giving a chance to the European Court of Justice to make its voice heard, and respecting its judgment unless they have extremely powerful reasons not to follow the law, with all the consequences that may entail. This would be a sort of political disobedience. I would not see it as a structural part of the system, as contrapuntal law, etc., tend to be, but as a very exceptional escape from it. I don’t think any of you makes that point about the obligatory nature of preliminary rulings in so many words; you don’t say that the procedure has to be followed. And that is the main problem; that
we have a mandatory bridging mechanism, that we have the instruments for a well-ordered dialogue, but they are not used. And they are not used, I believe, not because of fundamental value clashes, but because of considerations related to power, to institutional prestige, etc., that is, for reasons that carry very little weight.

Finally, I am also happy with pluralism within the institutions of the Union, and I think there is a great deal of pluralism in them, also at the Court. You have a judge from each member state. When hard cases have to be decided about fundamental rights or values, normally the research division of the Court makes a detailed study concerning the situation in the legal orders of the states. And the Court takes into account that situation to make sure that its intervention will not be disruptive for this or that legal order. That is pluralism within the institution. Do you need more? Can you have more and still have a legal order? I doubt it.

Neil Walker: To come back to your Belgian case, I would say all that happened there was that there was no outbreak of pluralist conflict. The Belgian court accepted the view from Europe, OK. But, that does not mean that somehow pluralism vanishes as an explanatory and descriptive template in that particular case. It just means that pluralism is not about conflict, pluralism is about the ontological reality of there being different legal orders having to find terms of accommodation between each other. And often these terms of accommodation operate quite smoothly and quite effectively. So, you know, the fact that sparks did not fly, does not mean that pluralism became inapplicable in that situation. That was perhaps just a normal running of a pluralist order.

On the normative point, I would say three things. One is that it seems to me first of all that the way you phrase the question is rather loaded; is it just descriptive? [...] At the end of the day I actually think that there is a normative value in having an accurate understanding of the world. That is in itself a normative value. So, the first normative premise is to say, yes it is a good thing to have a well-informed understanding of the world. There is no point of sticking your head in the sand, and just wishing the world was otherwise, if it has actually developed in a particular way. And insofar as pluralism announces a candid recognition of overlapping authority, that is a first normative value. Of course, it could be an over-recognition, it could be an essentialisation of difference. Miguel in his article talked about the Martians coming down and saying you see people sitting in the national courts or in European courts, believing different things. Well, the Martians have a point. There are actually differently constructed realities there, and we are better able from a modernist perspective to intervene in the world and to change the world if we understand it. So, that is the first
normative value.

The second normative value, I would say, has to do with recognition. One of the great emblems of the 1990’s is the politics of recognition. In some ways this is an aspect of the politics of recognition. What pluralism is saying at the meta-level—at the highest level—is that within our continental configuration we have to acknowledge a multiplicity of different sites, with their different claims, with their different agendas, with their different commitments, etc., etc. And that too is a good. It is a good to recognise the relationship between sites in a way that does not require one to defer to another, or one to be supreme and authoritative over the other. Because if the occupiers of these sites do not understand themselves in these terms—if the peoples and people of Europe are not happy with a idea of hierarchically ordered federation, so be it. It is imperative under the politics of recognition to respect that. That is part of what pluralism is saying.

Now the third normative point is maybe the most interesting. This asks whether there is something productive in thinking about legal and political relations on a basis of heterarchy, rather than hierarchy. Beyond simply the recognition point and beyond the empirical reality point, the third point is to explore whether there are productive possibilities in thinking of law in terms that cannot be resolved by some sort of final authority. Can law, considered as a modality of deliberation or public reason which is not reducible to a final authority in circumstances where that deliberation and reason threatens to exhaust itself, actually function? Of course, there is an increasingly interesting literature, which is by no means limited to the EU, about dialogue between constitutional courts—whether national courts or international courts or supranational courts or WTO. There is a body of work where the interesting question is, when we are talking about high constitutional principles, are we better resolving these high constitutional principles in a context of dialogue where no court and no political body can finally just stop listening because they get the final word. If you take away the authority of the final word does it make for a better constitutional law? I know, I am posing it as a question not as an answer, but that would be the third normative opening of constitutional pluralism.

Miguel Poiares Maduro: I think I would have two points on what you [Neil Walker] were saying and what Julio was saying. It seems that when there are no conflicts the tendency is to say that constitutional pluralism is not relevant and when there are conflicts the consequence may be that they are not respecting European law and so what is then the value of constitutional pluralism? But that is why I think that constitutional pluralism has to have some kind of thicker normative content to
determine, to a certain extent, the ‘rules of engagement’. I do not think what the German constitutional court did was necessarily correct in terms of constitutional pluralism as a normative theory. Because I do not think they have respected what I conceive as the meta-principles of constitutional pluralism. But, of course, some others may define a different threshold. What is important to me is that it requires a form of loyalty among the participants. It is not simply that you assert your own authority. That, in my view, is not constitutional pluralism at least not in a normative sense. For me constitutional pluralism means, on the contrary, some form of mutual engagement. You are ready to engage with the other jurisdiction and you are also ready to defer. And that is what we have to provide in my view when we propose constitutional pluralism; those rules of engagement. To tell constitutional courts under which conditions they should defer to the EU jurisdictions, and instead when they could feel authorised to try to create new rules of the game.

And I actually think that this is not irrelevant for the other domain mentioned by you; the day-to-day application of European law and not the potential for conflict at the systemic level. On the one hand, I think that if we found the legitimacy of European law on this pluralist construction, and with the right principles for constructing that, then you make national courts understand that they are actors of that system and they are not simply subject to them. And if they assume themselves as actors of that system, they will start to internalise the methodology of EU law, the hermeneutics of EU law. If they understand that they share a common methodological ground for example. That, in my view, will lead to a decrease in the instances of a kind of soft evasion; when national courts do not refer when they ought to refer. This is not necessarily conflict at the higher level but it’s still a form of evasion from EU law. If you make national courts part of the system and if you make them realise that they are actually constructing that legal order you make them truly European courts. That is what CILFIT is about. A requirement of universalisability; that is, a requirement to operate as European courts. To say to a national court that it must decide taking into account the possible views of other national courts and the impact of their decision on the broader EU legal order. You are an actor in a system that includes many other actors and you owe loyalty to that system. But, you are much more effective in doing that in a context where you recognise the pluralist construction of the Community legal order.

Julio Baquero Cruz: Yes, but in what way does that kind of moderate pluralism differ from the classical Community account you find in Pierre Pescatore, for example? Because you have loyalty, you have dialogue, you have engagement, you have bridging mechanisms, you have the whole thing
plus order, the possibility of order and the final word.

Miguel Poiares Maduro: This is why I insist for example on the issue of institutional choice. Because this is applicable to the European Court of Justice too. The Court of Justice should not be institutionally blind either. It is a discursive mechanism. And the element that guarantees the discursive mechanism is the possibility of constitutional conflicts and its prevention at the systemic level. That is what makes the European Court of Justice internalise in its own conception of the system that this is a two way relationship. But this is not to say that for the system to operate with national courts the latter can at all times legitimately decide whatever they want. That is not the point.

VI. QUESTIONS FOR MATTIAS KUMM

Matej Avbelj: OK, welcome back everyone. It is now my pleasure to greet also Mattias Kumm with us. We will have a chance to listen to the fourth vision of constitutional pluralism in European integration as well. The way we decided to proceed is that the speakers, who have spoken before, will each ask a question to Mattias so that he will be able to, basically, jump into the debate that he missed. Therefore, let us just get started. The sooner the speakers are finished with their questions, the more time there will be for a general discussion.

Miguel Poiares Maduro: My question to Mattias is the following. I have been following your work for a while in many domains, for reasons that you know. And, on one hand, in terms of constitutional pluralism, and I think even in terms of what has raised most interest for Matej and Jan and also other people, your focus has been on the Kompetenz-Kompetenz question and on potential conflicts of ultimate authority. But on the other hand I have always seen your work in that respect linked to a broader conception of constitutionalism. But you have never articulated that. I once classified your work as a kind of project in constructing a philosophy for the constitutionalisation of political life. Many of the concepts that you use, e.g., ‘practice contestation’ would in my view gain a new dimension and interest if you would be able to relate them better with an underlying conception of constitutionalism that is linked to your specific work in terms of constitutional pluralism.

So, my question to you is the following: is your notion of constitutional pluralism motivated by a kind of pragmatic concern with answering the question of ultimate authority in potential constitutional conflicts, or is deeply linked to your underlying notions of constitutionalism?
Mattias Kumm: Thanks for this question, Miguel. It provides me with the challenge to explain a significant part of my life’s work in five minutes... The pragmatic and the theoretically ambitious complement one another, of course. On one hand, the account of constitutional pluralism I provide establishes a framework of principles that are then applied to specific contexts to provide pragmatic workable responses to a set of pressing practical questions. How courts should address constitutional conflicts between the European Union and member states in the European Union. On the surface, this seems to be an exercise of what Kuhn would have called ‘ordinary science’; the academic lawyer tries to come up with a solution to a problem that arises in legal practice. On the other hand, what fascinated me about this practical issue is that the conceptual frameworks used by courts to justify solutions; be it the insistence on the effective and uniform application of EC Law by the ECJ, or the idea of ultimate constitutional authority being constituted by ‘we the people’ within the framework of the state, seemed to be inadequate to the task of designing conflict rules that reflect a careful assessment of the obviously relevant concerns in play. Furthermore, these frameworks could not explain the practice that courts were actually engaging in. There was an interesting disconnect here, something that seemed to point to something deeply wrong in the competing ways either proponents of European law’s primacy or classical constitutional jurists thought about the foundations of constitutional authority. With other words, this seemed to be the kind of problem that required rethinking the basic conceptual framework that we use for discussing constitutional authority. It is an issue that seemed to require a paradigm shift for thinking about constitutionalism, a truly revolutionary reconceptualisation of constitutional practice, both within and beyond the state. This is the project I see at least three of us here contributing to. Julio is here to keep us on our toes and remind us that grand announcements of paradigm shifts more often than not turn out to be little more than short-lived fashions.

But make no mistake; this is not a fashion. This is an enterprise that is likely to dominate the intellectual agenda for ambitious constitutional lawyers for years to come, simply because the problems it addresses won’t go away. Run of the mill practitioners either on the European or national level might not pay much attention to it. There is no reason why they should. Car mechanics or building statisticians continue working competently within the framework of Newtonian physics, even after that paradigm had been shattered by the work of Einstein, Heisenberg and others. Similarly, most cases can be resolved by lawyers without reference to or understanding of the issues that are at the heart of this project of reconceiving constitutionalism within a new paradigm of constitutional authority. But just as the practical applications of quantum mechanics are
rich and varied, so the implications of the new constitutionalism go way beyond constitutional conflicts and have only begun to be explored.

So let’s go back and situate the emergence of constitutional pluralism in the context in which it arose.

In the late 1990’s there were those who just assumed that the ECJ had gotten it right, that ultimately there was a new legal order whose law rightly claimed unqualified primacy over national law. If national courts didn’t fully agree, the belief went, it was only because they were not yet sufficiently educated and familiar with EU Law. Progress, in the sense of gradual acceptance of the ECJ’s primacy claims, seemed to have already occurred and further progress was believed to be inevitable. Yet, on the other hand, there were those judges and scholars writing for national constitutional courts and national constitutional lawyers, who continued to insist as a matter of course that the domestic constitution was the supreme law of the land and the only question was how to of interpret the conflict rules of the national constitution with regard to EU Law in order to find out how EU law fits into domestic practice. The Maastricht decision helped to make it clear to a European audience that this practice was not based on intellectual laziness and ignorance, but was grounded in a reasonably sophisticated, classical account of constitutional authority, that directly conflicted with the ECJ’s account. All of a sudden European lawyers paid attention:

“Hey, wait a minute! What’s happening on the domestic level is not just explained by recalcitrant ignorance. They are actually thinking about it. They are coming up with a reasoned argument about whether or not they should adopt the position of the European Court of Justice. And they end up unconvinced and reject it”.

So, to simplify things somewhat, there seemed to be a big conflict between the ECJ supported by European lawyers embracing the rule of European Constitutional Supremacy on one hand, and most national constitutional courts supporting a rule of National Constitutional Supremacy on the other hand. Now, what struck me immediately is that framing the issue as a choice between two fundamentally competing claims of ultimate authority seemed to miss central features of actual practice, that I had spent considerable time studying closely. The more I studied actual decisions by national courts, the more implausible this way of framing the issue seemed to me.

Just to illustrate the kind of complexity that you discover once you start looking little more closely, I’ll give a somewhat stylised and rough account
of British practice and debate, that reflects an evolution that, in some form or another, tends to have a similar structure in other constitutional systems. In the beginning (position 1), there is a claim to national constitutional supremacy; which, in Britain, took the form of a claim to parliamentary supremacy. In case of a conflict between a British statute enacted later in time and a piece of EC legislation, the British statute prevails. But soon came the first qualification (position 2). Soon the House of Lords said “yes, well, of course there is parliamentary sovereignty, but when we interpret a national statute that might be in conflict with the piece of EC regulation, we will, as an interpretative matter, give weight to EC law and make that a factor in our interpretation of our national law”. A factor. That’s weak. But it’s not the same thing as a straightforward rule, which just says “we just interpret our national law the way we interpret any other law and we don’t care about what else might be going out there”. And, then, came the next step (position 3). At a later point EC law was not just a factor to be taken into a consideration when interpreting national statute, it was the determinative factor. So, if in doubt, if there is space to interpret national law to be compatible with EC law, that space would be used to ensure compliance. And then we have a further step (position 4) and this many would describe as the current law in Britain. It does not matter whether the parliamentary statute is open to interpretation or directly in conflict with EC law. We will always assume the legislator just did not want to violate prescriptions of EC law unless it explicitly and directly writes that into legislation. We can imagine another step (position 5), that has been proposed by some but arguably does not at this point reflect current British law. Even if Parliament explicitly and directly writes into a law that it wants to overrule EC law, it may not do so. All parliamentary sovereignty means is that Parliament may revoke the act that is the basis for British membership in the EU. A final step (position 6) might be to recognise the primacy of EC law without qualification. Parliamentary supremacy would be conditional on compliance with EC Law.

Now the point here is not to suggest that there is an inevitable progress trajectory here. I take no position on whether position 4 is better or worse than, say, positions 3 or 5. The point here is to focus attentions on positions that are possible candidates for the resolution of constitutional conflicts, but that are impossible to describe in terms of a binary choice between national or European constitutional supremacy (here, positions 2 to 5). There is a puzzle here. Might this be an indication that something quite different is going on, something that we ought to be able to describe using a quite different conceptual framework for constructing constitutional authority?
In the end, my answer was ‘yes’. But before we jump to paradigm shifting new conceptual frameworks as a solution to the puzzle that constitutional practice has placed before us, let’s take seriously Ockham’s razor and first explore other, simpler attempts to make sense of it. Of course there might be a simple solution. The decision about the right constitutional conflict rules is a question of national constitutional interpretation. Determining the right conflict rule is just a question of looking at national constitutional provisions and their proper interpretation. The complexity of constitutional conflict rules might derive from the fact that the interpretation of the national constitution is often a difficult thing and might lead to complex answers of the kind we see national courts embracing. But that answer is unpersuasive. It does not fit the facts. First, the conflict rules developed by national courts have changed, even when the underlying constitutional text has not. Indeed, in Britain there is no underlying constitutional text, but just an interpretation of a practice, in which great rhetorical significance is placed on the highly contested idea of parliamentary sovereignty. More generally, a closer analysis of national constitutional practice in other jurisdictions confirms the hypothesis that the conflict rules developed by national constitutional courts are not developed by anything that is plausibly described as ordinary acts of constitutional interpretation, but more often than not reflects a straightforward functional, purposive type of reasoning; think of the German FCC’s Solange formulas. Something else is going on. So, if it is not ordinary constitutional interpretation, and it is not recognition of European primacy, what is a plausible account of what is going on?

Well, here is another simple answer. Let’s call it a ‘realist’ or ‘cynic’ answer:

“You know, let’s not fool ourselves. Constitutional judges are savvy political actors. They understand that their task is to manage a complex system of political and legal interdependencies. So, using whatever methodology and arguments resonate with their own legal tradition, they find a way to craft rules that minimise conflict and make the whole thing work, while insisting to keep open avenues for resistance, just in case. Rules relating to constitutional conflict present a kind of constitutional emergency regime for which the ordinary rules of interpretation don’t apply. Courts do what works best. So, when we talk about constitutional pluralism as a way of understanding constitutional conflicts, we are analysing an exceptionally limited domain where ordinary rules of constitutional interpretation are suspended. In this domain, we move beyond law. We move from legal interpretation to legal diplomacy and comity. We are talking about the savvy management by judicial actors of the interface between EC and domestic law. Beyond this narrow domain, constitutional law and our ideas of constitutional authority are left
standing as they are. That’s all there is to it”.

But if we don’t want to be dogmatic cynics and we refuse to be fooled into naively believing that courts are merely interpreting the national constitutions they accept as ultimate authority, what alternatives are there of making sense of practice? This is where the radical claim relating to a paradigm shift in constitutionalism comes in. The whole conventional story, the classical way we understand the legitimacy of domestic constitutions, needs to be revised. Not only does the classical story not fit with the way courts address the issue of constitutional conflict. On closer inspection, it also fails to be convincing on its own terms.

Why is it the case that we should regard domestic constitutions as the ultimate legal rules governing the national political community?

Positivists would simply say “well, we recognise it as a matter of fact”. But here, we’ve already seen, the facts are far more complicated. The actual conflict rules recognised do not simply reflect a rule of NCS or ECS. The identity of the Grundnorm or rule of recognition or in European constitutional practice is a complicated affair. Furthermore these rules are in flux and contested. So referral to conventions don’t help much to understand or guide legal practice in Europe. Some kind of a normative conceptual framework is needed to makes sense of and guide existing practice.

So, here is the classical conceptual framework used for justifying the ultimate legal authority of national constitutions; “the constitution is the supreme law of the land because ‘we the people’ have enacted it to establish a legal framework through which they govern themselves”. There are different versions of theories with this structure, but most focus on the moment of bringing into existence of the constitution, the creation of an ultimate authority out of a legal void - the Big Bang or the creatio ex nihilo of the constitution. First there was nothing and then there was the highest law. And what we want to ideally see is ‘we the people’ in some kind of high profile participatory deliberative way, bringing into being such an authority. That’s the conventional way of looking at it. So, if you want to find out whether EU Law or national constitutional law is the supreme law of the land you ask, “well, if something like that is going on the European level”; and you conclude, “you know, there might be some faint analogies of such a process in the various moments of treaty ratification, but it really does not amount to anything we can plausibly interpret as a constituant act of a European ‘we the people’”. So European Union law can’t be the supreme law of the land and Europe can’t have a constitution properly so called, but at best a functional equivalent - after all, golf clubs have
constitutions too, as Jack Straw once quipped—, that ultimately derives its authority from the member states. So, that's the classical framework. Unfortunately the idea that ultimate legal authority is based on 'we the people', that through an act of volition establishes an ultimate authority is deeply flawed. Miguel is among those who have written about what is paradoxical and unpersuasive about the conventional ways of thinking about domestic constitutional authority and Neil has as well. Even though this is not the place to actually make that case, what does the alternative look like? According to the ECJ, it's the principle of legality—the effective and uniform application of EC law—that grounds the ultimate authority of the EC. Contrary to Julio, I find that also unconvincing, for reasons I can't develop here. Neither emphatic 'we the people'–ism nor the monist legalism that the ECJ advocates either reflects actual practice by national highest courts or is otherwise convincing.

So, what is the something else that is to take its place? The foundation of law and of constitutional authority in Europe, I have argued, are the basic constitutional principles of political liberalism; the rule of law, democracy, human rights, complemented by subsidiarity to address questions concerning the allocation of legislative decision-making authority. But these principles are held together neither by the idea of a sovereign democratic state that is the source of all positive law, nor the idea of a legal system as a formal hierarchical order guaranteed by an ultimate authority recognised by everyone. Instead, these constitutional principles are held together normatively by the idea of human dignity as the foundation of law and institutionally by the commitment of all constitutional actors to play their part in securing the overall coherence and effectiveness of legal practice.

Of course, these constitutional principles, like all legal principles, ultimately require the support of officials and citizens to be effective. But they do not require enactment by 'we the people'. Their authority derives from the reasons that support them, connected ultimately to the idea of human dignity as the normative foundation of law. Constitutional texts reaffirm these principles, but mostly to make them more visible—think of the Preamble to the Charter of Fundamental Rights—or to provide a more concrete interpretation of them. These principles are not just principles that the people as the true sovereign have happened to choose to govern themselves. The meaning of collective self-government and the limits to that idea are determined by these principles and their interpretation. They are the foundations of law in Europe. They constrain and guide constitutional practice. They provide the language we use to settle debates and to contest old settlements. And they should be the direct focus of those trying to reconceive and guide constitutional practice on the
domestic or European level.

I think I have shown in my work that these principles better than any other conceptual framework serve to explain and guide the practice of national courts fashioning rules of engagement to address constitutional conflicts between EU and national law. But, as the heartpiece of a theory of constitutional authority, the new post-statist, post-nationalist and post-positivist constitutionalism that many of us here embrace has the purpose to more generally reconceive the foundations of law as it’s practiced in trans-nationally integrated liberal democracies. So, that’s how the pragmatic and the theoretical come together.

Neil Walker: A follow up question, if I may? It seems to me, reading your work and listening to you here, that there is a strong claim that provided we move away from certain understandings of what is the glue behind national law, certain understandings based upon either authority or even local culture, then some of the problems, some of the difficulties associated with making legal sense of constitutional pluralism, begin to disappear. Because, instead we understand law as a practice based upon reason. Reason knows no boundaries of community; reason does not to defer to authority. Therefore, once we go beyond the boundaries of national community, we still have reason. The difficulty with that is that most of us actually understand law as a compound of different things. There is an authority or command dimension of law —one does not need to be an ethical positivist to understand the sociological reality of this authority dimension within law— and there is also a cultural dimension within law. Take Dworkin for example, Dworkin’s theory of best fit, is precisely something which tries to put reason and culture together. He asks “what is the best understanding of law, conceived of as the best fit for this community”. So, there is a cultural dimension to law. But there is also a universal reason dimension to law. Because Dworkin tries to put these two together, he has to find an accommodation between the two, leaving aside binding authority almost entirely from his theoretical framework, or treating it simply as a product of the other two. But the problem is, if we try to move beyond constitutional pluralism, one does not have to deny the importance of reason —and I certainly do not-, some dimension of universal reason within law, to wonder whether there are enough ingredients in place for law always to hold in a trans-national context. If that part of law associated with the linkage between legal orders is devoid of autonomous authoritative foundations and compound cultural foundations, and if moreover it is contending with and confronting the insistent presence of these authoritative and cultural aspects in the different legal orders themselves, it seems to put a big strain on the reason component.
Mattias Kumm: First, the idea to sharply contrast authority and reason might not be very helpful for thinking about the complex kind of law, because as you rightly say, referring to my colleague Ronald Dworkin, it is a central feature of law that it somehow integrates both. The question is how the two are integrated. Here is a very short version, ridiculously oversimplified, of how I see the two connected.

When a particular legal actor, be it the European Court of Justice, a national constitutional court, a legislator, an administrative agency, thinks about what its role is and what it should be doing, in a particular context, it understands its own actions as part of a wider practice. In that practice, other institutions are charged with doing other things. Modern law institutionalises a division of labour between different actors for a variety of reasons. These include establishing a division of powers to avoid abuse, allow for effective participation and control (voice), allow for decisions to be influenced by the relevant expertise, etc. It is also part of the modern understanding of law that with regard to many issues there is likely to be disagreement about what the law should be or how it should be interpreted, even if all relevant actors are well informed and acting in good faith.

What constitutionalism does suggest—and I think that is something that Miguel would agree with this—is that the exact nature of each actor’s role and the exact limits of what a particular actor ought to be doing in a particular situation given decisions by other legal actors is very rarely determined exclusively by an authoritatively enacted rule regarding competencies. In most situations, there are likely to be settled understandings of the law, but in principle these understandings are always susceptible to be challenged in the name of constitutional principles. The extent of the authority of any actor is thus always, in principle, susceptible to justificatory pressures. Such justification of authority in turn relies on jurisdictional, procedural and substantive principles. When a court has to decide a human rights case, it does not simply say “I have been given jurisdiction to review human rights cases and therefore I will decide the issue on my best understanding of how these rights should be understood, no matter what anyone else thinks”. Courts tend to be sensitive to procedural principles. In the context of applying the proportionality principle, for example, they might give special deference to decisions reached by long and arduous public and parliamentary deliberations or questions that require particular expertise that the executive branch has effectively brought to bear on the issue. In many instances officials might plausibly say “this is authoritatively decided”. But courts will often say “look here we have a decision by some other actor that has some weight and let’s see exactly what weight it has and whether, all things considered
we should overrule it anyway”. The degree to which the decision of another is accorded weight depends on the jurisdictional reasons supporting the authority of the other institution, the procedure used to make it, and the plausibility of the reasons that support it. Of course, the humdrum practice of law generally deals with situations where most of these difficult issues are settled. But if they are settled that’s a sociological fact only. We can imagine a political context where many of these settlements become disputed again. So, constitutionalism provides you with the vocabulary to articulate and frame debates, about questions of authority. So, it’s not about authority versus reason. It is not about culture versus reason either. Obviously, the culture of reasoning and the understanding of what counts as reasonable within a legal framework is likely to be influenced by certain self-understandings and practices as they happen to be in a particular place, in a particular situation and in a particular time.

Julio Baquero Cruz: My question is about your argument that in principle EU law should prevail unless countervailing principles have greater weight. You mention three exceptions, and their ground seems to be the greater democratic pedigree of national law. Assuming that this is the case, I wonder whether you can balance these principles as you do. On one hand, you have the rule of law, with predictability, the ability to know in advance who is going to decide and according to which rules. And you unsettle that on the grounds that national law is more democratic. This is problematic, because you cannot have democracy without the rule of law. If you accept this kind of balancing, you may end up damaging the rule of law in the European Union, and also in national systems because the European dimension of the rule of law is part of the national rule of law. And you do not improve democracy on the European level or on the national level. You just preserve what you take to be superior national constitutional law. So, how do you deal with the heterogeneity of these two values? Can you really balance them in any meaningful way?

Mattias Kumm: I guess, there are two ways of interpreting your question. One would be to say “look, you have different sets of principles and you claim you can balance them against one another and how are you gonna do that”. So, that’s a general problem of balancing competing principles against one another and the possibility of rationally doing so, given that they might be incommensurable. I do not think that this goes to the heart of your question, so I will leave that aside.

The other way of understanding your question is that you are suggesting that there is something basic about the rule of law, that justifies giving it absolute priority over other principles, perhaps because without it, other
principles become unintelligible. That position has a long pedigree in the Western legal thought. The idea has been central to the discussion of civil disobedience. So, there is a legal decision and a citizen disobeys. And he disobeys because he thinks the government shouldn’t be doing what it’s doing. He thinks, or she thinks, that by disobeying in a certain way things might be improved. That’s a political act the purpose of which might be to change the practice. The question is under which circumstances you might legitimately be engaged in such a practice. And one answer is “never, because the rule of law is undermined; the rule of law is the very precondition for any meaningful understanding of justice, democracy”, etc. And I’ve always found that wholly unconvincing.

First of all, the law is being disobeyed a lot of the time, in lots of systems, in lots of situations, by a lot of people. And it tends not to immediately lead into a civil war or anarchy. So, just as a sociological point, the practice of law tends to be pretty robust. Of course, there are also situations where it breaks down completely. But it is difficult not to be amused by the rhetoric of disaster, mutually assured destruction, complete disintegration, etc.; for example, because the German Constitutional Court might issue a ruling that is incompatible with the ECJ’s holding concerning the availability of preliminary remedies in the context of challenging decisions under a regulation dealing with the import of bananas. I never understood why only a monist construction of the legal world and an unqualified submission to the authority of law could conceivably save humanity from disaster.

**Miguel Poiares Maduro:** But, if I may, just in an attempt not to isolate Julio too much, I do recognise that there is an argument that he’s putting forward which is rather powerful. That is the argument that if you collapse the description of that world into a normative statement, then you are actually legitimising derogations from the rule of law to the point that they may no longer be the exception. Then, this can threaten the concept itself. I think that’s the danger which Julio is mentioning...

**Mattias Kumm:** That’s a standard slippery slope argument. There are very few circumstances, where it is convincing. And I have yet to see any empirical studies that would support it in this context, certainly not by those who routinely invoke disaster scenarios.

**Julio Baquero Cruz:** Only two doubts. First, your argument, at least in the 2005 article, is not really conceived in terms of disobedience. Like contrapuntal law, it is a structural argument about the very essence and the normal state of the relationship between EU law and national law. Second, the argument from civil disobedience may work with individuals, but I
don't know whether it can be extrapolated to institutions. We need to think more about that.

Matej Avbelj: OK, I think despite the fact that you [Mattias Kumm] came late you had an opportunity to present your view equally comprehensively as all the others. Thank you very much for that. And now, there is time for you to take the floor. Yes, the next minutes belong to you; you the people. We have more than thirty minutes for questions and answers, so I would just like to start collecting your questions as well as comments, whichever might be.

VII. QUESTIONS AND COMMENTS FROM THE AUDIENCE

The first comment from the audience stressed the need for a wider debate, not limited to 'legal' questions concerning, e.g., the precise relationship between the Court of Justice and national courts, if constitutional pluralism intends to be a theory that captures the whole of the European integration. It noted the lack of the real political debate in the European Union and its states.

The following question wondered about a wider relevance of the pluralist theory beyond the confines of the European Union. It compared the current debates in the European Union to “the age-old question of the relation between international law and national law.” Is the theory applicable there as well?

Another question raised the issue of relevance of constitutional pluralism beyond the context of the European Union. It had firstly mentioned that some forms of pluralism existed in other constitutional systems; e.g., the United States. However, it continued, the competition between different authorities reflects not only various political communities, but also institutions. Should it be so much court-centred, as it seems to be in the EU? In a way, the following question only reflected on this, asking what the precise problem between the various courts was; competition of jurisdictions, while each actor recognises the others and the disagreement exists only as regards who should decide what?

The last question concerned the normative content of constitutional pluralism and went back to one of the ‘fundamental questions’ discussed at the beginning of the symposium. If pluralism is a theory about disagreement, what is the precise content of such disagreement?

Miguel Poiares Maduro: I do not want to answer all questions; may be the last three of them. They have a common point. It is whether constitutional
pluralism is something specific of European Union law and its relation with national law, particularly national constitutional law, or if it is something that is applicable beyond that. I think all answers from the three of us go in the direction that it is something applicable beyond that too. At the beginning, I even stated that I think that it is actually inherent in constitutionalism itself.

What you have are different levels and expressions of constitutional pluralism. In the European Union, this constitutional pluralism manifests itself even at the level of competing jurisdictions for ultimate authority. But that is just one more level of expression of this constitutional pluralism. What is the importance of this? The importance is not only that it tells us something about what constitutionalism is but also that once you develop a normative programme for constitutional pluralism, some of the elements of it are applicable at different levels, like at the international level, particularly the element of the institutional awareness required from courts. But not only courts, all institutions ought to define when they should defer to other institutions which may be in a better position to pursue the fundamental values of their legal system. What are the criteria for that?

Bruno De Witte: Can I ask you something? Why do you include international law in your concept of constitutionalism? Why do you call all that ‘constitutionalism’? Isn’t that stretching?

Miguel Poiares Maduro: To the extent that the international level assumes independent forms of power, constitutionalism enters into play since I define constitutionalism as a normative theory of power. In certain domains of international law, it is exactly that which is required. We can make this statement in empirical terms because in certain areas international law derogates from national constitutional law. To the extent, for example, that it affects the ideas of autonomy and self-government inherent in national constitutional law, then there is an argument that the legitimacy of that derogation has to be supported, in my view, on the basis of a constitutional argument in favour of international law that may require, at least, a partial constitutionalisation of international law itself.

But this is not only at the level of international law. And I think that is partly what you were saying; that constitutional pluralism existed already at the level of the state, including regarding the issue of ultimate interpretative authority. Simply, it was historically resolved—‘you used the expression sociologically resolved’—by attributing that authority to courts. But even that example of judicial supremacy is, in part, illusory. It is not
totally correct because, in reality -e.g., the doctrine that shaped what courts should do-, the truisms of constitutional adjudication are, to large extent, embedded by the logic of constitutional pluralism by the idea that the political process in many instances should trump the judicial process.

This makes the point that, in reality, constitutional pluralism exists and is applicable at different levels. Within the state, you also have constitutional pluralism, but it manifests itself in a different manner.

Neil Walker: A couple of points. I think we have to be careful about the extent in which we assimilate the debate within the national level to that between the national and the supranational level. If it is key to constitutional pluralism that there is a disputed final authority, then that is different than there simply being no indisputable final authority. At any time, any system of authority is contingent, is in theory disputable. The status of a supreme court always rest upon the contingency that people continue to agree on its grounding in an authoritative constitution. But at the state level, this is normally not ultimately a matter of dispute, even where there is much surface disagreement. So, for example, even when Bush comes up with his challenge to the status of the court through his strong departmentalism and his idea of the unitary executive he continues to say “it is within the Constitution that we have the final word”. There is no ultimate dispute over the authority of the Constitution.

Miguel Poiares Maduro: But I think that the key element is the extent to which this is internalised on the operation of the actors of the system even if they don’t formally contest the ultimate authority of the court.

Neil Walker: Sure, sure, I agree with you. But as I was going on to say, I think that the point about the European level is different. It’s pretty clear that not only is there no indisputable final authority in principle, but that there is actually an endemically disputed final authority. It’s there as an empirical fact, it is there in a way that is embedded in practice.

A couple of other points. And I think that international questions are interesting ones. It is noteworthy that there is so much new interest in so-called international constitutional law.

And much of that starts from the premise that some of the materials of international law, whether general principles, or customary international law, subsist regardless of the views of national constitutional orders. So, the moment you move away from a purely state-contractualist notion of international law -international law as a vehicle of the state-, then you are almost necessarily pushed towards the constitutionalisation of the very
idea of international law, with constitutionalisation pointing to the idea of a self-standing legal order. But, when it comes to the particular creature of international law called European law, we are dealing with the potential for a thicker constitutional frame of the type I discussed earlier, not just as thin claim to the autonomy of a legal order. So, I think that’s the difference there. That’s quite a significant difference.

As to the point on judicialisation, I think what is important here is, as I said earlier, that it is not the whole picture. If we understand the overlap between different constitutional orders with an overlapping jurisdiction, citizenship, territory, etc., as having political, popular and social dimensions, then constitutional pluralism clearly cannot just be about conflicts between courts. It’s a more deeply structural thing.

So, what you get is an incredibly difficult debate about the nature of the constitutional debate in the EU. You try to have a frame for that debate, but the very idea of such a frame is problematic precisely because that frame lacks the settled authority that an already established constitution would give it. It is a very complex question. But it’s there, and it operates not just in the narrow legal register. And there I think we should not give in too quickly on the notion of constituent power and ‘we the people’. When we are making thick claims for constitutionalism, then, obviously there is a hugely fictional aspect to the notion of ‘we the people’ if we deem it to be based on actual aggregative consent or contract. But I am not talking about that. I am talking about whether one can legitimately impute a particular political process to a collective, however we frame the test of imputation; tacit consent, retrospective consent, horizontal solidarity, etc. Can one legitimately think about this in terms of as a form of self-legislation of that particular collective? Because it seems to me, if one cannot, one has a very thin constitutional authority. If one can, then, one has a thicker constitutional authority. It may be that as I have argued in one piece that that collective ‘we the people’ in the European context is a hybrid and may be a collection of European people and European peoples but, we can still have the notion of constituent power there, which to me, it is one of the fundamental building blocks of thick constitutional legitimacy.

Why would we want to get rid of it? Maybe because we think it’s just implausible in the supranational context, but it seems to me it brings something normatively valuable to the debate. It’s fundamental in this area when we are talking about constitutional pluralism, when we are talking about the constitutional claims of the international order, or the WTO law, or the EU, whatever, we have to ask some hard questions about where they are getting their legitimacy from and one of those hard questions has
to deal with what I call the collective self-legislation, the self-authorisation function. Is there a democratic mandate for this in the broadest sense of the term? Is there some constituency to whom we can at least plausibly impute a notion of democratic self-legislation?

Mattias Kumm: You ask what are the kinds of constitutional orders that are recognised as legitimate authority in the strong constitutional sense. And the answer is that whatever constitutional order performs well over time in terms of realising, respecting and fulfilling foundational constitutional principles. If a constitutional order respects, protects and fulfil these principles we might also think of that practice as enabling collective self-legislation, though not much is gained by using this vocabulary. The focus on ‘we the people’ still traps constitutional thinking in a Hobbesian frame. Once the ‘people’ substitute for the king as sovereign, what you get conceptually is not liberal democracy, but nationalism, that may or may not be substantively enriched by principles of liberal democracy.

But there was another important question asked; what is the normative edge to the idea of constitutional pluralism? What’s the politics here? Why should it be normatively attractive to embrace it? Now of course this is a dangerous question, because ultimately you want a sophisticated theoretician of legal practice not to be biased by a political agenda, you don’t want a constitutional theorist to be a political provocateur, or a political activist on a mission. But, nonetheless, it is important to ask what the normative implications of conceptual frameworks are, even if the conceptual frameworks aren’t devised as political projects primarily but as attempts to make sense of and guide an ongoing practice. So here is the answer. On the conceptual level, constitutional pluralism allows basic commitments of liberal democracy to be articulated in a way that divorces them from the Hobbesian statist conceptual framework in which they originally had to fit. It allows us to reconceive legitimate authority and institutional practices in a way that makes without the ideas of the state, of sovereignty, of ultimate authority, and of ‘we the people’ as basic foundations of law and the reconstruction of legal practice. That opens the door to a more intelligent discussion of a wide range of questions relating to international law, European law and the design of institutions that might help solve the great policy challenges of the future.

Julio Baquero Cruz: I won’t have much to say because I did not really feel concerned by most of the questions that were asked... After all I am not a pluralist! However, you enter very risky terrain because if everything melts in the air then you can no longer breath as a lawyer. It is very difficult to walk in quicksand...
But I wanted to say something else; [...] something about the court-centredness and also the law-centredness of pluralism. Perhaps in the European Union there is deficit of the political. Political conflicts tend to be seen in legal terms and sent to courts instead of being dealt with politically. This is linked to pluralism, since pluralism deals with political issues translated into law. And I don’t know whether courts should be dealing with them in the first place.

In that sense, the promise of pluralism, if it has a promise, is more connected to the political process and political institutions than to law and courts. And perhaps not so much to those of the European Union, which may already be plural enough, in the way they are structured, the way the negotiation takes place, etc., than to national institutions. I think national institutions, including national courts, are not plural enough. They tend to be more narrow-minded. They tend to confuse the world with their own world... Whereas European institutions naturally tend to see a larger picture as a consequence of the interaction that takes place within them. Sometimes they also get stuck in their autonomous discourse, but they are more naturally open in view of their own structure, and composition, and procedures, etc.

[The last question from the audience concerned the relevance of the constitutional treaty and the process that led to its adoption for constitutional pluralism.]

Neil Walker: I think that it is a very good question and maybe we should have raised it earlier... My sense of this is that if you believe in something called constitutional pluralism, then you have to be against any notion of constitutional finality. You have to accept that if there is a conflict between authorities and no final authority which can resolve that, then any resolution of that conflict of authorities is a contingent one.

You also have to concede that, even if you accept, as I do, that there is a universal element within constitutional reasoning, there is also an element which is inherently particularistic; specific to particular constitutional communities.

So, there are two dialectics to constitutionalism. There is a dialectic of different authority claims and there is dialectic between the universal and particular. And it seems to me that in European context any constitutional settlement cannot be anything other than a continuation of a constitutional conversation in the context of that double dialectic. Any nominally non-constitutional settlement, such as the Treaty of Lisbon, is
also a continuation of that same constitutional conversation by other means. The label cannot create its own finality. It can do other things, which are symbolically, politically and practically very important in pushing the debate forward and developing a thicker constitutional frame but it cannot put the whole constitutional debate to rest. The whole point of constitutional pluralism is that it disallows that possibility of final settlement.

Mattias Kumm: I think the events surrounding the ratification of the Constitutional Treaty and now the Reform Treaty clearly suggest that there will not be a constitutionally monist order established in the European Union any time soon. On the contrary, what you can observe is a sharpening of the pluralism and sharpening of conflicts that might exist between national and EC law in some contexts.

Julio is right about one thing. One of the challenges of a normatively attractive plausible theory of constitutional pluralism is that it has to give an account of the conditions under which it is attractive and the conditions under which a monist resolution of constitutional issues is preferable. It would be a peculiar kind of pluralism fetishism to think that pluralism is always attractive. Why was Hobbesian monist thinking so attractive in its time? Well, the *Leviathan* was written during the civil war in Britain, just after the Thirty-Year War in Europe had ended. Not a good time to advocate legal pluralism.

So, what is it about constitutional practice at the beginning of the 21st century that makes constitutional pluralism more attractive? I think here there are three core factors. First, there widespread agreement on foundational constitutional principles as the language we use to contest and settle political and legal questions across constitutional sites. Second, there are the benefits of relatively thick political and legal integration; that provide further incentives to cooperate. These two features lower the costs of pluralism and enhance the chances of constructive engagement even without the recognition of a common ultimate authority. Third, the fact of relative diversity and social and political pluralism, complemented by problems of organising a full-fledged democratic process on the European level, limits the attractiveness of European constitutional monism.

Let me finish by saying something about the domain of application of constitutionalist thinking. Constitutionalist thinking is not restricted to the relationship between national and European practice. It is also applicable to the relationship between European and International practice. And it also applies to the relationship between different constitutional actors within the national, European or international level.
National courts, for example, called upon to adjudicate a rights issue, tend to always reflect on their role when they apply a proportionality test in human rights and constitutional rights context and think about how large the margin of deference should be to the legislator. That’s constitutionalist thinking within the most commonplace contexts of domestic constitutional practice. Constitutionalism provides a universal framework for thinking about law and the exercise of power in the name of the law.

Miguel Poiares Maduro: I agree with Mattias on this.

Your question can be answered at different levels. One would be what is the agenda for constitutional pluralism as a normative theory and I have already said something about that, so I will not repeat it.

Let me say something different therefore and address the question, as Mattias did, having has the starting point the failure of the Constitutional Treaty. You may remember that in my piece on contrapunctual law I had criticised the idea of having a clause on constitutional supremacy in the Treaty. I thought that that was ignoring constitutional pluralism. But Mattias has said that likely we will have even more constitutional conflicts. I am not sure about this. I think that the constitutional conflicts that will come up in the future will have a very different nature. They will have more to do with constitutional pluralism at the horizontal level; constitutional conflicts between national polities. I think that in the European Arrest Warrant decisions the reaction of some national courts has less to do with European constitutionalism as it has to do with the differences between national legal orders. There was some resistance towards to the idea of recognising decisions coming from other national legal orders when they are not sure if their constitutional standards fit their own set of values. That is a new challenge that will tend to increase with the new areas of mutual recognition. We’ll need to develop instruments for this horizontal discourse; for coherence to be built at the horizontal level. That is the first point I wanted to very briefly raise.

The second one has to do with the later debate between Julio and Mattias. Julio was arguing that there is an excessive tendency to delegate political questions on courts and to constitutionalise political questions. And if I understood it correctly, that’s the same argument that Sunstein has made in favour of judicial minimalism. His argument is not only a pragmatic argument, it’s normative; “judicial minimalism is good because it leaves more space for political deliberation, for political debate”.

On the other hand, however, there is an argument that can be made in favour of a judicial role with respect to those so-called ‘political issues’. We
can make an argument that with regard to certain issues some insulation from the day to day passions of the political process may be a good thing and that courts can be an instrument of rationalisation of the political process. Moreover, courts’ decisions may sometimes be necessary to restart political deliberation on certain issues. I think Mattias idea of courts as elements of Socratic contestation departs from a similar conception.

In my view, both Mattias's maximalism and Sunstein’s minimalism have a point and the problem with these approaches is that they are single institutional, to use Komesar’s expression. In this respect, they are not really pluralist since they do not build in each institution an institutional awareness to the competing claims of other institutions that, depending on the circumstances, may be more constitutional legitimate. It is not sufficient that you say there is a potential problem with the political process for courts to be legitimate to step in but or vice versa a problem with courts does not necessarily require the political process to take precedence. These decisions have to be taken with institutional awareness and on the basis of an institutional comparison, as Neil Komesar has so often argued for. In my view, one of the issues on the agenda of constitutional pluralism is to develop criteria for such comparison.

Julio Baquero Cruz: This is a great responsibility and I will only say the following; that in my view the future debate on pluralism will be about three kinds of limits, the limits of pluralism, the limits of law and courts, and the limits of constitutional law. We must ask ourselves what we can expect from constitutional law, and under what conditions may constitutionalism deliver it. I have the impression that we may be expecting too much from it, at least in the EU and its states, and in a context in which it cannot deliver all the goods that we expect from it.
**PLURALISM REGAINED**

**BOOK REVIEW:**

‘**EL COSMOPOLITISMO JUDICIAL EN UNA SOCIEDAD GLOBAL: GLOBALIZACIÓN**’

*by D. ORDONEZ-SOLIS*

(DERECHO Y JUECES, NAVARRA, THOMSON-ARANZADI, 2008)

David Baez Seara*

Cosmopolitanism, in its Kantian formulation, is linked to the idea of the removal of constraints to the public use of reason or, in other terms, to securing the possibility of free and unconstrained inter-subjectivity.¹ All the contemporary conceptions of cosmopolitanism share with the classical Kantian ideal the necessity of subjecting relations and practices to an un-coerced interaction and an impartial reasoning.² With *El Cosmopolitismo Judicial en una Sociedad Global* [Judicial Cosmopolitanism in a Global Society, in the English translation], Ordoñez Solís explains how the globalisation process creates a new type of ‘cosmopolitan’ rationale in which judges and courts are also involved. The book is divided into three main sections. In the first part, Ordoñez Solís succinctly explains the creation and the basic features of the globalisation process. In the second part, the author analyses the role of judicial dialogues by focusing on the relevant case-law with a special emphasis on the decisions of the European Court of Justice. In the last part, he introduces the idea of “communicative deliberative contexts” as both an incipient pattern of behaviour of the European judicial community and as a normative ideal that must be strengthened globally. The final product is an interesting and lucid analysis of the communicative interactions between European and international courts, that makes frequent use of the relevant case-law to illustrate the main ideas. In spite of this profusion of judicial decisions, the author skilfully avoids technical language and succeeds in writing a book intelligible for

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those interested in the globalisation process and with no formal training in law. The book, however, suffers from one serious flaw: the absence of more developed arguments to warrant the main idea of the book; namely, that judicial cosmopolitanism must be understood as the process of establishing international and supranational judicial instances supported by the involvement of national judges in the application of a so-called ‘universal’ order, together with a need to strengthen communicative or deliberative structures. This is particularly unfortunate because, not finding this necessary theoretical exercise, the reader could have the mistaken impression that ‘judicial cosmopolitanism’ simply amounts to a general exercise by courts and judges in seeking a sort of universal understanding on a wide spectrum of controversial issues concerning constitutional rights and freedoms. However, cosmopolitan claims are more limited and complex than this. If contemporary legal practice is characterised by communication and dialogue, their pre-conditions and causes need to be explained clearly.

In this short review, I concentrate exclusively on this issue. I do this merely because the idea of judicial cosmopolitanism as expressed by Ordoñez Solís is an accurate account of the practice of the European judicial community that merely needs some refinement. Perhaps this polishing process must start first by distinguishing between cosmopolitanism and pluralism. The former is the term used by Ordoñez Solís in his book while the latter is the designation most commonly used by European law scholars to talk about the relation between the European legal order and the municipal legal systems of the member states. Both terms do not necessarily need to be understood in the same way, as the driving idea of cosmopolitanism—at least, in its classical formulation— is the transposition of the constitutional state on the global stage, while pluralism can simply be understood as the interrelation of different legal systems. However, both terms are currently used in a very similar way. The so-called ‘new’ cosmopolitanism re-constructs the Kantian project in a manner that departs from ‘state’ structures by underlying the role of discursive procedures in multilevel systems. Similarly, legal pluralism sees the relations between legal systems in a pluralistic rather than monistic way, and as an interactive rather than hierarchical process. The way we use both terms in this review corresponds to their latter ‘discursive’ formulation and therefore the term ‘pluralism’—and its derivatives, ‘constitutional pluralism’ and ‘judicial pluralism’— can be replaced in the text by ‘cosmopolitanism’, and vice versa, without changing its meaning.

I. SOURCES OF PLURALISM

Poiares Maduro distinguishes between four sources of constitutional pluralism in the European context: the plurality of constitutional sources composing the EU constitutional framework; the non-conditional or resisted supremacy of EU rules over national constitutional rules; the emergence of new forms of power challenging the traditional legal categories upon which EU rules have been framed; and the existence of conflicting political claims supported by the corresponding claims of polity authority. The same types of arguments have been elaborated, in a more or less theoretical way, over the last decade and they are still being developed nowadays. They all derive from a view that opposes the paradigmatic conceptualisation of the legal system as an autonomous and closed entity. The notion of ‘system’ is replaced by other notions which do not (necessarily) entail the traditional features associated with legal systems, such as ‘order’ or ‘network’. In order to assess the significance of the pluralist argument, we need to say more about these four sources of constitutional pluralism.

1. The plurality of constitutional sources

The example of the European Union is especially significant here. What is particularly important in the existence of these multiple constitutional sources is the interaction of the different constitutional discourses which, as Maduro affirms, have “fed the EU constitutional framework and its general principles of law, particularly as developed in the jurisprudence of the Court of Justice”. By means of this inter-connection, the national constitutional discourses and the European legal discourse have evolved together into a new discourse, which has started a life of its own. European constitutional orders are intertwined at the level of the discourse of judicial officials, whose tendency to convergence creates new legal concepts.

2. Resisted supremacy of EU rules over national constitutional rules

The best-known cases of challenges to the supremacy of European law by

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5 See, for a detailed explanation of a ‘network’ view of the legal order, F. OST and VAN DE KERCHOVE, De la pyramide au réseau: Pour une théorie dialectique du droit, Brussels, FUSL.
6 Ibid., at p. 1.
national constitutional courts are perhaps the Solange I (1974),\textsuperscript{7} Solange II (1986)\textsuperscript{8} and Maastricht (1993)\textsuperscript{9} decisions of the German Constitutional Court. The monist thesis stated by the European Court of Justice in Costa v. ENEL (1964),\textsuperscript{10} according to which the validity of national law and European law is subordinated to their conformity with the Treaty, has been defied by dualist trends, provoked by the will of national constitutional courts to protect interests of special importance. What is important for the pluralist argument is that the monist-dualist dichotomy is overcome by a new discursive logic of interaction that entails a discursive conception of supremacy. This discursivity makes sense from the point of view of the foundations of the European legal order, which was based on national law, as well as from the point of view of national law itself, which is on many occasions derived from European law. This circularity interconnects both legal orders and makes them depend upon each other.

3. The emergence of new forms of power challenging traditional legal categories

On one hand, legal orders are interconnected to each other, borrowing and creating new legal concepts. On the other hand, they are also related to other societal orders, such as politics and economy. It is then possible to talk of a double input into the legal order; an internal input coming from other legal orders and an external input coming from other societal orders. If we focus our attention on the latter, it seems that the new trends produced by the process of globalisation affect the political and economic orders. The scope of this change is a matter of controversy amongst globalisation theorists, but what is far less controversial is that the current world economy and political system operate with a different form and logic from those of earlier decades. For instance, in today’s international politics the primary actors are no longer the heads of state and government or foreign ministers, but also administrative agencies, courts and legislatures, and in the economic sphere national economies are now enmeshed in a global system of production and exchange.\textsuperscript{11} Therefore, for the supporters of the pluralist argument, if law is to function within the society it regulates, it needs to fit into at least the basic principles of the other societal orders.\textsuperscript{12} This requirement puts pressure on those traditional

\textsuperscript{8} Wünsche Handelsgesellschaft, BvR 2, 197/83; Common Market Law Review, 1987, at p. 225.
\textsuperscript{9} BVerfGE 89, 155; Common Market Law Reports, 1994, at p. 77.
\textsuperscript{10} Case 6/64, Flamino Costa v. ENEL, ECR, 1964, at p. 585.
\textsuperscript{11} D. HELD, Global Convenant: The Social Democratic Alternative to the Washington Consensus, Cambridge, Polity Press, pp. 22 and 75.
legal categories unable to function in conformity with new societal changes and may occasionally replace them with new legal categories more appropriate for the new context.\textsuperscript{13}

4. The existence of conflicting political claims supported by the corresponding claims of polity authority

Whereas the three characteristics above stressed the capacity of constitutional pluralism for providing cooperation, in this last one, the stress is instead on competition between political claims and political authorities. Competition is nevertheless channelled through discursive procedures enabling communication between the conflicting authorities. The emphasis on discursivity identifies this approach with Habermas’ theory of deliberative democracy, according to which the normative claims of public authorities need to be validated in a deliberative procedure in which the addressees of those claims are allowed to participate. Political claims are seen by deliberative theorists as regulative statements which aim at correctness. In normal communication, the goal of correctness is the object of a tacit agreement between the speakers; when the claims are challenged by their addressees, however, then they need to be justified by means of a practical discussion concerning the conformity of the contested claims. The object of this discussion or deliberation is to re-establish the broken consensus between the parties.\textsuperscript{14} What is particularly interesting for the pluralist argument is the way in which this discussion takes place, as the deliberation between the participants needs to be institutionalised according to the conditionings of the communicative rationality; namely, (i) the only valid claims are those in which all the potential addressees could reach an agreement as participants in a rational discussion (principle of discussion) and (ii) the only legitimate norms are those which are susceptible to reaching the agreement of all members of the legal community at the end of a discursive and institutionalised process of law creation (principle of democracy). Therefore, cooperation – this time, framed as a deliberative process – is once again seen as the way to face conflicting claims.

From the analysis of the above four sources of constitutional pluralism, we can observe the interconnection between them since each one presupposes, at least to a certain extent, the other. However the ‘to a

\textsuperscript{13} For instance, the traditional legal categories associated with the classic state or the welfare state are substituted by the categories derived from the regulating state. See, for an account of Europe as a regulating state, G. MAJONE, \textit{La communauté européenne: Un état régulateur}, Paris, Montschrestien, 1996.

certain extent’ qualifier is a key issue, as abuses of deduction mixed with normative views can give us a wrong idea about the real scope of the pluralist argument. This argument, as we have said, is rightly implicit in each of the four sources. As Allan Rosas affirms, we are facing a patchwork of authorities instead of just one national government and one legislature.\(^\text{15}\) Similarly, Ordóñez Solís states, when talking about the judicial protection of human rights in the European sphere, that the procedure has a double top-down / bottom-up dimension that cannot be resolved by applying the criterion of hierarchy.\(^\text{16}\) However, it can also be argued that what the pluralist argument entails is just a complex system of delimitation of competences which itself entails a complex understanding of hierarchies. If that is the case it would then be possible to admit the above four sources of constitutional pluralism and still argue that most relations are still relations of hierarchy. In the next section we will try to determine the extent to which this view is correct.

II. Pluralist scenarios (i): Continuing with the state dynamics?

The debate on constitutional pluralism relies on the much wider debate on the relation between law and the state. As Raz argues, a theory of law—in this case, a theory about the European legal order—must be partly based on a theory of the state.\(^\text{17}\) A state is a political system embedded in a wider social system. In other words, the state is a subsystem among other subsystems which form a social system. These different subsystems are not monolithic entities and, consequently, an interaction exists amongst them. This must be the starting point of any discussion on pluralism and was, indeed, the main concern of the early pluralist writers. Hooker for instance refused to distinguish between legal and non-legal rules.\(^\text{18}\) The problem with this approach is that it is not that helpful for our purposes. How can we discuss the relation between national legal orders and the European legal order if we obscure the distinction between norms which are part of the law and those which are not? In addition, it is possible to distinguish


\(^{17}\) Other legal theorists reject this claim. For example, Kelsen claimed that the concept of ‘state’ can only be explained in legal terms; see H. KELSEN, General Theory of Law and the State, Cambridge, Harvard University Press, 1945, pp. 181-207. The French Constitutional theorist Michel Troper holds a similar view; see M. TROPER, Pour une théorie juridique de l'État, Paris, P.U.F., 1994.

between the legal and the non-legal by relying on a distinctive feature of law, its institutionalised nature. Therefore, a necessary condition for the existence of legal norms is their recognition by the law-applying organs. But one could argue that the institutionalised character of law is also determined by its enactment by law-creating institutions, and thus this act alone is enough to determine when a norm is legal. The problem with this argument is that it misrepresents the normative nature of law. As a normative system, the law purports to guide the behaviour of individuals and institutions; and, when the actions of law-creating and law-applying institutions conflict, the actions of the latter are the ones that affect the practical reasoning of the subjects.19

If it is possible to draw a line between legal and non-legal norms and if the legal is determined by law-applying organs which are themselves institutionalised, then it is also possible to conclude that law and the state are ultimately interrelated and in consequence any inquiry on constitutional pluralism must take into account the state—in the Benthamite definition of the term, the “independent political society”20—as an element of analysis un-dissociable from ‘law’ or ‘legal order’. But the state does not necessarily mean the ‘traditional state’, and therefore accounts on evolving forms of the state which stress the diminished independence of the “independent political society” are necessary for an accurate analysis of pluralist constitutional practices. In this respect, Neil Walker points out that while the state continues to be a player in the emerging multi-level order, a revised conception of constitutionalism should also be open to the discovery of meaningful constitutional discourse in non-state sites and processes.21 However, it seems that this discovery, and ulterior recognition, needs the state as a point de départ mainly because the act of recognition takes the form of a law-creating act by which the norm is incorporated into the legal system. On the other hand, the problem with constitutional pluralism is not the discovery of constitutional discourses in non-state sites, but how processes of regional and international integration create ‘autonomous’ legal orders which absorb part of the state’s ‘independent’ character by establishing state-like structures, as Ordóñez Solís well illustrates in the first part of the book.

The paradigmatic case in the creation of state-like structures is, doubtlessly, the European integration process. In this respect the

European Court of Justice makes three claims of supremacy about the legal orders of the member states: first, the European Court is entitled to give a definitive answer on all questions of European law; second, the European Court is entitled to determine what constitutes an issue of European law; and third, the European Court has supremacy over all conflicting rules of national law of the member states. However, these three claims are not always accepted by the constitutional courts of the member states. The court which has most vehemently challenged the supremacy of European law is probably the German Federal Constitutional Court with its *Maastricht-Urteil* decision of October 1993. The German Federal Constitutional Court declared that the German law ratifying the Maastricht Treaty could violate the constitutional right to participate in the elections of the Bundestag established in Article 38 of the German Basic Law, which excluded the possibility “of reducing the content of the legitimation of state power and the influence on its exercise provided by the electoral process by transferring powers to such an extent that there is a breach of the democratic principle in so far as it is declared inviolable by Article 79 § 3 in conjunction with Article 20 §§ 1 and 2”. In the view of the German Constitutional Court, European law suffers from a democratic deficit. In this respect, the Court held that the European Parliament only provides “complementary” legitimacy for European law and that, until those legitimacy conditions are obtained, “the functions and powers of substantial importance must remain with the German Bundestag”, as the German parliament must preserve sufficient powers “to give legal expression to what binds the people together (to a greater or lesser extent of homogeneity) spiritually, socially and politically”. But the explicit rejection of the supremacy of European law came in the third part of the decision when the issues of democracy and legitimacy were linked to that of competences. As Baquero Cruz affirms, the German Court expressed the following basic ideas: first, the validity of Community law depends upon the act of accession and ultimately upon the German Constitution and, therefore, Community law is not autonomous; second, the European

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23 The *Maastricht-Urteil* decision is not the only decision by the German constitutional court that challenges the supremacy claims. For instance, in *Solange I* of 1974, this same court stated that as long the European Community did not have codified fundamental rights, the German courts would continue to recognise the fundamental rights of Germany as supreme. It also maintained that German courts had the rights to review all incoming legislation to assure that it did not conflict with the fundamental rights of German law; see *Common Market Law Reports*, 1974, at p. 540.


Union has no competence to determine its own competence - no _kompetenz-kompetenz_-, thus any interpretation of the Treaty in a way not compatible with the basis for the Act of Accession “would not be legally binding within the sphere of German sovereignty”. Consequently, by affirming the non-acceptance of expansive interpretations of the Union’s powers, the German Constitutional Court challenged both the first and the third supremacy claims.

Furthermore, this conditional opposition to the supremacy of European law came under a particular conceptual framework of the process of European integration that we may label as a ‘national-constitutional’ approach, in which the relation between national constitutional orders and European law is seen from the point of view of the former. In this respect we are faced with two interrelated problems: first, we need to answer the question of whether the national-constitutional approach is an appropriate analytical tool in the description and understanding of our current European constitutional practices; second, we need to determine whether the national-constitutional approach is a necessary condition for European constitutional pluralism to exist. A negative answer to both of these questions paves the way for the development of alternative notions of constitutional pluralism which, as we will later argue, do not necessarily need to focus on the inconsistencies of rules of recognition.

By using the expression ‘compound of states’ the German Constitutional Court in the _Maastricht-Urteil_ decision stressed the dualistic character of the European process in which the national constitutional orders are seen as establishing the grounds for the validity of European law. However, this conservative discourse also entails a reification of the (traditional) state with its classic features of supreme internal and external authority. The problem with this view is that it does not reflect the actual political and legal scenarios and processes. In this respect, Weller believes that ‘state’ “is a technical term which modestly represents one of many layers of competence to which individuals have transferred public powers”. In spite of these arguments, the national-constitutional approach seems to be taken as the implicit basis for certain approaches to constitutional pluralism, which tend to stress the inconsistencies of fundamental rules of

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26 Ibid., at p. 89.
both the national constitutional and the European legal orders.\textsuperscript{10}

**III. Pluralist scenarios (2): Inconsistent rules of recognition**

In his illuminating analysis of European constitutional pluralism, Barber claims that the *Maastricht-Urteil* decision made explicit the existence of two pairs of inconsistent rules of recognition. There is a first pair of inconsistent rules giving supremacy to different sets of legal rules caused by contradictory claims: while the German constitutional court stated that European law takes effect through the German basic law, the European Court of Justice by contrast regards European law as the highest source of law within the European Union. Similarly, the second pair of inconsistent rules gives adjudicative supremacy to different courts. The reason for this is that, while the German Constitutional Court declared that it has the duty to have the final word on the content of all laws operative in Germany, the European Court of Justice by contrast affirmed that it has the final say on the laws with a European content that are operative in the member states.

These inconsistencies in the fundamental rules of the legal system—and the potential cause for conflict between courts—place lower courts, institutions and citizens in a difficult position, as in case of effective conflict the law will not be able to accomplish its fundamental function of guiding the behaviour of subjects. It seems, however, that so far, and despite the inconsistencies on the supremacy claims, European law has been able to affect the practical reasoning of its citizens and officials. This could be for different reasons: first, it could be the case that the inconsistencies operate only in a rhetorical and not in a practical dimension due to an explicit intention of judges to avoid possible conflicts; second, it could also be the case that lower courts decide to apply European law without seeking the mediation of constitutional courts, implicitly ignoring with this act the supremacy claim made by national constitutional courts.\textsuperscript{31}

In the first case, both national constitutional courts and the European Court of Justice avoid, in an exercise of judicial minimalism, ruling on the validity of European law. Legal controversies are resolved by reference to specific rules and low-level principles and therefore the courts’ legal


\textsuperscript{31} Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal*, ECR, 1978, at p. 629; the lower courts of the member states should not follow the incorrect decision of higher courts.
reasoning rests in what Sunstein labels as “incompletely theorised agreements”; that is, an exercise of incomplete theorisation of the law when the determination of ultimate validity of EU law is not absolutely relevant for the resolution of the controversy.\(^\text{32}\)

In the second case, lower courts have a commitment towards the authority of the European Court of Justice; that is, a commitment to resolving their possible disagreements by the application of a set of rules, or by membership to that set of rules, or by relying on the decision of the European Court. The issue at stake is whether lower courts are able to simultaneously commit to both their national constitutional court and the European Court.

1. **Incompletely theorised agreements**

The assumption under the idea of incompletely theorised agreements is that judges conceal the true basis of their decision in the name of social consensus. The law-applying officials faced with disagreements prefer not to provide deep justifications for their judgments, relying instead on legal rules and low- and mid-level principles to summon the required support. The aim is then to reach an ‘overlapping consensus’; that is, a convergence amongst the possible different political or moral views of lower courts and citizens. As Sunstein affirms, “if judges disavow large-scale theories, then losers in particular cases lose much less; they lose a decision, but not the world; they may win in another occasion”.\(^\text{33}\) However, the idea of incompletely theorised agreements is difficult to apply equally to national constitutional courts and the European Court of Justice, as their interpretive practices have been characterised by the use of deep-level justifications for their decisions. In the case of national constitutional courts, the *Solange I, Solange II* and *Maastricht-Urteil* decisions are exponents of this deep-level theorisation by the German Constitutional Court.\(^\text{34}\) In the case of the European Court of Justice, early path-breaking decisions deducted a constitutional framework distinct from that of traditional international law from the treaties through a highly theorised reasoning, assuming by this the autonomy and completeness of European law.\(^\text{35}\) Therefore, incomplete theorisation is not an adequate way to frame

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\(^{33}\) Ibid., at p. 41.

\(^{34}\) See, for a concise analysis of the legal reasoning of other European constitutional courts on the issue of supremacy, J. BAQUERO CRUZ, “The Legacy of the Maastricht-Urteil and the Pluralist Movement”, *supra* note 24, at pp. 397-406.

\(^{35}\) See M.P. MADURO, “Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism”, *supra* note 4; who affirms that “the Court was not simply concerned with ascertaining the aim of a particular legal provision; it also
the courts’ legal reasoning in the European context, as they do not particularly refrain from deeply justifying their decisions.

2. **Lower courts’ commitment**

When judicial officials commit themselves to an authority they are constraining their future selves to act in conformity with the authority's directives. But can officials be committed to two contradictory authorities, as constitutional pluralism seems to propose? This seems difficult from the point of view of the rationality of the participants in legal practice. If we accept that judicial officials are not all alienated participants, they must be committed to do their part in the creation and maintenance of a unified system of rules; and, in order to do that, they must look at the same tests for validity as the other participants. Once this is reached, the system will be unified in two senses: first, the rules of the system would pass the same tests for admission; and second, the participants will look at the same rules when guiding their conduct and evaluating the conduct of others. If officials commit themselves to two contradictory authorities, however, their commitment will amount to nothing, as one commitment cancels the other and vice-versa. If the lower courts of the member states are committed both to the authority of their national constitutional courts and to the authority of the European Court of Justice, the formal goal of the creation and maintenance of a unified system of rules will not be possible to achieve, as both authorities will make contradictory claims regarding the supreme authority in the system.

3. **A way out: Incomplete rule of recognition and theoretical inconsistency**

There are two plausible ways out of this pluralist trap. The first view affirms that the two inconsistent sets of supremacy rules -inconsistent rules of recognition giving supremacy to different sets of legal rules and inconsistent rules of recognition giving adjudicative supremacy to different courts- are just the result of the incompleteness of the rule of recognition. But they are not themselves rules of recognition, precisely because of the impossibility for lower courts to be committed to two contradictory interpreted that rule in the light of the broader context provided by the EC (now EU) legal order and its constitutional telos; there is a clear association between the systemic (context) and teleological elements of interpretation in the Court’s reasoning; it is not simply the telos of the rules to be interpreted that matters but also the telos of the legal context in which these rules exist; we can talk therefore of both a teleological and a meta-teleological reasoning in the Court". An alienated worker has the ‘participatory’ intention to contribute to the collective enterprise but she does not have the ‘group’ intention that such project be successful; see C. KUTZ, *Complicity: Ethics and Law for a Collective Age*, Cambridge, Cambridge University Press, 2000, p. 92.
The rule of recognition of a legal system does not necessarily need to provide solutions to all legal problems, such as the ultimate validity of the rules of European law within municipal legal systems. However, European courts have arrived at contradictory conclusions on the very same issue and there is some ground to believe that there are in fact two sets of simultaneous and inconsistent rules of recognition, if one considers the rule of recognition as a customary rule which is determined by the practices of the law-applying organs. Nevertheless, as it has been explained above, it is not possible to be committed to these two sets of inconsistent rules. Indeed, in such a case, the minimal requirements for the existence of a commitment would fail and, in the absence of a commitment, lower courts will not be able to guide their conduct. The incompleteness of the rule of recognition derives then from this impossibility of being committed to two inconsistent rules and entails conceiving the supremacy issue as an open question.37

In spite of the incompleteness of the rule of recognition, lower courts are able to guide their conduct simply because they defer to the same authority structure. Deference to the same authority structure is different from deference to an authority. To defer to the national constitutional court is to defer to an authority, and the same happens with deference to the European Court of Justice. Lower courts can also defer to a weaker hierarchy, however; and, in this particular case, they can defer to the bargaining structure that arises in the cases in which the issue of supremacy is at stake. If lower courts and judges can guide their conduct and resolve the disputes on a daily basis, it is simply because there is a rather clear delimitation of the power and competences between the diverse authorities. Only in the cases in which supremacy claims are involved would there be these judges and courts appealing to the authoritative structure represented by the bargaining process. This implies a further commitment on the part of higher courts to negotiate with each other until further consensus is reached. Of course, this bargaining does not have to take place explicitly, it is sufficient that some criteria can be drawn from the dialectics of the two judicial levels allowing the resolution of the concrete case.38

38 A. ROSAS, “The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue”, European Journal of Legal Studies, Dec. 2007, at p. 13; who defines horizontal judicial dialogues as the “dialogue taking place between courts which are more or less at the same level”.
The second view argues that, if guidance has been possible, it is because lower courts have in fact deferred to the authority of the European Court of Justice without ignoring the authority of their respective constitutional courts. The supremacy claims made by the national courts are seen as theoretical claims that do not affect their practical reasoning and therefore do not need to be ignored. In fact, what this second view stresses is the lack of a regularity of behaviour on the part of lower courts in acting in conformity with the supremacy claims of national constitutional courts to be able to create a (customary) rule of recognition. The second view simply accepts the existence of two sets of inconsistent rules of recognition and argues that, if guidance has been possible, it is because the supremacy issue does not affect the practical reasoning of lower courts. In other words, the debate as framed is a theoretical one and therefore supremacy does not play any relevant role in the mediation between lower courts and their actions; which is what practical authorities are in fact supposed to do. This does not mean that, in the future, the way in which the debate is framed cannot be modified, making inconsistency effective and thus affecting the guidance of courts. Yet, until then, the commitment of the law-applying organs in maintaining a unified system of rules is not incompatible with inconsistency at the level of the rules of recognition. Inconsistency here is just irrelevant.

Both views are plausible and there is indeed little difference between them. The accuracy of each view depends fundamentally on the accuracy of the claim that the supremacy question has a theoretical character. Both views are also consistent with most of the ideas expressed by Ordóñez Solís. The first view relies on the importance of deliberative contexts to foster an atmosphere of cooperation for the resolution of conflicts. The second view relies on a sort of imperfect monism, as the validity of the European law does not depend, in practice, on the municipal order.

IV. Conclusion

We have argued that the relations between the European and municipal legal systems of the member states are better understood from a pluralist view that does not conceive of the rules of recognition as inconsistent (first formulation), or that does not take inconsistency seriously (second formulation). On this we agree with Ordóñez Solís. Against him, we believe that the classical cosmopolitan approach in which he translates judicial practice is misguided, as it falls into the trap of the global state that we criticised in the first section of this review. It seems that on this point Ordóñez Solís sees the constitutionalisation of international law in terms of the compact entity of a ‘world republic’. However this view is incompatible with two main ideas of the book: the emergence of
communicative deliberative contexts visible especially in relation to human rights in regional spheres, and the sort of ‘federal’ collaboration existing between judges from different legal systems. Because these two ideas are correct the classical cosmopolitanism that Ordóñez Solís claims needs to be reformulated to make room for liberal, federalist and pluralist notions of judicial cosmopolitanism. This being said, even if Ordóñez Solís still has some work to do, his book presents a promising line of thought based on a new form of constitutionalism in which power not only originates in the state, but also in international and supranational organisations, and in which legal arguments need to be put in dialectical context.
The World Heritage Convention is a landmark for the protection of the cultural and natural heritage of mankind. Since its approval in 1972, it has become one of the most effective and important mechanisms for the protection of sites and monuments worldwide. And the book under review, the first commentary book to this instrument ever published, is a testament to thirty-five years of international practice under this instrument. Edited by Francesco Francioni (European University Institute), with Federico Lenzerini (University of Siena), this book offers valuable insights into the World Heritage Convention and its operation, bringing together contributors from several areas of the world, both academics and practitioners.

In this review, I intend to look at some of the core issues raised by the book. I will first briefly describe the book and its organisation, using this as a framework for discussing some of the most pertinent issues regarding the World Heritage Convention and the system established by it. I will open this analysis by looking at the conceptual issues raised by the World Heritage Convention, including the notion of ‘outstanding universal value’, essential for the application of the instrument. Next, I will analyse the Convention’s reach and representativeness with regard to the internationalisation of heritage and the alleged erga omnes character of heritage obligations in international law. I will finally analyse the

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1 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted on 16 November 1972 by the General Conference of the UNESCO. Entry into force: 17 December 1975, in accordance with Article 33. The number of states parties is, as of August 2008, of hundred and eighty-five (henceforth, “World Heritage Convention” or “the Convention”).

Convention’s interaction with other instruments for the protection of cultural and natural heritage and emerging areas of cultural heritage law, particularly the protection of cultural landscapes and of intangible cultural heritage.

I. **Structure of the Commentary to the World Heritage Convention**

The Commentary is divided into four parts: the first is an introduction to the work; the second is the actual commentary to the Convention; the third is the relationship of the Convention with other systems of heritage protection; and the fourth is the conclusions. Appendixes containing key documents for a better reading of the book follow. The way the book is structured, by first introducing the framework for analysis, followed by the actual commentary, and then bringing it back into the larger context of heritage preservation law, seems to be quite effective, as it reminds one that international instruments, while they must be understood in the light of certain concepts, must also be applied in depth, but without losing touch with the general structure of international law.

The book opens with an introduction to the significance and impact of the World Heritage Convention, by the book’s lead editor, Francesco Francioni. In this introduction, he highlights the importance of the World Heritage Convention in internationalising the topic of heritage protection, which until that point was considered to fall within the reserved domain of states. He also points out the interaction of this Convention with the birth of the environmental movement, also in 1972, with the Stockholm Declaration on the Human Environment. The two main innovative features of the Convention are then highlighted; that is, the recognition of the link between nature and culture, and the introduction of the concept of ‘world heritage’, as indicating a manifestation of heritage of concern to the whole of mankind, and not only to a certain group.

The second part of the book starts with a commentary to the Convention’s Preamble, in which Francesco Francioni discusses the values that should guide the application of the Convention. He also discusses the insight into the origins of the Convention that can be drawn from its Preamble, which also help inform these values. Next, the two definitional articles of the Convention, the one defining cultural heritage (Article 1), and the one

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defining natural heritage (Article 2) are analysed by Abdulqawi A. Yusuf and Catherine Redgwell, respectively.

The term ‘cultural heritage’ in the Convention came into being as an umbrella term to encompass three different types of heritage; namely, sites, monuments and groups of buildings.7 Importantly, the Convention moved away from the idea of ‘cultural property’, contained in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict;8 thereby, introducing a version of ‘intergenerational equity’, a crucial concept for cultural heritage, as it strengthens the reasons for protecting heritage. The shift from ‘property’ to ‘heritage’ – further explored below–9 also allows for other elements to be taken into consideration; in particular, cultural connections between objects and certain groups, and the internationalisation of the issue, since the term ‘heritage’ suggests a much broader concern, as it addresses the whole of mankind, while ‘property’ addresses the proprietor alone.10

Catherine Redgwell’s treatment of Article 2 stresses the historical development of the notion,11 before assessing the criteria for a property to fall under the scope of this article. She reaches the conclusion that the criteria established for natural heritage are not mutually exclusive, and that rather these criteria are analysed jointly and holistically.12

An interesting feature of this book is its separate treatment of cultural landscapes under the Convention, as a further commentary to Article 1, by Kathryn Whitby-Last.13 Even though this concept was not originally within the reach of the Convention, successive reforms to its Operational Guidelines have enabled the inclusion of cultural landscapes as a category worthy of protection.

Ben Boer comments upon the identification and delineation of world heritage properties,14 under Article 3 of the Convention. The process of identification, according to Boer, not only commodifies heritage, but also

7 Ibid., p. 25.
9 See infra Part II, Section A.
10 F. FRANCIONI and F. LENZERINI, The 1972 World Heritage Convention, p. 27.
11 Ibid., pp. 64-66.
12 Ibid., p. 68.
13 Ibid., pp. 51-62.
14 Ibid., pp. 85-102.
stresses the subjection of heritage to the control of sovereign states. This sovereignty-based approach is at least partly reinforced by Guido Carducci’s commentary to Articles 4 to 7, referring to national and international protection of cultural and natural heritage. He affirms that the duties under the Convention fall upon the state for the preservation of heritage, and that international protection is subsidiary and independent from national preservation.

Next, Tullio Scovazzi analyses the provisions creating the World Heritage Committee and the World Heritage List (Articles 8-11). He analyses the mandate and composition of the Committee, which are vital in establishing the bureaucracy that has for the past three decades positively transformed the meaning of the World Heritage Convention. He then goes on to analyse the List and the criteria for inscription therein, stating that the evaluation of a certain property is to be done in light of international standards, as opposed to national or regional values, thus strengthening the internationalism of the instrument. Gionata P. Buzzini and Luigi Condorelli also analyse Article 11 of the Convention, from the perspective of exclusion of property from the List and the List of World Heritage in Danger.

Federico Lenzerini then examines Article 12, which refers to the protection of properties not inscribed in the World Heritage List. According to Lenzerini, this provision is rather ineffective, not only because it does not impose clear obligations, but mainly because it is difficult to assess the “outstanding universal value” of properties not inscribed on the Lists. Ana Filipa Vrdoljak next assesses the World Heritage Committee (Article 13), as well as its Secretariat and support (Article 14). Federico Lenzerini looks at the World Heritage Fund (Articles 15-16), which according to him is one of the reasons why joining the World Heritage Convention is attractive to states, as they are bound to receive funds to help conserve and restore their heritage.

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15 Ibid., pp. 86-87.
16 Ibid., pp. 103-145.
17 Ibid., pp. 115-117.
18 Ibid., pp. 147-174.
19 Ibid., p. 161.
20 Ibid., pp. 175-199.
21 Ibid., pp. 201-218.
22 Ibid., pp. 205-207.
23 Ibid., pp. 219-241.
24 Ibid., pp. 243-268.
25 Ibid., pp. 269-287.
26 Ibid., p. 271.
activities to support the World Heritage Fund (Articles 17-18) are examined by Lynne Patchett.\footnote{Ibid., pp. 289-304.}

Anne Lemaistre and Federico Lenzerini look briefly at the several provisions on international assistance under the Convention (Articles 19-26),\footnote{Ibid., pp. 305-324.} and Vesna Vujicic-Lugassy and Marielle Richon look at the educational programmes encouraged by the Convention (Articles 27-28).\footnote{Ibid., pp. 325-334.} These provisions aimed at the promotion of ‘non-legal’ activities are very important for the success of heritage protection, because they are aimed precisely at making heritage protection operative in practice, be it for the present (through international assistance) or prospectively (through awareness raising and education).

State reporting (Article 29) is analysed by Ben Boer,\footnote{Ibid., pp. 335-343.} as is the federal clause of the Convention (Article 34).\footnote{Ibid., pp. 345-353.} Federico Lenzerini looks at what he refers to as “final clauses” (Articles 30-33 and 35-38).\footnote{Ibid., pp. 355-360.}

Part III of the Commentary, relative to the relation of the World Heritage Convention with other international treaties, opens with a brief report by Guido Carducci on the relation of the 1972 Convention with other UNESCO instruments on cultural heritage.\footnote{Ibid., pp. 363-375.} Catherine Redgwell describes the relationship to other instruments on natural heritage.\footnote{Ibid., pp. 377-397.} This part is perhaps one of the few shortcomings of the book as, in my opinion, the relationships between the World Heritage Convention and other instruments for the protection of cultural and natural heritage have been addressed rather descriptively, without taking into account their prescriptive effects, or the underlying theoretical tensions between these instruments. These instruments often have very different theoretical foundations, and the commentaries in this part fail to explore how these different foundations and the consequent effects they have on the texts of the instruments influence and mould this relationship, especially if one is looking for a unified whole that draws on multiple sources capable of addressing and resolving natural and cultural heritage issues.

In Part IV, Francesco Francioni and Federico Lenzerini conclude the book by looking at the problems and prospects for the future of the World
Heritage Convention. They highlight the primary reasons for the success of the Convention and the system created by it, one of them being its immense visibility, since the Convention is known not only for those working on the field, but it is generally known worldwide. Also, the fact that it involves local communities in the process of identifying, presenting and nominating cultural and natural heritage sites is important, as it reconciles local values and traditions with the universal significance of a particular site. The ‘soft’ character of the Convention, in the sense of imposing flexible and open-textured obligations upon states, is also pointed out as a factor for its success. The main problem the Convention meets in its application is its being based on an old-fashioned understanding of state sovereignty as a prevailing value in international law. Another big issue is that of the prevailing approach towards “outstanding universal value”, which favours a more monumentalised, western perception of heritage, not always compatible with the value of cultural diversity that UNESCO has been trying to promote over the last years. This is at least reconciled through the operation guidelines, though, and one can thus expect a more “pluralistic” and “diversity-oriented” approach in the choosing and managing of World Heritage sites.

Finally, the appendixes include core texts that work as true ‘companions’ for those using the book. These are: the full text of the World Heritage Convention; the Operation Guidelines for its Implementation; and the list of states parties to the Convention.

II. REASSESSING KEY CONCEPTS

After briefly outlining the structure and contents of the book, I would like to move to the analysis of some of the most important issues raised in it, starting with some of the key concepts involved in heritage law.

36 Ibid., p. 401.
37 Ibid., p. 402.
38 Ibid., pp. 402-403.
39 Ibid., p. 404.
40 Ibid., pp. 407-408.
1. Cultural and natural heritage: Heritage v. property

The Commentary addresses the conceptual issue of the shift from ‘property’ to ‘heritage’ in Yusuf’s commentary to Article 1. While I agree with the views expressed in his contribution, I would like to add some further elements to the discussion. The fact that the Convention uses the terminology ‘heritage’, instead of ‘property’, is indicative of an innovative approach to preservation of natural and cultural properties. Early international legal instruments protecting projections of culture came about through international humanitarian law, protecting cultural goods in times of conflict, and referring to them as “cultural property”. However, developments in the field reached a point at which the values attached to property needed to be modified in order for other social goals to be secured. While ‘property’ as a legal category offers interesting advantages, its use implied the setting up of a social policy to protect the possessor of the cultural object.

The traditional approach, however, came into conflict with the fundamental policy that was sought at a later stage of development of this area of law, as there was a shift from protecting individual interests to protecting interests of society in the preservation of cultural goods. The law had evolved to deem the value to be protected by norms to be “present and future generations”, or society as a whole, rather than the particular possessor of a certain object. This idea of protecting the interests of future generations gradually led to a change in terminology, and the term ‘cultural heritage’ began to be used.

Critique of the use of the term ‘property’ goes beyond criticising the ultimate value to be protected. After all, in one way or another, the protection of objects is one of the aims of property law, with the difference that property law does not inquire who is to benefit from such protection. It protects the interests of the possessor, and, for the purposes of the critique outlined above, it may well be said that the possessor is society as a whole, and thus ‘cultural property’ would still work as a concept.

Several scholars have raised the point that, particularly in the field of legal anthropology, ‘property’ is a Western concept, which does not necessarily address the needs of all peoples. There are several examples of societies

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43 Ibid.
that do not recognise property as a social possibility; rather than owning something, individuals belonging to these societies believe that they are owned by the environment around them, which is in certain cases nothing short of the embodiment of the deities that they adore. It seems natural that a religion does not allow one to own one’s object of adoration, or the reason for adoration—that is, that you adore some entity mightier than you—would cease to exist. Thus, if everything around me is a deity, and I cannot own a deity, I do not own anything. This argument is closely related to the critique that using the term ‘property’ implies a commodification of cultural aspects of life, which should not be treated as goods in the marketplace.

The use of the term ‘property’ is thus misleading, to the extent that it is, in the end, associated with things whose value transcends their physical existence. One compelling example of this is that one of the fundamental aspects of property as a right, *ius abutendi*, cannot be exercised when dealing with cultural goods. *Ius abutendi* is the faculty that the owner of a thing has to destroy the object; this is rather difficult to accept when speaking of cultural heritage.

It is interesting to note, however, that, despite all this, the Convention is not meant to create a system that overrules national property law; much on the contrary, the provisions of the Convention operate without prejudice to national property legislation. This reflects the sovereignty-based approach adopted by the Convention in its drafting, and it can somewhat harm the effort of internationalisation of heritage. As more and more states adapt their property laws to include exceptions related to heritage protection, though, the system again comes to harmony and the greater interest of protecting heritage is preserved.

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44 A real-life example of this is given in L.V. PROTT and P.J. O’KEEFE, “‘Cultural Heritage’ or ‘Cultural Property’?”, o.c., at p. 310; who mention a famous Australian case, *Milirrpum v. Nabalco Property Ltd*.


46 See L.V. PROTT and P.J. O’KEEFE, “‘Cultural Heritage’ or ‘Cultural Property’?”, o.c., at p. 310.

47 F. FRANCIONI and F. LENZERINI, *The 1972 World Heritage Convention*, p. 120.
2. **The nature v. culture dichotomy**

The alleged 'nature v. culture dichotomy' is perhaps one of the most important features of the World Heritage Convention. By dealing with these two types of heritage in separate articles, the Convention seems to draw a line differentiating both kinds. To talk of such a dichotomy is not sustainable, however, at least inasmuch as an attempt to refer to some sort of clear-cut separation. The inexistence of a clear distinction between cultural and natural heritage can be seen in the inclusion of the words “the combined works of nature and man” in the definition of cultural heritage in Article 1 of the Convention.\(^4^8\)

But the merging between culture and nature in protecting heritage is best illustrated by the notion of cultural landscapes, which—as we have seen—deserved a chapter of its own in the book,\(^4^9\) and is further explored below.\(^5^0\) For the present purposes, it suffices to say that the dichotomisation of nature and culture in the World Heritage system is at best a partial one, if not simply artificial,\(^5^1\) as the practice under the Convention has evolved towards a more holistic approach to heritage, focused on its significance, rather than the way it presents itself. The fact that the criteria for inscription on the World Heritage List are presented in a single list, rather than separate lists for cultural and natural heritage, is also very telling.\(^5^2\)

3. **Outstanding universal value**

The definition of “outstanding universal value” is not offered by the Convention, but only by its Guidelines (2005 version), and still in rather vague terms:

> “Outstanding universal value means cultural and/or natural significance which is so exceptional as to transcend national boundaries and to be of common importance for present and future generations of all humanity. As such, the permanent protection of this heritage is of the highest importance to the international community as whole.”\(^5^3\)

The idea is also expressed by paragraphs 6 to 8 of the Convention’s Preamble. According to Francioni, the term ‘universal’ “can be understood

\(^{4^8}\) Ibid., pp. 48-49.

\(^{4^9}\) See supra note 13 and accompanying text.

\(^{5^0}\) See infra notes 79-86 and accompanying text.


\(^{5^2}\) Ibid., pp. 73-74.

\(^{5^3}\) Ibid., p. 88.
as defining the quality of a site of being able to exercise a universal attraction for all humanity and exhibit importance for the present and future generations.”

It is not necessary therefore that the heritage at stake is representative of commonly shared beliefs or culture; it is sufficient that it appeals to our shared humanity, regardless of the way it does so, which can be different for each observer.

This understanding, however, has led to what has been pointed out as one of the key shortcomings of the World Heritage Convention and the entire system of heritage protection, which was either inspired or directly created by the Convention: the emphasis on the monumentality and aesthetic value of a manifestation of heritage, as opposed to its cultural significance (in the case of cultural heritage), or to its importance to biodiversity and the ecosystem where it is inserted (in the case of natural heritage).

As Francioni points out, though, reforms undertaken within the World Heritage Committee, at least with regard to cultural heritage, are aimed precisely at correcting this imbalance, offering a more nuanced and culturally-sensitive approach, inspired by anthropology. The criteria for natural heritage have also increasingly gained a stronger scientific base, except for some criteria on the “aesthetic importance” of “natural beauty”, which once again cross the bridge between nature and culture, and must also incorporate anthropological elements, even though a literal reading of its language suggests a more ‘monumental’ approach.

III. THE REACH AND REPRESENTATIVENESS OF THE WORLD HERITAGE CONVENTION

1. The internationalisation of heritage

Even though when it was drafted the Convention had provisions leaving the principle of state sovereignty untouched, its practice has evolved in the direction of more international action for the preservation of heritage. This has partly shaken one of the basilar principles of the Convention, but it is consonant with its evolutive interpretation and the current state of affairs of international law in the field.

Further, the definition of ‘outstanding universal values’, one of the core

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54 Ibid., p. 19.
55 Ibid., p. 29.
56 Ibid., p. 72.
57 Ibid., pp. 20–21 and 407–408.
58 Ibid., p. 73.
59 Ibid., pp. 5–6.
concepts of the Convention, highlights the international aspiration of the Convention and of heritage protection in general,\textsuperscript{60} despite the seemingly sovereignty-based approach of the original drafting of the Convention.\textsuperscript{61} The very fact that sovereignty is identified as a shortcoming of the Convention\textsuperscript{62} indicates a predominance of internationally-oriented action for the protection and safeguard of heritage.

2. \textit{The erga omnes character of heritage obligations}

The issue of the possible \textit{erga omnes} character of obligations under the World Heritage Convention is considered in the chapter by Guido Carducci.\textsuperscript{63} While acknowledging that there certainly is a collective interest in the protection of heritage at the intergovernmental and diplomatic level, he expresses doubt as to whether there is such an interest outside this specific context; which is necessary for creating a separate legal obligation.\textsuperscript{64} He argues that there is no clear expression of a “collective interest” in the preservation of heritage in the Convention’s provisions, and that there are only modest arguments that attempt to substantiate such an idea, without actually accomplishing it.\textsuperscript{65} He moves on to argue that the obligations in the Convention are aimed primarily at sovereign states, and the international community’s obligations are only subsidiary.\textsuperscript{66} Even though he finds there to be arguments both in favour and against the existence of \textit{erga omnes} obligations under the Convention, he cautiously concludes that the uncertainty on the matter means that only a decision on a specific case will be able to decide the controversy.\textsuperscript{67}

Gionata P. Buzzini and Luigi Condorelli, on the other hand, conclude that the obligations under the Convention are \textit{erga omnes}, precisely because they attend to commonly shared interests.\textsuperscript{68} The same reasoning—namely, that of attendance to commonly shared interests—has led Francesco Francioni to affirm elsewhere that there is an emerging customary legal obligation to protect cultural heritage.\textsuperscript{69} While this discussion is far from resolved, I do believe there is at least an emerging customary obligation of respect

\begin{itemize}
\item \textsuperscript{60} Ibid., pp. 88-89.
\item \textsuperscript{61} Ibid., p. 86.
\item \textsuperscript{62} Ibid., p. 404.
\item \textsuperscript{63} Ibid., pp. 132-145.
\item \textsuperscript{64} Ibid., p. 134.
\item \textsuperscript{65} Ibid., p. 136.
\item \textsuperscript{66} Ibid., pp. 136-137.
\item \textsuperscript{67} Ibid., p. 143.
\item \textsuperscript{68} Ibid., p. 178.
\item \textsuperscript{69} See F. FRANCIONI, \textit{Au-delà des traités: L’émergence d’un nouveau droit coutumier pour la protection du patrimoine culturel}, Florence, European University Institute, Law Department, Working Paper, 2008, No 5.
\end{itemize}
towards cultural heritage, based primarily on the wide ratification of heritage instruments, and the almost unanimous international outrage over the wilful destruction of cultural property in Afghanistan a couple of years ago.\textsuperscript{70} Even though it is difficult to use this to construe the \textit{erga omnes} effect of the Convention, there seems to be a tendency in this direction.

3. \textit{The transformation of the Convention by administrative practice}

One of the key factors for the success of the World Heritage Convention and the system created by it is certainly the World Heritage Committee, responsible for the creation, maintenance and evolution of the international activity related to the protection of cultural and natural heritage.\textsuperscript{71} This is one instance of an emerging phenomenon in international law, that of the transformation of international law by international organisations and the international civil service, as opposed to the traditional exclusivity of the state as a relevant actor of international law.\textsuperscript{72}

The role of the Secretariat is vital in this regard, as the Secretariat performs roles as diverse and important as management of the Convention, nominations for the Lists, reporting, reactive monitoring and deletion from the Lists, management of the representativeness of the lists, management of the World Heritage Fund, international assistance, dissemination of information, coordination with UNESCO and the bodies established by other Conventions dealing with cultural and natural heritage, and the World Heritage Emblem.\textsuperscript{73} Such a wide range of activities falling upon a non-political body, coupled with the trust deposited on the advisory bodies to the Committee (IUCN, ICOMOS and ICCROM)\textsuperscript{74} is telling of an attitude of more reliance on international organisations.

\textbf{IV. The World Heritage Convention and today’s heritage}

\textsuperscript{70} See, for an elaboration of this argument, R. O’KEEFE, “World Cultural Heritage: Obligations to the International Community as a Whole?”, \textit{International and Comparative Law Quarterly}, 2004, at p. 189.

\textsuperscript{71} F. FRANCIONI and F. LENZERINI, \textit{The 1972 World Heritage Convention}, pp. 220-221.


\textsuperscript{73} F. FRANCIONI and F. LENZERINI, \textit{The 1972 World Heritage Convention}, pp. 249-259.

\textsuperscript{74} \textit{Ibid.}, pp. 261-264.
1. **Relation to other instruments**

As I have mentioned, the Commentary seems not to capture all the richness of exploring the relationship between the World Heritage Convention and other instruments. While I address some of the two most pertinent issues—at least, in my view—in the following subsections, there is one general remark to be made at this point, and that is the importance of taking into consideration evolving accounts of the protection of cultural and natural heritage. For instance, more recent instruments relevant for the protection of natural heritage have moved away from a sovereignty-based approach to natural resources, at least in some instances: this new approach could be used to re-interpret the World Heritage Convention and overcome the obstacle of sovereignty. Similarly, new instruments for the protection of cultural heritage value cultural diversity and cultural sensitivity over monumentality and western standards when considering manifestations of heritage; this is important to help strengthen the Operational Guidelines and overcome the past practice under the World Heritage Convention towards a more inclusive and truly representative World Heritage List.

It is also interesting to note that in at least one instance other instruments (or their drafting history) have been used to shed light on the World Heritage Convention itself: when referring to the alleged ineffectiveness of Article 12 of the Convention, Lenzerini indicated that the fact that a textually identical provision was excluded from the Draft of the Intangible Heritage Convention was telling. This means that not only does the World Heritage Convention set up the bases upon which all heritage instruments are built, and thus informs their meaning; but also that the reverse is possible, thus making the set of instruments dealing with natural and cultural heritage a systematic, interconnected whole, aimed at offering the best possible protection to the heritage of mankind. I now move to analyse two specific issues relative to emerging areas of heritage protection law, cultural landscapes and intangible cultural heritage.

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77 See supra note 22 and accompanying text.

2. **Cultural landscapes**

Emerging legal frameworks for the protection of cultural landscapes, at least at the regional level, have brought the topic of cultural landscapes to the top of the agenda in heritage discussions. My aim here is not to re-discuss the emerging literature on the field, but rather to make one general remark on the relationship between the World Heritage Convention and the protection of cultural landscapes.

As it has been pointed out above, the notion of ‘cultural landscape’ did not originally fall within the World Heritage Convention and, at least to some extent, this notion crystallises the combination of culture and nature. Originally, cultural landscapes could have been included as natural properties at least, apparently under the 1977 Guidelines. They have come to be considered cultural properties, however, due to subsequent reforms to these Guidelines. Even though there have been attempts to inscribe properties in the list as simultaneously cultural and natural heritage, only very few of these applications have been accepted; the most remarkable example being Machu Picchu, in Peru. Cultural landscapes thus represent “the nature-culture continuum” But it is odd to note that, out of the thirty-seven properties of the World Heritage List inscribed as cultural landscapes, only three were inscribed by both their natural and cultural elements. This seems to embody some residues of the nature/culture dichotomy that should by this time have been extinguished.

79 See the Council of Europe’s 2000 European Landscape Convention.
81 See supra note 13 and accompanying text.
82 See supra notes 49-52 and accompanying text; F. FRANCIONI and F. LENZERINI, The 1972 World Heritage Convention, p. 60.
84 Ibid., p. 54.
85 Ibid., p. 61.
86 Ibid., p. 62.
3. **Intangible heritage**

The Commentary only briefly outlines the relationship between the two instruments: the World Heritage Convention and the Intangible Heritage Convention. But it fails to explore the linkage between tangible and intangible cultural heritage, which has recently been the object of some scholarly attention. While I do not aim at fully exploring this relationship here, it is important to note the interdependence and symbiosis between the two areas of cultural heritage: while the intangible heritage only gains expression through the physical existence of the tangible heritage, the tangible heritage is almost meaningless except for its aesthetic value without its intangible elements, without its history, its cultural background. As cultural heritage seems to move from an aesthetics-based type of appreciation towards a more cultural relevance-based approach, intangible heritage gains great importance in the field.

Intangible Cultural Heritage has been gradually taken into account by the World Heritage System in the reforms to the criteria for inclusion of manifestations of heritage under the ‘cultural heritage’ category. The prevailing idea today, when speaking of the relationship between tangible and intangible heritage, is that one can no longer consider sites or monuments in isolation, but that they are complex and multidimensional manifestations of heritage, embodying both tangible and intangible elements. This new, expanded and culturally-oriented concept of heritage prevails, and helps in taking a holistic approach to both fields.

Even though these two fields are in close interconnection, the international instruments related to them create different legal regimes. The inscription of a manifestation of heritage as either tangible or intangible heritage requires a choice as to the aim of protection, and the possibilities each system offers. This determination is to be done on a case-by-case basis, though, and my intention is not to offer elements here to help making such a choice, but rather to point out this tension.

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V. Concluding Remarks: World Heritage and the Heritage of the World

The topic of the conservation of the world’s cultural and natural heritage has gained increasing importance over the past three decades. This success is greatly attributable to the efforts of UNESCO and the World Heritage Convention, which have set up the foundations for a currently complex and multi-connected system for the protection of cultural heritage. As heritage protection becomes more and more internationalised, the international community must be ready for the challenge.

The plurality of sources from which elements for the protection of natural and cultural heritage can be drawn is a very positive feature of the system, because of its richness and comprehensiveness. Even in multiplicity, the system seems to find its way towards unified and consistent solutions, perhaps precisely because of the unifying axis of the World Heritage Convention. Its international call is an inspiring and powerful tool to safeguard what we as mankind should treasure the most, the heritage of the world.