Comparative Legal Studies and the Internationalization of Law
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Course: The Relative and the Universal[1]
The Weaknesses of Legal Universalism
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I would like to begin my course by studying the tension between the relative and the universal, which to me seems implicit in the very title of the chair.

On the one hand, comparative legal studies nourish, at least in a first time, review of legal relativism. Between this positivist relativism inscribed at the heart of systems of law and the abstract universalism of reason, there has for a long time been a peaceful coexistence. From the philosophy of ancient Greece to that of the Enlightenment, the majestic figure and a little distance from "the law of nature and of peoples" could even give the illusion of an alliance in fact because, far from threatening legal practices or calling them into direct or indirect question, it gave them quite to the contrary legitimacy in theory, more so given that international law was founded on the principle of the equality of all systems.

On the other hand, the phenomenon of internationalization of law – which goes beyond international law for the benefit of trans and supranational practices – , leads to the recognition, in certain legal concepts which have a universal calling (let us call them universalist), a status of positive law. Even if it is a matter of little more than a sketch, this recognition is already sensed as a provocation by the partisans of relativism.

Without trying to reconcile the viewpoints of relativists and universalists, I would take each of them seriously in analyzing this tension from the givens, principally legal, presented as a sort of introduction to the state of affairs.

A new deal

New, because between the relative and the universal, the relationship has changed. Perceived first as a simple coexistence between universalist theories and the eminently relative character of observable practices, this relations has been in fact progressively extended in the face of the challenge of globalization, which necessitates common legal responses and thus leads toward a conflict on inverted fronts: confronted by the emergence of universalist concepts, relativism is theorized and becomes a scholarly discourse. The conflict is henceforth open between the relative, which is inscribed in the very notion of law, identified with the State (the term "État de droit" seemed a pleonasm to Kant), and this universal, become legal by fragments, which makes its appearance in the manuals of positive law. Whether they are called human rights, crimes against humanity, common patrimony/heritage of humanity, lex mercatoria, lex electronica, or lex economica, these fragments have the calling to be applied to the whole of the planet Earth. Already alerted by

[1] Trans. Diane Amann. This translation is a working paper and should not be quoted.

the appearance of new normative ensembles with a supranational character, such as the ECHR or European community law, jurists discover, sometimes with anguish, this rupture of the equivalence between law and the State which is produced simultaneously at regional and global levels.

The challenges of globalization have in fact changed the legal landscape. Even though this is not the first instance of globalization in history,# it is, for the first time, characterized by technologies that abolish distances and play with borders. Favoring paradoxically local demands and the proliferation of States, globalization is accompanied as well, since the end of the Cold War, by the development of transnational strategies with a private character which affect all exchanges, whether it is a matter of economic and financial flows, but also scientific and cultural as well as migration. This globalization thus marks the weakening of the principles of sovereignty and of territoriality of States and the bypassing/surpassing of systems of national law, at a moment where global institutions are not ready to take over.## To be sure there exist regional institutions, but they contribute to an effect of interference ["brouillage"], all the more that their potential for legal integration varies from one region to the next. At the same time, globalization favors – from criminal networks to social exclusions, including technological risks – dysfunction of a global nature which cannot be resolved by a single State, not even by the most powerful one.

National systems of law do not remain less necessary as points for mediation ["relais"] among public actors, private economic actors, and civil society. Also the new universalist legal concepts do not seem destined to become substitutes for national laws, but rather to combine themselves with those laws, in a complementary and interactive manner. Universal norms suffice however to upset the former equilibrium. The conflict becomes more acute at the same time it is reversed: even though a dynamic of multilateral integration is henceforth developed in positive law, it is relativism which is dogmatized and becomes scholarly.

It is true that this dynamic – partial, evolutive and discontinuous – cannot be analyzed in one supranational "system" which would substitute its own coherence for that of the former state systems. Emerging only from new concepts at the intersection of various more or less constraining normative spaces , this dynamic does not form a "legal order" at the supranational level, in the institutional sense of, for example, Santi Romano.### When the inadequacy of former models, conceived for a law that is essentially based on the state and

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[#] See, e.g., J. Le Goof, "Les mondialisations à la lumière de l'histoire," in *Quelle mondialisation?*, Académie universelle des cultures, Grasset, 2002, p. 23 *sq.* See also *infra*, p. 238.

[##] See, e.g., Mireille Delmas-Marty, "*Trois Défis pour un droit mondial*, Seuil, 1998; *Le Droit saisi par la mondialisation*, dir. Ch.-A. Morand, Bruylant, 2001; *Le Droit et la mondialisation*, dir. E. Locquin et C. Kessedjian, Litec, 2000; *Commerce mondial et protection des droits de l'homme*, Institut René Cassin, Bruylant, 2001; B. Badie*, Un monde sans souveraineté*, Fayard, 1999.

[###] "Well beyond the pluralism of legal orders (state and nonstate) evoked since Santi Romano,[n 63] the pluralist theory would become then radically unilateralist (to each his own)." n.63: Santi Romano, *L'Ordre juridique*, traduit par L. François & P. Gothot de la 2e éd. d l'*Ordinamento giuridico* (1945; 1ère éd., 1918), introduction of Ph. Francescakis, préface de P. Mayer, Dalloz, 2002; comp. Didier Boden, "L'ordre public: limite et condition de tolérance, recherches sur le pluralisme juridique," thèse dactyl., université Paris-I, 2002, notamment no. 429.

interstate relations.

One must proceed therefore to an inventory of the difficulties, beginning with The Weaknesses of Legal Universalism, in the first part (2003 course), and reserving The Failure of Legal Relativism for a second part (2004 course): first the incompleteness of ideas, then the force of things.

Even when it becomes positive law, universalism remains marked by its origin. It remains a matter of pure reason and indicates an objective to attain, a path to follow, more than it determines a precise and stable normative content. This congenital incompleteness would not be enough to reject universal legal concepts as false ideas but could lead to the consideration of them as ideas of reason, in the Kantian sense of ideas that does not have a usage "properly constitutive" but "a regulating usage, excellent and indispensably necessary, that which guides understanding toward a certain end."[1] Ideas as beacons [Idées phares] rather than ideas as falsehoods. [idées fausses].

However these concepts, whether it is a matter of human rights, or humanity (in the sense of crimes against humanity, or of the common patrimony/heritage of humanity) or of the market (at the confluence of lex mercatoria, lex electronica, and lex economica), henceforth comprise a part of positive law: thus they have a constitutive usage and also come under practical reason.

Without doubt this very ambiguity is a weakness with regard to the criteria by which the validity of systems of law is ordered. Examining this legal universal in gestation in light of three criteria – rationality (formal validity), legitimacy (value-based [axiologique] validity), and efficacy (empirical validity)[2] – we find in fact fluid concepts [concepts flous – fuzzy concepts], conflicting values, and largely ineffective norms.

1. Fluid Concepts

Despite their heterogeneity, the three examples mentioned above – human rights, humanity, and the market – have in common a character that is undetermined, or underdetermined, which affects their formal validity, at the risk of creating the kind of unforeseeability that this synonymous with uncertainty in law.

Human Rights

Though not immediately universal, human rights law seems already universalizable. But neither the elaboration of the Universal Declaration of Human Rights (UDHR), nor its application have replaced the diversity of relativism with uniformity.

[1] Emmanuel Kant, *Critique de la raison pure*, Dialectique transcendentale, II, 429, Gallimard, coll. La Pléiade, vol. 1, p. 1248.
[2] See François Ost & Michel van de Kerchove, *Jalons pour une théorie critique du droit*, Bruxelles, Facultés universitaires Saint-Louis, 1987, p. 255 *sq.* (proposing this plural conception of validity).

In adopting on December 10, 1948, an "international" Declaration of human rights which would become "universal" only in the course of drafting, the U.N. General Assembly expressed more of an ideal than a reality. Drafting took place in the days after World War II, at the beginning of events that would lead to the Cold War, to decolonization, and much later to the breakup of the Soviet Bloc, events that entailed the multiplication of States (from 58 to 190). Of the 56 States present during the vote ([2], Honduras and Yemen, were absent), a strong majority of 48 voted for the text. As for the States that abstained, six of them belonged to the Soviet Bloc, opposed to a conception judged too individualist; while two others (South Africa and Saudi Arabia) wanted to preserve their conceptions of, respectively, apartheid and the status of women.

During the two years of drafting, the political climate had deteriorated to such a point that December 1948 was without doubt a deadline for adoption of a text that risked, with some months of delay, falling into one of history's dungeons [oubliettes]. Political tensions, added to the ethical debate, could have led to diverse legal contradictions which would have left the work unachieved (see infra, the conflicts of values at the heart of human rights).

Thus it is not surprising that in these practical applications, experimented first at a regional level, case law struggled to apply these texts in a uniform fashion, even in a region as homogeneous as Europe. Thus it is that case law comes to accord the States a "national margin of appreciation"[3] which tries to combine the universalism of human rights to the relativism of national traditions. In sum, the fluidity was divided: there was the conceptual fluidity which surrounds the definition of rights contained in the Universal Declaration, and also the operational fluidity, inherent in the recognition of this national margin, variable in space and in time, which conditioned the application of the law.

Because it must not be mistaken about the "universal" nature of human rights law: the term does not refer to the eternal forms or values that Gilles Deleuze and Félix Guattari consider "the most skeletal and the least interesting,"[4] in their regularity and their permanence. Nothing either regular or eternal in these concepts here, which are no longer the inverted image of the mechanisms of power that they would reproduce in reverse [?], but rather like the lines of flight/escape [what I have called buffering mechanisms] that constitute the cartography of the social field. When it is a matter of positive law of human rights, the universal is not opposed to the relative.

Thus the ECHR admits the diversity of national laws each time that it recognizes a national margin that reserves for each State a sort of right to be different, therefore a certain relativism. It arrives at this more or less happily, if one may prolong the metaphor, this comes back to admit that the same picture is constructed according to the lines of multiple perspectives corresponding to many observers placed at different points of the picture. I think of the inquiries of Paolo Uccello demonstrating, with the three versions of the battle of San

[3] Lawless v. Ireland, 23 juill. 1961; Affaire linguistique belge, 23 juill. 1968.
[4] Gilles Deleuze & Félix Guattari, *Qu'est-ce que la philosophie?*, éd. De Minuit, 1991, p. 80.

Romano, how the plurality of lines of perspective, far from introducing disorder, creates a dynamic for the viewer himself, I come to the hypothesis that fluidity permits human rights to aspire to the universal and to try to resolve the aporia**announced by Philippe Malaurie "to wish without transcendence to transcend laws."[3] Human rights would not transcend laws because they are of an entirely different nature: their initial underdetermination permits a variable determination in space and in time, and this in turn facilitates their adaptation to a reality that is both plural and evolutive.

It will remain to demonstrate this because this fluidity is first perceived as a disruption in the various sectors of law influenced by human rights. At the very heart of legal universalism, although the human and humanity proceed apparently from the same reality, the universalism of human rights does not accord straightaway with humanity when the latter becomes a legal category in its own right.

Humanity

Humanity has a bad reputation. Its universalism is perceived as totalitarian, threatening humans in their singularity, but also as rebellious, worrying the sovereignty of States. This is doubtless why humanity appears so late in the legal field and in such an explosive manner: there does not exist a unique legal concept which would distinguish the rights of man from the rights of humanity. However, if it registers today "in the imagination of Nations," it is that humanity is not only a dream: according to René-Jean Dupuy, humanity has become a reference for which the advent in history "does not confuse itself with the radiant anticipations of utopia," but "announces a reality to be constructed."[4]

However, like a victim in need of help, humanity is not straightaway distinguished as a matter of law from the humans that compose it. In the extension of the law of war, "humanitarian" law is defined as a branch of public international law centered on the human person.[5] Through the Geneva Conventions, progressively enlarged from the law of war to the law of armed conflicts, the law is attached to protect civilians, prisoners of war and combatants (Protocol Additional I of 1977). More recently a law of "humanitarian intervention" was recognized in the case of natural catastrophes or of "emergency situations of the same order."[6] Universalist by its effects (the Geneva Conventions have been ratified by

** [*aporie* – wonder and amazement before the confusing puzzles and paradoxes of our lives and of the universe. Socrates et al. Tried to evoke the philosophic spirit in young men by awakening their aporia, not simply by providing answers to these puzzles.

[3] Philippe Malaurie, La Convention européenne des droits de l'homme et le droit civile français, *JCP*. 2002. I. 143.

[4] René-Jean Dupuy, *L'humanité dans l'imaginaire des Nations*, Conférences, Essais et leçons au Collège de France, Julliard [sp?], 1991.

[5] P.-M. Dupuy, *Droit international public*, Dalloz, 5e éd., 2000, sec. 576.

[6] "...carrying a beginning of a response to the exhortation of Michel Foucault: 'The unhappiness of men must never be a silent remainder of the policy. It is founded on an absolute right to lift itself up and is addressed to those who hold power." [M. Foucault, "Face aux gouvernements, les droits de l'homme," in *Dits et Écrits*, t. IV, *1980-1988*, Gallimard, 1994, p. 708.] In case of catastrophes ... cites U.N.G.A. Res. Nov. 21, 1988, guaranteeing free access to aid victims, reinforced in 1990 by the creation of "corridors of humanitarian emergency." [M. Bettatti, "Souveraineté et assistance humanitaire," in *Humanité et droit international. Mélanges René-Jean*

nearly all States), this humanitarian law completes that of human rights. Inspired by a sentiment of humanity, it proceeds from a solidarity without borders, political in the civic sense of the term,[7] but it does not affirm for all the autonomy of humanity in relation to individuals to be helped.

This must wait for the appearance, in the statute of the Nuremberg Tribunal, of crimes "against humanity," progressively detached from war crimes, to conceiver humanity as a specific legal category. Unlike most "ordinary" crimes, for which definition is national and can vary from one legal system to another, it is immediately at a planetary level that the crime against humanity is affirmed. But unlike the war crime, which protects combatants in the name of international law, the crime against humanity is situated at the supranational level, marking the will to protect "humanity," universal by nature, even if one does not know how to define it.

The point that the diverse prohibitions enumerated as crimes against humanity have in common is without doubt their collective dimension. In fact, the Nuremberg Statute aims at crimes committed "against all civilian populations" and the expression then is found again, with weak variants, from one text to the other. In sum, what the incrimination of the crime against humanity, including genocide, signifies, is that the human being, even when deeply enrolled in a group, ought never lose his individuality and be found reduced to being nothing more than an interchangeable element of this group and rejected as such. If the human being feels a need for identificational belonging, he cannot be locked in, chained to his group, without losing his status at the heart of humanity. This depersonalization of the victim in fact puts into question the otherness, that is to say at the same time the singularity of each person as a unique being and his equal belonging to the human community.

But at the hour of biotechnologies, appear new forms of depersonalization, not only by extermination but also by denaturation. From the destruction of life, one moves to its fabrication, illustrating what Foucault called the biopower [biopouvoir]: "the highest function is no longer to kill but to invest life from end to end." The right to die and power over life being able to lead to a "eugenic ordering of society."[8] To make a crime of eugenics, then of reproductive human cloning, French legislators created a new type of crime "against the human species," taking the risk of separating hominization from the humanization that our species has yet to achieve.[9] This choice, contrary to the history which had always mixed the two processes of biological evolution (hominization) and the humanist endeavor (humanization), shows that humanity remains a legal concept under construction. Its

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Dupuy, Pedone, 1991, p. 35 *sq.*]

[7] See E. Goemaere & F. Ost, "L'action humanitaire: questions et enjeux," in *Humanité, humanitaire*, Bruxelles, Facultés universitaires Saint-Louis, 1998, p. 111 *sq.*

[8] Michel Foucault, *La volonté de savoir*, Gallimard, 1970, p. 183. [see also "The question is openly posed by Jacques Testard: 'can one change humanity without losing it?' J. Testard, *L'homme probable*, Seuil, 1999.]

[9] "... humanity is not only what distinguishes man as a matter of biology from the animal, but also what is founded symbolically the dignity, that of each individual and that of the human family as a whole. Hominization is without doubt unachieved and humanization still very fragile: Let us not risk dividing what long history has mixed well together."

definition commands research for a meaning, for an ordering of the nature, for a line on the moral horizon.

But without doubt humanity only possible if one takes into account every chain of generations.

Kant had perceived this in a premonitory fashion in his proposals for a universal history,[10] in particular the second: “among men, natural dispositions that aim at the usage of his reason should only be developed completely in the species, but not in the individual.” Which leads one to underline the fact, labeled as strange and even enigmatic, “that the prior generations only seem to pursue their tiring labors for the profit of later generations, ... although only the latest generations must have the chance to live in the building to which had worked a long line of [devanciers] (it is true without have been intentionally wished).”

But precisely we have perhaps arrived at a stage where it is intentionally that we want to preserve the hope of a habitable world. Whence the questions about biotechnologies and, more broadly, the appearance of a new theme of “sustainable” development, which relies on the concept of humanity and carries in itself, beyond human rights (which aim at present generations), those of future generations.

But then, if one includes future generations, it is no longer a matter of protecting humanity as a victim of crimes directed against humanity, one must recognize as well the prerogatives and notably a patrimony, or heritage, protected as such, even common goods.

It is by a strange destiny[11] that the notion of patrimonium, associated in Roman law with the good father of the family [paterfamilias better?], accompanies in international law the emergence of humanity as a subject of law. The term can seem ambiguous, with its double meaning, at the same time pecuniary by its contents (goods said to be patrimonial can be quantified in monetary terms) and symbolic by its container (as an attribute of the personality, patrimony is inalienable[12]). But it expresses a double solidarity, transnational and transtemporal, which does not go by itself: the first bumps up against the principle of territoriality of systems of law, which seems to exclude the very idea of common management of the space and the resources which it [law?] produces; as for transtemporal solidarity, since it is associated with future generations, it is found confronted by multiple temporalities which determine the rhythms of development, which differ from one civilization to another.

Far from being immediately universal, the concept of common patrimony of humanity indicates without doubt a long process of universalization which would suppose, at the current stage, that there would be national margins, in space and in time. More still that human rights

[10] Emmanuel Kant, *L'idée d'une histoire universelle au point du vue cosmopolitique*, Gallimard, coll. Pléiade, vol. II, p. 187 s.

[11] F. Ost, “Le patrimoine, un statut juridique pour le milieu,” in *La Nature hors la loi. L'écologie à l'épreuve du droit*, La Découverte, 1995, p. 308.

[12] See the classical theory of Aubry and Rau, in *Cours de droit civil français*, *ibid.*, Marchal et Billard, puis Marchal et Goode (successeur), 1917, t. IX, p. 332-382.

or crimes against humanity, it would appear thus like a fluid concept, for which the meaning varies inevitably in space and in time. This statement is imposed since the appearance of the concept, but it explains perhaps as well its evolution toward that of the common goods of humanity.

There would have to be numerous ecological disasters so that the term "common patrimony of humanity" was launched by the ambassador of Malta (Pardo), in 1967, in anticipation of the third conference on the law of the sea.[13] The Convention of 1982 on the law of the sea provides a description of its principal traits: non-appropriation, non-discrimination and participation of diverse countries in the management, such a regime supposes rules guaranteeing to all access to resources and imposing on all the financing of their conservation and of institutions to implement them. The resistance of States, attached to their territory and their sovereignty, leads however to prefer now the expression "public global goods" to designate goods as different as the climate, water, air, or biodiversity, and to evoke a multilateralism implying not only governmental actors but also businesses, territorial collectivities, nongovernmental organizations. But their legal regime remains to be defined, between an economic conception (which refers to the market) and a more political conception (which evokes the common patrimony).

This new reference to the market evokes another form of globalization, which gives a growing roles to private economic actors. The change is more radical and privatization without doubt more difficult still to reconcile with national relativism. Not only does privatization increase the risk of fluidity, but it also announce a new contradiction between the spirit of sharing which underlies the rights of man and of humanity and the spirit of competition appropriate to the market.

The Market

For twenty years, the expression "law of the market" seems to dedicate by its usage, but it is the result neither than the market is a universal concept, nor that there exists a law of the market conceived as an autonomous legal order.

The market is first of all a place, where offer and demand confront one another.[14] It is also perceived as a fact that one personalizes: one speaks of its good or bad health, even of the "tyranny" of the market, to the point that it is seen as "a sort of god for which man is the agent,"15 which would at the end take over from the State because it carries in itself a

[13] R.-J. Dupuy, "L'humanité dans l'imaginaire des nations," p. 236 ("la litanie désespérante des désastres écologiques").

[14] "'The discourse of globalization rests on the viewpoint of classical liberal economic according to which the market represents the natural state of organization of society ... Freed from interferences provoked by the state interventions and public regulations, the spontaneous organization of this society takes the form of a network of exchanges for which contract is the legal translation and the law of offer and demand the economic expression.' F. Ost, "Mondialisation, globalisation, universalisation: s'arracher encore et toujours à l'état de nature," in *Le Droit saisi par la mondialisation,* dir. E. Locquin et C. Kessedjian, Lictec, 2000, p. 5 *sq."*

[15] M.-A. Frison-Roche, *Droit et marché*, Sirey, coll. "Archives de philosophie du droit," 1995, p. 286 *sq.*

dynamic of spatial extension which could “dissolve the State from above”[16] and which entails/results in already a confrontation with the Nation-State.

At the global plan in effect, the law of the markets is not limited by interstate law: it encompasses henceforth nonstate (anational or transnational) normative ensembles that are the lex mercatoria and by extension lex electronica; while the WTO, liberating exchanges, calls for the corollary of a supranational order, the future lex economica. Despite the apparent symmetry, the three terms do not refer to homogeneous conceptions. Unlike lex mercatoria, for which the private origin goes up to usages and rules of commerce once described under the name “corporate law,” [droit corporatif],[17] and of the lex electronica which is claimed to be nonstate, lex economica, recommended by certain ones to regulate the private economic powers and to create a competitive global order, would be conceived by States, on the base of a “multilateral accord of public international law.”[18]

One has yet to examine the universalism of these notions. Surely markets without borders seem to designate the spatial diffusion of products or of services rather than sharing of meaning which is at the heart of universalism, but the model which underlie them expresses as well a claim to universalism. Whether it is a matter of commerce of information or of finance, and even if the rhythms are different form one sector to another, from one region to another, globalization is accompanied by the appearance of a new model of social organization for which actors use the language of universalism. “From the moment that commercial values acquired a universal status, the question was posed of the universality of noncommercial values as a counterweight.”[19]

The question refers to that of the legal order of reference: inscribed in a spontaneous order, at its base one of self-regulation, must the concept of the market escape all the more every integration into an organized order, reattached to a State or to a community, regional or global, of States? From orders to disorder, there is not only a bad play on words but also a risk that affects the whole of those concepts born of the market. One only will pass from a spontaneous order to an organized order on the condition of arriving not only at defining a global economic order, but ordering the plurality of legal orders simultaneously concerned. Unless this occurs, the universal market risks to lead to global disorder.

It can end up there by several paths. First there is the path of autonomy: if the claim to the market of universalism is not integrated into a vision of the whole, put otherwise if it isolates the market to do it, not only a universal concept, but also a genuinely autonomous legal order, this cloistered [cloisonnée] conception of law will lead, if not to “dissolution of States,” [see stern fn] at least to overhanging them and the dissolution of the political into the

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[16] B. Stern, “Introduction,” in *Marché et nation: regards croisés*, Montchrestien, 1995, p. 12.

[17] E. Lambert, Sources du droit comparé ou supranational, Législation uniforme et jurisprudence comparative, *Recueil d’études sur les sources du droit en l’honneur de François Gény*, 1935, t.III, p. 478 s. (spéc. p. 498).

[18] W. Abdelgawad, “Jalons de l’internationalisation du droit de la concurrence: vers l’éclosion d’un ordre juridique mondial de la *lex economica*,” *RIDE*, 2001, no. 2, p. 161.

[19] Ph. Hugon, “Le commerce international illicite au cœur des conflits entre les lois, les pratiques et les normes,” in *L’illicite dans le commerce international*, dir. Ph. Kahn et C. Kessedjian, Litec, 1996, p. 53.

economic. This is why the very expression of lex mercatoria has been criticized (and the critique is also has value, it seems to me, with regard to lex electronica), because it gives one to think that it would be a matter of a genuine legal organization translating the existence of a society of merchants, conceived with a coherence of the whole; even though these are only "islets of organization which appeared in the international commerce, not a unique organization."[20]

But the second path, that of a return to relativism, does not resolve the difficulty if each national legal order applies then its own rules and its own conception of the public order [ordre public] in order to assess the validity of instruments of global commerce that are contract and arbitration. In the two cases, the indeterminacy of applicable norms would result in the development of illegalities.[21]

To be sure punctual responses can be sketched piecemeal by States which have the means to do so. To avoid all abandonment of sovereignty, [tout] in remedying the limitation of their internal public order, the United States develop, with no regard for international law, direct or indirect, an extraterritorial conception of their national law, applicable even without bringing the matter within the jurisdiction, directly or indirectly, of American territory.

Concerned to avoid this alternative of relativism/imperialism, a part of the doctrine proposes to call upon a public order that is transnational (or anational), conceived not from States, but at the confluence of the collectivity of States and of the collectivity of private actors who are the international merchants. Meeting up with the idea that international commerce favors an open society "favorable to the development of a legal cosmopolitanism,"[22] this notion introduces here ethical preoccupations.[23] The difficulty is that in practice, the law of international commerce, which pursues before all the immediate and the material, only makes for ethics and for the common interest in exceptional circumstances.[24] All the more that the moral or ethical rule only rarely can be referred to the name of a transnational order that is nowhere to be found. If the moral rule nonetheless prevails, this can only be in the name of its own belief.[25] One comes back to relativism and the solution remains state-centered.

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[20] P. Lagarde, Approche critique de la *lex mercatoria*, in *Droit des relations économiques internationales*, *Mélanges Goldman*, p. 125 s.

[21] "In sum each of these paths, the autonomy of a transnational law of the market, and the return to national law, come to reinforce the observation of Michel Foucault respecting the "differential supervision of illegalities" [M. Foucault, *Surveiller et Punir*, Gallimard, 1975, p. 287; also p. 89 *sq.*.]: on the side of popular illegalities harshly repressed by the national penal law (rape, blows and injuries, murder, etc.), the illegalities of the affluent would be treated in a minor fashion, whatever the degree of damages (to goods or persons). At the hour of globalization, it would profit all the more relativism and of plurality of national legal orders whether a conception which would universalize the market as an autonomous order ruled by its own rules. In the 2 cases, the indeterminacy of applicable norms results in impunity for illegalities."

[22] B. Oppetit, "Philosophie de l'arbitrage commercial international," *JDI*, 1993, p. 813.

[23] J.-B. Racine, p. 353 "la traduction juridique de préoccupations éthiques"

[24] B. Oppetit, "L'Illicite dans le commerce internationale," in *L'Illicite dan le commerce international*, op cit p. 13 sq.

[25] P. Mayer, "La règle morale dans l'arbitrage international," in *Mélanges Bellet*, Litec, 1991, p. 379 sq.

To get out of this impasse, more nuanced formulas are envisaged, in order to consider the autonomy of arbitration and to make the arbitrator appear as a "a private international judge of globalization, who takes charge not only of the values of free exchange but also those of the universal morality or the general interests defended by the States and the international community."[26]

But it is difficult to believe that such a scenario will occur spontaneously, without recourse to sanctions, national or supranational, because even in placing it in context, to define the public order as transnational is to separate it from States. At least to renounce the paradox of a spontaneous order in order to seek to organize the global order with the support of States, but orienting it toward an order which would become progressively supranational.

Such an endeavor is sometimes contemplated from the WTO. One observes already, for example with the entry of China into the WTO, that the protocol of accession imposes reforms which are not limited to simple technical adjustments.[27] Around the three principles imposed by the protocol of accession (uniform application, transparency, jurisdictional supervision of acts of administration), are already perceptible effects in their nature general, and doubtless more durable. If the mechanism of the WTO appears, at least potentially, effective, it is first of all because commerce is marked by an interdependence that imposes strong legal interactions (less for ideological reasons than account of the press of events [force des choses]). But also without doubt for legal reasons, holding to the double dynamic which makes the law of the WTO a law with a global calling: on the one hand the unification of rules (the principle of unique agreement guaranteeing a genuine multilateralism, and no longer a network of engagements that are bilateral or à la carte); on the other hand, their primacy over the subsets, national or regional, controlled by the Organization.[28]

But the illegalities do not confine themselves solely to commercial and economic law. They invite to take into account also the violations of the rights of man and of humanity, from either the WTO, or other organizations like the International Labor Organization (ILO) or the World Health Organization (WHO), even the United Nations (U.N., Sub-Commission on human rights or Human Rights Committee). Which would suppose an uncloistered [non cloisonnée] conception of global law.

In sum, one could put up with the fluidity, inherent in the search for a legal universalism that is not hegemonic, but on the condition that the universal is not divided by an excessive autonomy of the concepts that constitute it. Therefore on the condition that the conflicts of values are surmounted.

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[26] Ph. Fouchard, "l'arbitrage et la mondialisation de l'économie," in *Philosophie et droit économique, quel dialogue? Mélanges Farjat*, op. cit., p. 395.

[27] L. Choukroune, "L'état de droit par l'internationalisation, objectif des réformes," in *Perspectives chinoises*, 2002, no. 59, p. 7 *sq*.; "Les conséquences juridiques de l'entrée de la Chine à l'OMC," in *La tradition chinoise, la démocratie et l'État de droit*, op. cit.

[28] See Hélène Ruiz Fabri, "La contribution de l'Organisation mondiale du commerce à la gestion de l'espace juridique mondial," in *La Mondialisation du droit*, op. cit., p. 347 *sq.*

2. Conflicting Values

The weakness of legal universalism is not only formal. In terms of legitimacy, it poses a major question: can one build a community of law without a community of values? In fact the concepts evoked, human rights in diverse legal forms taken by humanity or by the market, can henceforth, by degrees and according to different modalities, be invoked before a judge, national or international. By inscribing normative universalism into positive law, the human rights postulate a community of law at a planetary level.

Before claiming that this community of law could create, by a sort of practical wisdom or by constructivism by baby steps, a community of values, the potential conflicts must be examined: conflicts at the very heart of human rights, but also "mixed" conflicts, between persons and things, man and the market, or, as with global public goods, between the market and humanity.

Conflicts at the Heart of Human Rights

Far from expressing a homogeneous vision of values, human rights are crossed by multiple tensions. Michel Villey had a good hand to demonstrate, and demonstrate, the incoherencies: "each of the claimed human rights is the negation of other human rights, and, practiced separately, is the generator of injustices."[29]

To take the measure of these "injustices," the most rigorous method consists of legal instruments themselves and from their division into civil and political rights (rights from) and economic, social and cultural rights (rights to), which would, as Jean Rivero has noted, express a distinction in principle between liberties [libertés] and claims [créances]: "the powers to demand, which confer on their holders a claim on the State are juxtaposed with the powers to act, which constitute the traditional liberties."[30] It remains to see if this division postulates an insurmountable contradiction or a simple complementarity, or if on the contrary the rights figuring in one same category are necessarily reconcilable.[31]

Between rights related to a same instrument, the notion of limitation, particularly explicit in the ECHR and the European jurisprudence, gives a vital lead/main theme [un fil conducteur]. The large part of civil and political rights are in fact supplemented by a limiting or escape clause.[32] If one combines the clause authorizing temporary derogations in the case

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[29] Michel Villey, *Le droit et les droits de l'homme*, PUF, 1983, p. 13; also, *Précis de philosophie du droit*, Dalloz, 1975, no. 83 s.; D. Cohen, "Les droits à ...," and D. Gutmann, "Les droits de l'homme sont-ils l'avenir du droit?," in *Études F. Terré*, Dalloz, 1999.

[30] Jean Rivero, *Les Libertés publiques*, vol. 1, *Les Droits de l'homme*, PUF, 1974, p. 117-118.

[31] "It remains to know if this duality implies an insurmountable contradiction. With great intellectual candor, Jean Rivero states that he is perplexed: 'Between the two categories, is there contradiction or complementarity?' To this question, the response, he said, 'can only be nuanced.' It even goes, it seems to me, as to the inverse question, to know if, to the contrary, rights figuring in the same category are necessarily reconcilable."

[32] W.J. Ganshof Van der Meersch, "Le caractère autonome des termes et la marge d'appréciation des gouvernements dans l'interprétation de la CESDH," in *Mélanges Wiarda*, Carl Heymans Verlag, 1988, p. 201

of war or other exceptional circumstances, with other limitations, by nature permanent, admitted either by reason of exceptions restrictively enumerated, or more broadly restrictions authorized with a national margin of appreciation, on arrives at a level by four degrees.[33]

At the very top, rights to absolute protection for which the Convention admits neither restrictions, nor exceptions, nor derogations: this category corresponds to the prohibitions of torture and of cruel, inhuman or degrading punishment or treatment, and also to the prohibition of slavery and collective expulsions, to which the U.N. Covenant adds a prohibition on imposing on a person a medical or scientific experience [experiment?] without his consent and the obligation to recognize in every place the legal personality of each person. At the other end of the enumeration, the legal value thus expressed is read as respect for the human dignity, in the strongest sense of the term. An almost absolute protection then corresponds to the rights that can be suspended temporarily in the case of exceptional circumstances, but are protected, in the absence of such circumstances, without exception nor restriction: this is the case of the right to nondiscrimination, and so of the presumption of innocence and more broadly the fair-trial rights [? – droits-garantie] (legality, access to the courts, and fair trial]. Finally all those other rights, announced with exceptions or restrictions, make do with a relative protection: relatively strong, for the rights add clauses foreseeing exceptions restrictively enumerated (principally the right to life[34] and the liberty to come and go); or relatively weak it being a matter of rights for which the restrictions are admitted in a nonlimiting fashion and with a national margin of appreciation (respect for private and family life,[35] liberty of thought, conscience or religion,[36] liberty of expression, of meeting and association or of marriage, or yet protection of property).[37]

This hierarchy commands implicitly the general typology of conflicts because the rights to absolute and quasi-absolute protection should carry it with them in every hypothesis, not only on the public order and reason of State, but also about other rights and liberties.

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sq.; also François Ost, “Originalité des méthodes d’interprétation de la CEDH,” in *Raisonner la raison d’Etat. Vers une Europe des droits de l’homme*, dir. M. Delmas-Marty, PUF, 1989, p. 440 *sq.*

[33] “Most rights have what is called sometimes an escape clause which comprehends threee types of limitations (derogations, exceptions and restrictions), drawing to the contrary a hierarchy of four degrees.” “Introduction,” in *Libertés et droits fondamentaux*, dir. M. Delmas-Marty & C. Lucas de Leyssac, Seuil, 2e éd., 2002, p. 15 *sq.* et 26 *sq.*. Cf. *Classer les droits de l’homme*, dir. E. Bribosia & L. Hennebel, Bruylant, 2004.

[34] Pretty v. UK, March 14, 2002 (separating euthanasia from right to life as an unforeseen exception); comment. Sudre, *JCP*, 2002, I, 157, no. 1.

[35] See Marie-Thérèse Meulders-Stein, “Individualisme et communautarisme: l’individu, la famille et l’État en Europe continentale,” *Droit et Société*, 1993, p. 163 *sq.*; also “Vie privée, via familiale et droits de l’homme,” *RIDC*, 1992, p 767.

[36] See P. Wachsmann, “La religion contre la liberté de l’expression, sur un arrêt regrettable de la CEDH, *Otto Preminger Institute c. Autriche*,” *RUDH*, 1994, p. 441 (case upholding, by application of a national margin of appreciation, the criminal conviction of the producer of a film judged blasphemous to the Roman Catholic religion).

[37] Among the many works criticizing the manner in which European human rights judges have applied the margin of appreciation are Caroline Picheral & Alain-Didier Olinga, “La théorie de la marge d’appréciation dans la jurisprudence de la CEDH,” *RTDH*, 1995, p. 567 *sq.*; M. Delmas-Marty & M.L. Izorches, “Marge nationale d’appréciation et internationalisation du droit,” *RIDC*, 2000, p. 753 *sq.*; also F. Sudre, J.-P. Marguenaud *et al.*, *Les Grands Arrêts de la CEDH*, PUF, 2003, p. 67 *sq.*

Similarly the rights to relatively strong protection only permit the exceptions enunciated in the Convention. However the rights added to the general clause of "restrictions necessary in a democratic society" (protection relatively weak) can lead to conflicts among individuals,[book p. 132] since the Convention admits the principle of a limitation "in order to assure the recognition of the rights and liberties of the other." Beyond these fluctuations, case law, in protecting the freedom of expression and reinforcing nondiscrimination, defines a common conception of the democratic life that could contribute to building a European public space, in the political sense of the term.[38]

At the global level, it seems more difficult to reconcile from the human rights the Chinese and Occidental conceptions of the freedom of expression or, yet more difficulty, the American conceptions (affirmative action) and Islamic (status of women) of nondiscrimination. This is that the religious question, eluded by the silence of the UDHR, has not any more been resolved by the regional texts. To the secular humanism of the texts of the United Nations, and so of the European, American and African human rights conventions, is opposed the Islamic Declaration and the Arab Charter, which do not separate religion from law. [book p. 139] Revealed truth against demonstrated truth: the conflict could seem insurmountable. At least it must avoid confusion with another conflict, often mixed in with the religious conflict, that which opposes civil and political rights to economic, social and cultural rights.

Surely the UDHR accords to each person, not only the civil and political rights but also the economic, social and cultural rights, which it declares "indispensable" to his dignity and to the development of his personality." (art. 22) Joining the ones and the others to equal dignity (art. 1), the Declaration implies the indivisibility of the whole.[39] Out of the Cold War, the conflict was nevertheless hardened to the point that in 1966 two distinct covenants were adopted, which States ratified separately (and even in Europe, the Social Charter is distinct from the ECHR).[40]

It remains that this division refers less to a difference in nature between the two categories than to a historical conditioning. Case law (principally European) demonstrates, by an interpretation "indirect" ["par ricochet"[41]], how contradiction can become complementarity. Case law considers in fact that the violation of a social or economic law can

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[38] book p. 136: "At least one can value the emergence of a common conception of freedom of expression which is attached to preserved a "public policy space," with the ethical responsibilities that this implies, rather than a 'free marketplace of ideas.' Y. Galland, "Les obligations des journalistes dans la jurisprudence de la CEDH," *RTDH*, 2001, p. 873.

[39] see book p. 63 & n.23 – citing idea of René Cassin and initial opposition by United States & USSR. see book p. 122: "Tolerance underpins in fact the UDHR, "international" then "universal," of human rights, notably Art.1 where was separated every philosophical or religious presupposition attaching man to nature or to God, for the reason that nations should and could arrive at a practical accord about the base principles without having to look for consensus on the fundaments."

[40] J.-F. Akandji-Kombe, "Actualité de la Charte sociale européenne, chronique des décisions du Comité européen des droits sociaux sur les réclamations collectives (juillet 2001-2002)," *RTDH*, 2003, p. 113; C. Pettiti, "La Charte sociale européenne révisée," *RTDH*, 1997, p.3.

[41] G. Cohen-Jonathan, *La Convention européenne des droits de l'homme*, Economica, 1989, esp. p. 82.

make the object of a sanction if it entails as a consequence that of a civil or political law. Affirming since 1979 "that there is no waterproof/airtight partition between civil and political rights and economic and social rights,"[42] the ECHR imposes indirectly, in the name of a fair conception of procedure, the right to legal assistance, then, in the name of nondiscrimination, of other social rights, including the right to lodging. In making States responsible, with regard to civil and political rights, for genuine, affirmative obligations, European case law does not content itself with building complementarity; it also demonstrates the indivisibility of the two categories, only implicit in the UDHR. The transposition at the global level would be all the more necessary that the conflict at the heart of human rights is aggravated by the "mixed" conflict which opposes more broadly the rights of man and of humanity to the market.

Mixed Conflicts

With the rights of man and the various legal forms taken by humanity (victim of crimes or master of domain)[43] and by the market (lex mercatoria, lex electronica and lex economica), universalism has become normative, but only by fragments. In order that these fragments can be adjusted ones to the others, a community of values must be constructed, but the cloistering/partitioning [cloisonnement] of different spheres of law is such that each sphere maintains its own coherence without really communicated with the others.

By their critique, whether it be radical[44] or more nuanced,[45] economists highlight, in the debate about the future global order, the importance of the conflict between the conceptions of law that privilege commercial values (concepts tied to the market) with those that are noncommercial (the rights of man and of humanity). But the debate is not limited to the contents of the rules of law; it extends to the two visions of justice, procedural and substantive, which entered concurrently without being easy to determine whether it is a matter of a conflict or of complementarity.

Between commercial and noncommercial values the distinction gets muddled when one passes from the national to the international normative space. On the one hand, the object of international commerce stretches well beyond the strict definition of the act of commerce in internal law. On the other hand, the legal framework seems unadapted to noncommercial values, on account of the inversion of hierarchies operated by the principle of free movement of persons, merchandise, services and capital. Whether it is a matter of regional organizations, such as the European Union (EU), or global organizations, such as the World Trade Organization (WTO), noncommercial values can not be totally excluded. They can even legitimate restrictive measures; but, precisely because they are seen as restrictions, they are

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[42] Airey v. Ireland, Oct. 9, 1979, ser. A., no. 32.

[43] from book p. 75: "As a new legal category, humanity is constructed thus either like the victim of crimes, or like the holder of a patrimony, or, more broadly, as "master of the domain."" (quoting René-Jean Dupuy, "L'humanité dans l'imaginaire des nations," in *Conférecnes, essais et leçons au Collège de France,* Julliard, 1991, p. 222 *sq*.

[44] Joseph E. Stiglitz, *La grande désillusion* (Globalization and its Discontents), Fayard, 2002. [disucssed book p 143]

[45] Amartya Sen, Des idiots rationnels, in *Ethique et économie*, PUF, 1993; *Un nouveau modèle économique* (Development as Freedom), éd. Odile Jacob, 2000.

strictly interpreted and occupy a secondary position in the hierarchy of norms. It results in practice that only concepts related to the market (in its diverse forms) would be already of universal application. However the rights of the human and of humanity under there diverse forms, although proclaimed universal, would remain dependent on the national legal order, at the risk of being declared incompatible with the principle of free movement.

It is true that in the regional European space the situation is more nuanced. The Court of Justice of the European Communities is well "the armored arms of the mechanism of incompatibility of national measures,"[46] but it is also concerned with respecting fundamental rights, including the rights consecrated by the ECHR, source of inspiration for community law. One must take into account besides the progress mentioned above of the European Court of Human Rights (ECHR). Finally the Convention for the Future of Europe [CFE] proposes to inscribe the Charter in the future Constitution, therefore to give it legal force within the community space, and simultaneously to adhere to the European human rights convention, therefore to recognize its direct opposability [it can be invoked] to community matters, without doubt under the control of the European Court of Human Rights. Thus this convention [CFE] could announce a future European public order assuring a certain balance between commercial and noncommercial values.

Compared to Europe, the global situation is much more conflicted, on account of a strong dissymmetry of the processes of internationalization, to the benefit of commercial values. On the one hand, the principle of free movement, impose by the GATT Accords and then by the WTO, under the quasi-jurisdictional control of the Dispute Settlement Body, eases their spatial diffusion (and the extension of their definition) by requiring States to lift barriers on exchanges (internationalization of commerce); on the other hand, the resistance of/from noncommercial values is weakened by the insufficiency of control mechanisms and the complexity of interactions in a space much more fragmented than the European space.

Among the national, the transnational, and the supranational public order, the contours of a genuine global order remain to define. If the three paths have been explored, none seems to resolve the conflict in a satisfying fashion. The first bumps up against the fragmentation of national law, which leads to the choice of the system most favorable to the market. The second path, proposed by specialists in arbitration, is obedient/submitted to the good will of international commercial actors and of the dubious efficacy to resolve the conflict of values. What remains is the third path, that of a future supranational order. Conceived a little like a transposition of the regional model to the global process, it implies the opposability of noncommercial values to businesses, from the market (World Trade Organization/World Intellectual Property Organization) and/or human rights (United Nations).

To suppose that such a principle could be admitted it would remain to put in place controls, which refers to another debate, apparently less in conflict but potentially as sensitive in the search for a future global legal order, between procedural and substantive justice.

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[46] [book p 150] M.-A. Hermitte, "L'Illicite dans le commerce international des marchandises," in *L'Illicite dans le commerce international*, dir. Ph. Kahn et C. Kessedjian, Litec, 1996, p. 163.

Renewed by the attempt of John Rawls to liberate the just [juste - fair?] from the guardianship of the good: "To give a procedural solution to the question of what is just/fair, such is the aim declared in The theory of Justice of Rawls; a fair procedure in light of a just arrangement of institutions, this is what is exactly signified by the title of Chapter 1, "Justice as Equity.'"[47]

The question is not specific/peculiar/suited [propre] to universalist legal concepts. But the question took a fullness without precedent to the international plan, where it seems easier to arrive at agreement on a common means to say the right that a common conception of values inscribed in the rules of law.

The right to a fair trial belongs to human rights, but the Transnational Rules of Civil Procedure have also been elaborated by the American Law institute, and sponsored by Unidroit. [book p 163] Private in origin, the project, inspired by the American model, offers to those who would wish to make use of it (businesses, arbitrators or States) for private litigation related to transnational commercial operations, an alternative in the search for a universal procedure. That is to say the ambiguity of the contemporary current in favor of "the procedural ethic."

Henceforth there are in fact jurists who transpose and radicalize Rawls, as besides Habermas,[48] in proposing to rationalize no longer of the trial toward the policy, but of the policy toward the trial, the trial becoming the model of the policy.[49] It is thus that the proceduralist "conception" of philosophers, comes today, under the pen of numerous jurists, to this term "of ethics," procedural, even of "procedural democracy," at the risk of giving to believe that a fair procedure suffices to guarantee a fair decision.

Without questioning the search for a common law of the trial, necessary to a degree that develops the global jurisdictions, criminal, but also commercial (like the Dispute Settlement Body created at the heart of the WTO), the analyze raises the question of what are the beneficiaries of a procedural progress than cannot, in any hypothesis, claim to be a substitute for substantive progress.

In sum, the conflicts of values are doubtless for the international community the major challenge for the coming decades. It may be that the ambition is limited to conceive a global public order of police, resting on a system of collective security, multilateral if the united Nations obtains the necessary means, or unilateral if the current American vision carries the

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[47] P. Ricœur, "Une théorie purement procédurale de la justice est-elle possible? À propos de la théorie de la justice de Rawls," in *Le Juste*, Éd. Esprit, 1997, p.73.

[48] book p. 160

[49] book p. 160: "Underlining the fact that trials have opened to nongovernmental organizations, as *amicus curiae*, not as parties to the litigation at bar, Marie-Anne Frison-Roche sees in the trial the model of public space in the sense given by Habermas. She proposes to reason "no longer of the process toward the policy, but of the policy toward the process." [M.-A. Frison-Roche, "Évaluation critique," in *Variations autour d'un droit commun. Travaux préparatoires du colloque de la Sorbonne*, dir. M. Delmas-Marty, SLC, 2001, p. 160] According to her, the trial would become the "model of the policy" [p. 161.]

day; then the internationalization of the law risks the continuation of privileging commercial values and procedures to the detriment of ethics and of substantive justice. Or it may be that one tries to build, through the catwalks/gateways/passageways [passerelles] among the diverse multinational global and regional organizations, a genuine global legal order in the sense announced, if not realized, by Article 28 of the UDHR; then only does it become possible to combine market, the rights of man and of humanity.

But it would not be enough to accumulate texts and to build passageways in paper. It must yet guarantee the effectiveness of these norms, a condition of empirical validity of systems of law.

3. Ineffective Norms

The empirical validity – to judge norms by their effects – seems the most evident, because it marks the return of law to facts, but also the most ambiguous, as for the definition of "effects," and perhaps the most dangerous, when one comes to reduce validity to this sole criterion. Favored by the current positivists, who presuppose the definition of law as an order of constraint, validity can lead to a realism that is purely normative. The risk is then, either of legitimating based on this sole criterion the validity no matter what the system of norms as long as it proves effective over time, or conversely to disqualify every system for which effectiveness cannot be demonstrated.

It does not remain less that, in the plural vision retained here, the effectiveness of norms remains one of the criteria of their validity. This vision permits in fact avoidance at the same time of the traps of a "simply idolatry of the fact" (the unapplied norm does not exist) and those of the dogmatic (it little matters whether or not the norm is applied as long as it has been regularly adopted by a competent organ).[50] But the vision does not suffice to pinpoint which effects matter.

One must come back to the polysemy [having many meanings] of the word "norm," revealed by its derivations: on the one hand, normative and normativity, which implicate an ideal, a "must be"; on the other, normal, normality, normalization, which refers to the means of conduct, to "being." In the first perspective, effectiveness is first of all instrumental; in the other, it can be symbolic if the norm conveys and inculcates a certain idea of normality, independently from any legal obligation. Let us recall for example that the UDHR, without binding legal force, is invoked in the whole world by victims of violations.

Despite these nuances, it remains that universalist concepts do not form a genuine system and that the risks of ineffectiveness are found strongly increased in it, as much by the dispersion of sources as by the insufficiency of recourse.

Dispersion of Sources

[50] J. Carbonnier, *Flexible droit*, 4ème éd. LGDJ, 1979, p. 99s.

[bok p. 171] There is a mystery of the source. Only the geologist has some idea about the phenomena that make some things rise up or others to falter, but the diviner does not reveal the secret. Neither geologists, nor water-diviners/dowsers [sourciers], jurists employ gladly the expression, enlightening by the dynamic representation that it gives to the law, imagined as a flow [flux] or a river, but they also are wary of a metaphor too poetic, for which the Latin and Ciceronian origin (fons juris) does not pardon the naturalist suggestion.[51] Kelsen was particularly critical: "one can design by this word the methods of creation of law, or as well every superior norm in its connection with the inferior legal norm for which it settles/resolves/sorts out/adjusts [règle] the creation."[52] At the end, he concludes, "the multiplicity of significations of the term 'sources of law (or of the law) leaves it seeming truly unusable."[53]

But it is precisely this multiplicity, still increased in international law, which seems to me interesting and useful, because it explains, but also nuances, the report/review of the weaknesses of normative universalism. One must therefore attempt a pinpointing, first topological, then typological, of this multiplicity of sources.

The term "topology" is borrowed from that part of mathematics that studies the notion, at first intuitive, of continuity and of limits, applicable in geometry as well as in algebra. This borrowing provokes analysis of these phenomena which suggested a vicinity/neighborhood [voisinage – proximity/nearness?] between the normative spaces fed by partially autonomous norms. But the analogy is stopped there because these terms will be employed in their current meaning, without claiming to construct a theory of the sources in the normative universal.

As you have in fact seen, these sources spring up in a dispersed and unforeseen fashion, without one being able to join them to a unique legal order. First of all the international order seems itself made of a multiplicity of partial legal orders, which refer to diverse international organizations and are partially implemented by a score of international (regional and global) jurisdictions. But the normative universalism refers also to national sources, because the State, whether it admits or not the direct applicability of the international norm, remains the principal agent of application of international law. Despite the apparent discontinuity that such dispersion creates, the relations of vicinity install themselves in normative spaces, different according to whether the dispersion is geographical or methodological.

The normative geography of human rights is not that of the market. We have already had occasion to acknowledge this, in particular in Europe where this horizontal dispersion entails the effects of vicinity, positive to the degree where the application of the European human rights convention reinforces the effectiveness of the community law: The Strasbourg court serves, one says, as a "Samu" [Service d'aide médicale d'urgence – ambulance

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[51] P. Amselek, "Brèves réflexions sur la notion de sources du droit," in *Sources du droit*, Sirey, coll. "Archives de philosophie du droit," 1982, t. 27, p. 252 *sq.*
[52] Hans Kelsen, Théorie pure du droit, trad. Ch. Eisenmann, Dalloz, 1962, p. 313.
[53] Id. p. 314.

service/paramedics] to the European Community in order to obtain the good execution of its provisions by the States.[54] At the global level, such effects seem much more restrained: there is no global human rights court to serve as paramedic to the WTO. Conversely, the WTO, confined essentially to global commerce, seems little disposed to play this role with regard to human rights. However the effects are perceptible in the context of the vertical dispersion, among national, regional and global sources. At first glance, this dispersion seems to reinforce instrumental effectiveness, since it implies a hierarchy from one level to another. But it especially asserts/expresses itself to the benefit of the market.

As for the crime against humanity, the return to national law leads sometimes to total ineffectiveness, therefore to impunity, on account of indirect forms of self-amnesty. [para.: book p. 175] At least to take into account also regional norms. In assimilating international crimes to grave violations of human rights, inter-American courts have in effect contributed to reinforcing the effectiveness of the universal norm, judging incompatible with the American Convention direct and indirect forms of self-amnesty. Thus the ineffectiveness of the global norm, weakened by the national norm, can eventually be saved by the regional norm.

To the geographical dispersion is added a methodological dispersion if the interpretation of universalist concepts, instead of limiting itself to the exclusive reference of international law, uses also the comparative method. In this regard, the revival in international law of the exclusive dogmatic conception is only without doubt a defensive reaction occasioned by the audacities of the practice (new manifestation of the conflict on reversed fronts discussed above). The observation of practices shows in fact the growing place of the comparative method, called upon to reinforce the effectiveness of the universal norm in the case of imprecision of the international definition.[55] On the condition of being systematized, the search for a "common denominator" would permit the enlightening of the application of imprecise norms (instrumental effectiveness), all in avoiding the suggestion of the subjectivity of the judge (symbolic effectiveness).

In sum the topology demonstrates less the weaknesses of the normative universal than its growing complexity which renders the evaluation at the same time uncertain and evolutive. All the more than the relation is not only of vicinity. In the case of vertical dispersion, the sources are not all of the same normative authority. The hierarchy is clear when it is a matter of a strongly integrated concept, like the market. It is less so when one asks, for example, across the respective authority of the international penal law and human rights, on the degree of normative intensity of different concepts, said otherwise on the typology of norms.

In terms of typology, the "modern" conception, benefiting the effectiveness founded on the force (obligatory or binding) of law, would make room for a conception that in English

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[54] G. Cohen-Jonathan & J.-F. Flauss, "La CEDH et le droit international général," *AFDI*, 2001, p. 433; see *e.g.* Dangeville v. France, Apr 14, 2002, observe J.-F. Flauss, *AJDA*, 2002.

[55] M. Delmas-Marty, "L'influence du droit comparé sur l'activité des tribunaux pénaux internationaux," in *Crimes internationaux et juridictions internationales*, dr. A. Cassese & M. Delmas-Marty, PUF, 2002, p. 95 *sq.*; M. Delmas-Marty, "La CPI et les interactions entre droit interne et international," *RSC*, 2003, p. 1 *sq.*

is called soft law. In French, the word has two translations: droit mou and droit doux, which could suggest that the weakness of law, or the suppleness if one want to remain neutral about it,[56] can effect either the obligatory force (the intensity of the norms would be graded between hard and soft), or the binding force (the intensity of sanctions, between hard and [doux]). Naturally mistrusting with regard to the delights/pleasures of legal sophistication, I must admit, although the two levels (le mou and le doux) are the most often confused, that the dissociation permits refinement of the degree of the legal force with which spring the sources of law.

This dissociation seems to me all the more useful that legal universalism, hardly sketched out, renders the dissociation doubtless particularly visible. One can see it with human rights: the obligatory force, absolute or quasi-absolute, of "inderogable" rights does not guarantee the effective application of constraining/binding sanctions in the case of transgression. One observes it also, conversely, with lex mercatoria, or the codes of conduct, nonobligatory norms that become however constraining/binding as long as the parties choose to refer it and the arbitrator or the judge sanctions indirectly the transgression of it.

As for the obligatory force, international law is first of all affected by the gradation, which varies normative intensity according to the nature of the norms, which either propose (declarations, recommendations, programs, etc.), or impose (constitutional norms, legislation and regulations [réglementaires] of internal law, community directives and regulations [règlements], or yet conventions and international treaties). Add a phenomenon described as dilution of the norm, by extension of holders of rights and of duties.

For my part, I do not see a pathology because it is the very ambition of legal universalism that it aims to become effective for all and in regard to all (omnium et erga omnes). Doubtless this dilution carries with it inevitably a gradation, because it seems impossible, at the current stage, to assure to the same degree of normative intensity the effectiveness of norms of application also extended. But the difficulty is less in this variability of normative effect than in the repartition of power which underlies it. It is this inequality that poses the problem, all the more so that to the oligarchy of States is added a private oligarchy which commands the functioning of the market, as long as the weak normative intensity (nonobligatory norms) is combined with the absence of binding/constraining sanctions to favor the powerful among the States or businesses.

The constraining/binding force of law depends in fact on the sanction, restitutionary or repressive, which commands the constraint exerted on the person to whom the norm is addressed. When it is a matter of sanctioning the States which have had for a longtime the monopoly of legitimate constraint and remain "the agent that cannot be ignored of execution of international law,"[57] one conceives that it would be difficult to impose sanctions, for lack of a global government and of a global police force, which would be imposed on them. In every hypothesis, the sanction is distinguished from the brutal force (the law of the most

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[56] C. Thibierge, Le droit souple. Réflexion sur les textures du droit," *RTDCiv.*, 2003, p. 599 *sq.*
[57] P.-M. Dupuy, *Droit international public*, op. cit., sec. 410.

powerful) by its juridicité, therefore by the existence of recourse, for which it remains to analyze.

Insufficiency of Recourse

The creation of the International Criminal Court (ICC) marks perhaps a turning point because it is in sanctioning the prohibitions that a community builds its identity and common memory. For lack of restoring a global order which does not yet exist, the essential function of international criminal justice would be, in enlightening the public opinion, to transform conviction and sentencing into institution of a future order. But the process is hardly sketched out and its ambition "to be for the law, against force"[58] is realized in a deeply unequal fashion, only when force "is not too strong," according to the formula of Péguy reprised by the writer Tzvetan Todorov.[59] This brings us to the debate on the force of the law.

It is true that recourse is not limited to criminal law. Analysis must include diverse forms of judicial recourse of global law and equally take into account inverse process, for which the decision of the House of Lords in the Pinochet affair remained the emblem, of the globalization of national judges.

The judicialization of global law, still an exception, is most often subordinated the consent of the States. The International Court of Justice at The Hague (ICJ), a generalist and universal jurisdiction created by the U.N. Charter as the masterpiece of international law, remains an optional and consensual jurisdiction, a simple court of arbitration the competence of which is limited to States and for which jurisdiction is conditioned by the goodwill of those States.

At least the dispersion of normative sources brings with it a multiplication of jurisdictions, or more broadly of organs of control, and an opening of recourse to private actors, individual or collective.

The only genuine global jurisdictions, for which competence is imposed, and nonconsensual, are the criminal tribunals. But the difficulties of their creation, delayed for nearly a century (an idea envisioned already in the Versailles Treaty of 1919), bear witness to the narrow alternatives where international law is found locked up, between an ineffective universalism, if it depends on the will of all the States, and an imperialist efficacy, "imposed by a handful of superpower States."60 In fact the international criminal tribunals (ICTs) have been created, not by a convention that would enter into force upon sufficient ratification, but by a resolution of the U.N. Security Council, obligatory straightaway. But the tribunals have an ad hoc competence, limited in space and in time. Conversely, the competence of the ICC is potentially permanent and universal, but in reality this competence is only obligatory for the

[58] cf. book p. 39: "Pascal's formula remains still current in its troubling ambiguity: "not being able to do what it may be force to obey justice, one made that it would be just to obey force." B. Pascal, *Pensées*, Gallimard, coll. "La Pléiades ", 1969, p. 1152.

[59] T. Todorov, *Mémoire du mal, tentation du bien. Enquête sur le siècle*, Robert Laffont, 2000, p. 298.

[60] M. Chemillier-Gendrau, "Le droit international entre volontarisme et contrainte," in *L'Évolution du droit international. Mélanges Hubert Thierry*, Pedone, 1998, p. 93 *sq.*

countries that have ratified the Rome Statute. It extends to nationals of third parties only under extremely limited conditions.

Despite these precautions, the very firmness of the United States' anti-ICC offensive is an indirect homage, if not to the effectiveness, at least to the potential of the Court. But this offensive gives an idea of the difficulties that the international community encounters to reinforce, within the regional courts, the judicialization of human rights.

In the matter of human rights, the separation in fact grows bigger with regard to the market. A consequence of the dispersion of sources, the division observable in Europe between the Council of Europe and the European Community is reproduced between the United Nations and the WTO. But with this major difference, that Europe established two jurisdictions, the European human rights court and the Court of Justice of the European Communities, whose crossed exchanges begin to constitute a sort of coregulation which could institutioanlize itself and facilitate the solution of conflicts between commercial and noncommercial values; although at the global level, this division comes with a strong dissymmetry. This level [?-celle-ci] would have besides the tendency to grow along with the increase in power of the mechanism for settlement of disputes, jurisdictional or quasi-jurisdictional, which is put in place at the WTO,[61] compared to the stagnation of the United Nations in the matter of human rights.

However the appearance of private actors as subjects, active or passive, of international law, is one of the great novelties. But the organization of redress, far from being homogeneous and univocal is as the reflection of conflicts of values mentioned above. If it is true that recourse from private actors, when it is admitted, has for a common denominator the weakening of States, it does not express for all that – fair from it – the emergence of a genuine community of values, but rather that of interests, if not antinomic [contradictory], at least strongly heterogeneous.

Concerning businesses, the merchandising [commodification? – marchandisation] seems to go hand in hand with judicialization. To the degree that competition stiffens, the necessity to weigh [intérêts en présence = opposing interests/litigants] comes back to the power (jurisdictional or quasi-jurisdictional) of the authorities of regulation. The statement/observation extends from internal to regional international law, with the reinforcement of the law of the judge at the heart of the European Union.[62] It seems under way as well at the global level as long as certain States given to investors the possibility of seizing directly an international arbitration in the case of a dispute.[63] In the end, the question remains posed, despite the oppositions, of a multilateral accord on the investments, supposed to protect at once investors against "unforeseen political and economic turns of events of investments in

[61] H. Ruiz Fabri, "Le règlement des différends au sein de l'OMC ...," op. cit., p. 303 sq.

[62] *Le Droit au juge dans le'Union européenne*, op cit; also C. Harlow, "L'accès à la justice comme droit de l'homme," in *L'Union européenne et les droits de l'homme*, dir. Ph. Alston, Bruylant, 2001, p. 189 *sq.*

[63] book p. 190: states there is the possibility of direct recourse before an arbitrator if there are persistent delays in execution of order. citing Helene Ruiz Fabri, "Question de la mise en oeuvre des rapports," chronique du règlement des conflits, *JDI*, 2001, 906.

foreign countries," and "”States against the excessive demands of too powerful multinationals."[64]

Still it must avoid to reinforce thus the conflict between commercial and noncommercial values. To accord to investors the status of active subjects of international law,[65] opening them to redress against States logically would imply the establishment as well of their responsibilities, as passive subjects, in the case of violation of international law of the rights of man or the rights of humanity. For lack of arriving at this, the dissymmetry of redress opened to nonstate actors risks increasing inequalities, exacerbating conflicts of values and in the end weakening not only the effectiveness but also the legitimacy of normative universalism.

To avoid that the dissymmetry be aggravated, among private actors, enter economic operators and simple civilian actors (individuals and nongovernmental organizations), for which the possibilities of action are at this moment very restricted, whether it is a matter of human rights in the strict sense or of the rights of humanity, it is sometimes proposed to enlarge the list of international crimes to domains in which transnational businesses could be directly responsible: biotechnologies (reproductive cloning) or attacks on common goods of humanity (pollution). In the case of the most serious, criminal law could thus reestablish a balance among nonstate actors, all the more so given that the Statute of Rome reinforces the position of victims before the ICC.

Besides criminal law can be applied, on account of the principle of universal jurisdiction, by national judges that thus "globalized." To the degree that international norms are integrated into internal law,[66] national judges become in effect, by a sort of "functional division," in the sense imagined in premonitory fashion by Georges Scelle in the 1930s, the guardians of international law (regional or global). The conditions vary according to whether their system admits or not the direct applicability, but it is sufficient that the matter refer to their ordinary competence (territorial or personal). More surprising, the "globalization of judges" leads to an extension of their competence to facts having no link to the State (deeds committed abroad, by foreigners, on foreign victims). This universal jurisdiction ought to aim in good logic at the protection of universal values. In reality it is only exceptionally admitted or imposed by international law, and more rarely still applied.

It must have been the emulation come from the creation of the international criminal tribunals so that the judges awakened and, by one of the effects of vicinity discussed above, began to apply the texts that they had up until then ignored. One discovers then that the path of universal jurisdiction would imply not only the clear and precise international bases, but yet a harmonization of one system to another, still broadly utopian at the global level.[67]

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[64] P. Weil, "Des investissements privés internationaux," op. cit., p. 422. [bk p 202]
[65] book p. 201
[66] See the report of the Conseil d'État, *La Norme internationale en droit français*, op. cit.
[67] [book 205] See for ex. *L'Harmonisation des sanction pénales en Europe*, op. cit.

Whence the second path, not alternative but complementary, of mixed jurisdictions created in diverse parts of the world (Kosovo, Sierra Leone, East Timor and more recently Cambodia[68]). Composed in part of national judges and in part by judges from the international community, these jurisdictions bear witness to an effort of imagination in order to find responses to the ineffectiveness of universalist norms. Their extension to developed countries, like the United States, could transform them into ateliers of legal pluralism. At the least it would not serve as a pretext to marginalize the ICC. [book p 215: on the condition that they are not used as instruments by countries hostile to the ICC]

In conclusion, the principal weakness of legal universalism holds to conflicts between the values for which the coherence of the whole would command however the very idea of a global legal order. But the reconciliation can refer neither solely to traditional concepts, nor to obligatory and constraining/binding means of law.

One could try to come back to relativism and to the autonomy of different systems. But, in this time of globalization and of interdependence, the vaunted independence risks leading to a dependence in fact with regard to the legal system of the most powerful country: from pluralist relativism, one slides sometimes toward an imperialist relativism, which tends to confuse itself with an imperial conception of universalism. At least this is the verification at which it would have to proceed the next year in examining the limits of legal relativism in the fact of a globalization in full expansion. After the incompleteness of ideas, the force of things.

In sum, despite appearances, relativism is not realist. Realism would be to call upon the imagining [creative?] forces of law to break out of the impasse. The weaknesses analyzed, whether it is a matter of concepts flous or of ineffective norms, opens perhaps another path to try to construct together a future community of values, making the bet that the flou, the doux and the mou would be like the parapets/ramparts of this complexity. It must perhaps be nourished from the incompleteness of ideas in order not to submit to the force of things.

[68] D. Boyle, "Les Nations Unies et le Cambodge, 1979-2003. Autodétermination, démocratie, justice internationale," thèse, université Paris-I, 9 mars 2004.