

LAW AS MNEMONICS: THE MIND AS THE PRIME SOURCE OF NORMATIVITY

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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’ (*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-GĪTĀ, Ch. 2, Text 60.

² Mnemonics: the study and development of systems for improving and aiding the memory; see the *Oxford Dictionary*, Oxford, Oxford University Press, 1999, p. 914.

³ O. RANK, *Der Mythos von der Geburt des Helden: Versuch einer psychologischen Mythendeutung*, Wien, Turia & Kant, 2000, mainly at p. 19.

⁴ See, e.g., I. BLOCK, “Truth and Error in Aristotle’s Theory of Sense Perception”, *Philosophical Quarterly*, 1961; D. SUMMERS, “Three Excerpts from the Judgment of

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'

Sense", in C. FARAGO, *Leonardos Writings and Theory of Art*, New York, Garland, 1999, pp. 97-112, at pp. 97-101.

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,⁵ 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.⁶

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*”.⁷

⁵ See, *e.g.*, R.J. NEUWIRTH, “International Law and the Public/Private Law Distinction”, *Austrian Journal of Public and International Law*, 2000, pp. 393-408.

⁶ See F. VESTER, *Die Kunst vernetzt zu denken: Ideen und Werkzeuge für einen neuen Umgang mit Komplexität*, Stuttgart, DVA, 1999, p. 23.

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”.⁸

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 *iustitia* 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

⁸ See M.L. JOHNSON, “Mind, Metaphor, Law”, *Mercer Law Review*, 2006, pp. 845-868, at p. 845.

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, initialled 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 Lumière*.⁹ 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”.¹⁰

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

⁹ See, for the history and the difficulty of attributing the invention of film to one inventor, G. SADOUL, *Histoire du cinéma mondial*, 9th ed., Paris, Flammarion, 1949, pp. 7-19; K. THOMPSON and D. BORDWELL, *Film History: An Introduction*, New York, McGraw-Hill, 1994, pp. 4-12; T. RAMSAYE, “The Motion Picture”, *Annals of the American Academy of Political and Social Science*, 1926, pp. 1-19; T. RAMSAYE, “The Rise and Place of the Motion Picture”, *Annals of the American Academy of Political and Social Science*, 1947, pp. 1-11.

¹⁰ P. NORA, “Between Memory and History: *Les lieux de mémoire*”, *Representations*, 1989, pp. 7-24, at p. 15.

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.

I. *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.

¹² E. MACH, *The Analysis of Sensations and the Relation of the Physical to the Psychological*, New York, Dover, 1959, p. 239 [first published in 1885].

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

¹⁴ W. BENJAMIN, “Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit”, in R. TIEDEMANN and H. SCHWEPPENHÄUSER, *Walter Benjamin: Gesammelte Schriften*, 2nd ed., Frankfurt, Suhrkamp, 1978, pp. 436-508, at p. 467.

¹⁵ See G. OLLINGER-ZINQUE, “La culture des idées: Ce qui est invisible ne peut être caché à notre regard”; F. LEEN, “Un rasoir est un rasoir: Le mot et l’image dans certaines peintures de René Magritte”; R. WANGERMEE, “Magritte et ‘l’univers du son’”, in G. OLLINGER-ZINQUE and F. LEEN, *René Magritte (1898-1967): Catalogue du centenaire*, Gand, Ludion, 1998, pp. 14, 23 and 37-53.

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

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.

¹⁸ *Ibid.*, p. 123.

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

¹⁹ A. SCHÖNBERG, *Style and Idea*, Berkeley, University of California Press, 1975, p. 101.

²⁰ M. ELIADE, *Patterns in Comparative Religion*, Lincoln, University of Nebraska Press, 1996, p. 460.

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

²¹ See Guyau, quoted in H. KEYSERLING, *Das Reisetagebuch eines Philosophen*, Frankfurt, Ullstein, 1990, p. 136 [first published in 1918].

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

²² See B. KOSKO, *Fuzzy Thinking: The New Science of Fuzzy Logic*, New York, Hyperion, 1993.

²³ See, *e.g.*, D.T. SUZUKI, *The Zen Koan as means of Attaining Enlightenment*, Boston, Tuttle, 1994.

²⁴ See especially C.G. JUNG, *Mysterium coniunctionis: Untersuchungen über die Trennung und Zusammensetzung der seelischen Gegensätze in der Alchemie*, 4th ed., Olten, Walter-Verlag, 1984.

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”.²⁵

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*”.²⁶

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

²⁵ G. TEUBNER, “Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?”, in C. JOERGES, I.-G. SAND and G. TEUBNER, *Transnational Governance and Constitutionalism*, Oxford, Hart, 2004, pp. 3-28, at p. 16.

²⁶ I. MYER, *Qabbalah*, Whitefish, Kessinger, 2003, p. vi.

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”.*²⁷

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

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.

certainty in the law”.²⁸

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

²⁸ J.H. MERRYMAN “On the Convergence (and Divergence) of the Civil Law and the Common Law”, *Stanford Journal of International Law*, 1981, pp.357-388, at pp. 364-365.

²⁹ See especially H.P. GLENN, *Legal Traditions of the World*, Oxford, Oxford University Press, 2000.

³⁰ See M. KASER, *Das Römische Privatrecht*, München, Beck, 1975, p. 353; R. TASCHERAU, *Théorie du cas fortuit et de la force majeure dans les obligations*, Montréal, Théoret, 1901, pp. 1-2.

³¹ 1969 Vienna Convention on the Law of Treaties, Article 62.

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' bodies 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 Subiela.

³³ H. BENOIT, *Let go: Theory and Practice of Detachment according to Zen*, New York, Weiser, 1973, pp. 154-163.

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.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 *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"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 *nasciturus*; beginning with the transformation of the embryo into a foetus, quickening -*i.e.*, the first

³⁴ See, e.g., E.C.J., Case C-506/06, *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 *in vitro* fertilised *ova* have not yet been transferred into her uterus.

³⁵ US Supreme Court, *Roe v. Wade*, 1973, 410 US 113.

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

³⁶ *Ibid.* pp. 133, 160 and 163.

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.

³⁸ See D.R. SMITH, "Legal Recognition of Neocortical Death", *Cornell Law Review*, 1986, pp. 850-888, at p. 851.

³⁹ See, *e.g.*, D.A. SHEWMON, "Brainstem Death, Brain Death and Death: A Critical Re-Evaluation of the Purported Equivalence", *Issues in Law and Medicine*, 1998, pp. 125-145.

question by new scientific and technological advances.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 *No te mueras sin decirme adónde vas*, Lynne Stopkewich’s *Kissed* or Pedro Almodovar’s *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 *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 *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 *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,

⁴⁰ See A. TREW, “Regulating Life and Death: The Modification and Commodification of Nature”, *University of Toledo Law Review*, 1998, pp. 271-326.

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].⁴¹

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

⁴¹ High Court (Chancery), *Cummins v. Bond*, 1927, L.R. 1 Ch. 167.

⁴² S. WEIL, *La pesanteur et la grâce*, Paris, Plon, 1948, p. 160.

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 intertwinement 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 -or the entirety- of citizens 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.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 *Daedalus and Icarus*, Da Vinci's flying machines or the first launch of the Earth satellite *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.⁴⁴ The proposed criteria for the delimitation of air sovereignty vary from effective control to the criterion of aerodynamic lift -*i.e.*, the highest point to which a conventional aircraft can ascend (around 20 miles)-, the atmospheric space -*i.e.*, any space where air is found which may be the case up to 10.000 miles-, the exosphere -*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 -*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 *usque ad finitam*.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 to all states 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".⁴⁶

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

⁴³ 1982 Montego Bay Convention on the Law of the Sea, Articles 2-3, 33, 55, 76 and 87.

⁴⁴ 1944 Chicago Convention on International Civil Aviation, Article 1.

⁴⁵ For a discussion of the delimitation of air sovereignty, see J.F. MCMAHON, "Legal Aspects of Outer Space", *British Yearbook of International Law*, 1962, pp. 339-399.

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.⁴⁷ 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*".⁴⁸ 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

⁴⁷ M. WEBER, *Soziologie, Weltgeschichtliche Analysen, Politik*, 4th ed., Stuttgart, Kröner, 1968, pp. 151-ff.

⁴⁸ See S. ZWEIG, *Joséph Fouché: Bildnis eines politischen Menschen*, 44th ed., Frankfurt, Fischer, 2001, p. 165.

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

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.

⁵⁰ *Ibid.*, pp. 134-ff.

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”.

⁵² See, e.g., H. LAUTERPACHT, *Private Law Sources and Analogies of International Law*, London, Longmans, 1927.

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 to an end 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 disharmonieren 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

⁵³ See W. KAEGLI, “Discordia Concors: Vom Mythos Basels und von der Europa-idee Jacob Burckhardts”, in M. SIEBER, *Discordia Concors: Festgabe für Edgar Bonjour zu seinem siebzigsten Geburtstag am 21 August 1968*, Basel, Helbing and Lichtenhahn, 1968, pp. 131-152, at pp. 136-152.

⁵⁴ Compare: J.D. WILETS, “The Demise of the Nation-State: Towards a New Theory of the State Under International Law”, *Berkeley Journal of International Law*, 1999, p. 193-229; H. HELLER, “The Decline of the Nation State and its Effect on Constitutional and International Economic Law: The Nature and Structure of the State”, *Cardozo Law Review*, 1996, pp. 1139-1216; C. SCHREUER, “The Waning of the Sovereign State: Towards a New Paradigm for International Law”, *European Journal of International Law*, 1993, pp. 447-471.

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.⁵⁵ 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

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).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.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.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.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

⁵⁶ EC Treaty, Part II - "Citizenship of the Union", Articles 17-22.

⁵⁷ EC Treaty, Article 230.

⁵⁸ EC treaty, Titles I and III; see, on people's right to move and reside freely within the EU territory, Article 18.

⁵⁹ See, *e.g.*, the discussion of neo-functionalism by P. CRAIG, "The Nature of the Community: Integration, Democracy, and Legitimacy", in P. CRAIG and G. De BÚRCA, *The Evolution of EU Law*, Oxford, Oxford University Press, 1999, pp. 1-54.

and coins in January 2002.⁶⁰ 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.⁶¹ 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.⁶² 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

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.

⁶¹ EC Treaty, Articles 151-152, 157-162 and 174-181.

⁶² For the evolution of the concept of culture, see especially A.L. KROEBER and C. KLUCKHOHN, *Culture: A Critical Review of Concepts and Definitions*, New York, Vintage, 1952.

or class, and up to a whole society.⁶³ 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 agri*) 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.⁶⁴ 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.⁶⁵ 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

⁶³ T.S. ELIOT, *Notes Towards the Definition of Culture*, London, Faber, 1968, p. 21.

⁶⁴ See, e.g., E. SAPIR, “The Status of Linguistics as a Science”, *Language*, 1929, pp. 207-214; Y.M. LOTMAN, *Universe of the Mind: A Semiotic Theory of Culture*, London, Tauris, 1990, p. 273.

⁶⁵ See, e.g., T.W. ADORNO, “Culture and Administration”, in T.W. ADORNO, *The Culture Industry: Selected Essays on Mass Culture*, London, Routledge, 1991, pp. 107-131, at p. 123.

⁶⁶ Note that the EU’s motto ‘united in diversity’, as previously mentioned in Indent 4 of the Preamble to Part I and Article I-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”.⁶⁷ 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.

⁶⁷ 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”⁶⁸

*“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”.*⁶⁹

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’.⁷⁰ 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 103.⁷¹ 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

⁶⁸ Cf S.P. HUNTINGTON, *The Clash of Civilisations and the Remaking of the World Order*, New York, Touchstone, 1996.

⁶⁹ S. WEIL, *The Need for Roots*, London, Routledge, 2002.

⁷⁰ See, e.g., P.C. JESSUP, *Transnational Law*, New Haven, Yale University Press, 1956; G. TEUBNER, *Global Law Without a State*, Aldershot, Dartmouth, 1997; H.J. BERMAN, “World Law”, *Fordham International Law Journal*, 1995, pp. 1617-1622.

⁷¹ See, on the constitutional character of the UN Charter, G. RESS, “The interpretation of the Charter”, in B. SIMMA, *The Charter of the United Nations: A Commentary*, Oxford, Oxford University Press, 1994, pp. 25-44, at pp. 26-27.

linkage debate' -or trade and [...] problems⁻⁷²; *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.⁷³ Although it initially only had a declaratory character, this unique legal document has most probably achieved a legally binding, normative status in the meantime.⁷⁴ 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 indivisible 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.⁷⁵ 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

⁷² See, *e.g.*, J.P. TRACHTMAN, "Trade and [...] Problems, Cost-Benefit Analysis and Subsidiarity", *European Journal of International Law*, 1998, pp. 32-85.

⁷³ UN General Assembly, *Resolution 217 A (III)*, 10 Dec. 1948, *Universal Declaration of Human Rights*.

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".

⁷⁵ See also C. ROUSSEAU, "De la compatibilité des normes juridiques contradictoires dans l'ordre international", *Revue critique de droit international privé*, 1932, pp. 10-192; M. ZULEEG, "Vertragskonkurrenz im Völkerrecht", *German Yearbook of International Law*, 1977, pp. 246-276; E. ROUCOUNAS, "Engagements parallèles et contradictoires", *Recueil des Cours*, 1987, pp. 9-288.

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 *embarrass 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).⁷⁸ 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

⁷⁸ See H. MOSLER, "General Principles of Law", in R. BERNHARDT,, *Encyclopaedia of Public International Law*, Vol. 7, Amsterdam, North Holland, 1984, pp. 89-105, at pp. 92-93.

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.