Comparative Legal Studies and Internationalization of Law
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Course: The Refoundation of Powers[1]
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The year 2005 should have been a great moment in the construction of an international legal order: expected were the consolidation of the European order through the Constitutional Treaty for the European Union; the stabilization of the global order through reform of the United Nations, which celebrated its sixtieth anniversary; and the completion of the Doha Round to celebrate the tenth anniversary of the World Trade Organization.

It was a triple failure.

In commenting on the halting of negotiations at the WTO, Pascal Lamy underscores that "globalization is happening more quickly than the means to regulate it." That observation holds as well for the other institutions, so that it is true that the crises have first of all revealed a void, or more precisely an absence of the theoretic model that depicts the practices linked to the organization of powers. The U.N. crisis demonstrated that the former model – that of a nation-state that reserves political power to states and constructs international law around interstate relations – functions *no longer*; but the two other examples also demonstrated that an alternative model – alter-national even supranational – does *not yet* exist; such a model exists neither in a region that has strongly integrated in the last century, like Europe, nor in a domain that is consent-based, like global commerce. In sum, we are constrained, at this moment in history, simultaneously to refuse a fallback to a nationalist model and an escape by means of a globalist model. The path between what is *no longer* and what is *not yet* remains to be marked out; nonetheless, its broad outline already is clear, because a time of crisis serves to reveal the difficulties that must be resolved if one is to get out of it.

Without doubt it will be necessary – if Europe is to get a new lease on life, if the United Nations is to pull itself up out of impotency, if the WTO is to resume negotiations – to institute public powers. Or rather to reinstitute them: to render them operative, is not simply a matter of applying the distinction made at the national level among the executive, the legislative, and the judiciary to the international level. A more radical transformation is surely necessary to overcome the public-private divide and to connect diverse actors. Not only institutional actors (what we might call "instituted powers") are at issue, but also the relations of those actors with other actors: on the one hand, economic and civic actors (the relation between power and will), and on the other hand, scientific actors (relation between power and knowledge).

In the wake of triple defeat, reconnection of power, will, and knowledge calls for a triple

[1] Trans. Diane Amann. This translation is a working paper and should not be quoted. The complete course was published in 2007 by the publishing house Seuil, as volume III of the series entitled "*Les forces imaginantes du droit*."

step.

Doubtless there must be a new *reinstitution of powers* (I), in the traditional sense of the term (executive, legislative, and judicial), because globalization calls for new articulations between international and national jurisdictions. But refoundation also must pay due attention to a *rebalancing of will* among economic and civic actors (II), and to the importance of the *intersection of knowledge* (III).

1. Reinstituting Powers

There is no lack of candidates who might benefit from the reinstitution of powers. To the contrary, one could say that these candidates vie with each other to exert at the global level the powers of the legislator, of the executive, and of the judge. In these times of interdependence in which frontiers become porous, in both a physical and a metaphorical sense, states remain in charge of *inter*national negotiations. But questions that are *trans*national questions – such as communication by Internet or the flow of commerce – or global – such as climate change or biotechnology – relate directly to judges or to international organizations. The vacillation between "government of judges" and international "governance" bears witness to institutional superabundance and, at the same time, to the legal and political incertitude that accompanies it.

Even though it scarcely has been sketched out, the new global organization of powers is already contested, as much by alternative globalization movements as by sovereigntists or even by a part of the American liberal school that judges the regulations in place insufficient.

But these criticisms vary with the nature of the power at issue. The increase in the power of judges as pilots of globalization is realized with existing means, without necessitating a genuine institutional reform, the techniques of interpretation already offering numerous possibilities to national jurisdictions at the same time that they reaffirm progressively the place of international jurisdictions. With regard to the exercise of the legislative and executive power at the principal international organizations, however, most projects for reform failed to be realized, a fact that no doubt helps to nourish the feeling of crisis and so to evoke, in the manner of a new Grail, the quest for "good governance." One sees too the advent of veritable legal monsters, of which the "Treaty Establishing a Constitution for Europe" gives us a first look, that are at once unsettling and innovative.

The increase in the power of judges

One observes first of all an intensification of exchanges among judges, facilitated by new information technologies and by the implementation of judicial networks. These exchanges, spontaneous and horizontal – that is, nonhierarchical – traditional among the judges of the common law, now extend to judges of the legalist a sort of informal community of judges that accompanies "internationalization" (as that term is properly used, to refer to the extension of jurisdiction beyond national territory), the nature of which is more ambiguous.

Depending on whether it comes from internal law on the basis of extraterritorial competence, or from international law on the basis of conventions imposing or suggesting a universal competence, the internationalization of national judges sometimes expresses a unilateralism that tends to hegemony, sometimes a multilateralism that tends to pluralism, reinforced by a feeling of emancipation and even of emulation.

Emancipation is in effect the consequence of the direct applicability of international texts which modify, and sometimes neutralize, internal law. Freed from internal law for the benefit of a international law directly applicable, of which imprecision has the effect of reinforcing their margin of interpretation, judges, notably in Europe, have thus seen their field of competence enlarged. This has been true even in the United Kingdom: since the entry into force in 2000 of the *Human Rights Act*, the European Convention for the Protection of Human Rights and Fundamental Freedoms has become directly applicable even in domains as political as emergency legislation. Thus did the House of Lords in 2004 annul the *Terrorism Act* of November 2001, solely based on the Convention, though it must be admitted that two subsequent laws attenuated the effects of the judges' decision...

To this is added an effect of emulation which holds to the concurrence created by the development of international jurisdictions and contributes paradoxically to stimulate the boldness of national judges: it is not an accident that the innovative position adopted by the House of Lords on Nov. 18, 1998, in its first decision in the *Pinochet* case appeared just four months after the adoption on July 18 of the Statute of Rome establishing the International Criminal Court.

This ensemble of mutations calls for the progressive harmonization of national rules, therefore an international supervision because harmonization is rarely spontaneous. This is to say the link between the internationalization of judges and the process, apparently inverse yet doubtless complementary, of the "judicialization" of international law.

In a world which remains officially conceived on an *inter*national model, the development of international jurisdictions can surprise, although national sovereignty seems an obstacle that cannot be surmounted: only states have the power to create an international jurisdiction, and they are naturally disinclined to do so. And yet the obstacle has in fact been got 'round, under the double influence of the universalism of human rights and of the globalization of the economy. And the multiplication of international jurisdictions begins to upset the organization of powers by introducing a new dynamic – one that is *trans*national, and sometimes *supra*national, into the legal order.

This dynamic is reinforced by a phenomenon of autonomization which is particularly visible in a region like Europe, where the first international jurisdictions go back fifty years and which could extend itself to more recent organs, such as the appellate body of the WTO or the International Criminal Court.

And autonomization gives rise to imitations from one jurisdiction to another, not only among jurisdictions competent in matters of human rights, but also in economic matters, by the

game of “inter-systemic” exchanges among courts of equivalent nature established in different geographic spaces, such as, for example, Europe (the Court of Luxembourg for the European Communities), Africa (the Court of Ouagadougou, Burkina Faso, for the Economic and Monetary Union of the West Africa), and Latin America (the Court of Quito, Ecuador, for the Andean Community).

In the end, it is every balance of powers which finds itself challenged/in doubt/questioned. To begin with the legislative power, already in competition at the level of domestic law by the growing role of constitutional judges, and now weakened by international law, to the degree that the emancipation of national judges and the autonomization of international judges increased. Not only the International Criminal Tribunal for the former Yugoslavia is engaged in a supervision of the legality of U.N. Security Council resolutions in order to affirm its own jurisdiction; but other international jurisdictions have just begun – notably with relation to human rights by means of autonomous interpretations – to impose constraints on national sovereignty that are more and more strict. Drawing upon the argument of the necessity to resolve the practical problems created by the backlog of the court, the President of the European Court of Human Rights has besides openly posed the question of its “constitutional” future.

It is perhaps to go a little fast, it being a matter of a system henceforth open, well beyond the 25 members of the European Union, to more than 800 millions persons within the states, among them Russia or Turkey, whose conceptions in terms of democracy are very different. In such a context, the role of the Court of Strasbourg cannot without doubt be compared neither to that of a constitutional judge, or to a third degree of jurisdiction. But recent evolutions, and the more and more political nature of the decisions issued, shows how the exercise of a jurisdictional function can be transformed into a veritable power, doubtless prefiguring, not only for other regions but also at the planetary level, the appearance in the future of a global judicial power.

Already very engaged, such a transformation makes necessary the search for governance that one hopes is sufficiently democratic to be called “good.”

In Search of Good Governance

The goal is not to adapt the model of *national* government for the benefit of a *supra*national authority, whether regional or global. Nor is it to confine it to a purely *inter*national organization of the world. It is to try to combine these different models in order to create the bric-a-brac of heterogeneous plans, unstable and evolutive, that is called governance.

This usage of the terme goes back, to the days after the fall of the Berlin Wall, to the creation within the framework of the United Nations of a Commission on *Global Governance*. Published in 1995, the report broached the question of the sovereignty of States and of the reform of U.N. institutions in a classic enough fashion. Whether it is a matter of balance of functions or of the attribution of jurisdictions, the relations remain of an *inter*national type. However, at the European level, the White Paper of the European Commission on *European Governance* (2001)

proposes five principles said to constitute good governance – openness {“ouverture”}, participation, responsibility, efficiency, and coherence – which are combined with the fundamental principles of proportionality and subsidiarity to determine the choice of level (national, international, or supranational) at which the decision should be made: “the ‘linear’ model consistent of deciding policy at the top must be replaced by a ‘virtuous circle,’ based on interaction, networks and on participation at all levels, of the definition of policies all the way through to their implementation.”

Interaction, networks, levels, the return of the search of an ordered pluralism is apparent. But it is a matter of the “definition of policies all the way through to their implementation,” put another way the organization of the legislative and of the executive power. But the method described evokes less the separation of powers than the interrelation of various levels of competence: participation is foreseen “at all levels,” in order to permit governments and national legislatures to communicate among themselves, and thus with European institutions. Written into the European “Constitutional Treaty,” this change of method underlies also other debates on the role of the International Labor Organization, the future of the WTO, or the reform of the United Nations.

From government to governance, separation of powers seems marginalized, or even neutralized, by a disequilibrium of functions that is not only tolerated, but organized, by global governance which calls back in some sort to institute dispersion among diverse levels of competence. Legislative competence is thus distributed among the national level (States’ own competence), the international level (shared competence, by means of instruments negotiated horizontally among governments, such as declarations, conventions, or framework-decisions), and the surpranational level (competence attributed to an international organization that imposes the norm vertically, by U.N. Security Council resolution, or in Europe by directive or Community regulation).

Whence the importance of techniques of attribution of competence, of which the most developed is subsidiarity, which functions a little like a modulator [*variateur*]: it moves toward more integration if states parties due not attain the goals of the Union and toward less integration in the inverse case. Invented within the national framework of federal governments, then adapted to the regional framework of Europe, this technique of supple internationalization would be without doubt adaptable at the global level.

But precisely because it is supple, subsidiarity helps along, at the interface of law and politics, the interplay of powers that determines choices. Subsidiarity would call for a rigorous supervision, all the more necessary because these plays of powers also develop in an “intersystemic” fashion; that is, among systems of different nature. European judges thus can be led, for example, to examine the conformity of measures taken in application of decisions of the U.N. Security Council, at the risk of coming to exercise indirectly some supervision over global governance.

These same judges also can be called to decide, within the framework of the struggle

against terrorism, the interplay of powers among the United States and Europe. Notably in the domain of transportation, where American officials have obtained from the Council and from the Commission, but against the advice of the Parliament, an agreement regarding the treatment and the transfer of *Passenger Name Records* by airlines to customs and border officials of the U.S. Department of Homeland Security. Concluded without reciprocity, this agreement called "cooperation" has been challenged before the Court of Justice of the European Communities. But what principles will be applicable?

One sees that if the separation of powers is not adapted at the global level, the network put in place is not the panacea that would guarantee "good" governance. Whence the return to the first sense of the word: to steer a ship, one needs a compass. But which compass?

If we feel directionless, it is not because we lack a compass but perhaps because the poles have changed at several intervals since the end of World War II: the first bifurcation corresponds to the onset of the Cold War and the division of the world into two blocs, which shifts priorities toward questions of security; the second goes back to 1989, the end of the Cold War having a principal effect of thrusting to the forefront economic and financial globalization; but the attacks of September 11, 2001, in turn modified the given, global terrorism having an effect of "remagnetizing" the security pole, with the major difference that it is not longer a matter either of international relations nor of the law of war, but rather of criminal law and of the implementation of a repressive program at the heart of global governance. Whence this new challenge of a community which is constructed without an exterior; that is, without a common enemy.

In sum, "to reinstitute the powers" would suppose the invention of new legal instruments for this global governance which implicates at once a rethinking of traditional function, a rationalizing of the dispersion of competences, and finally a resolving of the tension in refinding a compass with which to orient itself.

The complexity of plans which already have been put in place contributes to a fear that reason, already awakened, will not come to give birth to a monster.

Must We Fear Legal Monsters?

This expression appears in the course of the controversy surrounding the Treaty Establishing a Constitution for the European Union. Is it an international treaty, a constitution, or some third category: legal monster or new species? Between the fear of change and the attraction of novelty grew the perplexity of jurists.

To learn the correct term we must begin with an autopsy of the monster. Whatever the future of Europe is to be, the debates around the constitutional treaty will have in fact permitted a better understanding of the contradiction, the incompleteness, and the incoherence that characterize the internationalization of law:

- Contradiction stems from clinging at times to the hybridization of categories that seem

contradictory, such as “treaty” (*inter*national) and “constitution” (*supra*national), at times to the creation of new categories that seem incompatible with old ones (such as “governance” juxtaposed with “government,” or “space” with “territory”);

- Incompleteness, by the interruption of the hierarchical chain, stems from the ambiguity of principles such as subsidiarity or mutual recognition of decisions of justice, which permit limitation but sometimes impose integration (the *Conseil constitutionnel* was not mistaken, incidentally, in its decision of November 19, 2004, judging necessary on this point, such as other clauses, revision of the French Constitution);

- As for incoherence, it appears in the declaration of the objectives of the Union (art. I-3 of the constitutional treaty). This laborious enumeration so mixes disparate notions, such as “peace, its values, and the well-being of its peoples,” a “space of liberty of security and of justice without interior borders” and “a great interior market where competition is free and non distorted.” Then followed, in a jumble, the famous concept “of social economy of a market highly competitive market, which is supposed to reconcile full employment with social progress and a heightened level of protection and improvement of the quality of the environment” (arts. I-3 § 3 ¶ 1). Then only appeared the key word: “solidarity,” in relations among states parties and in relations with the rest of the world. Likely to identify Europe, this principle ought to be placed at the head of the project and it must show why it is necessary today for Europe and should be necessary for the whole of the planet, tomorrow or after tomorrow.

Because solidarity is born of a will to transform this interdependence to which one submits as if a calamity (symbolized notably by relocations) into a project that one builds as if a common destiny. To build this solidarity without renouncing the diversity called for by the motto “United in diversity,” it was not at all a matter of simplification, like the drafters had imprudently promised, but of practicing a pedagogy of the complexity, utilizing the apparent contradictions in order to reduce the incompleteness and incoherence. This latter path would have required an effort of imagination.

An effort yet more necessary to reinstitute the powers at the global level and to find the alternatives to the triptych “independence/sovereignty/community of states.” It is true that current trends can seem unfavorable to a pluralist organization of powers. By weakening states, interdependence leads to dependence that favors powers exercised in a hegemonic manner: the hegemony of markets that results because states are overwhelmed, in the strict sense of the word, by the globalization of economic markets whose functioning they struggle to regulate; or the hegemony of superpowers that results when the United States places its own national interest above all others, even to the point of rejecting the concept of an international community. Instead of moving toward a global order in which national sovereignty would step aside in favor of collective interests, we will have moved straight toward a triptych of “dependence/globalization/hegemony.”

Let us at least conceive of another type of organization, on a Kantian model. We could name it “interdependence/ “mondialité” /human community.” But Kant’s vision, as enlightening

as it may be for conceiving the relationship among national community (civil law), international community (law of nations), and supranational community (cosmopolitan law), does not explain how all three of these can function together in our world. Because the organization into networks implies a redistribution of functions among these different levels and among diverse sectors of law (human rights, the market, the environment, health ...)

To imagine the redistribution among the levels of institutional organization, the internationalist Georges Scelle had invented the concept of "*dédoublement fonctionnel*,"[2] relating to the national court's dual role as an instrument both of the sovereign state and the international legal order whose norms it gives internal effect. But this duality is observe even in what are called super-state societies, for the reason that specialized organs never cover all functions; besides there must from now on be an integration with the overall construction of regional organizations, which have multiplied in proportions once unforeseeable.

It also remains to conceive the articulations between sectors, compartmentalization being accentuated by the practices of financial institutions, in particular the evaluations of the World Bank which concentrate on quantitative variables such as the unemployment rate, ignoring more qualitative goals, such as social justice, environmental protection, or more broadly fundamental rights as a whole, and which privileges only national plans, with no regard for international networks and at the risk of contradicting other commitments. In failing to recognize the complexity of today's world, sectorization weakens coherence – but on the other hand, complexity weakens the completeness that would assure the security of the law.

To break this impasse – and to reinstitute executive, legislative, and judicial powers – it is not enough to separate powers evidently outdated, nor to set up networks whose function is uncertain and whose results are as unforeseeable as a compass that spins out of control every time a new global catastrophe shifts its northern pole. But it seems to me one must also move away from the linear vision that would extend from the standard of the *État de droit* to all states the the necessary preparation for every global organization. Uncertain as a matter of law, this vision is hard to achieve as a matter of policy, and besides, it could serve to legitimate the hegemonic organization of the world.

Thus we have a nedd for a new monster that will combine, like prior practices tried to do, the standard of *état de droit* with the networks of global governance. Such a combination requires legal techniques that do not reduce complexity, but rather that organize it. Whether inspired by mechanism [bridges?], regulators, instruments of adjustment) or by biology (porosity of systems, importance of the membrane that separates without isolating, like a filter permitting exchanges), the essential is first to permit governance networks to function in a legal fashion; that is, in a rigorous and predictable manner, and so to conjoin complexity and objectivity.

It is thus necessary to systematize within governance networks the usage of concepts like subsidiarity, conceived like passageways between levels and between sectors, but at the risk of favoring overall instability. Inseparable from complexity, instability permits avoidance of

[2] G. Scelle, *Précis du droit des gens*, 1933, republished by CNRS 1954.

monsters acclaimed by the dogmatic [*monstre sacré en français*] but it does not guarantee coherence.

To reinforce coherence, it is the biological metaphor that can guide us: to the image of the membrance that filters exchanges among living cells, there must be plans filtering exchanges among the different components of global governance. One could consider, as one example, common goals (like the eight goals of the Millennium or the three goals announced by the U.N. Secretary-General in his report for the sixtieth anniversary of the United Nations); or, as another example, the priorities, whether they are defined by reference to international law such as *jus cogens* norms or economic terms such as "collective preferences" or "global public goods."

In sum, if it is true that complexity is inherent in pluralism, it calls for a certain fragmentation of powers instituted among different levels (infranational, national and international, regional or global) and their sectorization around specific objects (such as the market, the environment or human rights).

However, a renewal of legal techniques is necessary in order to promote the articulations and the interactions, from one level to another and from one sector to another. In order to reduce disorder without guaranteeing stability. One could even say, in a scarcely provocative manner, that global governance will be more durable the more it remains in motion, and for that reason it will be unstable. Whence the increasing importance of judges who try to correct the disorder of the world, by adjustments or readjustments, without ever fixing definitively a global order that replaces that of the states.

But the *Etat de droit* does not rest solely with judges. That is there must not be fear of legal monsters: for lack of a state, and thus for lack of a global government and parliament, *l'Etat de droit* must be combined with governance in networks. But it is also why "refoundation" cannot be limited to networks of governance, but must carried by a collective will which assumes the participation of all actors, including private, economic, and civic actors.

II. To Rebalance Wills

From powers to wills, the choice of words is not neutral, but rather indicates a voluntaristic approach. An approach that the *Conseil d'État* includes within the republican vision, that it [Conseil] opposes to the liberal vision that is described as utilitarian in that it limits the general interest to the sum of particular interests. If the two approaches seem virtually incompatible, it is because they "agree neither on place that ought to be recognized for the state nor on what ought to be the reach and the nature of its intervention."[3]

And yet, the debate seems to be shifted with the European construction, and then with globalization. The question is no longer to choose between the liberal state and the state that guarantees the general interest, but before all to wonder about the conditions of a "governmentality" outside of the state. Michel Foucault had a premonition of the importance of

[3] Conseil d'État, *L'intérêt général*, Rapport 1999, no.50.

this;[4] however, he could not have perceived the risk, denounced by Pierre Bourdieu, that "the states would fulfill a function of *screens* that prevent citizens even the leaders themselves, from noticing their deprivation or from discovering the places and the stakes of a true policy."[5] Observing that in Europe states would build "an illusionary screen of proper politics to mask the true places of decisionmaking," he did not give up hope of "turning Europe to politics or politics to Europe," and pleaded for a European social movement and for he creation "of transnational authorities charged with controlling dominant economic forces and with subordinating them to truly universal ends." Thus did he believe in the possibility of a general will which could be expressed outside of states.

But how to make this "general will" emerge, if not by giving voice to noninstitutional actors and in bringing together the particular wills that they express? If this is an observation that no one contests, even certain persons deplore it, it is that public actors do not hold the monopoly on global governance. The observation appeared since 1995 in the report of the United Nations defining this as "the ensemble of methods by which individuals and institutions, public and private, manage their common affairs."

Must one hold to this dichotomy of "public/private"? Or that of "state/civil society"? One could believe it if one considers that the official discourse in Europe or "civil society," envisaged as a block, is paid court to by institutions wishing to reinforce their legitimacy in order to answer to the critique of "democratic deficit." Whether it is a matter of the White Paper of the Commission on European governance, or of the initiatives of the European Parliament, one comes to wonder if civil society has not become a stake of power, rather than a veritable actor. However, civil society appears very heterogeneous, including in institutions like the Economic and Social Committee (CES) in Europe, or the U.N. Economic and Social Council, so that interests diverge among the economic components and the social currents. We will separate therefore the public actors, on the one hand economic actors and one the other whose we will call "civic" in order to take the differences into account, as to underlying interests and as to the powers that represent or defend them.

The preponderance of economic actors

In the 1960s and 1970s, "economic law" is claimed to be the goal of organizing these private economic actors, to the junction of a public order of protection (a police state [*Etat gendarme*] using prohibitions and sanctions) and of direction (a providential state using regulation and incitation, in order to orient, even to direct, the economy). But this duality, that one finds again at the base of the criminal law relating to business, again has been put into question by the new practices of "regulation," a term relating less to a "public" order than to "the increase in influence of economic forces." Combined with the sectorization of markets, regulation "poses serious problems in the need of a global governance."[6] Problems of coherence, as one has seen, but also problems of the balance of powers, from the moment that globalization

[4] Michel Foucault, *Dits et écrits*, III, 1976-79, Gallimard, 1994.
[5] Pierre Bourdieu, *Contre feux 2*, éd. Raison d'agir, 2001.
[6] G. Farjat, *Pour un droit économique*, PUF, 2005.

can lead, if not straightaway to a regulation without the state, at least to a rupture between domestic and international economic law.

In its most recent appearance, international law has in fact transformed the role of national borders: once impermeable in order to preserve the political independence of states, borders become porous in order to facilitate economic cooperation among states. If domestic economic law partakes at the same time of protection and of direction, and if general international law is a law of protection, international economic law, itself, would be a "law of expansion."[7] The consequence is that instead of preserving states, it both makes them fragile and makes marginal the efforts of international law designed to rein in private economic powers. Private economic powers thus are liberated of all constraint.

This autonomization comes about in several steps. The appearance of businesses that are multinational ("transnational," to use the vocabulary of the United Nations) is not a new phenomenon. The definition used by the Economic and Social Council – "businesses whose social seat is in a determined country and which act in one or more other countries, by the intermediary of branches or subsidiaries that they coordinate" – refers implicitly to the notion of "multinational" economic that had emerged at the beginning of the 1960s, favoring the flow of direct overseas investments and the mobility of firms' productive activities from one territory to another. A mobility which creates in fact an autonomy in relation to the national legal framework that businesses can choose in their best interests.

But since the end of the Cold War globalization has promoted an expansion without precedent: in the years that followed, multinationals became the principal operatives of global commerce. Substituted for the *inter*national economy, – a matter for political and diplomatic arenas – is a *multi*national economy, the role of business being determinative in the transformations of globalization, to such a point that those businesses have a tendency to supplant states. Bit by bit this economy, whose global character values first of all the predominance of the financial dimension, imposes itself everywhere, including in a country such as China, even as it continues officially to advocate a "socialism of the market."

The upheaval also affects the legal domain, blurring the separation between the public and private international spheres; that is, between microeconomic relations (for example, the law of international sales or of international contracts) and macroeconomic relations (for example, the law of the WTO or that of investments). Because in each of the two branches the privatization of powers manifests itself: in private law with *lex mercatoria*, like in public law with the direct access of businesses to international justice, through to the law of investments. In this matter, arbitral tribunals (whose decisions are obligatory) are not only seized on the basis of agreements between states. Since 1990, they accept also unilateral requests from investors: from the moment that comes under a state having concluded a treaty with the receiving state, any private investor can attract this state before an arbitral tribunal that might condemn it. This grant of international personality (that is to say of the status of subject of international law) to private economic actors, thus reinforcing their preponderance, invites ones to wonder about the

[7] D. Carreau and P. Julliard, *Droit international économique*, 2d ed., 2005.

responsibility which ought to accompany such a transfer of power.

But the idea that one who holds global power ought to be responsible, if possible at the global level, bumps up against a number of arguments. The fear of the perverse effects of a responsibility which would make one "flee from power in order to avoid responsibility" does not seem very convincing when considered in light of the draw of power. The difficulty of imputing fault within an organization as complex as a multinational enterprise in which decisionmaking occurs at several levels in the hierarchical chain is, however, a genuine problem, in criminal and noncriminal law alike, given that the sanction is supposed to be "punitive."

This problem of imputability of fault may explain in part the traditional difference between, on the one hand, the unlawful conduct of the popular classes, offenses against property (traditional criminal law, called "the common law," [ordinary law], built around the model of robbery, and prosecuted with diligence), and, on the other hand, the unlawful conduct of rights: infractions définies comme la violation de règles techniques ou de permis administratifs], which is reserved for more affluent classes (white collar crime, for a long time virtually ignored). At first blush the observation seems reinforced by globalization because these types of unlawful conduct, integrated at risk to business [*dans le bilan on programme le "risque penal"*], is all the more tolerated because the mobility of multinational enterprises permits them to play one country off of another, and this tolerance translates into the preferences given to self-regulation over state-imposed sanction.

But the observation corresponds only to a part of reality, because global commerce henceforth demands equality among competitors. The market is interested therefore in the unlawful conduct of rights for which it encourages severe pursuit, for instance by paying witness to some high-profile trials in the United States or in Europe. If the game is to be played with equal arms, one must in fact succeed in leveling the playing field. Nothing stunning therefore if liberalism, after having suppressed the borders of commerce and promoted deregulation, dissociating economic space from political territory, carries with tougher ethics – as witnessed by the project of "Principles of Responsibility" aimed at businesses and elaborated by the U.N. Sub-Commission for Human Rights. This toughening accompanies an internationalization of responsibility.

The path has been opened by national initiatives, principally in the United States, where judges may impose heavy sanctions – penal, via the Sarbanes Oxley law of 2002, and civil, via the Alien Tort Claims Act of 1789, rediscovered a couple decades ago – for overseas activities of multinational businesses and their leaders. This path could lead one day to a universal global responsibility; if, that is, the link to ethics inspired by the U.N. project is reinforced. Needing thus to combine international soft law and domestic hard law, the path remains unilateral. Whence the interest in having responsibility better framed by multilateral conventions (for example, that relating to corruption).

Confronted with this extension of their responsability, economic actors' strategy does not consist of denying the necessity of unifying norms – quite to the contrary, economic actors

themselves plead for unified norms regarding corruption – but they consider it "illusory" to suppose that supervision could have some kind of longterm effect if businesses do not accept the principle and do not cooperate explicitly. Whence the proposition of associating economic actors with the exercise of legislative power, executive power, and – Why not? – judicial power. In the absence of supra-state institutions representing the general will at the global level, the proposition is not absurd; however, such a partnership, which must be considered as a sharing of sovereignty, will by nature instrumentalize responsibility, and so run the risk of becoming a means by which the most powerful can press for domination of the market. Out of a diversity of economic actors there would be slippage toward one economic system, even to "totalitarianism of the economy." At least to find a method to organize the partnership by combining the guarantees of the *Etat de droit* (legality, judicial or jurisdictional guarantees, respect for fundamental rights) with the suppleness of governance networks organizing the exercise of powers.

Still, so that governance operates in a democratic fashion, civil, or civic, actors must also be represented, in order to open the path toward a genuine rebalancing of powers.

The Emergence of Civic Actors

One does not become a "citizen," or more broadly, a "civic actor," only by the will of institutional powers. Quite to the contrary, one must win a struggle for a power that no state has been spontaneously disposed to recognize. In the international sphere, any such conquest occurs even more slowly. The rights of association and of assembly are guaranteed in the Universal Declaration of Human Rights and in the Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights. But the status of being a subject at international law is reserved to the states, or in exceptional circumstances to private investors. Surely the U.N. Charter provides that the Economic and Social Council can consult nongovernmental organizations (NGOs), but it is a matter of a potential role more than of a formal status, and so global citizenship remains to be built. A difficult task, because unlike economic actors, who are supported by the states, civic actors, who are often perceived – and who sometimes perceive themselves – as the adversaries of states, claiming, in the name of the general global interest, a strategy of self-legitimation, or of self-institution, which is substituted for self-limitation.

The entire problem is there because by setting oneself up as representatives of the general interest apart from every procedure of democratic investiture, nongovernmental organizations risk being accused of being impostors, all the more that they organize themselves in diversified and heterogeneous fashion. If unions so far play only a modest role at the global level, however nongovernmental organizations strictly speaking, have internationalized themselves according to a process of growth that resembles that of multinational enterprises, the geographical map of their seats of power corresponding to that of multinationals, to such a degree that sometimes they are called "multinationals of the heart." [cf. Thierry Pech, Esprit/Seuil, 2005]

To avoid simultaneous sanctification and demonization, there must be, given the absence of a global parliament, a legal framework flexible enough that it does not reduce inventiveness,

but precise enough that it promotes new formes of democracy, if not representative, at least participatory, even deliberative. In sum, it should be a matter of constructing a global public space, one that presumes respect for criteria that are in fact democratic, such as independence, representativeness, and legitimacy.

"Independence" refers to questions of finances and origins. To the extent that civic actors are engaged in new types of partnerships – with states and with organizations that are international, regional, or even interregional (for example, the role of nongovernmental organizations in the Cotonou Accords signed in 2002 between the European Union and the African, Caribbean and Pacific Group of States), and sometimes even with economic actors (for example, the Global Compact) – it becomes trying, for governments or for businesses, to develop their influence through organizations that in reality serve their interests, at the risk of weakening the credibility of nongovernmental organizations. Whence the necessite for a global ehtics code, of the type that have multiplied themselves in Western states since the 1990s, the formula permitting also the broaching of the other criteria, representativeness and legitimacy.

If it is true that representativeness is measured less by the number of adherents than by the diversity of the geographical, social, and cultural foundation of civic actors, the path toward a genuine representativeness is long. It can pass notably by the progressive extension of an organization that at first is national (such as Oxfam, Amnesty International, Doctors without Borders, or the International Movement ATD Fourth World), or by the construction of federations and coalitions (geographic or thematic), which should be permitted to rectify the current predominance of Western nongovernmental organizations.

The question of legitimacy is even more complex. It lies at the intersection of three spheres: legality (law), efficacity (force), and morality ("good," with all the ambiguity of a definition which refers to ethics). According to the many possible overlappings/points of intersection humanitarian action is inscribed in several configurations, such as the *winning* action, the only one that would reunite the three spheres, or still, according to the preferred spheres, *legalist*, *dissenting*, or *maverick* action.[8]

Still more must one assess these three criteria according to how well they function. The balancing of these criteria will not be the same in all circumstances – participation in the judicial or, more broadly, the jurisdictional, function, or more diverse activities, from opinion campaigns to the contribution to negotiations, each of which are components of participation in the legislative function.

The International Court of Justice, though it is the only universal court with a general jurisdiction, has not permitted participation in the jurisdictional function. Nonetheless, nongovernmental organizations at times "are invited" to play a role in trials, before national judges or between special international judges. The objective, as it is perceived in particular in human rights courts, is to defend (apart from personal interests, such as those of an ordinary individual) either the interests of victims or the general interest in the broader sense. Present here,

[8] E. Goemare & F. Ost, *Humanité, humanitaire*, Faculté de l'Université St. Louis, 1998, p. 128.

again, is the debate between defense of rights and defense of law.

Examples are not lacking: Amnesty International and Human Rights Watch have intervened many times: for example, before the House of Lords in the *Pinochet* case; before the European Court of Human Rights and the *ad hoc* international criminal tribunals. And the source of the first decision of the International Criminal Court, regarding the role of victims, is the Fédération internationale des droits de l'homme. Beyond humanitarian law and human rights law, enlarged to include the struggle against poverty (as evidenced by the founding in 1974 of the International Movement ATD Fourth World), civic actors henceforth also contribute to the search for coherence among global commerce and human rights, in contrast not only with States but also with multinational enterprises; for example, in the debate surrounding patented and generic medications.

Nongovernmental organizations further help to elaborate international norms – in the larger sense, a legislative function. There is the familiar story of Henri Dunant, whose distress over the battlefield at Solferino in 1859 led him to create the International Committee of the Red Cross, which has since contributed to every elaboration of humanitarian law, called "Geneva law" to distinguish it from laws of war elaborated solely by states. Thereafter nongovernmental organization affected other domains, among them human rights, including economic, social, and cultural rights, international criminal law, and the protection of the environment. There are well known examples of the legislative success of nongovernmental organizations, such as the role of Amnesty International in the adoption of the Convention Against Torture, or that of the federation of nongovernmental organizations established to promote creation of the International Criminal Court by means of the Rome Statute adopted in July 1998.

But one of the most striking examples – because it takes direct aim at the sovereignty of states – is that of the 1997 Ottawa Convention prohibiting antipersonnel mines. Although the problem seemed insoluble, it took hardly more than a year for the elaboration of a text, and less than a year and a half elapsed between adoption of the convention on Dec. 1, 1997, and its entry into force on March 1, 1999: an appeal to emotion, combined with solid legal and scientific expertise and an intransigent political conception (a nonderogable text imposing a total ban), succeeded beyond all hope. Like by a stunning alchemy between a *savoir-faire* – a know-how – which consists of a professionalism that is beginning to take on the somewhat provocative name of "nongovernmental diplomacy," and a *savoir-faire* that at a given moment permits the crystallization of public opinion. It remains to extract the conditions under which this formula may be transposed.

Whether it is a matter of *faire-savoir* – to do in order to know – or *savoir-faire* – to know how to do – the question of knowing ["*savoirs*"] is henceforth at the heart of the new global governance.

III. At the intersection of forms of knowledge

Why link forms of knowledge ["savoirs"] to the refoundation of powers? At first blush they are quite separate. On the one hand, there is objectivity and scientific doubt; on the other

hand, subjectivity and political certainty. On the one hand, there is verifiable scientific truth; on the other hand, adhesion to nondemonstrable values, beginning with human rights proclaimed in the preamble to the Universal Declaration of Human Rights as if an act of faith: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights ...."

Between power and knowledge there will be the same link of "continuity-discontinuity" as there is between the evolution of life and the passage to a moral or ethical norm. As Paul Ricoeur wrote in his dialogue with Jean-Pierre Changeux, "Life has left us in the middle of a stream, without giving us the rules to make peace prevail over war and violence."[9] The response of the scientist is that knowledge could contribute to reinterpretations and reappropriations because "the research can not go forward wearing blinders. He must run the risk of making a mistake. Scientific models are submitted to the verdict of facts and are judged by the facts." Therefore, Changeux asks, "why not reactualize Spinoza's unity of substance from the things we know today?" To this, Ricoeur retorts that "your plea, very much in the spirit of Popper, for modeling and verification, I hold it to be irrefutable in your domain. But this discourse scarcely takes us nearer to what would be a reactualization of substance in Spinoza's sense... One finds here the problem of continuity-discontinuity." I would add that one also finds it in the relation between knowledge and political power. There remains an apparently insuperable discontinuity between what is and what ought to be; in contrast, continuity would be more than ever necessary since we no longer look to religion or magic for protection from the dangers that menace our societies, preferring scientific research into causes and a technological approach to solutions.

Let us take for example climatic change. It is since the 1970s that the problem of potential actions of human activities on the climate begins to preoccupy scientists. Convinced of the gravity of the problem, the international scientific community organized more quickly and efficiently than the political community. In 1979, the World Meteorological Organization (WMO) launched a global program of climate research, and it has devoted itself since 1986 to the study of interactions between the climate and the environment, with particular attention to the human dimension as it relates to climatic change and biodiversity. The Intergovernmental Panel on Climate Change was created in 1988 under the auspices of the WMO and of the U.N. Environment Programme [http://www.ipcc.ch/] and became a fan belt between political decision makers and the community of scientists interested in the evolution of the climate which would participate first in the elaboration, and then in the pursuit, of the Kyoto Protocol.

As is well known, nothing is yet resolved and what is to follow Kyoto is yet to be negotiated. But at least we have an illustration that questioning born of this globalization of experts, in the face of powers that remain for the most part organized at the nation-state level, leaving open the question of a global governance which would also call for a democratization of knowledge.

Globalization of experts

[9] Jean-Pierre Changeux & Paul Ricœur, *Ce qui nous fait penser, La nature et la règle* (Odile Jacob ed., 1998).

To the degree that societies become "societies of knowledge,"[10] there appears a new type of expertise which carried with it modifications in the exercise of the three institutional powers (judicial power at first, but also executive and legislative powers), including at the international level where there appeared a "global expertise in governance," which contributes to governance without being bound up with it. It appeared first in Europe, with the new Independent Agencies, charged with monitoring and evaluating safety risks in sectors ranging from maritime and aviation, to food supply, to the environment and health. According to the Senate [French Senate] these practices will contain the seeds of "the risk of a shift of the cursor in decisionmaking power from the political to the scientific," leading to a "reduction in the responsibility of the political and commensurate increase in that of the expert," posing the question "of the democratic control of those who truly make decisions on behalf of the public."[11]

But the phenomenon has become global: besides the Intergovernmental Panel on Climate Change, new entities are charged with technical norms, such as the Codex Alimentarius Commission, an intergovernmental body which entrusts the elaboration of norms respecting food to five groups of experts. Created in 1962 under the double aegis of the Food and Agriculture Organization (FAO) and the World Health Organization (WHO), the Codex comprehends more than 200 norms aiming at foods or groups of foods, whose legal nature has become quasi-legislative since the creation of the World Trade Organization (WTO) in 1995, on account of the fact that certain WTO accords refer to technical norms. Even if the WTO Appellate Body refuses to consider these to be obligatory norms, this referral in and of itself introduces an intermediate point of recommendation between the opposite poles of encouragement and obligation.

It would be too much to conclude from this that there has been a "reduction in the responsibility of the political and commensurate increase in that of the expert," because the most sensitive questions, such as the labeling of genetically modified organisms, remain in the political domain. On its own, knowledge does not give rise to decisions that determine the historical evolution of societies. And yet, faced with global problems, interdisciplinary expertise, at the intersection of studies that are scientific, yet also legal, economic, social, and cultural, would be necessary to elaborate responses that are not uniform but rather are "contextualized"; that is, adapted to diverse local, national, or regional contexts. Situating itself at the intersection of various forms of knowledge, this expertise could thus contribute to rationalization of the recognition of margins in space (national margins) and in time (different speeds).

Then appears the necessity of transposing the "independence, contradiction, objectivity" triptych of national judicial expertise to the global expertise of governance, by adding the jurisdictional competence, which is the *raison d'être* of expertise, and the pluralism that would permit the precise integration of globalization with geographic, economic, and cultural specificities.

In Europe, the situation evolved in this sense in certain sectors, such as medicine, where European directives reinforced independence, which is equally at the base of the creation of the

[10] *Vers les sociétés du savoir*, UNESCO, 2005.
[11] *Les agences européennes: l'expert et le politique*, rapport no. 58, Senate 2005.

European agencies, by imposed a declaration of interests on experts. At the global level, the new procedure of selecting experts, implemented by the FAO and the WTO takes into account scientific training, conflicts of interest, and the representation of all the regions of the world as well as gender parity.

This move toward improving the qualities of expertise renders possible a future global status of "expert," around which the driving principals, such as freedom of research and freedom of expression for researchers, both of which already are guaranteed in various national and international texts. There remains tension between free expression for researchers (the "right to speak") and obligations of confidentiality (the "duty to remain silent") which are more and more frequently imposed on researchers, either to protect professional secrets or because of the ban on defamation, even of inaccurate disparagement. This tension calls for more precise articulations, in internal as well as in international law, between freedom and responsibility.

But the concern of informing the public suggests also a link between the globalization of experts and a "democratization of knowledge," which would imply – if not total transparency, which is no doubt neither possible nor desirable – at least a reflection on access to knowledge and sharing of knowledge.

The democratization of knowledge

If every human being is from now on an "active citizen" from his or her majority [18 y.o. in France], democratization remains an unachieved process. At the same time that citizenship is internationalized by a process of addition (one is a citizen of his or her village and of his or her city, but also a European citizen, and, ultimately, a citizen of the world), citizenship is transformed by the process of multiplication: from being active, one becomes *inter*active, and this prepares for the passage from representative democracy to participatory and deliberative forms.

It is thus that knowledge and power are tied together. Access to knowledge commands good usage of representative democracy, but the right to information stimulated by the appearance of the Internet favors the participatory form. From public debate to online debate, networks of powers are already overrun by the power of digital networks which bring together, in a nonhierarchical manner, divers social actors.

It is less for ideological reasons than by the force of things that digitization seems devoted to putting again into question ot only the rule of law, but also the organization of powers. Impossible to localize, because it is found everywhere at once, the Internet escapes state-based rules, which suppose a defined and stable spatial-temporal framework. Each user being at once a sender and a receiver, the Internet appears impossible to govern according to the traditional paths, the expression of "Internet governance" expressing, through [beyond?] this impossibility, the search for acceptable alternatives, a plan that is national but also global.

Because reflection has become global with the 2003 Geneva World Summit on the

Information Society. The Plan of Action proposed in Geneva defined "indicative targets" to improve connectivity and access to information and communication technologies, and proposed the creation of a Digital Solidarity Agenda. Situating cooperation between states and the private sector within the framework of the United Nations – and not of the WTO – this Plan of Action entrusted the Secretary-General himself with the task of creating a working group on "Internet governance," according to an "open and inclusive" process intervening in a multi-partnership of intergovernmental and international organizations as well as economic and civic actors. Taken up again in 2005 in Tunis, in a more political perspective which keeps track of the diversity of the partners and of the interests that they defend, advancing a new "discourse of the information society," the debate remains unachieved, notably because of the strong opposition of the United States which seeks to preserve its initial mastery of the Internet.

It remains to know how this interaction among individuals who define the information on the Internet can guarantee a genuine information democracy, with the criteria of independent and impartiality that such a democracy presupposes, even as the risks of manipulation, of disinformation, and even of information put to criminal purposes, develop at the same pace as the positive effects.

The question of governance is equally posed with respect to the sharing of powers. Sharing in effect would call for an adjusting of intellectual property rights, one that would include the limitation of existing rights for the benefits of nonexclusive goods, considered as "common goods," and so the promotion of new rights to protect, in addition to the traditional forms of knowledge, biodiversity and cultural identities. The objective would be all the more difficult to attain with respect to the application of intellectual property to living things, an application that implies a vision of the linkages to nature that former rights of intellectual property doubtless treat differently than would the new rights.

From the intersection of forms of knowledge, one comes to the dialogue among cultures. Henceforth affirmed with force by international law (first by the 2001 Universal Declaration on Cultural Diversity and then by the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions), the principle of cultural diversity marks an evolution that accompanies the passage from the information society toward "the societies of knowledge." Refusing to favor a unique model of knowledge, which would be imposed from north to south, and "[*r*]*ecognizing* the importance of traditional knowledge as a source of intangible and material wealth," this UNESCO convention observes that the process of globalization, facilitated by the rapid evolution of information and communication technologies, creates "unprecedented conditions for enhanced interaction between cultures," representing "a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries."

So that diversity survives even as interdependence becomes more and more constricting, translation must be considered not only as a linguistic tool, but also as a "political paradigm," to use an expression that François Ost[12] proposes to borrow from Paul Ricoeur, evoking also the

[12] François Ost, "Les détours de Babel, La traduction comme paradigme politique," conférences Collège de France, 2006.

miracle of translation which creates "resemblance where there seemed only to be plurality."[13] Far from making diversity disappear, translation, a mediator between diversity of culture and universalism of knowledge, would contribute to "building disaccords." In this sense it would become a "political paradigm."

Conclusion: Toward a new Trilogy?

In an ideal world, knowledge would inspire the will, encouraging rational choices. In its turn, will would inspire power, by organizing and legitimating power, instead of the phenomena of self-reproduction and of self-legitimation too often seen. In the real world, the violence of conflicts and the intensity of blockages encourages more realism. A trilogy therefore – rather than a triangle – to mark this combination of different logics determining the unstable forms which have in common the inclusion of all actors, institutional and noninstitutional. But instability does not preclude the search for new foundations.

Some propose a global contract. The difficulty with this is that it would be a contract at once "multidimensional," to connect actors and institutions in a different manner from one level to another, from one sector to another, and "total," aiming necessarily to include the all actors. In these times of international terrorism, the enemy would be found therefore within the community, and not outside of it, identified from then on to each among us. From total global contract, one would slip easily toward a generalized totalitarianism, of which some precursors already can be perceived.

This is why the refoundation of powers cannot take place in law alone. That it is a matter of ordering the interactions which underlie a multidimensional contract, or of posing limits on the downward spiral of security concerns, at the global level. This new "legal monster" only being able to have been engendered by the hybridization of methods of governance and of the *Etat de droit*, borrowing on the one hand from the art of coordination – that is, of organizing interactions among state and nonstate (economic, civic, scientific) actors who participate in the exercise of powers – and on the other hand the more difficult art of subordination of power to fundamental rights.

Without forgetting that the *Etat de droit*, like the global contract, conditioned by the renewal of legal formalism placed under the sign of "ordered pluralism," would call for at their turn a much larger refoundation, at once civic, legal, and philosophical (political in the more complete sense), around which may be built a community of values, the possible conditions of which remain to be explored.

[13] Paul Ricœur, "Project universel et multiplicité des héritages," *Entretiens du XXIème siècle*, UNESCO 2004.