Comparative Legal Studies and Internationalization of Law
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Course: The Relative and the Universal[1]

Course: Ordered Pluralism
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What dominates the legal landscape today is the great disorder of a world that is excessively fragmented, even dislocated, by an anarchical globalization, and at the same time very quickly made united, even uniform, by hegemonic integration that occurring simultaneously in the silence of the market and the roar of weapons. To give order to the multiple without reducing it to the identical, to admit pluralism without renouncing a shared law – a shared degee of the just and the unjust – can consequently seem an inaccessible objective, an exercise that is practically vain.

To take the contrary position, to try to overcome the contradiction for the benefit of a conception of the global order that is neither the fusion of diverse systems of law nor their complete separation, is to renounce at the very same time the utopia of unity and the illusion of autonomy. It is to accept a modest vision of law, conceived as a sort of quilt that ties together by the multiple interactions – judicial and normative, spontaneous and imposed, direct and indirect – of the national or international legal ensembles that history had separated and which rejects a fusion which would be synonymous with hegemony.

At this juncture – at the onset of this epistemological mutation, which affects the very notions of legal order and of legal systems – "ordered" pluralism is not to be confused with the pluralism of separation, nor with the pluralism of fusion. Rather, it oscillates from one to the other, in a process of making differences compatible [*une sorte de "mise en compatibilite" des differences*]. It is not a matter of an established order but of the instability that results from the interaction which engenders trends both toward integration and toward disintegration, but also of expansion and of the falling back of one normative level to another, at speeds which vary for each normative ensemble, even within a single ensemble.

The Process of Interaction

The internationalization of law can develop without any pluralism, by the simple extension of a hegemonic system. By its very simplicity, such a process could henceforth seem the most likely hypothesis, when one observes the omnipresence of American law. But the United States, despite its current status as "superpower," is not the only candidate for hegemony and the rivals are already sufficiently numerous that one may dare to put forth the hypothesis of a pluralist internationalization that would privilege, not the extension of a single system but the interactions among different legal ensembles. One finds here a glint of diverse pluralisms.

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

The pluralism of separations does not impose isolation and does not exclude interactions, but it limits them to horizontal processes, without hierarchy, by the interaction of crossed influences, by the intersections one might say to mark the reciprocity of one ensemble to another, of one institution to another, even of one Supreme Court to another. Despite the discontinuities that hold to the autonomy of diverse legal ensembles, what is new is that as situations of interdependence multiply themselves they render isolation impossible and favor multiple interactions. Whatever domain is considered, neither the government of "independent" states, nor the legislatures of "sovereign" parliaments, nor the judges of the "supreme" courts, can entirely ignore the existence of other national, regional, and international legal ensembles: national law is found in some manner defined/determined/surrounded [*cerné*] in every part. The international, regional, and global ensembles do not escape this phenomenon either. Thus, the World Trade Organization is not isolated and integrates for example, certain rules of environmental law. And the most recent debates regarding the reform to come makes one think that the question of the integration of fundamental rights will be more and more openly posed. Their recognition at the level of universal standards could lead the Dispute Settlement Body to impose on member states a social clause and a human rights clause, soon prompting one to imagine interactions between the WTO and the new Human Rights Council proposed as part of the reform of the United Nations, or between the WTO and the International Labor Organization. But these exchanges would remain horizontal because the hierarchy would suppose the recognition of peremptory or *jus cogens* norms still under debate or the utilization of concepts, such as collective global goods or the common goods of humanity, still under discussion.

Failing that, the interactions will continue to develop, even between different normative levels. Thus one sees a multiplication of interactions – "horizontal" because they do not involve the hierarchy – among national jurisdictions such as the Supreme Courts of Canada, South Africa, and the United States, between regional jurisdictions such as the European and inter-American human rights courts, and between global jurisdictions such as the International Court of Justice and the Human Rights Committee charged with monitoring states' compliance with the International Covenant on Civil and Political Rights. One can observe besides an analogous phenomenon in criminal justice matters; that is, the cross-references among national courts such as the British House of Lords, often cited for its groundbreaking decisions on official immunity in the *Pinochet* affairs, the regional human rights courts, and the international criminal tribunals.

In sum, the essential contribution of processes of normative and judicial intersections is to create a dynamic that permits, in certain conditions, the multiple constraints of national and international ensembles, conceived at the outset as different models, to integrate and reconcile. Indispensable at this juncture yet still provisional, intersections favor avoidance of conflicts and help to resolve certain contradictions, but they cannot dispense totally with hierarchy: they prepare the transition in acclimating different legal ensembles to an internormativity that could only become a genuine ordering if there exists a principle of order. The horizontal nature of processes of intersection, weighted down by *jus cogens* or customary norms, ought to find itself thus little by little "verticalized." This neologism suggests a call to a hierarchy that is more or less strict according to whether it imposes an identical law – that is, whether it imposes unification – or it limits itself, loosened by the recognition of a national margin of appreciation, that movement toward compatibility typically called harmonization.

Harmonization: The word conjures musical resonances which happily recall ancient times when law was associated with song and poetry. But the legal domain is not the musical domain and harmonization is not to be confused with harmony. The suffix expresses a movement toward harmony, a desire in movement, which includes already the goal of integration at normative and/or judicial levels, but not yet the composition or the recomposition, which would take, for example, the form of a code, civil or criminal, unified at the regional or even the global level. The intensity of the opposition raised in France by the European Civil Code project, to which was attributed all the vices, and the splendor of the celebrations for the 2004 bicentennial of the French Civil Code, to which were credited all virtues,[1] seems to show the impossibility of a codification of unification, even if limited to Europe. One can surely think that this impossibility is only provisionary, like this "fatal impotence" [*fatalité d'impuissance*] which beset France, between 1789 and 1799, the three versions of the Civil Code drafted by Cambacérès[2]; or even to hope that the nostalgics would in the end console themselves, like the jurists who regretted disappearance of the custom of Vermandois or of such other of some 60 major customs that France counted in that time consoled themselves. But the comparison is only half-convincing because the risks of a European construction and *a fortiori* of a global legal order, by dominating hegemonic are sufficiently real, and the resistance sufficiently argued, to encourage rather the conception of harmonization as an alternative to unification; that is, as a specific process that includes the objective of normative and/or judicial integration, but is limited to an imperfect integration the key to which is the preservation of national margins of appreciation and the instrument the directive principle [– *principe directeur* – an American audience would more likely understand "standard" here, if that is a correct translation] rather than the rule.

There remains to understand how the fluidity of directive principles, opposed to the precision of rules, can favor the formation of a pluralist order. That is, how to overcome the contradiction which seems inherent at two ends: pluralism returns to dispersion, to free movement, although the term of order invites one to think in terms of structure, even of constraint. Taken at face value (*ordo*: the line, the rank), it would force "the entry of pluralism in the rank, the alignment of the elements that it comprises." But the objective of a pluralist harmonization would be, quite to the contrary, to respect diversity while permitting its harmonious expression: "it is a matter of composing a mosaic, which one would not make by throwing diverse elements haphazardly, but by combining them in such a manner that the result is an *ensemble picture*, the most harmonious possible."[3] In other words, the process of harmonization would only be able to guarantee the harmony of legal forms to which it gives birth (the result, thus the formation of an order), across conditions that are both institutional (existence of supervision) and formal (rigor and foreseeability of reasoning) which are rarely reunited, even at the level of a region like Europe. There is therefore something unachieved in this limited process of the rapprochement among legal systems that remain different.

Unification, would it be the best route to internationalization of the law? Although the

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[1] See *Le bicentenaire du code civil, Dalloz*, numéro spécial Apr. 8, 2004; Colloque de la Sorbonne, Mar. 11-12, 2004.
[2] J.L. Halpérin, *L'impossible code civil*, PUF, 1992.
[3] M.L. Izorches in *Marge nationale d'appréciation et internationalisation du droit*, RIDC 2000, p. 753 sq.

normative and judicial intersections are only an entry to the subject, a relation without integration, and although harmonization revealed the complexity and the imperfections of a putting into compatibility that sometimes is synonymous with arbitrariness, unification would be the only process of perfect integration. “Perfect” from a formal point of view, because in ignoring the notion of the national margin of appreciation, and in excluding differences, unification would permit itself to represent the legal order, regional or even global, on a model that is hierarchical and that adheres to traditional national orders. However, this perfection is not guaranteed from an empirical point of view because such a unification implicates such difficulties of implementation that it risks being largely ineffective; and less still from an axiological [“ethical”] point of view because the legitimacy of unification is strongly contested even at the restrained level of Europe. Besides, the notion of unification seems to be the negation of all pluralism: thus, for example, the European Constitutional Treaty does not say how the “union always most narrow” that it announces is linked to the respect for diversity and for pluralism that it is also supposed to guarantee. *A fortiori* at the planetary level, where unification seems rejected almost unanimously. One no longer sees unification henceforth like a distant and unreal utopia, but like a nightmare that one fears contrary to what is realized, on the model imagined by Kant of a global tyranny. The fear is all the more lively that the times have changed since the Age of the Enlightenment and that all think that a unique/single/singular/only law would already be under way, well beyond the regional level, in field as varied as international criminal justice or international contract law.

Yet one must avoid confusing the unique/single/singular/only and the hegemonic. Because the process is sufficiently engaged that one can begin to distinguish, behind the formal appearance of perfect unification, several modes of generating norms for which the signification/meaning/significance is clearly different in terms of pluralism. On the one hand on can observe, particularly in the area of commercial law, but also in other domains such as the cultural domain, a unification by means of the unilateral transplantation from one system to another; which would signify, if the phenomenon must be generalized, not only a risk of hegemonic domination of one system over the others, but also the lack of all diversity, the erasure of history, the forgetting of the inventiveness of peoples.

However unification by hybridization, which European justice system or even, at the global level, international criminal justice, now tries with more or less success, characteristically breaks new ground by crossing different systems, therefore by incorporating elements of the juridical diversity of the world. These forms of justice could, in this sense, be called “pluralist.” But the two metaphors also make one cautious because the transplants are often rejected and the hybrids sometimes sterile. The process of hybridization alone would conform to the hypothesis of an ordered pluralism, but it implicates conditions of elaboration and of supervision which rarely come together. For proof of this, consider the Statute of the International Criminal Court; that is, the difficulties of defining, and then applying, a unified criminal procedure within the Rome Statute. Especially when the international court is only subsidiary to a national judicial system – as is the case with the complementarity principle underlying the Rome Statute – marking thus the link between the process of interaction and the levels of organization.

Levels of Organization

The very notion of internationalization evokes a change of levels of organization (from the national level to the international or supranational level), but this movement of expansion is revealed to be as disordered as that of integration. Should they expand in a manner that is premature, ill-prepared or lacking in control, international organizations can in fact provoke a backlash, a foretaste of which we have now with the debate about Europe.

The difficulty is in effect that passage from processes of interaction to veritable organizations requires a minimum of stabilization that is not given in advance: "ensembles of events, even if they are interconnected, do not pass easily from a jumble/cluster to an organization."[4] This formula applies as well to juridical events. Even though linked together by the processes of interaction previously studied, the jumble/cluster, normative and judicial, is not easily transformed into organizations sufficiently autonomous and stable to constitute a legal order. "Order" remains identified with the level of the State, and legal organization is essentially situated at the national level.

Before leading to an order, the processes of interaction in effect draw new figures which break ancient habits and demand establishment of new habits. It is without doubt not by chance if the usage of the term "space" ("area" in English) understood not only in a geographic, but also in a functional, even structural sense: "European legal space/area," to designate the rules of cooperation and of harmonization common to all the member states of the European Union; "Schengen area/space" or "Euro space/area" for the rules applicable to some of them; then "space/area of liberty, security, and justice" to regroup instruments combining cooperation and harmonization in the criminal justice field. And the use of the term is not limited to Europe. It has begun to be used as well for other regions, and even at the planetary level of expressions such as "the Kyoto space/area," to designate the program that completes the Rio Convention on Climatic Changes in imposing a partial harmonization of rules regarding" greenhouse gases.

But the "normative spaces/areas," negotiated by states not eager to abandon their sovereignty, does not implicate, or does so in a very incomplete fashion, the creation of executive, legislative, and judicial institutions which would stabilize the whole/ensemble. That is to say the importance of "levels" of organization which commands a progressive, normative and institutional stabilization, and which favors the eventual transformation of a space in a legal order by an institutional and normative autonomization which detaches them from member states. But this transformation is not forming in a linear fashion, from the national level to the international or regional level, and then to the global level. It separates human rights from the market and opposes several models of economic integration. In the end the chronology varies: sometimes the regional organization gets ahead of globalization, as an "experimental laboratory"; sometimes it occurs in reaction, to try to change the direction or only the speed (by an accelerating, or conversely in a braking, effect).

At the regional level, autonomization would call for a neutralization of balances of power/upperhandedness and a reinforcement of factors of cohesion which alone make possible veritable itineraries of convergence, but traced to them is not always discussed in a timely

[4] D. Andler, A. Fagot-Largeault, B. Saint-Sernin, "La causalité," in *Philosophie des sciences*, vol. 2, Gallimard, 2002, p. 920.

fashion. To return to the example of Europe, on of the misunderstandings raised by the European Constitutional Treaty [Treaty] holds in fact that the principal bifurcations had been taken before consulting European citizens, notably during the successive enlargements. These enlargements were imposed by the Nice Treaty, for which it must not be forgotten that it poses, with earlier treaties, the framework, if not "constitutional," at least "institutional," of the European Union, neither more nor less difficult to modify than the future Treaty. Even if one can think that on certain points the treaty improves this framework, that it is a matter of the organization of powers (first part) or certain dispositions integrating the earlier treaties (third part), the problem is that the formula of the *referendum*, which permits only one binary response, is particularly ill-adapted to the complexity of the questions raised.

In reality only the adoption of the Charter of Fundamental Rights, precisely because these rights are indivisible, could make usefully the object of a block agreement or a block rejection. For lack of a preliminary declaration of interdependence, which would have expressed the *raisons d'être* for the creation of the European Union, from its extension by the successive enlargements and of its deepening, the question of the insertion of the Charter into the legal framework of the European Union being the only question heard. It is true that is a major question. What is at stake is less to define the content of each of these rights, for which the scope will depend in part on the circumstances to which they will be applied, as it is to mark at the regional level the appearance of a genuine legal order for which the coherence, if not the stability, is for the first time inscribed in a treaty. Between the two poles of the market and of human rights, reunified around six chapters that link economic, social and cultural rights to civil and political rights, the treaty draws in effect, in the place of a simple "normative space" built around a market without interior borders, a "legal order." This order is not entirely autonomous – because it is added on top of national legal orders that are not about to disappear – but it presents a coherence of the whole. Up to now, despite the expression of "community system," [l'ordre communautaire] the law of the communities and of the European Union does not have proper coherence, fragmentation being besides underlined by the repartition of issues according to the three pillars created by the Maastricht Treaty. However, the adoption of the Charter of Fundamental Rights will commit to law the bipolarity in fact (market/human rights) which is instituted by interchanges between the two European courts; and the program will yet be reinforced by the planned adhesion of the European Union to the European Convention on Human Rights. In itself the advent of this bipolar legal order would have been a "first" in the international arena!

At the global level, the paradox is that in 60 years, since the Charter of San Francisco creating the Organization of the United Nations, the project of a global legal order has deepened and at the same time faded. The project has grown deeper with the adoption of legal instruments in domains as diverse as human rights, commercial law, health law, and environmental law. But it has faded as well, since these legal instruments are fragmented by the vagaries of the national (and sometimes regional) strategies of States, or by the transnational strategies of business. Globalization (in the broad sense including at the same time economic globalization and the universalism of human rights) is not therefore associated with a global law already established, for which one could describe the components, but with the transformation of the legal landscape by the growing diversification of a law that, though organized in a plural fashion, is rarely

pluralist. This transformation seems to have favored at the same time a fragmentation that disperses the project of global order around scattered objects, a privatization that blurs the common project for the benefit of private interests, and, unexpectedly, a movement of criminalization a criminal law globalizes, without affirming its coherence around common values. Thus globalization, "uniformization at/by the bottom" is distinguished from worldliness ["mondialité"],to borrow the apt formula of Édouard Glissant, defined as "the striking adventure without precedent that is given to us to live in a world that, for the first time and so genuinely and so immediately, at once multiple and singular, and inextricable."[5]

The adventure is in fact without precedent, because the movement of expansion comprehends a change not just of degree, but also of kind. Extending across the whole planet, it leads to inclusion without exclusion, to a normative organization without external enemy, at least without a humanly identifiable enemy, except for us to consider ourselves as our own enemy, and so to the catastrophes, natural or otherwise, that we help to unleash. The terrorist attacks underlined besides the specificity of global terrorism: it tends to turn the planet into a common space so that one can neither hold the enemy outside (as in the case of a foreign war), nor identify within (as in the case of civil war). This poses the formidable problem of an invisible enemy, spread everywhere without being able to be pinpointed in any particular place. More broadly still, it is difficult to conceive of a common space that has no exterior.[6] That it is a matter of crimes, of risks or of economic and financial flows [flux], even of the flow of information on the Internet, the interdependences, by multiplying intergovernmental agreements, tend to weaken the autonomy of nation-states to the profit of a model that is more authoritarian than democratic. It would call for this "interior global policy" of which Jurgen Habermas has demonstrated both the necessity and the urgency,[7] but which, as a practical matter, has yet to be invented.

Despire the discontinuities existing among national, regional, and international organizations, one can put forward the hypothesis of a progressive integration according to the model described by Pascal Lamy as "*La démocratie-monde*" – the democratic world.[8] Even while observing that regionalism is not natural and that "geography does not make history," Lamy nonetheless underscores that regional constructions could constitute a first step toward what he calls an *alternational* democracy. He notes in effect that regional constructions "constitute much of reusable materials on the global scene; the convergences among members to which these constructions lead make clear positions held in common; these regional ensembles are a first place of synthesis where is made an apprenticeship of a first confrontation of collective preferences, of a putting to the test of common choices, of a practice of compromise, of a reduction of mistrust." The position thus will be clarified and consolidated at the moment of participation in the discussion of global questions.

It must still be that convergences exist, that common positions can be expressed in a single voice and that collective preferences reflect common choices. Put another way, it must take into account the status of the regional organization at the global level; that is, of the role of

[5] E. Glissant, *La cohée du Lamentin*, Gallimard, 2005, p. 15.
[6] M. Morvan, Séminaire du Groupe COMP-LEX, Action « Droit et systèmes complexes » (Université Paris 2 et Montpellier, Ecole polytechnique, ENS Lyon), 7 avril 2005.
[7] J. Habermas, *Une époque de transitions, Ecrits politiques 1998-2003*, Fayard, 2005, pp. 124 et 163.
[8] P. Lamy, *La démocratie-monde, Pour une autre gouvernance globale*, La Bibliothèque des idées, Seuil, 2004, pp. 69-70.

the sovereignty that the members states delegate to it in global negotiations. To be useful on the global scene, the regional organization must be represented, as, for example, the European Community is represented by its commerce commissioner at the WTO. But situations are very different from one region to another, and there is sometimes strong reluctance to consent such a delegation in the name of a solidarity that not every regional organization is ready to accept.

From this comes the call for transversal categories, such as peremptory norms (*jus cogens*) or the global collective goods, which would express, for lack of agreement on the indivisibility of human rights, the recognition of a common global interest. But to the degree that expansion (enlargement) accompanies integration (deepening), at the global level as at the regional level, rhythms diversify and changes in speed create other disorders.

Speeds of Evolution

Normatives spaces to normative times, the passage of levels of organization to speeds of evolution seems in fact inevitable, since one of the principal traits of processes of internationalization of law is their evolutive character. This study of ordered pluralism thus tends to favor a sort of legal kinetics, related to energy and movement: energy produced by the divers processes of implementation and their variations according to the levels of organization, and movements, characterized by directions and speeds.

Continuous or not, changes in direction are associated with the succcession – concordance or discordance of time – among the past, the present, and the future.[9] But in addition to the chronology and the changes of direction already observed, I would introduce the question, apparently unusual [*insolite*] of speeds. "Speed is power itself," Paul Virillo has writes,[10] adding that "every society is a society in progress." [*société de course*]

It is, in fact, to the currents [*courses* – progress? rates?] of speed that we attend, among the national and international normative groupings, even among such and such sector of regional or global law. Because the rhythms participate in the adjustments and readjustments of the legal assemblage ["*bricolage*"] which is already in place. One remains in search, not of lost time, but of an apt time – *kairos* in Greek – for adjustment toward more justice and more reasoning, in the literal sense of a mixture. Ordered pluralism is also the art of mixing rhythms and of combining to the more just – here still of adjusting – speeds to energies, and to inertias, appropriate to each society. Just as the global normative space has not suppressed the national space, nor prevented the appearance of regional groupings, the global time has not suppressed historical time, neither that of States nor that of regions.

Too slowly, evolution gets bogged down and, in losing its course, the grouping concerned loses its normative autonomy: thus it is that sinking of the European project runs the risk of leading to the transfer of a part of the choices to the global level. But too rapidly, evolution creates distortion, not only in terms of concurrence on a very market, but more gravely in terms of separation among the diverse sectors of human and social activity. Commercial law would not

[9] F. Ost, *Le temps du droit*, éd. Odile Jacob, 1999.
[10] P. Virillo, Conversation avec Philippe Petit, Textuel, 1999.

be known durably [?] to distance environmental law, health law, or human rights law, without destroying the equilibrium of the whole. Wisdom is also described as "temperance," [moderation] and it is this art of combining different rhythms into one common harmony that I would evoke here in pointing out the principal legal instruments that permit application of brakes or acceleration on evolutions and transformations. To find those brakes and accelerators that are best adapted to our societies would be the wisdom of good government and is not happenstance if Temperance/Moderation finds itself seated beside Justice in Siena's Allegory of *Palazzo Publico*.

In sum, the contemporary period is not only characterized by an acceleration of legal time, nor by the strange couple/duality associating virtual space and route in real time. The major phenomenon holds perhaps to discrepancies in speeds from one space to the other. As much as the law resists internationalization, these discrepancies take part in the very diversity of peoples and of their systems of law, but to the degree that these interdependencies in fact impose ever greater normative and jurisdictional interactions, these discrepancies have perverse results, the realization of which ought to condition each placement in order or in compatibility: from asynchrony (different spaces, different speeds) to polychrony (one space, many speeds), it will be a matter each time of looking for the tools of a pluralist synchronization.

Asynchrony is characterized by contrasting rhythms – the persistent slowness in the area of human rights versus the neat acceleration in the area of commerce since the creation of the WTO in 1994. If States have accepted this change in speed, from GATT to the WTO, it is without doubt for reasons at once economic, political and legal that the end of the Cold War had liberated it in some sort. From an economic point of view, the stabilization of international commerce would permit the States more efficient management, thus lowering the "transaction costs" and facilitating strategies of reciprocity which make treatment of new problems easier. Politically, the process at the base of negotiations to the opportunity/occasion of trade rounds, protects a partially diplomatic nature which leads to a network of accords, by addition and superimposition/stacking of instruments that are distinct yet interdependent (practical and interrelated ["technique et millefeuille"] Besides, the program/project does not oppose States against private economic actors, for whom the interest are most often convergent, to such a point that the State appears sometimes as their spokesperson. As a result such a program/project is better tolerated than those human rights by which States are confronted directly by victims, in the name of superior principles universal in nature, posed as overarching. Thus one would comprehend that the discrepancy with human rights grows bigger.

And yet the phenomenon does not seem unavoidable. If one looks at what is happening at the regional level, particularly in Europe, the race seems to be run differently and the contours of speed are as if inverted, the example leading to propose the notion of linkage/connection/tying ["articulation"] as a condition of synchronization. In leaving "the game" in the implementation of normative integration, good linkages would facilitate changes of speed and synchronization, while bad ones would block all movement. But which kind of linkage is it?

A linkage of powers, first of all, among the political, the legal, and the economic. The comparison which precedes shows that in Europe there is one connection supple enough among

political, legal and economic powers that had permitted to avoid, up till now, blockage. Even if the future of human rights in the European Union remains uncertain (only the entry into force of the Constitutional Treaty would give legal effect to the Charter), it remains the fact of synchronization holding to a bipolar legal construction rendered possible by political and economic choices that coincide in part with normative spaces (all the European Union members having adhered to the European Convention on Human Rights).

At first glance the experience seems to demonstrate that such a linkage cannot function at the global level because the coincidence of normative spaces (market space, human rights space), which eased legal integration in Europe, seems totally nonexistent. It suffices to convince one of this to compare the eagerness of States to join the reticence of States with respect to the International Covenants and other international instruments for the protection of human rights, including the Treaty Establishing the International Criminal Court.

However these resistances are weakened if one takes into account the linkage of the economic and the legal. Thus the accession of China to the WTO, on Dec. 11, 2001, unleashed in that country a wave of reforms which is not limited to matters of business (corporate law, contract law, intellectual property, insurance, antitrust, foreign commerce ...), but is also situated in the perspective of general principles, imposed by the Protocol of Accession, such as transparency, uniform application of the laws or the effective oversight of administrative acts. Entry into WTO thus could contribute to the construction of a State governed by the rule of law and, in this sense, could take part in an indirect synchronization between commercial and human rights law.

This indirect effect obviously can be reinforced if normative integration is accompanied, in China and elsewhere, by an "awakening" on the part of national judges, who learn to use the new instruments from the international sphere.[11] At the same time appears the significance of a second type of linkage, between different levels of normative organization. On several occasions, although the situation seemed blocked at the global level, the dynamic was relaunched at the national, regional, or even inter-regional level. Thus with the matter of corruption, as with climate change, the linkage between the regional organization – and sometimes within the nation (despite the refusal of the United States several states within that country have introduced limitations on emissions of GES [gazes]) have contributed, in avoiding blockage, to an indirect synchronization at the global plane.

Besides the processes of interaction by cross-currents of norms and the dialogue among judges, evoked above, in creating a sort of permeability among different normative spaces, should permit in the end a more direct synchronization, accompanying the autonomization of national and international oversight mechanisms. It would suffice that judges learn to integrate into their legal reasoning different normative spaces, therefore to practice internormativity (among the Accords of commerce and the projects of the WTO, of environmental law, even of human rights law).

But the attempt could then be to claim to impose the same rhythm on all States. Whence

[11] J. Allard et A. Garapon, *Les juges dans la mondialisation, La République des idées, Seuil,* 2005.

the hypothesis, which remains to be verified, that to remain pluralist, every synchronization should preserve a national *tempo*; that is, a national margin in time and not only in space. In other words, the hypothesis that the synchronization could lead to acceptance of a certain polychrony.

Polychrony: Unusual in the legal arena, the term expresses the idea of a differentiation in the time, an admission that projects of normative integration could transform themselves at different speeds in the same space. It is thus that one evokes sometimes the notion of Europe "at several speeds" as the means to relaunch the process of internationalization and thus to avoid, according to the formula envisaged by former German Chancellor Helmut Kohl, that "the slowest wagon dictates the speed of the entire convoy"; even perhaps to avoid the complete blockage of the convey, if the formula should permit to one group of wagons to redeploy only after a stop, as that which would mark the failure of the ratification of the Constitutional Treaty in certain countries.

But the current reality in Europe must not hide the existence of analogous phenomena at the global level, the objective being, somewhat conversely, to take into account the heterogeneity of national and regional situations in order not to impose on a State a rhythm that it could not follow. Such is, for example, the basis of the principle of "common but differentiated responsibility," inscribed in Article 3 of the framework-convention of the United Nations respecting climactic changes and implemented by the Kyoto Protocol, which distributes States in several categories according to their level of development.

In sum, the differentiation of involvement/engagement in time would be a means to reconcile in the legal field expansion (a normative space that enlarges), and integration (a normative order that deepens).

Yet to be acknowledged is the diversity of projects that do not always clearly separate the differentiation of normative time from other forms of differentiation: at several speeds (*multi-speed*), at variable geometry (*variable geometry*), and à la carte (*pick and choose*). Among these three categories a gradation is apparent, according to which it is a matter of favoring a principally national conception or of accompanying a process of integration able to go from the inter-national to the supra-national. The "à la carte" method is the one most weakly integrated, because it permits each State to choose in discretionary fashion the measures that suit it and thus to remain in an intergovernmental relationship, international in the traditional sense of the term (the *Thatcher* method); that of variable geometry (horizontal or vertical project) is situated in a more open perspective which, according to the intensity of integration of the program, can favor passage from the inter-national to the supra-national sphere (the *Delors* method); and finally the multi-speed method seems more constraining if the rules for integration are fixed in advance at the supranational level, only the rhythms (speeds of integration) being varied (the *Willy Brandt* method, later espoused by *Joschka Fisher*).

In practice, these categories are often mixed together. Thus in Europe, the differentiations that have arisen with regard to the Schengen Accords combine variable geometry and multiple speeds. They will then be enshrined by the Amsterdam and Nice treaties, then the Constitutional Treaty, under the name of "reinforced cooperation," first in the singular (Amsterdam Treaty),

then in the plural (Nice and Constitutional treaties), as if European lawmakers themselves were hesitating among the diverse possible conceptions. However, at the global level, the project created by the convention – framework for climactic changes and the Kyoto Protocol set forth in advance the rules of GES and partially determine the speeds of integration for each category of State.

If the diversity (political, cultural and economic) observable among the different parts of the world justifies without doubt the extension, and the diversification, of these practices at several speeds that I propose to name "polychrony," that same diversity would make necessary, in order to avoid negative consequences/spinoffs [? "dérives"] a new type of legal framing/supervision/structure/construction, ["encadrement"] because examination of these practices shows that this diversity can also lead to disorder and to arbitrariness if the "multispeed" formula becomes synonymous with an "à la carte" conception. To avoid these perverse effects the legal structure should doubtless extend simultaneously to the conditions of capacitation [? – "habilitation"] and to effects in the future ["anticipation"].

It remains that, should it be necessary, work in normative time (at several speeds), cannot be isolated from a reflection of the order (at variable geometry) and space (at several levels). This is without doubt the condition if polychrony is to favor a pluralist synchronization of several legal systems. However, even if the practices are sometimes mixed together, the movements remain dissociated among the processes of interaction, the levels of organization and the speeds of evolution. "To order pluralism," therefore, would consist of moving from this dissociation toward correlations, therefore to mark the legal programs which could assure, in the presence of chaotic movements (integration/disintegration; internationalization/re-nationalization; synchronization/desynchronization), a pluralist equilibration that could announce the transformation of the very concept of legal order.

To order the clouds?

In conclusion, to study the internationalization of the law as a movement, and to privilege the processes of implementation, the levels of organization and the speeds of transformation rather than figures and models, risks putting in question the very concept of a legal order – even of destroying the basic intuition that there exists a "legal order" and that it resists the internationalization – as well, to be sure, the globalization – of the law. A means to follow once more Bachelard: "intuitions are useful: they serve to be destroyed."[12] But let us not forget that his *Philosophie du non* does not entail a will to negation: "it does not matter what, it does not matter when, it does not matter how, it denies," but its purpose rather is to include, or to envelop, that which it denies: "thus non-Euclidean geometry envelops Euclidean geometry, non-Newtonian mechanics envelops Newtonian mechanics, and wave mechanics envelops quantum mechanics."[13]

One might think that the "modern," or Euclidean, vision of the legal order, identified to the State and represented by a system of norms and institutions at once hierarchical, territorial,

[12] G. Bachelard, *La philosophie du non*, Presses Universitaires France, 8th ed., 1981, p. 139.
[13] *Id.* at 137.

and synchronized, is henceforth enveloped by a conception called "postmodern," or non-Euclidean. With the proliferation, the diversification and the dispersion of sources, the monopoly of the State across its principal figures is in effect called into question anew: the State-as-center is under attack by the decentralization of sources, the State-as-public-sphere by privatization. Finally, and especially, the State-as-nation, expressing the sovereignty of a community made of intertwined interests and identical aspirations, is threatened by the internationalization of the law. Not only is "the State no longer the only captain on board,"[14] but the concepts of order (On), of space (En), and of normative time (Tn) begin themselves to escape and one comes to wonder if there even is a captain on board, and if so, who it may be.

The course permits demonstration that each of these three axes possesses a dynamic potential, a putting into movement, but also that their dissociation produces movements that appear contradictory, nonlinear and disordered: as with clouds on a windy day, the new legal groupings seem to lose shape as soon as they take shape, even before one is able to draw their contours.

To move from disorder to order – to "order the clouds" – there must be enough strong correlations to make legal groupings in formation a little more stable and a little more durable. These two adjectives do not necessarily express the same idea, because an excessive stability can impede "durability." On the side of traditional instruments of stabilization by the hierarchy of norms and institutions, we have encountered other programs, sometimes called "regulatory concepts," ["concepts régulateurs"] which contribute less to stabilization than to equilibration of these legal groupings, and perhaps thus to rendering them more durables: subsidiarity or complementarity, the reinforced cooperation or differentiated responsibilities of the Kyoto Protocol, it is always a matter of facilitating adjustments between the internal level and the international, regional or global level. But such concepts also call for new techniques, like the national margin of appreciation and its indicators of variability, precisely in order to regulate the variability in space (a grouping with variable geometry) and in time (a multispeed grouping) and thus to permit the implementation of mechanisms for evaluation and supervision. Adjustments and readjustments, regulation, then evaluation and supervision, such will be the conditions of a pluralist equilibration.

It remains to be seen what the "country of ordered clouds" will look like. The omnipresence of hegemonic practices, imposing legal transplantations that are scarcely pluralist, and the increase in power of practices said to be ultraliberal [in the sense of economic liberalism], juxtaposed with autonomous systems supposed to be self-regulating, does not seem a successful means to solve the puzzle of the One and the Many. And the third hypothesis, that of an ordered pluralism, would call for a transformation in the legal order as it is now understood – a "*trans*-formation" in the literal sense of the term because it is a matter of "crossing" in our understanding of the legal order from a model that is simple to one that is complex, or even hypercomplex.

But the principal choices remain in the political domain, because the modeling of the legal order does not give the key to draw out the dialectic of one model or the other. Reason, Bachelard would say, "must obey science." If in fact science tends to describe what is, reason is

[14] J. Chevallier, *L'Etat post-moderne*, 2d ed., LGDJ 2004, p. 2005.

at its service; however, law is "normative," it says that it must be and therefore calls to the will, even to the will to will. ["volonté, voire au volontarisme"] It is thus that, in the great founding texts, legal reason seems sometimes to disobey observed reality, as if to protest against that reality, for example by proclaiming, contrary to every observable reality, that all human beings are born free and equal in rights. Between the descriptive and the normative, there is thus a discontinuity which can only be overcome by a leap into the unknown, by a wager on the future, an attempt to abolish the danger.

Put otherwise, the *trans*-formation of the national order into a legal order that is regional, or *a fortiori* global, because it entails such a wager, neither can be left only to jurists, nor enclosed within the law: precisely because this transformation calls for will, it supposes a return to the political sphere. Thus one begins to divine the path to be followed. To avoid a situation in which movements of the internationalization of law, freed to the winds, remain totally disordered, unforeseeable, and uncontrollable, one yet must reintroduce the actors (the 2005 seminar) and study a new foundation of powers (2006 course).

Seminar: "Actors and Methods of a Pluralist Internationalization"

The processes of internationalization studied in the course entailed – besides the apparent diversity among commercial law, human rights, and penal law – changes already observable yet for which the results do not yet drawn a stabilized model: between disorder and hegemonic order, the path of an "ordered pluralism" remains uncertain. Whence the hypothesis that the emergence of a pluralist global order, calling for a renewal of methods, reinforces the role of receivers of the norm (that is, judges, lawyers, and prosecutors).

Invited to evoke their experience with the internationalization of the law (broadcast on France Culture in October 2005), several prominent actors on the global scene[15] marked the importance of interactions among the national and the international (regional or global) levels. Stephen Breyer made clear that as for the U.S. Supreme Court, it is a matter of nonhierarchical interactions, or nonbinding rules; or at least, according to Guy Canivet, of realizing the multiplicity of linkages between national and international jurisdictions and the variety of vectors and circulation of the law. On the side of the international courses, their colleagues underlined that the site of a supple harmonization supposing either national margins of appreciation, evoked by Françoise Tulkens for the European Court of Human Rights, or a conception of justice that combines, according to ICC Prosecutor Luis Moreno Ocampo, national and supranational

[15] Principal participants were: Guy Canivet, chief President of the *Cour de cassation* (*Influences croisées entre juridictions nationales et internationales*); Luis Moreno Ocampo, Prosecutor for the International Criminal Court (*La CPI – du statut à sa mise en œuvre*); Pascal Lamy, Director General of the World Trade Organization (*L'intégration juridique européenne dans le contexte mondial*); Robert Guillaumond, attorney at the firm of Adamas Asia and Adamas France (*La réforme du droit chinois et la globalisation économique*); Françoise Tulkens, Judge of the European Court of Human Rights (*L'usage de la marge nationale d'appréciation par la Cour européenne des droits de l'homme*); Stephen Breyer, Associate Justice of the United States Supreme Court (*La place des normes étrangères dans la jurisprudence constitutionnelle des Etats-Unis*); Pierre-Marie Dupuy, Professor at the European University Institute in Florence (*Unité de l'ordre juridique et/ou pluralisme de l'espace juridique mondial*). Discussants included: Lu Jianping, Professor at the People's University in Beijing; Stafano Manacorda, Professor at the University of Naples; Marie-Laure Izorche, Professor at the University of Montpellier 1; and Alain Pellet, Professor of the University of Paris 10-Nanterre.

interests. All of them were nonetheless aware of the risk of arbitrariness in the choice of criteria that command interactions and determine the scope of national margins. This more supple conception of the rule of law, not totally written in advance but elaborated by the actors as a whole, would call in fact for an increase in transparency and in rigor: “there must be logic for coherence and therefore foreseeability and yet fluidity for cohesion, suppleness, respect for diversity. ... But it must no longer be that the system is unconnected, that the suppleness becomes softness,” commented Marie-Laure Izorche.

Which brings us back to the interface between law and politics, to the role of actors and to the observation of diversity, even to the incompatibility of conceptions among persons from Europe, the United States, and China. Although Pascal Lamy acknowledged for Europe “the proper force of law outside of States” and the judicialization of international relations, Justice Breyer insisted to the contrary on the limits on the powers of the judge, a tacit admission of the judicialization of social relations within the United States a refusal to allow a similar judicialization outside, with regard to international relations, except by extension (extraterritoriality) of American law. Finally the Chinese conception was summarized by Lu Jianping as a separating of three globalizations: “yes” to economic globalization, “no” to political globalization and “perhaps” to a legal globalization limited to the commercial sphere.

If experiments conducted in the “European laboratory” demonstrate that the construction of a pluralist legal order is possible when it coexists with political will, shared concepts and “institutional machinery,” the current crisis shows as well that law cannot isolate itself from politics. And nothing guarantees that this regional experiment will be transposable to the global level, as Pierre-Marie Dupuy showed, underscoring, from international to global law, the difficulties of passage from the plurality of international legal orders to the unity of a future global order.