Jean-Sylvestre Bergé · Sophie Harnay
Ulrike Mayrhofer · Lionel Obadia *Editors*

Global Phenomena and Social Sciences

An Interdisciplinary and Comparative Approach

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Foreword

Trying to understand globalization from the standpoint of social sciences means trying to understand the connections between phenomena happening simultaneously in different parts of the world, be it the operations of a global business enterprise with a value chain that extends to all five inhabited continents, or the effects of climate change in the work and life patterns of numerous populations, or the policy and practice of world institutions trying to regulate war and mediate between opposing parties in a conflict, or the circulation of culture, technological innovation, and ideas.

Such global phenomena do not happen in a conceptual vacuum and are not beyond the reach of regulators. In the past forty years, social sciences research has accompanied the various aspects of this globalization, trying to understand and explain them, as well as provide conceptual tools for their effective regulation through policy and practice.

As a result, a two world wars in the first half of the twentieth century, the newly formed United Nations adopted a "global" framework for the regulation of all human behavior on the planet: the Universal Declaration of Human Rights of 1948. This framework has considerably developed since then, as wars and conflicts, decolonization, technological innovation, and changing social perceptions pushed the limits of what was initially considered the realm of human rights.

The drafters of UDHR had never really considered same-sex marriage, genetic manipulation, climate change, or drone assassinations, yet the framework has endured. The human rights doctrine has proven its resilience through multiple developments and adaptations to new situations. It has been developed both at the international level, through the adoption of new multilateral or regional normative frameworks, and at the domestic level, through constitutional and legislative standards as well as a very rich case law produced by independent and competent courts and tribunals in many countries, often against the will of the Executive or even that of the majority of the population.

The central tenet of this doctrine is the necessity for all actors of the social sphere—international and regional organizations, all branches of governments, local authorities, private actors, civil society organizations, individuals … —to

absolutely respect the human dignity of every individual involved, regardless of status and circumstances. This has become the ultimate legitimacy test for any public policy.

It has become clear that majority rule cannot be the alpha and omega of politics and law. Contemporary democracies are nowadays founded on three pillars: political representation, human rights, and the rule of law, which means legal accountability for violations of the first two pillars at the request of anyone. This triptych is based on the principle which is at the root of all human rights, Immanuel Kant's categorical imperative: "Never treat the other only as a means, but always also as an end."[1] This is one definition of dignity.

At the domestic level, the protection of the human rights of all has often become a constitutional and therefore supra-legislative principle, deemed superior to parliamentary sovereignty. Indeed, the lesson from the 1930s is that majorities can be wrong and that the "will of the people" cannot ultimately be implemented at the expense of the dignity of even a single individual. Courts have generally been entrusted with the role of telling the Executive and Legislature the limits of their power, even in spite of electoral support.

At the universal level, the principle of human rights has been placed next to the more ancient territorial sovereignty principle which has defined the international stage since the Renaissance. They now constitute the two fundamental paradigms of international law. But they haven't been hierarchized and the actors of the international stage—States as the main actors, but increasingly also other actors, such as intergovernmental institutions, international financial institutions, international courts and tribunals, arbitration bodies, international NGOs, global private actors … —constantly need to judge how both principles can be simultaneously respected, one not being allowed to legitimately prevail over the other unless very specific circumstances are met as justification.

This human rights framework is constantly challenged, often forgotten, frequently sidelined, and it has evolved in fits and starts over the past decades. But it is never denied as being key to our collective survival on this planet.

The human rights lens is certainly not the only lens through which to analyze global phenomena, and multidisciplinarity is essential to an in-depth understanding of their sometimes terrifying complexity. But it is always relevant in order to decide how to regulate the human activities that cause or respond to such phenomena.

Climate change cannot be tackled through mitigation and adaptation measures without such measures being evaluated according to their human rights consequences. Most typically, discrimination against the most vulnerable and marginalized parts of the population will be at stake, and a human rights analysis helps determining how to reduce such violation of their rights while ensuring the success of our collective responses to climate change.

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[1] "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end" (Immanuel Kant (1993) [1785] *Grounding for the Metaphysics of Morals*. Translated by JW Ellington, 3rd edn, Hackett, Cambridge (MA), p. 30).

Similarly, the United Nations Guiding Principles on Business and Human Rights have been established to help business enterprises and governments to regulate the conduct of business actors in ways that are respectful of the individuals affected by such conduct, wherever they may be.

Ex ante human rights impact assessments and ex post human rights monitoring and evaluation processes are more and more practiced in order to determine the ongoing legitimacy of social policies, security decisions, environmental protection frameworks, business practices, and many other measures which impact individuals, whomever is responsible for their adoption or implementation.

Every human life is an individual trajectory, crisscrossing social spaces and interacting with other individuals. It is essential to remind ourselves constantly that there is no human activity that isn't affecting individuals, and especially the most marginalized and vulnerable, and that the fate of the latter must be a permanent preoccupation in the regulation of the former. This human rights framework was "universal" in 1948: it has remained "globally" relevant in the twenty-first century.

Understanding global phenomena, deconstructing the changes in the power relationships that cause such phenomena or that they engender, analyzing the social impacts of their developments, and building theoretical frameworks to explain their dynamics and consequences are essential to provide policy makers and citizens with the tools necessary to ensure that our collective response to such global phenomena is one that protects and enhances human dignity.

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Introduction

This collective work stands at the intersection of five disciplines: political science, management, economics, anthropology, and law.

It is also the result of an international exchange between academics from different countries and cities: United Kingdom, United States, Brazil, France (Lyon, Paris, Nancy).

The aim of this work is to establish a bridge between global phenomena and the way they are viewed and understood by different social and human science disciplines. This objective is not new. Previous works, particularly in French, demonstrate this desire to examine such phenomena from a range of perspectives: see, for example, Crépeau F and Thérien JP (eds) (2007) Penser l'international: Perspectives et Contributions des Sciences sociales. Les Presses de l'Université de Montreal, Montreal. See also Wieviorka M et al. (eds) (2015) Penser Global: Internationalisation et Globalisation des sciences humaines et sociales. Maison des sciences de l'homme, Paris. Nevertheless, the authors of this collective work considered it essential to explore it for themselves.

The issue is not straightforward. The question given to the authors of the contributions was this: from an epistemological point of view, is the global phenomenon capable of transforming our disciplines?

The answer is not simple or singular and three main variables must be taken into consideration.

First, one can imagine that analysis would differ widely from one discipline to another, depending on whether the global phenomenon is an already established reality for the discipline concerned.

Second, the answer would vary greatly depending on the global phenomenon concerned. Within the same discipline, analysis could be very different as per the phenomenon studied.

Finally, in dealing with such a subject, one cannot limit oneself to a single geographical and cultural area. Even with respect to the same discipline and the same phenomenon, the context in which the analysis is carried out could lead to high divergence.

Beyond this diversity, the common thread uniting the various approaches of the human and social sciences to global phenomena lies in the researchers building pathways between their disciplines when considering a reality that is *a priori* external to them. The disciplines' appropriation of this "otherness" is undoubtedly one of the most consistent methods for taking a critical look at the way in which they are constructed.

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Part I
Political Science

War and Globalization: Understanding the Linkages

Frédéric Ramel

Abstract Major wars between great powers like the two World Wars and the Cold War during the twentieth century, participated to the second globalization process. But dealing with the relations between globalization and war must not be reduced to warfare as an independent variable. For more than two decades, International Relations (IR) scholars have focused on the transformation of war as a result from globalization. The dynamic shrinking of distance on a large scale caused some effects on warfare, on war but also on models and tools in order to understand these dimensions of strategy. What are the effects of globalization on the transformation of war debate? To what extent some new approaches aim at producing an epistemic revolution? This chapter introduces the classic debate between realisms and liberalisms concerning these links between globalization of war. This debate does not change the epistemic beliefs that lead the academic field in IR contrary to the new wars debate initiated by post-clausewitzian approaches that aims at dissolving the modern distinctions: war and peace, combatant and non-combatant, politics and crime. The chapter ends with a third perspective that describes the impacts of globalization—defined as the development of interdependencies at different levels—on the capacity interaction. In this last perspective, globalization is both a context and an opportunity for actors in order to make war …. but also peace. By coming back to Political theory, analysis of war today shows the emergence of a 'global state of war'.

Introduction

World is getting smaller. Development of technology in transportation or communication does not explain exclusively this process. Merchants, explorers and religions have been some driving forces that tend to integrate societies through History (Gopinath 2008). But this process results also from military conquest and wars.

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In twentieth century, major wars between great powers like the two World Wars and the Cold War, were a variable of globalization because 'armies were dispatched far from home and soldiers and warriors interacted with those politically and culturally different' (Mansbach and Rhodes 2012, 103). War is a way to 'wordling globally' as the two World Wars illustrated. But globalization generates symmetric effects on warfare and war per se.

Globalization as the 'rising levels of interdependence on progressively larger spatial scales' (Deudney 2007, 1) operates in different dimensions. Some authors as Kirshner insist in an array of phenomena that derives from unorganized and stateless forces that generate pressures (Kirshner 2006) or powerful but uncoordinated consequences of individual behavior and technological change (Kirshner 2006, 2). As for Giddens, he proposes a useful and seminal perspective that is relied on the abolition of distances. For him, keeping a distance has increasingly less sense politically due to the disconnect between time and space: 'the intensifying of planetary social relations brings distant places so much closer that local events are influenced by events that occur thousands of kilometers away and vice-versa' (Giddens 1991, 131). Globalization means the 'dynamic shrinking of distance on a large scale' that can be described thanks to four linked processes: extensivity (the strengthening of events and social life), intensity (the volume of global events), velocity (the acceleration of interactions) and impact (the growing signification of events and decisions in distant places). But dealing with the relations between globalization and war must not be reduced to warfare as an independent variable. For more than two decades, IR scholars have focused on the transformation of war as a result from globalization. The dynamic shrinking of distance on a large scale, for not saying the 'death of distance' as a political grammar, caused some effects on warfare but also on models and tools in order to understand military strategy.

How to handle these links between globalization and war? What are the effects of globalization on the transformation of war debate? How they call into question traditions of thought in Political science? To what extent some new approaches aim at producing an epistemic revolution?

This chapter is divided in three sections that explore these relations between the conception of globalization used by these approaches quoted above and their explanation of war. Firstly, I will focus on IR theories and especially a new debate between realisms and liberalisms concerning these links between globalization and war. Beyond these controversies, there are some convergences because this debate does not change the epistemic beliefs that lead the academic field in IR. Secondly, I introduce sociologists who set up a link between globalization and the transformation of war. In other words, globalization entails new modes of war and also new wars. Second globalization—or second modernity if I use the Giddens and Beck's qualification—changes radically the way to make war. All these perspectives share the same post-clausewitzian approach that aims at dissolving the modern categories or distinctions in strategy and Political Science: war and peace, combatant and non-combatant, politics and crime…. This second research program tries to generate an epistemic revolution. One of the most important claim is to promote a new field that must be substituted to classical strategic

studies: i.e. security studies. Thirdly, I propose a via media by relying on both strategic and political theories. Instead of defending an epistemic revolution, I prefer to study the impact of globalization—defined as the development of interdependencies at different levels—on capacity of force interaction. In such perspective, globalization is both a context and an opportunity for actors in order to make war but also peace. By coming back to political theory, the analysis of war today shows the emergence of a 'global state of war:' no declarations of war, no direct military opposition between armies, latent and diffuse 'state of war' that implies States and non-state actors.

A New Rationalist Debate: Realism vs. Liberalism in IR Theory

During the interwar, the so-called first debate in IR[1] opposed Liberals and Realists concerning the futility of war. Among the different arguments mobilized by both parties, trade and economic interdependencies are interpreted differently. For Realists, they did not entail a deep transformation of warfare and war. On the contrary, Liberals wanted to show their impact on political decisions towards strategy and the resort of force. By this way, they referred to one tradition of liberalism from Montesquieu to Kant and Constant who insisted in the *doux commerce*. To a certain extent, the current debate extends this thread by addressing the linkages between globalization and war.

Realist Tradition: Globalization Has No Effects on War

According to Realists, globalization may not be qualified as an independent variable in IR. They are skeptical towards global processes of globalist claims in general, and all the more reluctant to examine their potential consequences on the eradication of war. For them, war must be explained thanks to material variables which the most decisive is the distribution of power in the international system (Waltz 1979). Realists contest any influence of globalization on war because distance remains a relevant factor in international relations. Global village is a myth, or a mental cartography that is not translated into empirical confirmations (Porter 2015). For instance, Mearsheimer insists on the fact that oceans block the projection of military capabilities. They must be compared with an obstructive force in international relations. 'The stopping power of water' (Mearsheimer 2002) makes impossible a global hegemony, even for the United States. Great powers can only control a part of the globe. In History, they are only regional hegemons. The existence of oceans explains such phenomenon.

[1] According to Schmidt, this debate is reconstructed in order to justify the opposition between idealists and realists (Schmidt 2012).

Liberal Tradition: Globalization Makes War Futile

For Liberals, globalization generates strong effects on state interests and, therefore, on the resort of force. Globalization makes war both unnecessary and costly. These arguments are more restricted to democracies between them. In other words, the effects of globalization seem to be confined in a specific thesis: the peaceful reputation of democracies which have been found in Kant (2008) and Tocqueville (1945) but more recently in Doyle (1986). But these effects must be enlarged because they concern all the States no matter how they organize their own political system. They make war futile and geopolitics becomes a source of illusion (Ikenberry 2014). Economic globalization 'makes the resort to arms by States less likely because the macroeconomic discipline demander by world financial markets lending institutions and powerful credit agencies is incompatible with militarism adventurism' (Kirshner 2006, 9). In other words, liberals tend to emancipate their own thought from territorial constraints when dealing with war. They deny any role of distances and spaces in that matter, even water mentioned by Mearsheimer. For instance, Madeleine Albright argues that 'the idea of an ocean as protection is as obsolete as a castle moat' (Porter 2015, 168). If water does not embody a frontier, then, the orientation of foreign policy has to be profoundly revised. The former under-Secretary of State Anne-Marie Slaughter considers that the definition of 'vital strategic interests' changes. They embody 'universal values' instead of 'oil and geography' (Rogin 2011, 16).

Epistemic Beliefs: How Rationalists Are Conservatives

This debate between rationalist approaches has two limits. Conceptually, rationalists use a restrictive perception of international interactions. They concern the relevant actors who intervene in globalization (they adopt a stato-centered conception), and the main component of globalization defined exclusively in economic terms (they focus on globalization as the development of economic interdependencies).

Theoretically, they do not take into account a variable that explains a part of the current wars based on liberal values. The reasons of this convergent occultation differ. Realists do not care about normative or ideological factors whatsoever. Liberals do not make allowance for the darker sides of liberal modernity—i.e. liberal justification of wars—but also globalization as a variable that could orientate the resort of force because of values diffusion. In other words, Realists and Liberals do not recognize the existence of 'globalizing wars' that aim at the abolition of state sovereignty. Both theories remain their epistemic beliefs and concepts whereas other approaches tend to initiate a Copernic revolution in IR towards war.

An Epistemic Revolution: The End of Clausewitz's World

The second set of approaches calls into question the clausewitzian model of modern warfare.[2] Clausewitz defines war as an institution between States controlled by political leaders as his famous assertion shows: war as the continuation of policy by other means. Political leaders set the goal of war which, once reached, makes the confrontation useless. In other words, the final victory is apart from the strategic action. This recognition of the political is central—it indicates the direction to be continued—but also a way to canalize the resort of force. The military means are subordinated to political objectives. This conception rests on the strategic effects of the French revolution. Indeed, the revolutionary principle produced a new government whose character and practice released energies in the name of the republican values. War became the cause of people.

The rise of globalization entails new forms of war (warfare), but also a new nature of war that radically alters the Clausewitz's understanding of war. These change result from 'the death of distance' or 'the end of the State's monopoly of violence in a world shaped by the risks generated through industrialized civilization, where ultimately anything can become a missile in the hands of determined fanatics' (Beck 2005, 11). Two main academic discourses monopolize this alternative conception.

New Wars

Mary Kaldor associates globalization to a 'revolution in the social relations of warfare' (Kaldor 1999, 3) that has highlighted a new kind of organized violence since the end of the Cold War.[3] Classical State against Sate warfare becomes less relevant compared with the development of weakened states where most armed conflicts arise. This approach relies on the statistic decline of interstate armed conflicts and the increase of civil wars since the end of the Cold War especially in the Balkans and in Sub-Saharan Africa. Kaldor promotes a post-clausewitzian perspective 'because new wars are not contests of wills but more similar to a mutual enterprise. The warring parties are interested in the enterprise of war rather than willing or losing, for both political and economic reasons. The inner tendency of such wars is not war without limits, but war without end' (Kaldor 2013). In order to clarify the distinction between 'old' and 'new' wars, Kaldor uses four criteria:

[2] The academic literature dedicated to this critic is numerous, especially in History of Strategy (look at Van Creveld 1991). Here, I illustrate the impact of globalization on war by focusing on two examples.

[3] The historical period she used his clearly narrow because she aims at qualifying the strategic situation after bipolarity that embodied a type of war instead of exploring effects of second globalization since Second World War.

> Actors: Old wars were fought by the regular armed forces of states. New wars are fought by varying combinations of networks of state and non-state actors—regular armed forces, private security contractors, mercenaries, jihadists, warlords, paramilitaries, etc.
>
> Goals: Old wars were fought for geo-political interests or for ideology (democracy or socialism). New wars are fought in the name of identity (ethnic, religious or tribal). Identity politics has a different logic from geo-politics or ideology. The aim is to gain access to the state for particular groups (that may be both local and transnational) rather than to carry out particular policies or programmes in the broader public interest. […]
>
> Methods: In old wars, battle was the decisive encounter. The method of waging war consisted of capturing territory through military means. In new wars, battles are rare and territory is captured through political means, through control of the population. A typical technique is population displacement—the forcible removal of those with a different identity or different opinions. Violence is largely directed against civilians as a way of controlling territory rather than against enemy forces.
>
> Forms of Finance: Old wars were largely financed by states (taxation or by outside patrons). In weak states, tax revenue is falling and new forms of predatory private finance include loot and pillage, 'taxation' of humanitarian aid, Diaspora support, kidnapping, or smuggling in oil, diamonds, drugs, people, etc. It is sometimes argued that new wars are motivated by economic gain, but it is difficult to distinguish between those who use the cover of political violence for economic reasons and those who engage in predatory economic activities to finance their political cause. Whereas old war economies were typically centralising, autarchic and mobilised the population, new wars are part of an open globalised decentralised economy in which participation is low and revenue depends on continued violence (Kaldor 2013, 2–3)

According to her, globalization transforms warfare but also the concept of war. New wars are similar to crimes where political ends or negotiations disappear in favor of a blurred separation between combatants and non-combatants; private and public spheres, civil and military components (show Table 1). New wars theory aims at showing that war and States are separated: States do not monopolize legitimate violence yet, civilian casualties increase massively (the ratio of civilians to military casualties used to be eight combatants to one civilian killed in old wars, but that this has been dramatically changed in new wars, where it is now approximately eight civilians to one combatant).

Table 1 Old and new wars

	Old civil wars	New civil wars
Causes and motivation	Collective grievances	Private loot
Support	Broad popular support	Lack of popular support
Violence	Controlled violence	Gratuitous violence

Source: Kalyvas SN 2001, New and Old Wars. A Valid distinction? World Politics 54 (October 2001), 102

New Militarism

A branch of military sociology develops another approach that casts doubt on the Clausewitzian framework. This branch corresponds to the second wave of militarism defined as a social fact.[4] Born during the 'second cold war' in the 1980s, the first wave had the ambition to update the weberian heritage in military sociology. The main aim was to criticize the dominant neo-marxism that considered the relations between war and society as the extension of capitalism and imperialism. It describes the role of war in the formation of the State or of the revolutions. The second wave remains faithful to this conception: i.e. 'the penetration of the social relations by the military relations' (Shaw 2012, 20).

Nevertheless, a current aim consists in examining the emergence of new militarisms. Martin Shaw, for instance, analyzes new relations between societies and wars that differ from their modern components. States lose progressively their monopole of violence. Shaw distinguishes two types of militarism. The first is 'industrialized total warfare' which presents the principal following features: mass peasant; national conscription; diffusion of the military values via art, novels as well as the press. In this figuration, 'mass peasant and worker mobilization, arms and other state institutions penetrated society, conscription served as a school of nation, a general cultural diffusion of military values' (Shaw 2012, 25). The second corresponds to 'global surveillance warfare which rests on new condition of armed forces usages (globalization of economy, integration of non-Western powers within the international system, the rise of a global media space). This second model that emerges is linked to the development of asymmetrical conflicts even though it is more a tendency and not still a completed form. For Shaw, 'whereas in total war, states and armed movements typically controlled economy, politics and media over a wide territory, with a real possibility (even if not always realized) of economic, political and informational autarchy, now armed actors of all kinds are forced to recognize multiple economic, political, media and legal pressures which limit their freedom of action even within territory control' (Shaw 2012, 28).

[4] Militarism differs from ideology (glorification of the war and the martial values), a specific behaviour (propensity to use force in order to solve a conflict), a budgetary option (increase the importation of armaments), or institutional influence (interpretation according to which the military must access to political power). The notion of militarism in sociology consists in thinking the relationship between militarism and societies, or, more precisely, in examining the social relations, the institutions and the values in relation to the war as well as the preparation of war. Some sociologists refuse to use this concept because of too polysemic. See for instance Der Derian (2012).

To Change Mental Maps: How Post-clausewitzians Are Revolutionists

These different approaches merge by defending the same epistemic position. They yearn to a fundamental change of our concepts and tools in order to address war nowadays. According to them, empirical facts during Post-Cold War open a new path that takes more and more distance from the modern perspective described by Clausewitz. From the ethnic wars in the Balkans to the counter-insurgency in Afghanistan and Irak, from civil wars internationalized in Africa to the development of Jihadism, strategic facts since 1991 have showed anomalies that the Clausewitz model would be unable to highlight. They do not embody a new black swan that the former theory of war could explain. They invite radically to a new mental map for understanding the resort of force today. In other words, globalization differs from a simple variable that clarify wars. This process modifies more in depth the concept of war. For Kaldor or Shaw, globalization requires a change of epistemic representations of war. A new fault line is the main consequences of this conception. Indeed, to explain war means to neglect defense studies and to develop security studies that provide the most adapted tools for elucidating wars.

These approaches are refreshing in IR but they are also exposed to several critics. For instance, Kalyvas wonders whether the opposition between old and new wars seems relevant because some processes considered as unreleased are not quite so new (Kalyvas 2001). Besides, these new representations of war rely on a confusion between the character and the nature of war. They infer a new concept of war from the existence of new combatants (Strachan and Sheipers 2011). They interpret Clausewitz's definition of war by selecting a unique component: war as an act of policy, i.e. the State. However, Clausewitz considers that the expression of war differs from times and that war cannot be subsumed exclusively to policy. He insisted in a trinity—forgotten by his current detractors—:

> Clausewitz then goes on to say that war has three elements—passion, the play of probability and chance, and reason. He associates these three particularly (but not invariably) with three groups of actors in war: passion with the people, the play of probability and chance with generals and their armies, and reason with government and the political direction of the war. […] The three elements in Clausewitz's trinity are attributes, not actors; the trinity is not made up of the people, the army and the government. […] A state's policy is unilateral, at least in design, and its use of war as an act of policy is therefore also unilateral. But war itself is not unilateral; it is reciprocal. Seeing the trinity in terms of the state and the state's coordination of its actions has deflected our attention from the fact that the trinity in its original formulation is a statement about war's nature. Clausewitz says war is not only like a chameleon but also like a trinity (Strachan 2009, 28–30).

Chameleon and trinity compose the nature of war. Contemporary analysts propose to carry on this Clausewitzian conception in order to understand current wars. They spot a variable intensity of the three components including a withering of the involvement of the people in contemporary international interventions (Vennesson 2011). If I do not subscribe to the labels proposed by new wars defenders, I will not

use the same clausewitzian tools in order to explore the relations between globalization and war today. My position tends to elaborate a via media between rationalists and revolutionists.

A Via Media: From Warfare to a 'Global State of War'

This via media comes back to the modes of warfare and the justification of war nowadays in order to set up some links between them and globalization. In other words, I raise the question: how to make war in a global era? Globalization entails more opportunities to adopt plasticity in strategic figurations (what I call the ductility of warfare) but also new cleavages concerning the legitimacy of military intervention. These trends contribute to a 'global state of war' that becomes more and more difficult to exceed.

The Ductility of Warfare

Contemporary modes of warfare are characterized by three processes that result from the development of globalization concerning economics and technics: privatization, robotization, hybridization. They generate ductility in warfare. Ductility comes from material sciences and engineering. It is a measure of a material's ability to undergo appreciable plastic deformation before fracture. It refers to plasticity. Ductility shows that Warfare today does not take place in a specific area or zone both temporally and spatially.

Privatization means the delegation of strategic functions supported so far by the States. It covers a large heterogeneity of services: military logistics, education of armed forces, but the most emblematic corresponds to the direct participation in the military engagement that compares privatization to a modern manifestation of mercenary.

Privatization comes from a commodification of defence activities (King 2006). Such process is not new but the promotion of neo-liberal theories that advocate a withdrawal of the State in globalization causes mimetism between liberal governments in order to privilege outsourcing practices.[5]

Globalization relies on technical innovation that makes easier the communications through borders. The development of these technics allows the creation of new guided machines and robotization. For instance, the use of drones in operation systems continues to increase. One of the significant manifestations of this trend appears in the United States. The U.S. department of Defense (Dod) deployed 163 drones in February 2003. In 2012 there are 7454 for 10,767 manned aircraft (or 41%

[5] Privatization appears also in the use of human force unpaid by the Lords of war, whether in sub-Saharan Africa or Asia.

of the Dod aircraft). It should firstly be noted that the intention with drones is not about the protection of the soldiers (an induced gain) but the permanence of the mission. Indeed, the drones have a very strong endurance. In this regard, the Chief of staff of the USAF in 2003, John Jumper, says: 'the thing that makes a Predator a real comparative advantage for us, is the fact it stays in flight within 24 hours. It is persistent.' Robotization has major effects on physical distancing (i.e., the riser increase). The riser increase is part of long historical and technological processes: the production of weapons whose scope becomes higher. In other words, the direct contact between enemies tends to disappear from the Hoplite combat to the invention of the aerial weapon through the rise of the jet or firearms weapons. This physical distancing has two strategic consequences. First, it tends to overwhelm the decision-making process. The boundaries between strategic and tactical levels are dissolved since command can have real-time access to the theatre of operations (Singer 2009). Second, it extends the space within which strategic interactions unfold. No space as such is considered as inaccessible for conducting operations.

The last process is hybridization. Even though it was already used in strategic thought (Beaufre 1998), the term re-appears in 2005 in an article by two American officers, James Mattis and Frank Hoffman (Mattis and Hoffman 2005). They explore how to articulate conventional and not conventional warfare. They propose a joint use of forces. Hybridization means to go beyond the classic opposition between regular and irregular war. At the politico-strategic level, there is always a porosity between these two modes of war: to articulate firepower, discipline, and direct strategy in guerrilla (defined as an irregular war), ambushes or assassinations, and indirect strategy in conventional war. Today, practitioners tend to articulate both at the operational level (mixing dispersion and concentration) and at the tactical level (combining conventional capabilities tactics and advanced non-linear own some form of irregularity). These trends affect both States (the case of Russia against the Ukraine) and proto-States (the Islamic State) (Tenenbaum 2015).

A Central Normative Clash

Post-national wars ('state-like interventions' for humanitarian purposes) or prevention/reaction against terrorist attacks: both of these trends are embedded in a new conception of international law that allows globalization. Traditional international law must be defined as a right of the State. It relies on an indifference towards the political regimes that States establish and, for instance, the respect of individual freedoms. This indifference is inscribed in the San Francisco Charter in particular in article 2 paragraph 4. But traditional international law tends to change by the recognition of human beings' rights (Tourme-Jouannet 2013). This branch of Law takes progressively a look on domestic affairs that have been excluded since its origins. By defining the human person as the ultimate beneficiary of international law, it triggers a *humanitarization* of military interventions. The protection of individuals defined as true subjects of law must be guaranteed. International law becomes more

and more substantial in addressing these human rights *inside States* contrary to its original version which was limited to the fulfilment of a formal framework *between States*. As the former General Secretary of the United Nations, K. Annan, says: 'States are now widely understood to be instruments at the service of their peoples, and not vice versa' (Annan 2009). According to him, the emergence of an international norm against the violent repression of minorities illustrates this normative transformation. It is worth noting that this trend relies on a strong relation sociologists have already points out when exploring cosmopolitanism. For instance, Simmel sets up a link between the enlargement of social circles and a qualitative individualism shaped by the recognitions of individual singularities (Simmel 1999).

This normative shift (from a formal to a substantial conception) generates a normative cleavage between actors who want to accentuate this trend and those who, on the contrary, refuse this evolution. Emerging powers as China, India or Brazil are more than reluctant to justify the use of armed force in these terms. The debate concerning the responsibility to protect, especially for the Libyan case in 2011 reflect both positions. The evolution of international Law creates also reactions inside the Muslim World. The claim of a Caliphate by the Islamic State can be interpreted as a global discourse that aims at identifying a new overlay at the global stage.

A New "Global State of War"

Globalization modifies strategic interactions by extending the places of confrontation. The front lines differ from conventional wars. A new global state of war emerges. Modern philosophers mobilized the state of war in order to understand strategic relations between States. They debate on the factors that explain the state of war. For Hobbes, this state is natural in every anarchical situation, before or after the social contract. According to Rousseau, this state depends on social conditions. War does not embody a natural relation but a political institution motivated by ostentation. Although their disagreements, both consider the state of war as a situation where States evolve. Nowadays, a new state of war appears between them. The confrontations take new forms because of globalization requires strategic restraint. As Chris Brown points out, 'whereas in the past it was common for rising powers to feel that they had to define their new status by challenging existing power-holders, building empires and 'co-prosperity' spheres, […] this is no longer necessary, and indeed may be even more counterproductive than previously' (Brown 2010, 8).[6] The new state of war also doubles because non-state actors are part of it. The qualification 'War of terror' is not significant and incoherent conceptually. But it refers to this second state of war where actors of different nature are interrelated. The first

[6] Kirshner adopts a similar perspective but he insists in the role of macro-economic factors that makes 'the resort to arms by States less likely because the macroeconomic discipline demanded by world financial markets, lending institutions, and powerful credit agencies is incompatible with military adventurism' (Kirshner 2006, 9).

state of war is *latent* between major powers. The second is *diffuse* between asymmetric actors.

When distinguishing the United States and other Hegemonic powers in History like Britain or France, Charles Krauthammer asserts: 'We don't hunger for territory. […] For five centuries, the Europeans did hunger for deserts and jungles and oceans and new continents. Americans do not. […] That's because we are not an imperial power. We are a commercial republic. We don't take food; we trade for it' (Krauthammer 2004). The American power focuses on a more decisive control: to access the global commons, i.e. the non-sovereign spaces or domains that fall outside the direct jurisdiction of sovereign States and can be used by anyone (high seas, air, space, cyberspace). All of them are vital channels for trade and prosperity. To guarantee the freedom in these spaces but also the freedom to enter to them become the foundations of power. That's why the American Grand Strategy aims at sustaining these global commons that can be compared with the nerves of globalization, a global flow infrastructure. The U.S. want to access this 'major hub or hub of hubs of a network of global interdependencies' (Ikenberry 2011, 311). To evolve in these global commons means to use mobility and flexibility. Both were already developed in maritime strategy that provided the first framework of global commons management, as the naval strategist Alfred Thayer Mahan exposed in his *The Influence of Sea Power Upon History 1660–1783*.[7] They give body to a doctrine that focused on agility in international relations. The importation of global commons in strategy[8] reveals a strategic conduct of the US that must adapt their own resources to globalization: 'the key idea behind coopting the notion of the global commons is to justify the effective and agile uses of power beyond the traditional sovereign realms, while at the same time *making sure* that the global commons remain accessible and secure to such forms of power. It may be further argued that these non-sovereign spaces are becoming increasingly *important* as a result of the expansion of the global realm of finance, trade and commerce, which relies on free access to and use of the global commons' (Aaltola et al. 2014, 95).

The modern state of war depicted by Hobbes or Rousseau is embedded to logics of territoriality. The States were uncertain of their frontiers. They have to reinforce their protection towards their neighbours. The current state of war between States is no longer limited to a strictly material and territorial component. It concerns the way to evolve in the global commons or to maintain the flows that are substantial for their own economic (circulation of products) and social (digital and physical connexions between peoples) vitality. This confrontation infiltrates the civilian and

[7] Mahan is quoted in the documents produced by NATO concerning global commons: 'maritime, air, outer space, and cyber space—constitute a universal public good that serves as a crucial enabler of international security and trade. The architecture of the modern international system rests on a foundation of assured access to and stability in the Commons. Alfred Thayer Mahan described the world's oceans as 'a great highway ... a wide common' in his classic 1890 work, 'The Influence of Sea Power Upon History.' He further observed that the fundamental purpose of a strong navy was not simply to attack enemies, but to protect maritime trade'. (ACT 2009, ii).

[8] Developed for centuries in Philosophy, the concept was first used in IR to deal with the degradation of ecological systems and environmental issues. See Hardin (1968).

private sector fields. 'Sub rosa warfare' in the cyber domain (Libicki 2009) may become the adequate qualification of strategic interactions by focusing on confidential and secret warfare (Ramel 2014).

The second category of this state of war concerns the development of islamist terrorism that relies on a specific interpretation of Quran and Hadiths. The first expression of islamism was national as the domestic levels show in Egypt or Algeria for instance. The islamist national failures, although legal victories, entail a transnationalization of the movement. Islamism becomes progressively privatized and globalized. As for an example, Afghanistan war catalyzed the new generations of islamists during the 1980s. Al Qaida and the Islamic State that comes from a scission with the latter are two different representations of current Sunnism. I will not come back to the origins of these actors and the academic debate that divides scholars about this phenomenon.[9] I only introduce a strategic consequence, i.e. the *diffuse* state of war it provokes. Terrorist attacks towards civilians no matter where they are located relied on several principles that globalization facilitates the implementation. Circulation of flows (financial and peoples) favors the dispersion (to attack anywhere) and the contagion (horror transcends the frontiers). By underlining these principles, Frédéric Gros proposes to change our category. He substitutes a state of violence to a state of war (Gros 2010). This perspective is stimulating because it shows how philosophy could elaborate a concept by taking into account the influence of globalization on political phenomena. But a state of violence excludes reciprocity that characterized war. Does this mechanism disappear totally in the current terrorist attacks? If political ends may be more complex to identify, these assaults generate interactions between protagonists. For instance, the Islamic State causes more than a stir in France after the Nice and Saint-Etienne-du-Rouvray events in 2016. They tend to dislocate national cohesion. In other words, to keep the notion 'state of war' does not mean to be faithful to tradition in political philosophy. It also means that classic mechanisms as reciprocity for instance still matter.

Conclusion

Is globalization considered as a whole transforming from an epistemological standpoint Political Science and IR? Two major answers are identifiable. On the one hand, rationalists both realists and liberals remain attached to their classic frameworks. Globalization does not transform their own scientific *Weltanshauung*. Path dependency prevails in their academic approach. On the other hand, revolutionists want to initiate a Copernican revolution because globalization rhymes with the death of the Clausewitz model.

Between these two trends, I propose a via media that uses several disciplines from political theory to sociology and IR. This perspective is probably less ambitious

[9] For an example, see Olivier Roy and Gilles Kepel's position after the terrorist attacks in France in 2015. Their disagreements have been developed for many years. See Mamdani (2005).

because it takes distance with both parochial and general conceptions of war. Modestly, it aims at describing the relations between globalization and capacity of force interactions without assigning a global trend. On this basis, globalization entails some tensions with two centralities: namely the distinction between internal and external (i.e. the Hobbesian model of politics) and the relations with territorial aspect of strategy. But the main consequence is the new 'fog of war' because the distinctions between war and peace, between civilians and militaries, between order and chaos are more and more scrambled.

References

Aaltola M et al (2014) The challenges of global commons and flows for US Power. The perils of missing the human domain. Ashgate, Farnham

ACT (2009) Multiple futures project. Navigating towards 2030—Final Report, April 2009. Available at https://transnet.act.nato.int/WISE/NATOACTRes/Training/MultipleFu/file/_WFS/20090503_MFP_finalrep.pdf

Annan K (2009) Two concepts of sovereignty, United Nations. Available at http://www.un.org/News/ossg/sg/stories/kaecon.html (Jan 20). [1st publication: The Economist, Sept. 18, 1999]

Beaufre A (1998) Introduction à la stratégie. Hachette, Paris

Beck U (2005) Power in the global age: a new global political economy. Polity Press, Cambridge

Brown C (2010) Rules and norms in post-western world. In: Kessler O et al (eds) On rules, politics and knowledge: Friedrich Kratochwil, international relations, and domestic affairs. Palgrave Macmillan, New York, pp 213–225

De Tocqueville A et al (1945) Democracy in America. A. Knopf, New York

Der Derian J (2012) War becomes academic: human terrain, virtuous war and contemporary militarism. An interview with James Der Derian. In: Stavrianakis A, Selby J (eds) Militarism and international relations. Routledge, New York, pp 59–74

Deudney DH (2007) Bounding power. Republican security theory from the Polis to the Global Village. Princeton University Press, Princeton

Doyle M (1986) Liberalism and world politics. Am Polit Sci Rev 80:1151–1169

Giddens A (1991) The consequences of modernity. Polity Press, Cambridge

Gopinath C (2008) Globalization. A multidimensional system. SAGE Publications Inc., Thousand Oaks

Gros F (2010) States of violence. An essay on the end of war. The Chicago University Press, Chicago

Hardin G (1968) The tragedy of the commons. Science 162:1243–1248

Ikenberry J (2011) Liberal Leviathan. Princeton University Press, Princeton

Ikenberry J (2014) The illusion of geopolitics. The enduring power of liberal order. Foreign Aff, May–June:80–90.

Kaldor M (1999) Old wars and new wars: organized violence in a global era. Stanford University Press, Stanford

Kaldor M (2013) In defence of new wars. Stability. Int J Secur Dev 2(1):1–16

Kalyvas S (2001) New and old wars. A valid distinction? World Polit 54:99–118

Kant E (2008) Perpetual peace. The Book tree, San Diego

King A (2006) The post-fordist military. J Polit Mil Soc 34(2):359–374

Kirshner J (ed) (2006) Globalization and national security. Routledge, London

Krauthammer C (2004) Democratic realism. An American foreign policy for a unipolar world. Irving Kristol Lecture, AEI Annual Dinner (Washington), February, 12. Available at http://www.let.uu.nl/~arend-jan.boekestijn/personal/historisch%20ambacht/krauthammer.htm

Libicki MC (2009) Sub Rosa cyber war. In: Czossek C, Geers K (eds) The virtual battlefield: perspectives on cyber warfare. IOS Press, Amsterdam, pp 53–65
Mamdani M (2005) Whither political Islam? Foreign Aff 84:1
Mansbach RW, Rhodes E (eds) (2012) Introducing globalization: analysis and readings. CQ Press, Thousand Oaks
Mattis JN, Hoffman F (2005) Future warfare: the rise of hybrid wars. Proceedings Magazine 131/11/1,233:18–19
Mearsheimer JJ (2002) The tragedy of great power politics. WW Norton & Company, New York
Porter P (2015) The Global Village myth. Distance, war, and the limits of power. Georgetown University Press, Washington, DC
Ramel F (2014) Access to the global commons and grand strategies: a shift in global interplay. Étude de l'IRSEM 30
Rogin J (2011) Anne-Marie slaughter accuses Obama for prioritizing Oil over values. Foreign Policy, March, 16
Schmidt BC (ed) (2012) International relations and the first great debate. Routledge, London
Shaw M (2012) Twenty first century militarism: a historical-sociological framework. In: Stavrianakis A, Selby J (eds) Militarism in international relations: political economy, security, theory. Routledge, London, pp 19–32
Simmel G (1999) Sociologie. Presses universitaire de France, Paris
Singer P (2009) Tactical generals: leaders, technology, and the perils of battlefield micromanagement. Air Space Power J 23(2):78–87
Strachan H (2009) The changing character of war. A Europaeum lecture. The Graduate Institute of International Relations of Geneva, 9 Nov 2006. pp 28–30
Strachan H, Sheipers S (eds) (2011) The changing character of war. Oxford University Press, Oxford
Tenenbaum E (2015) Le piège de la guerre hybride. Focus stratégique IFRI 63 (October)
Tourme-Jouannet E (2013) Le droit international. Presses universitaire de France, Paris
Van Creveld M (1991) The transformation of war. Free Press, New York
Vennesson P (2011) War without people. In: Strachan H, Sheipers S (eds) The changing character of war. Oxford University Press, Oxford, pp 241–258
Waltz K (1979) Theory of international politics. Addison-Wesley, Boston

Part II
Management

Multinational Enterprises and Sustainable Development in Emerging Markets

Pervez N. Ghauri

Abstract Foreign direct investment (FDI) is often considered positive for the host countries in emerging markets as it brings in foreign capital and job opportunities. The relationship between MNEs and local governments has however seen its ups and down. Over the years, it has changed from a period of conflict after the World War II, where MNEs were investing for purposes felt to be detrimental to government policies, to a more co-operative nature. The 1980s and major part of 1990s saw the co-operative relationship leading to the danger of race to the bottom through excessive locational competition. In this paper, we examine the most influential literature from 1970s onwards and the current state of this relationship. Our analysis reveals that the increased tensions caused by anxiety due to 9/11 and subsequent development in the political economy, company strategies and government policies. We examine the changing relationship between multinationals and national governments. Thanks to globalisation MNEs are increasingly becoming more powerful and often this process is accelerated due to lack of any collaboration between MNEs and the governments. Thus, governments, particularly in emerging markets, are becoming more and more dependent on multinationals from the developed countries. In this study, we intend to evaluate whether MNEs can play a positive role towards problems of emerging markets such as poverty reduction and economic development.

Introduction

This chapter examines the relationship between multinational firms and sustainable development in emerging markets. In the period from the 1950s to the first decade of the new millennium, there have been profound changes in this relationship. Governments and MNEs have moved from a situation of conflict, to one

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where government policies were seen as a constraint on the activities of MNEs and then finally to an era of co-operation (Boddewyn 1992). But now there is a situation of great uncertainty following the '9-11' and subsequent changes in the political economy which this paper seeks to illuminate. In recent years, the conditions and the landscape for MNEs have changed as compared to earlier decades. The multinationals and emerging markets (EMs) relationship is manifested by suspicion and anxiety. The host governments are now uncertain of strategic implication of multinational decision making (Prasad and Ghauri 2004; UNCTAD 2015). It is interesting to see whether the welcoming approach of EMs towards MNEs will continue. Some of these issues are old that the role of MNEs is seen both as contributing to host country's economic development and as a hindrance to local firms' development and loss of jobs due to rent-extracting power of MNEs, loss of control over national resources and displacement of indigenous firms (Ghauri and Yamin 2009).

A key issue determining the impact of globalisation on emerging markets on international business is the nature of the relationship between national governments and multinational firms. Our contention is that the conceptualisation of this relationship has mirrored the changing balance of power between states and firms and between rich and poor nations. The current configuration of the global economy has brought us to a point of inflexion in this relationship, which might lead to a totally new world order.

The most profound change in the world economy in the first post-war period is however, the emergence of successive waves of Asian countries as key players in the world economy, bringing new competition to Western nations and fostering the notion of a 'loss of competitiveness' in the developed countries. This had a number of effects. First, FDI in these countries changed in nature and its conceptualisation ceased to regard the host economy as purely a pliable object. Second, as outward oriented policies replaced protectionist ones, emerging country multinationals became salient and the analysis of their strategies became important (Ghauri and Buckley 2002). Third, the policies of host governments towards inward investment have been shaped by the increasing interdependence of global economic activity (Buckley and Ghauri 2015). Asian emerging countries went beyond Newly Industrialised countries (NIC) to become full global competitors and the post communist nations began to enter the world economy as transitional economies. The danger facing many economies was that of being left on the fringes as globalisation drew countries together either through expanded world trade and FDI or through the creation of Multinational Enterprises and Sustainable Development in Emerging Markets creating WTO and trading blocs (EU, NAFTA, ASEAN-AFTA). Some of these issues, such as privatisation, the emergence of China, the Asian crisis and 9-11 have made scholars and policy makers rethink their strategies and priorities.

The Critical Literature

One of the very early pieces on foreign investments and the growth of the firm by Edith Penrose (1956) pointed out the controversial aspects of foreign investment, where in spite of the successful establishment of a subsidiary, local benefits may be low because excessive returns may be transmitted out of the host country. It revealed that for the year ending 1954, GM earned a return of 590% on its original dollar investment in Australia. Later, Stephen Hymer (1971) looked into 'two basic laws of development'; namely the Law of Uneven Economic Development and the Law of Increasing Firm Size. He claimed that the multinationalisation would continue through giant firms from both sides of the Atlantic. He suggested that MNEs would spread their day-to-day, i.e. manufacturing, activities all over the globe, thus diffusing industrialisation to developing countries and creating new centres of production. The other activities, i.e. co-ordination and communication, would stay closer to the head offices which would be completely centralised. As a result, 'the best' highly skilled and highly paid manpower would concentrate in the major cities of the US and Europe, while lower level skills and manpower would remain in other parts and cities of the world. MNEs would thus be greatly interested in the markets of these less-developed countries. This was further confirmed by Buckley and Ghauri (2004) in their global factory study.

Whenever we discuss MNEs and developing countries, it becomes inevitable to enter a discussion of the determinants of development. Streeten (1974) started with the assumption that countries are poor because they are poor and thus need large injections of foreign investments as they cannot raise their own capital. The low investment ratio was considered both the cause and effect of poverty. While discussing MNEs and developing countries it suggested that the bulk of FDI in developing countries consisted of the re-investment of local earnings. The analysis of Barnet and Muller (1975) addressed the myth of development, 'the struggle of human beings to realise their full potential' and an evaluation of FDI. Already by the end of the 1960s, the gap between rich and the poor world was widening. Moreover, the gap within countries was also widening, a small minority was becoming affluent but for a large majority the miseries were increasing. Although in absolute terms there has been growth in most countries. The positive impact of MNEs as regards job opportunities, should be compared with the negative impact of maintaining and increasing poverty and having conflicting interests to those of developing country governments and masses of population. As the primary objective of MNEs is profit maximisation, MNEs thus use all their resources and superior knowledge and power to achieve this. Moreover, MNEs are often blamed to serve only the elite population in emerging markets and considered to create unfair competition for local firms who do not have the knowledge and resources to compete with foreign firms. This has had an adverse effect on the distribution of income, poverty and employment levels in emerging markets.

Raymond Vernon's Sovereignty at Bay (1971), and his later analyses, Ten Years After (1981), also analysed the developments which took place in the field of MNE growth in the subsequent decade. In trying to predict the behaviour of US based MNEs, Vernon explained that although his product life cycle hypothesis (1966) has worked well over the years, it needs to be modified as the innovation lead of US firms was declining. The later study admits that MNEs from Europe and Japan have gained somewhat more in importance as compared to 10 years earlier. Moreover, there are a number of new MNEs based in Brazil, Mexico, Hong Kong, India and other developing countries that have also emerged by 1981. Developing countries had competitive advantage, particularly in the raw material and extractive sectors, but in manufacturing and the emerging service sector, control of the key competitive advantages remained firmly under the control of innovative MNEs. Vernon concluded that a new stability was emerging, based on mutual recognition of goals and control of key resources.

Later studies by Dunning (1988, 1994, 2000 and Dunning and McKaig-Berliner 2002) re-evaluated the benefits of FDI and pointed out that both country and firm specific factors have changed considerably. Countries have a more welcoming attitude towards foreign firms which they see as a positive means for creating jobs and of enhancing the competitiveness of their local capabilities and firms. For firms, a more systematic and integrated approach combining production and marketing was becoming a strategic issue. These issues are creating a new balance of benefits and costs for both parties that needs to be investigated.

More recently, Krugman's work has come in the forefront starting with historical material and referring to the fact that only a short while ago several scholars and writers were warning that the biggest threat to US prosperity was competition from other developed nations. According to Krugman (1994), now that many economic writers have lost interest in the much-hyped threat of Japan to the USA's dominance, they have started seeing a new enemy: the emerging economies of the Third World. While the advanced nations had shown a disappointing performance over the past decades, Asia, especially China and South East Asia, had shown a remarkable and rapid growth. However, in Krugman's opinion, the fears about the economic impact of Third World competition were entirely unjustified. Theoretically, there were some reasons for concern about the possible impact of Third World competition on the distribution of income in the West, but in practice there was almost no evidence that this was as serious as some countries suspected. The only effect of Third World growth was on the distribution of income between skilled and unskilled labour within the First World. Assuming that there was more skilled labour in the North and more unskilled labour in the South, the North will export skilled-intensive products. Thus, the two parts in fact trade in skilled and unskilled labour. Northern skilled labour becoming scarcer will increase the wages of skilled labour and will reduce the wages of unskilled labour. The same type of mechanism has now shifted between the North and the South at a global level. This was the effect of North-South trade and it has very little to do with growth or performance, which is dependent on domestic productivity. On the other hand, if the West creates barriers to imports from emerging markets, it may destroy the most promising aspects of

today's world economy: widespread economic development for the benefit of all. Buckley and Ghauri (2004) suggest that the consequences of the globalisation represent political challenges and reaction against these changes has led to a questioning of the effects of global capitalism as well as its moral basis.

Multinationals in Emerging Markets

The role of developing countries 'The South' has not been seen by academic authors as merely an inert recipient of investments from 'The North'. Although Gereffi and Evans (1981) highlighted the dependence of developing countries like Mexico and Brazil on MNEs, and their policies to handle this dependence, they argued that countries like Mexico and Brazil should not be considered as typical developing countries as they are 'too industrialised' and have also developed sophisticated administrative apparatuses capable of protecting local interests. Hill and Johns (1985) discussed the role of FDI in developing East Asian countries. In the later years however, there have been profound changes in the makeup of global economy and flows of FDI. In 2015 FDI inflows recovered strongly as compared to previous years increasing by 38% to $1762 billion—their highest level since the global economic and financial crisis of 2008–2009 (UNCTAD 2016). The FDI inflow to developing countries also continued to grow and at $765 billion was 9% higher than in 2014 (UNCTAD 2016). As in 2014, half of the top ten recipients of FDI inflows continued to be from developing countries, receiving 43.4% of total FDI inflows, as shown in Fig. 1 (UNCTAD 2016).

Buckley and Casson (1991) analyzed MNEs in developing countries in terms of the interplay between two types of culture, a highly entrepreneurial culture in developed countries versus less entrepreneurial social groups in developing countries. It was claimed that the limited entrepreneurial culture in developing countries is one of the reasons for their underdevelopment. These two types of culture describe the values which stimulate the emergence of individual performances and competencies. The paper dealt with 'the poorest and most persistently' underdeveloped countries, such as sub-Saharan African countries. MNEs also differed from each other because of differences in their home countries. One condition for development was that there are resources with the potential to be exploited. Some countries, however, failed to realize their potential due to lack of education and training, inefficient use of labor due to lack of infrastructure. They claim that the technical culture stimulates the study of laws and experimentation while the moral culture influences organization building, commitments, honesty, stewardship, and other values related to contractual arrangements. MNEs are considered to be a major instrument for transferring both the technology and the entrepreneurial culture of DCs to EMs, which according to these cultural differences are difficult to transfer. This explains the limited spill-overs of MNEs operations in EMs. In the later years however, their analysis has proven to be shaky as the emergence of successful entrepreneurs from China and India has proven to be no less capable than their Western counterparts.

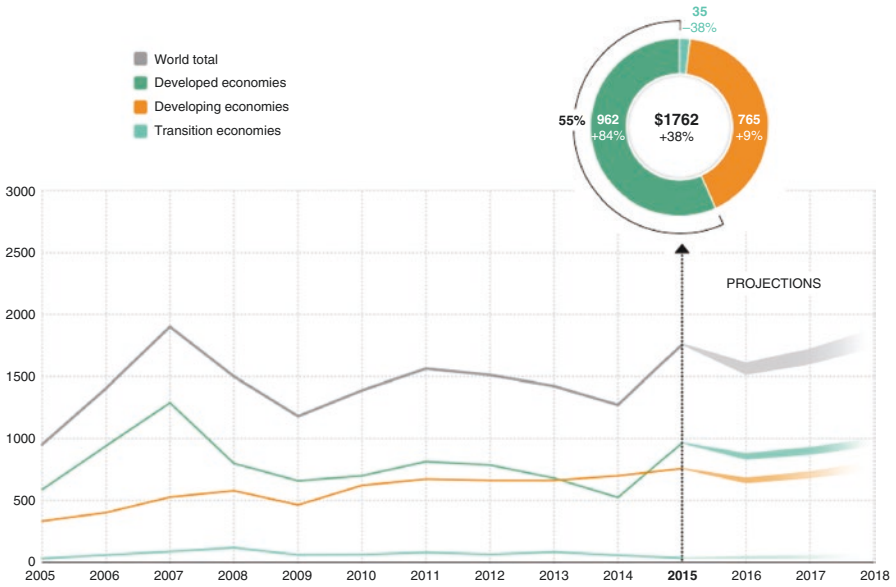

Fig. 1 Global FDI inflows by group of economies, 2005–2015, and projections, 2016–2018 (Billions of dollars and per cent). Source: ©UNCTAD, FD/MNE database (www.unctad.org/fdistatistics)

The shift in the recent years from extreme liberalization and minimal state to a more general disenchantment with globalization and emphasis on presentation of civil societies in EMs is leading towards increasing tension between MNEs and EMs (Lall and Tenbal 1998; Buckley and Ghauri 2015; Firth and Ghauri 2010). This shift has also its roots in the increasing realization that industrialization in East Asia was a governed process and was not market led (Lall 1984, 1994; Havila et al. 2002). The government policies in Korea, Singapore and Taiwan to govern market forces played a greater role in generating economic development than anything else (Ghauri and Yamin 2009). In more recent years however, we have several entrepreneurial and competitive businesses such as Alibaba, ZTE, Lenovo and TATA from China and India.

Factors Influencing MNEs and Governments Relationship

While discussing the MNE-government relations and questions whether MNEs have been causing stability or discontinuity in the third world, Kaplinsky (1991) provided some statistical evidence that the world's largest 350 MNEs employed 25 million people and their liquid financial assets were three times larger than the total global assets of gold and foreign exchange. These 350 MNEs accounted for more

than 40% of the total global trade of a number of the world's largest economies. The MNEs located their production in a limited number of countries and those developing countries where MNEs concentrated production for export generally achieved significant economic growth. This type of FDI contributed to the New International Division of Labour (NIDL). However, the basis of globalization began to change, as far back as the 1980s. The principles of optimal location and scale began to change. It is now no longer self-evident that NIDL-type strategies for FDI, which have been successful in the past, are likely to be fruitful in the coming years. Issues such as the transformation of the basic rules of competitiveness, the changing determinants of optimum location, unevenness in the world economy and the changing parameters of scale economies have all influenced the above changes. The changing patterns of production are directly related to EMs (Buckley and Ghauri 2004).

Stopford (1994) also dealt with the issue of growing interdependence between transnational corporations and governments. The starting point was the idea that the rapid growth of FDI has brought MNEs center-stage in the international political economy. This development challenges traditional comparative advantage and directs attention towards created assets instead of natural endowments. As suggested, in wealth creation and a greater degree of partnership between MNEs and governments. In this respect, both parties needed to understand each other's objectives and consider policy co-ordination as a positive-sum game and not as a zero-sum game. Four factors were considered to be central in this increasing interdependence:

1. The growth of MNEs; that the output from assets located in one country was owned and controlled in another, which makes it very hard for governments to control foreign investors;
2. The growth share of MNEs in exports, both from home and host countries given that MNEs manage about three-quarters of the world trade;
3. MNEs are primary sources of R&D in technology and thus dominate world trade in technology payments, often through transfer pricing. An understanding of MNE decisions on the location and transfer of R&D is of the utmost importance for governments;
4. The growth of strategic alliances and other forms of collaboration among MNEs.

These collaborations have changed the structure of competition and challenge the power of governments. There is a triangular diplomacy model: government-government, company-company and government-company to illustrate competing national and international resources. More recently however, non-governmental organizations (NGOs) have been playing a major role in reshaping the global political-economic landscape. A number of studies are thus challenging the two sectors bargaining model (e.g. Teegen et al. 2004). These studies claim that NGO's many and varied interactions with MNEs and governments represent new challenges to both parties.

Understanding of globalization is crucial to an understanding of international political economy. Globalization is often referred to as varied phenomena, which suggests a multiple level analysis in terms of economics, politics, culture and ideology. However, globalization is driven mostly by economic forces such as;

reorganization of production, international trade and the integration of financial markets (Buckley and Ghauri 1999, 2004). It is not uniform across countries and the strategies of multinationals are therefore crucial to its causes and consequences (Ghauri and Buckley 2002). While discussing production, the state and new social movements, we detect a series of relationships among: (a) economic globalization and the state; (b) pressures on the state from below by subnationalism and from above by supra-national institutions such as EU and NAFTA, (c) globalization and democratization and, finally, (d) resistance to globalization to prevent the eruption of social tension. Globalization thus encompasses contradictory trends (Mittelman 1994). On the one hand, there are the unaccountable forces of globalization, which are largely beyond the control of effective state regulations. On the other hand, the state pulls in the opposite direction by using a variety of government intervention measures to create a competitive edge. Power is dispersed among more actors and interregional competition is heightened between the 'triads' of Europe, North America and Asia.

The globalization of production has also led to a globalization of consumption which is threatening local cultures, tastes and buying behavior and is provoking nationalistic sentiments (Buckley and Ghauri 2004). A recent emphasis on social responsibility and behavior of MNEs, pharmaceutical firms in particular, regarding pricing of drugs (e.g. AIDs drugs) in EMs have widened the rift between MNEs and EM governments (Vachani and Smith 2004; Ghauri and Rao 2009). All this is thus causing tensions at global, national and sub-national levels (Dunning and Wallace 1999; Firth and Ghauri 2010; Ghauri et al. 2015).

The Changing Nature of the Relationship

Privatization (the transfer of productive assets from public to private ownership) has been part of most structural adjustment policies in EMs since the 1990s. It has been undertaken to achieve a variety of objectives, such as enhanced economic efficiency, reduction of financial deficits and reducing the role of the state. If we summarize experiences with privatization strategies showing that there is now a sufficient body of evidence to review its progress made and to assess what works and what does not. We end up with the cautionary point that privatization alone is unlikely to ease significantly the burden of the state-owned sector in many EMs.

The emergence of China as a major player in the world economy and its full membership in WTO since 2001 has already had an impact equal to that of Japan in earlier decades of the Post War World. An initial, almost blanket acceptance of FDI has now become more targeted in terms of priority sectors and regions. China represents a non-uniform environment for the inward investor and there are currently difficulties in the implementation and transparency of business law, contractual difficulties, regional differences and uncertainties about the direction of future economic policies. These challenges need to be addressed by careful adaptation of company strategies.

We are in a state where MNE-host country relations in a world in which middle income countries have fully emerged onto the world stage, leaving behind a group of largely poor less developed countries which have so far been bypassed by globalization. Increasing locational 'tournaments', to attract FDI may have reduced the benefits to the host countries as have the increasing skill of the managers of MNEs in making their investments more 'footloose' (Oxelheim and Ghauri 2004). Differences within developing countries may lead to divergence between those which can develop the velocity to catch up and those which will fall behind as the world economy becomes more interdependent.

Host country policies which have changed in this period include the relaxing of controls, increasing incentives to inward FDI, privatization, provision of guarantees and arbitration. We have seen a trajectory of MNE-emerging market relations where tension increased 1950–1975 and then reduced, whilst the host country gained bargaining strength in the first period, which relaxed as the MNE gained ascendancy. The present state of globalization that has increased the mobility and flexibility of MNEs demands from the government to create and upgrade assets to derive advantages for local economies (Elg et al. 2015). This has to be done at specific industry level including the creation of institutional support from MNE activities (Cavusgil et al. 2013; Firth and Ghauri 2010).

If we re-examine some of the issues above, we can see that the penetration of Southern Multinationals in the North will increase. As asset prices fall in developed economies, more of the firms denominated in these assets will be acquired by Southern multinationals which is evidenced by Lenovo taking over IBM laptop business and TATA taking over Land Rover and Jaguar. The symmetry of the relationship will be further distorted by the decline of Northern multinationals in the South, which will be increasingly unable to fund outward FDI and which will be vulnerable to takeover. With increasing numbers of M&As, the balance of power will thus swing ever more decisively to the Southern firms.

All of this, of course, is not without cost to the multinationals. Prahalad and Lieberthal (1998) say: 'In order to participate effectively in the big emerging markets, multinationals will increasingly have to reconfigure their resource base, rethink their cost structure, redesign their product development process, and challenge their assumptions about the cultural mix of their top managers. In short, they will have to develop a new mind-set and adopt new business models to achieve global competitiveness in the post imperialist age' (page 79). Prahalad and Lieberthal thus predict the end of corporate imperialism and a more 'accommodatory' stance by multinational firms in emerging markets. At the same time, they advise MNEs to go beyond the elite segments in these markets and target consumers at the base of the pyramid if they want to have a sustainable competitive position in these markets (Tasavori et al. 2016).

There are also grounds for believing that bargaining power will continue to move in the direction of multinational firms. They have a wider choice of investment locations as new 'emerging countries' put themselves forward as export platforms—usually on a tax-free basis. Their proprietary technology is widely sought after by EMs and their branded products sell at a premium to upscale consumers globally.

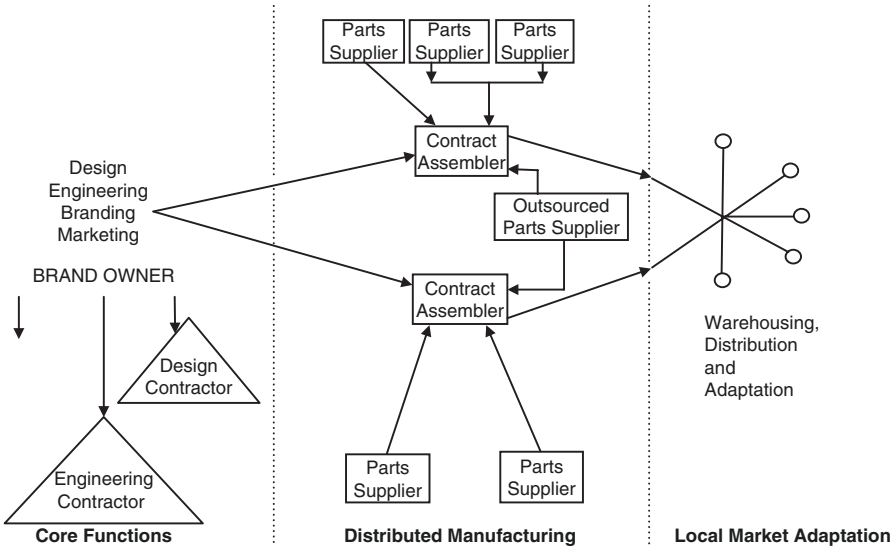

Fig. 2 The global factory (Source: Buckley and Ghauri 2004, p. 89)

Flexible manufacturing and production controlled by IT systems mean that more and more of the activities of MNEs are footloose. As suggested by Buckley and Ghauri (2004), the manufacturing system of future will use distributed manufacturing, where products are more and more responsible to customer needs through flexible factories (the global factory, see Fig. 2). In flexible factories, all plants can make all firms' products and brands and can switch between different firms' products very quickly using new technologies and robots. The global factory concept is thus already in place. The global factory is opposite to vertical integration and internalization. In this case, the production is shared by plants all over the globe that are manufacturing different parts that travel to another location to be assembled into a final product. In this system, most of these plants are not owned by brand owners who control the designing and marketing while most other parts of the value chain are outsourced all over the globe in quest of the most optimal location.

It is clear that increased globalization is beyond the control of any single nation state. One important response is the growth of regional co-operation which allows state policies to be coordinated to prevent wasteful competition or even combined to produce regional trading and investment blocs such as; EU, NAFTA and ASEAN. Table 1 examines the impact of policies of emerging countries on MNEs and the reciprocal impact of the strategies of MNEs on emerging markets. The final part of the table examines the impact of international developments. Several policies are listed which individual emerging countries may follow to attract inward investment by MNEs. The results of these policies may well increase competition among emerging countries, unless the final policy—regionalization is followed to ameliorate the impact of the others. Regionalization requires coordination of policies,

Table 1 The interdependence between MNEs and developing countries

Policies of developing countries	Impact on MNEs
Subsidizing Industries	Increased local competition
Education improvements	Potential to recruit managers, scientists and develop new technologies in emerging markets
Stronger markets	Development of new products specifically targeted at emerging markets
Developing export processing zones	Export platform opportunities
Regionalisation	Decreased opportunities for investment tournaments
Strategies of MNEs	*Impact on developing countries*
Multiple sourcing	Increase competition between host countries
Reduced unskilled labour component in production and services	Reduce DFI in emerging markets
Risk Management (shift away from political to financial risk)	Variable impact depending on financial "soundness"
"Flexibility"	Joint ventures Danger of increasing "footloose"
Local sourcing	Increased spillovers and positive linkages

cooperation between countries and the willingness of countries to forge opportunities in the wider interests of the region—these factors are not always present.

The strategies of MNEs in the global economy are largely geared towards achieving flexibility of operation, including multiple sourcing and risk management (Buckley and Casson 1976, 1998). The reduction of the unskilled labor content in many areas of production, distribution and services, through substitution of capital and information technology, together with new method of operation, means that efficiency-seeking FDI is becoming more important where inputs from EMs play a dominant role.

Finally, recent developments at global level, such as increased volatility in political economy, protectionism and increasing importance of non-market actors such as NGOs, favour flexible strategies. However, the attempt to regulate trade (for example by the WTO) and to bring investment and services within the audit of international regulation have so far proved largely ineffectual.

Managing Increasing Interdependence

The notion that increasing interdependence can in any sense be 'managed' is rather superficial. Who is to do the managing? There are two groups of actors that have been the focus of attention—firms and governments. Firms are often seen as 'islands of conscious power' within a sea of market relations. Their international strategies rule out the market and the boundaries of the firm are defined by the point at which the costs of using the market fall below the cost of internal organization (Coase 1937).

The second group of actors is made up of governments and governmental bodies who seek to regulate their economies in line with the perceived best interests of their population. Governments aim to plan their economies to seek goals which they believe a purely market outcome will not secure. This is particularly true for emerging countries for which the market outcome is, by definition, unsatisfactory. Conflicts between the operations of markets and government policies are greatest in these situations (Buckley and Ghauri 2015).

We can thus expect an increasing tension between the strategies of MNEs and government policies. However, we need to consider the fact that markets are not perfect and both firms and governments are attempting to appropriate rents in a world of imperfect markets (Buckley and Ghauri 2002). This opens the possibility of collusion between governments and MNEs in dividing rents and mitigating conflicts between them. It is this game which is taking place in a globalizing world where markets are becoming increasingly interdependent and this is critical in allocating the benefits of improving technology, communication, productivity and output leading towards a sustainable development in EMs.

Previously, the absence of strong local competitors in most emerging markets was one of the reasons that the FDI flow was predominantly from the industrialized countries of the North to the developing countries of the South. The import substitution and protectionist strategies of most emerging markets of that era made FDI a more viable mode than trade to gain access to these markets. Now government induced market imperfections are disappearing, there are many strong and competitive local firms that can beat off the entry of foreign firms. Moreover, most of the countries have moved away from protectionist politics and are opening up their markets to all types of entry by foreign firms; the nature of the resource flow has thus changed.

In addition to the above, agglomeration has become a major factor in MNE strategies towards FDI (Oxelheim and Ghauri 2004). This leads to synergetic effects such as foreign firms buying from each other. Moreover, the presence of a number of foreign firms helps to develop specialized know-how and skills with regard to the availability of skilled labor, suppliers and distribution networks. Thus, it is not surprising that the stock of FDI in a given country is often a good predictor of future FDI.

Conclusion

This paper charts a series of profound changes in the configuration of the world economy since the end of World War II. Many less developed or undeveloped economies now deserve the epithet ‘emerging’. This reflects the reality of the waves of emerging economies that have become significant players in the globalizing world of economy. A new assertiveness has followed economic success and this is influencing future economic and political relationships. The new assertiveness in emerging markets came at a time of increasing interdependence between

Table 2 Functions of state

	Addressing market failure			Improving equity
Minimal functions	Providing pure public goods: Defense Law and order Property rights Macroeconomic management Public health			*Protecting the poor:* Antipoverty programs Disaster relief
Intermediate functions	Addressing externalities Basic education Environmental protection	*Regulating monopoly:* Utility regulation Antitrust policy	*Overcomingimperfect information:* Insurance (health, life, pensions) Financial regulation Consumer protection	*Providing social insurance* Redistributive pensions Family allowances Unemployment insurance environmental
Activist functions	*Coordinating private activity:* Fostering markets Cluster initiatives			*Redistribution:* Asset redistribution

Source: (IBRD) (1997), p. 27

economies. This growing interdependence is manifested by an increasing amount of international trade (UNCTAD 2016) but is clearest in the quantum leap in international direct investment which flows between established developed countries (Buckley and Ghauri 2015). Foreign direct investment is strategic, not only from the point of view of the investing multinational firm but also from the viewpoints of both the parent and recipient countries. The globalization across markets create thus new challenges that need sophisticated decision making on parts of governments and multinationals. In this respect, multinationals are better equipped to handle these new conditions. The governments, particularly from developing countries, are not in a position to perform even the intermediate functions (see Table 2) as stipulated by IBRD (1997). Where the governments have to address basic education, environment protection, regulation of monopolies, overcoming imperfection and providing social insurance such as poverty reduction. The decline of FDI in the period after 9-11, the increasing oil prices due to the war on terror have demonstrated the increasing tensions between DC governments, MNEs and governments from EMs.

The recent development in the political economy has thus created an atmosphere of mistrust between DC governments and EM governments. Most EMs now believe that market economy is the only system that can increase sustainable development and poverty reduction. They however want to adopt this system under a certain controlled manner and not imposed by a third party. They fear that a focus on war on terror and increasing waves of patriotism in DCs are building walls between the DCs and common goals of poverty reduction and sustainable development in the South. These governments also want that the World Bank, IMF and WTO, who are often blamed to guard the interest of the Western world, should play a neutral role binding all members and asking DCs to open their markets for imports from EMs as well (Wolf 2004).

As suggested by Prahalad (2004), to be successful MNEs need to adapt their products and strategies to the markets and consumers of the developing countries. They must make products that are affordable and accessible to the majority of population in these countries. It seems that there are psychological barriers between MNEs and EMs. While MNEs believe that EM consumers are poor living under poverty without buying power and that EM governments are often corrupt regimes, the EMs on the other hand believe that MNEs and their governments exploit their powers through rent seeking behavior and have no intention to contribute towards local development and poverty reduction.

There has thus been a reassessment of the realignment of the goals of (EM) country government towards 'competitiveness'—joining the globalizing world economy instead of resisting the impact through protectionism. Although several economies have achieved the breakthrough, many countries have been completely bypassed, gaining a minuscule fraction of the world growth. There has also been a growth of the 'New Mercantilism' where, through the rhetoric of competitiveness (as Krugman (1994) shows), beggar-my-neighbor policies are followed. Trade is described in terms of metaphors from warfare, rather than being regarded as mutually beneficial. In fact, it is now DCs, the proponents of the free market, that are becoming more and more protectionists.

The shareholder return-driven environment that prevailed in the last millennium and the perceived difficulties of global governance in MNEs have fueled the current crisis in governance of firms. This has led to opinions that MNEs are safely looking for control and benefit only owners and executives rather than other stakeholders such as society (Ghauri and Buckley 2002; Ghauri et al. 2014). It is therefore important to be aware of the dangers imposed by capitalism and risks of mismanaged liberalization. We need to re-divert our attention to ensuring effective responses to global environmental challenges instead of forcing EMs to follow Western style free markets and to do what they would not prefer to do. Globalization and global economic integration does not render states destitute or enhance poverty and inequality. It is the mismanagement of this process that is creating mistrust and inequality within and beyond countries.

References

Barnet RJ, Muller RE (1975) Global reach. Jonathan Cape, London

Boddewyn JJ (1992) Political behaviour research. In: Buckley PJ (ed) New directions in international business. Edward Elgar, Cheltenham

Buckley PJ, Casson M (1976) The future of the multinational corporation. Macmillan, London

Buckley PJ, Casson M (1991) Multinational enterprises in less developed countries: cultural and economic interactions. In: Buckley PJ, Clegg J (eds) Multinational enterprises in less developed countries. Macmillan, London

Buckley PJ, Casson M (1998) Models of the multinational enterprise. J Int Bus Stud 29(1):21–44

Buckley PJ, Ghauri PN (1999) The global challenge for multinational enterprises: managing increasing interdependence. Elsevier, Amsterdam

Buckley PJ, Ghauri PN (2002) International mergers and acquisitions. Thomson Learning, London
Buckley PJ, Ghauri PN (2004) The globalisation, economic geography and the strategy of multinational enterprises. J Int Bus Stud 35(2):81–98
Buckley PJ, Ghauri PN (2015) International business strategy: theory and practice. Routledge, London
Cavusgil T, Ghauri P, Akcal A (2013) Doing business in emerging markets, 2nd edn. Sage, London
Coase R (1937) The nature of the firm. Economica (ns) 4:386–405
Dunning JH (1988) Explaining international production. Allen & Unwin, London
Dunning JH (1994) Re-evaluating the benefits of foreign direct investment. Transnatl Corporations 3(1):23–51
Dunning JH (2000) The eclectic paradigm as an envelope for economic and business theories of MNE activity. Int Bus Rev 9(2):163–190
Dunning JH, McKaig-Berliner A (2002) The geographical sources of competitiveness: the professional business services industry. Transnatl Corporation 11(3):1–38
Dunning JH, Wallace L (1999) New Jersey in a globalising economy. In: Phelps NA, Alden J (eds) Foreign direct investment and the global economy. The Stationary Office, London, pp 253–269
Elg U, Ghauri PN, Schaumann J (2015) Internationalization through socio-political relationships: MNEs in India. Long Range Plan 48(5):334–345
Firth R, Ghauri P (2010) Multinational enterprise acquisitions in emerging markets: linkage effects on local firms. Eur J Int Manag 4:135–162
Gereffi P, Evans P (1981) Transnational corporation, dependent development and state policy in the semi-periphery: a comparison of Brazil and Mexico. Lat Am Res Rev 15(1/3):31–64
Ghauri PN, Buckley P (2002) Globalization and the end of competition: a critical review of rent-seeking multinationals. In: Havila V, Forsgren M, Håkansson H (eds) Critical research on multinational corporations. Elsevier, Oxford, pp 7–28
Ghauri PN, Rao PM (2009) Intellectual property, pharmaceutical MNEs and the developing world. J World Bus 44(2):206–215
Ghauri PN, Yamin M (2009) Revisiting the impact of multinational enterprises on economic development. J World Bus 44(2):105–107
Ghauri PN, Tasavori M, Zaefarian R (2014) Internationalisation of service firms through corporate social entrepreneurship and networking. Int Mark Rev 31(6):576–600
Ghauri P, Hadjikhani A, Pahlberg C (2015) Multinational corporations' relationship with political actors: transparency vs. opacity. In: Forssbeck J, Oxelheim L (eds) The Oxford handbook of economic and institutional transparency. Oxford University Press, New York, pp 341–158
Havila V, Forsgren M, Håkansson H (eds) (2002) Critical perspective on internationalization. Elsevier, Amsterdam
Hill H, Johns B (1985) The role of direct investment in developing east Asian countries. Weltwirtschaftliches Arch 121(3):355–381
Hymer SH (1971) The multinational corporation and the law of uneven development. In: Bhagwati JN (ed) Economics and world order from 1970s to 1990s. Macmillan, London
International Bank for Reconstruction and Development (1997) The state in a changing world–World Development Report 1997. IBRD, Washington, p iii
Kaplinsky R (1991) TNEs in the third world: stability or discontinuity? Millennium. J Int Stud 3(1):53–77
Krugman P (1994) Does third world growth hurt first world prosperity. Harv Bus Rev 72(4):113–121
Lall S (1984) Exports of technology by newly-industrializing countries: an overview. World Dev 12(5–6):741–480
Lall S (1994) The East Asian miracle: does the bell toll for industrial strategy? World Dev 22(4):645–654
Lall S, Tenbal M (1998) Market stimulating technology policies in developing countries: a framework with examples from East Asia. World Dev 26(8):1369–1385
Mittelman JH (1994) The globalisation challenge: surviving at the margins. Third World Q 15(3):427–443

Oxelheim L, Ghauri P (editors) (2004) European Union and the Race for Inward FDI in Europe, Oxford: Elsevier.
Penrose ET (1956) Foreign investment and the growth of the firm. Econ J 66(262):220–235
Prahalad CK (2004) The fortune at the bottom of the pyramid: eradicating poverty through profit. Wharton Scholl Publishing, Philadelphia
Prahalad CD, Lieberthal K (1998) The end of corporate imperialism. Harv Bus Rev 76(4):69–79
Prasad, B, Ghauri, P (editors), (2004) Global Firms and Emerging Markets in the Age of Anxiety, New York: Praeger.
Stopford J (1994) The growing interdependence between transnational corporations and governments. Transnatl Corporations 3(1):53–77
Streeten P (1974) The theory of development policy. In: Dunning JH (ed) Economic analysis and the multinational enterprise. George Allen & Unwin, London
Tasavori M, Ghauri PN, Zaefarian R (2016) Entering the base of the pyramid market in India: a corporate social entrepreneurship perspective. Int Mark Rev 33(4):555–579
Teegen H, Doh JP, Vachani S (2004) The importance of non-governmental organisations (NGOs) in global governance and value creation: an international business research agenda. J Int Bus Stud 35(6):63–483
UNCTAD (2015) World investment report. UNCTAD, Geneva
UNCTAD (2016) World investment report. UNCTAD, Geneva
Vachani S, Smith NC (2004) Socially responsible pricing: lessons from the pricing of AIDs drugs in developing countries. Calif Manag Rev 47(1):117–144
Vernon R (1966) International investment and international trade in the product cycle. Q J Econ 80:190–207
Vernon R (1971) Sovereignty at bay. Basic Books, New York
Vernon R (1981) Sovereignty at bay: ten years after. International Organisation, Summer 1981
Wolf M (2004) Why globalization works. Yale University Press, New York

Multinational Enterprises and the Challenges of Globalization

Valérie Fossats-Vasselin and Ulrike Mayrhofer

Abstract This chapter attempts to contribute to a better understanding of how multinational enterprises (MNEs) can meet the challenges of globalization. Multinational enterprises have gained considerable economic power and emerging countries have become increasingly important as markets but also as investors. In this study, we focus on the expansion of two European MNEs into Asia. Our analysis shows that this region is seen as a crucial marketplace, which explains why companies seek to locate more resources in Asia. They attempt to develop managerial practices that facilitate the integration of subsidiaries in local business environments. This key factor can be considered as a driver for success.

Introduction

Multinational enterprises (MNEs) play a predominant role in today's global economy and their influence in both mature and emerging markets has considerably increased. In 2015, the world's 500 largest companies generate 27.6 trillion US dollars in revenues and 1.5 trillion US dollars in profits. They employ 67 million people worldwide (Fortune Global 500). Following the trend of market liberalization, MNEs have diversified their geographic expansion and developed their investments in emerging countries (Meschi and Prévot 2016).

A multinational enterprise is a company that conducts foreign direct investments (FDIs) and that owns or, to a certain extent, controls value-added activities in several countries (Dunning and Lundan 2008, p.3). These activities generally take place within subsidiaries that can be either wholly owned (greenfield subsidiaries, acquisitions) or partially owned (joint ventures). Organizational configurations of multinational enterprises are diverse and their geographic dispersion changes according to the opportunities offered by foreign markets. Because of the increasing internationalization of their activities, MNEs need to consider the economic,

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institutional and cultural diversity of local environments and adapt their managerial practices (Mayrhofer 2013). Emerging economies are characterized by a high degree of uncertainty, which can be explained by institutional transitions and environmental changes (Peng and Zhou 2005).

In this chapter, we will analyze how multinational enterprises face the challenges of globalization. We will first present major trends concerning foreign direct investments (FDIs) conducted by MNEs before analyzing their development in emerging markets. We will more specifically focus on the expansion of two European MNEs into Asia which has become the most attractive region for FDIs. We will explain how they organize their activities in Asia and how they adapt their managerial practices to achieve better performance.

Multinational Enterprises in the Global Economy

We will first examine key characteristics of the world's largest multinationals before analyzing recent trends concerning foreign direct investments conducted by these companies.

The World's Leading Multinationals

Multinational enterprises have gained significant economic and financial power. They can be considered as major players of the globalization process. A significant number of multinationals have their headquarters in mature economies, but the recent period is marked by the rising importance of emerging market multinationals, i.e. companies originating from emerging countries, which also aim to expand on the world market (Cuervo-Cazurra and Ramamurti 2015). In 2015, the US Walmart group is the first MNE in the world, followed by the Chinese companies State Grid and China National Petroleum. As indicated by Table 1, eight US companies, six European companies (two German, one British, one Dutch, one Italian and one Swiss group), four Chinese companies, one Japanese company and one South Korean company appear in the ranking of the world's 20 largest multinational enterprises, published by Fortune Global 500.

MNEs of this ranking operate in both manufacturing (e.g. petroleum refining, motor vehicles and parts, computers and office equipment, electronics and electrical equipment) and service industries (e.g. retailing, insurance, healthcare, banks). Their annual sales range between 152.4 billion US dollars (General Motors) and 482.1 billion US dollars (Walmart), and their annual net income goes from −6.5 billion US dollars (BP—British Petroleum) to 53.4 billion US dollars (Apple). Their number of employees is between 68,000 (McKasson) and 2,300,000 (Walmart).

Table 1 Classification of the world's 20 largest multinational enterprises (according to their total sales in 2015)

Rank/Company	Headquarters location	Industry	Total sales (in billion US dollars)	Net income (in billion US dollars)	Number of employees
1. Walmart	Bentonville, United States	Retailing	482.1	14.7	2,300,000
2. State Grid	Beijing, China	Energy and utilities	329.6	10.2	927,839
3. China National Petroleum	Beijing, China	Petroleum refining	299.3	7.1	1,589,508
4. Sinopec Group	Beijing, China	Petroleum refining	294.3	3.6	810,538
5. Royal Dutch Shell	The Hague, Netherlands	Petroleum refining	272.2	1.9	90,000
6. Exxon Mobil	Irving, United States	Petroleum refining	246.2	16.2	75,600
7. Volkswagen	Wolfsburg, Germany	Motor vehicles and parts	236.6	−1.5	610,076
8. Toyota Motor	Toyota City, Japan	Motor vehicles and parts	236.6	19.3	348,877
9. Apple	Cupertino, United States	Computers and office equipment	233.7	53.4	110,000
10. BP (British Petroleum)	London, United Kingdom	Petroleum refining	226	−6.5	79,800
11. Berkshire Hathaway	Omaha, United States	Insurance	210.8	24.1	331,000
12. McKasson	San Francisco, United States	Wholesalers: Healthcare	192.5	2.3	68,000
13. Samsung Electronics	Suwon, South Korea	Electronics and electrical equipment	177.4	16.5	319,000
14. Glencore	Baar, Switzerland	Mining and crude-oil production	170.5	−5	102,388
15. Industrial and Commercial Bank of China	Beijing, China	Banking	167.2	44.1	466,346
16. Daimler	Stuttgart, Germany	Motor vehicles and parts	165.8	9.3	284,015
17. United Health Group	Minnetonka, United States	Healthcare	157.1	5.8	200,000
18. CVS Health	Woonsocket, United States	Food and drug stores	153.3	5.2	199,000
19. EXOR Group	Turin, Italy	Diversified financials	152.6	0.8	303,247
20. General Motors	Detroit, United States	Motor vehicles and parts	152.4	9.7	215,000

Source: Based on data provided by Fortune Global 500 (2016)

Foreign Direct Investments of Multinational Enterprises

During several decades, the world economy was dominated by multinational enterprises from mature economies, notably from North America, Europe and Japan, who developed their activities in their home country before expanding into other developed countries. The recent period is marked by the rising importance of emerging markets, which offer new growth opportunities and whose companies also aim to conquer foreign markets.

In 2015, foreign direct investments (FDIs) amount to 1762 billion US dollars (+38% in regard to 2014). This significant increase can be explained by the recent flow of international mergers and acquisitions who account for 40.1% of FDIs. The figures provided by UNCTAD (2016) show that investments made by mature economies (72.3% of outward FDIs) remain more important than investments of emerging economies (27.7%). The European Union (33%), North America (24.9%), and East and South-East Asia (19.9%) appear to be particularly active investors abroad.

Table 2 indicates the world's top investing countries in 2015. It shows that the United States rank first (20.4% of outward FDIs), ahead of Japan (8.8%), China (8.7%),

Table 2 The world's top investing countries in 2015

Country (rank in 2014)	Value of FDIs (in billion US dollars)	% of outward FDIs
1. United States (1)	300	20.4
2. Japan (4)	129	8.8
3. China (3)	128	8.7
4. Netherlands (7)	113	7.7
5. Ireland (9)	102	6.9
6. Germany (5)	94	6.4
7. Switzerland (153)	70	4.7
8. Canada (8)	67	4.5
9. Hong Kong, China (2)	55	3.7
10. Luxemburg (15)	39	2.6
11. Belgium (32)	39	2.6
12. Singapore (11)	35	2.4
13. France (10)	35	2.4
14. Spain (12)	35	2.4
15. South Korea (13)	28	1.9
16. Italy (14)	28	1.9
17. Federation of Russia (6)	27	1.8
18. Sweden (22)	24	1.6
19. Norway (16)	19	1.3
20. Chile (19)	16	1.1

Source: Data provided by UNCTAD (2016, p.6)

Table 3 The world's top FDI recipient countries in 2015

Country (rank in 2014)	Value of FDIs (in billion US dollars)	% of inward FDIs
1. United States (3)	380	21.6
2. Hong Kong, China (2)	175	9.9
3. China (1)	136	7.7
4. Ireland (11)	101	5.7
5. Netherlands (8)	73	4.1
6. Switzerland (38)	69	3.9
7. Singapore (5)	65	3.7
8. Brazil (4)	65	3.7
9. Canada (6)	49	2.8
10. India (10)	44	2.5
11. France (20)	43	2.4
12. United Kingdom (7)	40	2.3
13. Germany (98)	32	1.8
14. Belgium (189)	31	1.8
15. Mexico (13)	30	1.7
16. Luxemburg (23)	25	1.4
17. Australia (9)	22	1.2
18. Italy (14)	20	1.1
19. Chile (17)	20	1.1
20. Turkey (22)	17	1.0

Source: Data provided by UNCTAD (2016, p.5)

the Netherlands (7.7%) and Ireland (6.9%). The ranking continues to be dominated by mature markets, but one can note the presence of Hong Kong, China (3.7%), Singapore (2.4%), South Korea (1.9%), the Federation of Russia (1.8%) and Chile (1.1%).

In 2015, mature economies received 54.6% and emerging economies 45.4% of FDI flows. East and South-East Asia (25.4%), the European Union (24.9%) and North America (24.3%) seem particularly attractive for international investments.

Table 3 presents the first 20 countries that received FDIs in 2015. It shows that the United States (21.6% of inward FDIs) rank first, ahead of Hong Kong, China (9.9%), China (7.7%), Ireland (5.7%) and the Netherlands (4.1%). It shows that China and other emerging countries attract a significant part of investments: Brazil received 3.7%, India 2.5%, Mexico 1.7%, Chile 1.1% and Turkey 1% of FDIs.

The analysis of major FDI trends shows that Asia has become the major region for international investments. In the following part, we will therefore examine the development of MNEs in Asia.

The Expansion of Multinational Enterprises into Asian Markets

In order to better understand the challenges of globalization faced by MNEs, we selected two European companies who are world leaders in their respective industries and who have significantly developed their activities in Asia: Saint-Gobain and Volvo Group. The analysis is based on secondary data (annual reports, press articles, etc.) and interviews conducted with several managers. Table 4 presents major characteristics of these two MNEs.

Saint-Gobain, the world leader in the habitat and construction markets, shows a strong commitment to innovation and internationalization. The Chairman and Chief Executive Officer (CEO) of the group declares: 'In all our businesses, our absolute priority is to listen closely to customers so we can respond to their needs today while helping them anticipate those of tomorrow. We will continue with our investments and acquisitions in high-growth-rate countries and in high-performance materials […]. Saint-Gobain showed strong progress in its 2016 results. We saw the benefits of our optimization efforts and of our development in emerging markets' (Saint-Gobain 2016). Two key drivers are presented for developing the business of the company: emerging markets and high-performance materials. Saint-Gobain operates in 66 countries and seeks to benefit from the economic growth in emerging markets. Saint-Gobain Sefpro, a major brand of Saint-Gobain for high-performance materials, is a leading manufacturer of refractories for the glassmaking industry.

In 2016, Volvo Group introduced a brand-based organization, covering ten business areas. The President and CEO of Volvo indicates: 'We have identified improvement areas such as speeding up decision-making and strengthening our agility to adapt to market volatility. Our tools for achieving this include decentralizing decisions and accountability. One step in this direction was the implementation of a brand-based organization for our truck business. Each of the brands now has responsibility for its own commercial development and profitability' (Volvo 2016).

Table 4 Key figures of Saint-Gobain and Volvo Group in 2016

Companies	Headquarters location	Industry	Total sales (in billion euros)	Net income (in billion euros)	Number of employees
Saint-Gobain	Paris, France	Construction	39.1	1.3	173,063
Volvo Group	Gothenburg, Sweden	Trucks, buses, engines and construction equipment	31.1	1.4	84,039

Sources: Saint-Gobain (2016), Volvo (2016)

The Attractiveness of Asian Markets

For Saint-Gobain and Volvo Group, Asian countries are considered as priority markets, mainly because of their size and growth potential. The importance of Asia on the global scene attracts the attention of both practitioners and researchers (Kwon 2010; Amann et al. 2014; Nguyen and Rugman 2015).

Concerning Saint-Gobain, we can mention that the need for infrastructure in emerging countries continues to develop strongly: China has thus become the major market for construction activities and the Indian market is expected to grow twice as fast as China in the coming years. Consequently, Saint-Gobain has increased investments in emerging countries, which represent about one third of its total investments. The group focuses on product development and proposes differentiated products that are adapted to local markets. It plans to strengthen its position in China and India to benefit from the growing demand. 'For Saint-Gobain Sefpro, China represents half of the global market in quantity, closely followed by India and other countries in Asia. Our final markets are mostly based in Asia', explains the Asia Pacific Sales Director of the company.

For Volvo Group, capturing the economic growth in Asian countries is defined as a strategic priority. Emerging economies represent 65% of the truck market and show a significant growth potential. The company mainly focuses on China, South-East Asia and India which have become major markets for its activities (Volvo 2015, 2016). Table 5 illustrates the importance of Asian markets for Saint-Gobain and Volvo Group.

Several reasons explain the expansion of MNEs into Asian emerging markets. First, the high growth rates make it easier to acquire new customers than in developed countries. Second, it is important to enter these markets early to benefit from a first-mover advantage and to grow together with customers. Third, implementing subsidiaries in Asia allows access to lower production costs. Finally, we can observe a growing interest of Asian companies for investments in Europe. It is thus important for Western MNEs to compete with these companies in their home-region.

Table 5 Importance of Asian markets for Saint-Gobain and Volvo Group

Companies	Importance of Asian markets
Saint-Gobain	– Asia and emerging countries: 19% of total sales – Main markets: China, Indonesia, Japan, Malaysia, Singapore, South Korea, Thailand and Vietnam
Volvo Group	– Asia: 18% of total sales – Largest markets: Japan, China, South Korea and India

Sources: Saint-Gobain (2015) and Volvo (2016)

The Regional Organization of Activities

When companies enter foreign markets, they can use a variety of development modes: exports, cooperation agreements (e.g. joint ventures) and wholly-owned subsidiaries (Mayrhofer 2013).

Saint-Gobain has developed an important number of subsidiaries in Asian emerging countries, notably in China and India. Their facilities concern research and development (R&D), production and sales activities. The subsidiaries are either wholly-owned subsidiaries or joint ventures established with local companies. For instance, Saint-Gobain Sefpro started its activities in China in the early 1990s by setting up a joint venture with a local partner. At that time, foreign investors had to form joint ventures with Chinese companies if they wanted to enter the market. As mentioned by the Asia Pacific Sales Director, the company continues to open new production plants with local actors in order to share the risks. Investments are mainly driven by the size and growth of markets as well as the low level of production costs. Saint-Gobain Sefpro implemented its first production plant in India in 2002. At that time, there were only two competitors in the market. The company decided to acquire them and then stopped the business activity for one of them. Entering the Indian market thus represented an important opportunity for the company.

It seems interesting to mention that Saint-Gobain has a preference for wholly-owned subsidiaries. Joint ventures are mainly created for legal reasons and the sharing of risks, and the company attempts to hold a majority equity stake in their capital. In fact, choosing a market entry mode is a strategic decision. Schaaper (2005) highlights that, in China, companies more frequently establish wholly-owned subsidiaries for sales than for production activities. Schaaper et al. (2011) recommend to use wholly-owned subsidiaries if companies aim to have strong control on local operations, since this entry mode avoids sharing strategic information with competitors.

Saint-Gobain Sefpro mainly serves glass manufacturers, which represent a limited number of customers. The company's sales teams work for the subsidiaries in China, India and Japan. Additionally, they have a sales office in Indonesia and a regional network of agents in several Asian emerging countries (South Korea, Thailand, Vietnam, Pakistan, Philippines and Taiwan). The Asia Pacific Sales Director explains, 'we have a unique business coverage, the sales network markets the products from all our factories and the salespeople work in our subsidiaries. The agents are located in countries where there is a demand for our products. We are in a business with a small number of clients. It is thus necessary to maintain our relationships with major clients in different countries.'

The Volvo Group operates in more than 190 markets and has established subsidiaries in different parts of the world. Many subsidiaries are wholly-owned and therefore controlled by the company, e.g. the Japanese subsidiary that was established through an acquisition. Several subsidiaries take the form of joint ventures. For example, the company has created joint ventures in China and India where the group

has gained strong market positions. It is also present in other countries such as Malaysia and Taiwan through independent distributors (Volvo 2016).

In 2016, the Volvo Group decided to nominate a specific management team for Asia to seize the opportunity for profitable growth. The objective is to capture growth by establishing a value-chain with an appropriate cost structure and by working more intensively with local partners. The management team has its own resources for R&D, manufacturing and sales. The sales organization is located in Singapore, a city that is considered as a strategic location for many European MNEs. The subsidiary is set up as the regional headquarters and used as a gateway to reach other Asian countries. Enright (2005) argues that many Western MNEs establish regional headquarters in Asia. The objective of these intermediate organizational structures is to maintain control over production and sales in Asia while increasing the proximity with local territories. Lunnan and Zhao (2014) explain that regional headquarters can have a role in the sharing of knowledge and managerial practices.

Adapting Managerial Practices to Succeed in Asia

Asia represents a region with an important number of countries characterized by diverse cultures and institutions that are more or less developed. Kwon (2010) demonstrates that a strong market orientation can generate high subsidiary performance. 'Foreign subsidiaries, which possess superior technology advantages and maintain active network relationships with local key entities such as suppliers, distributors, customers, and governmental authorities, are shown to actively devote themselves to market orientation' (Kwon 2010, p.179). The necessity of being part of local business networks is intensified in emerging countries, which are characterized by weaker institutions. Therefore, MNEs seek to recruit local people. The Asia Pacific Sales Director of Saint-Gobain Sefpro explains that his team is only composed by local people. Many of them have been working for the company for more than ten years, which allows building trust and long-term relationships with customers. This is especially important for China where informal networks (guanxi) are part of the local culture and can play a decisive role for the management of business relationships.

Since MNEs experience price competition from local firms, there exists a certain pressure to implement subsidiaries in Asian countries. For Lam and Yeung (2010), human resource management issues are critical. Local employees are less costly, can be legally imposed by strict recruitment conditions for foreigners and have more knowledge about the local environment. Expatriate managers bring expertise in the industry sector and are more familiar with the organizational culture of the MNE, thus facilitating headquarters-subsidiaries relationships. The authors recommend finding a balance between these two types of employees, which also depends on environmental uncertainty. For this reason, the manager of the subsidiary is often an expatriate, e.g. the director of the Volvo joint venture in China is European.

Social exchange within MNEs has a positive impact on the development of trust and organizational citizenship behavior (Lai et al. 2014). Social exchange is evaluated by contact frequency, reciprocal support and strong relationships. In this perspective, we can mention that the integration of employees within and across subsidiaries is an important challenge for MNEs, especially in Asia where employee turnover appears to be high. Trust, consensus in decision-making, communication and personal relationships are often key factors explaining the success of joint ventures established in Asia (Varma et al. 2015). The collaboration of employees is central and facilitates the relationships between the headquarters and local subsidiaries.

The trend to increasingly recruit local managers requires clear objectives and the adaptation of managerial practices. Welch and Welch (2006) explain that MNEs achieve higher performance when objectives are clearly communicated and associated with a system of rewards for local employees. Saint-Gobain Sefpro has a centralized system of reporting, but the sales force enjoys a significant degree of autonomy.

Emerging economies are the preferred target for investments of European MNEs, even if they are not always familiar with their managerial practices as well as cultural and institutional contexts. Choosing expatriates and local staff to manage subsidiaries seems an adequate managerial practice for Asian markets. Expatriates can be assigned by the company, but they can also be self-initiated, e.g. young Europeans who have established themselves in Asia. They know the cultural and institutional environment and can more easily interact with local managers. Since it is necessary to train local staff, both Volvo Group and Saint-Gobain provide on-line training programs for their Asian employees.

Conclusion

This chapter has attempted to contribute to a better understanding of how multinational enterprises can meet the challenges of globalization. Our analysis shows that MNEs have gained considerable economic power and that emerging countries have become increasingly important as markets, but also as investors. Figures provided by UNCTAD (2016) indicate that Asia has become the major region for foreign direct investments. Current academic literature calls for more research on emerging economies in Asia and the recent economic crisis has pushed MNEs towards Asian markets (Fossats-Vasselin 2017).

The expansion of two European MNEs into Asia shows that the activities developed in this geographic region concern different elements of the value-chain. In this sense, our work is in line with the research conducted by Nguyen and Rugman (2015) who find that 95% of the production of Asian subsidiaries is sold in Asian countries. This figure suggests that Asia has become more than a location offering cheap workforce. It has to be considered as a crucial marketplace, which explains why companies tend to locate more resources in this strategic region of the global economy. It is therefore necessary to develop managerial practices that facilitate the integration of established subsidiaries in local business environments.

References

Amann B, Jaussaud J, Schaaper J (2014) Clusters and regional management structures by Western MNEs in Asia: overcoming the distance challenge. Manag Int Rev 54(6):879–906

Cuervo-Cazurra A, Ramamurti R (eds) (2015) Understanding multinationals from emerging markets. Cambridge University Press, Cambridge

Dunning JH, Lundan SM (2008) Multinational enterprises and the global economy, 2nd edn. Edward Elgar Publishing, Cheltenham

Enright MJ (2005) Regional management centers in the Asia-Pacific. Manag Int Rev 45:69–82

Fortune Global 500 (2016) Ranking of the world's 500 largest companies. Fortune Magazine, New York

Fossats-Vasselin V (2017) Coordination et contrôle, des enjeux permanents pour la firme multinationale. In Tournois N, Very P (eds) Innovation ouverte : ses exigences et résultats. Vuibert, Paris, forthcoming

Kwon YC (2010) Market orientation of Korean MNE subsidiaries and their performance in the Chinese and Indian markets. Int Mark Rev 27(2):179–199

Lai C, Singh B, Alshwer AA, Shaffer MA (2014) Building and leveraging interpersonal trust within and across MNE subsidiaries: a social exchange perspective. J Int Manag 20(3):312–326

Lam SSK, Yeung JCK (2010) Staff localization and environmental uncertainty on firm performance in China. Asia Pacific Journal of Management 27(4):677–695

Lunnan R, Zhao Y (2014) Regional headquarters in China: role in MNE knowledge transfer. Asia Pac J Manag 31(2):397–422

Mayrhofer U (2013) Management of multinational enterprises: a French perspective. Palgrave Macmillan, Basingstoke

Meschi PX, Prévot F (eds) (2016) Economies émergentes. Quels enjeux pour le management international? Vuibert, Paris

Nguyen QTK, Rugman AM (2015) Multinational subsidiary sales and performance in South East Asia. Int Bus Rev 24(1):115–123

Peng MW, Zhou JQ (2005) How network strategies and institutional transitions evolve in Asia. Asia Pac J Manag 22(4):321–336

Saint-Gobain (2015) Annual report

Saint-Gobain (2016) Press release results

Schaaper J (2005) Contrôle multidimensionnel d'une filiale à l'étranger: construction d'un modèle causal à partir du cas des multinationales européennes et japonaises en Chine. Finance Contrôle Stratégie 8(1):159–190

Schaaper J, Mizoguchi S, Nakamura H, Yamashita S (2011) Control of French and Japanese subsidiaries in China: implementing control mechanisms before and after the global economic crisis. Asia Pac Bus Rev 17(4):411–430

UNCTAD (2016) World investment report 2016. Investor nationality: policy challenges. United Nations Conference on Trade and Development, New York, Geneva

Varma S, Awasthy R, Narain K, Nayyar R (2015) Cultural determinants of alliance management capability–an analysis of Japanese MNCs in India. Asia Pac Bus Rev 21(3):424–448

Volvo (2015) Annual report

Volvo (2016) Annual and sustainability report

Welch DE, Welch LS (2006) Commitment for hire? The viability of corporate culture as a MNC control mechanism. Int Bus Rev 15(1):14–28

Part III
Economics

Globalization and Climate Change

Andrea Maneschi

Abstract The worldwide phenomena of climate change and globalization raise many questions for the social sciences. How do globalization and climate change affect each other? What challenges do their interactions present to social scientists? Who are the winners and losers from globalization and climate change? Do their impacts on the welfare of specific social groups intensify or offset each other? Within the limited scope of this chapter, I intend to provide some brief (and incomplete) answers to these important questions.

The Kaya Identity quantifies the role of global production and its linkages to technology in generating the carbon dioxide and other greenhouse gas emissions that are mainly responsible for climate change. From his work on the entropy law and its relation to economic growth, Nicholas Georgescu-Roegen concluded that there is an urgent need to restrain the level of economic activity and the resulting generation of pollution and other waste products. Georgescu-Roegen's writings inspired subsequent advocates of this view such as Serge Latouche.

Introduction

The worldwide phenomena of climate change and globalization raise many questions for the social sciences. How do globalization and climate change affect each other? What challenges do their interactions present to social scientists? Who are the winners and losers from globalization and climate change? Do their impacts on the welfare of specific social groups intensify or offset each other? Within the limited scope of this chapter, I intend to provide some brief (and necessarily incomplete) answers to these important questions.

The effects of climate change have been documented by scientists, statesmen, the media, national and international organizations. There is increasing awareness of climate change around the globe, since the public at large is increasingly affected by its extent and implications. Although it is often referred to as 'global warming,' the effects of climate change go considerably beyond the well-documented warming of our planet.

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The health and future prospects of humankind have been adversely affected (among other consequences) by the ongoing reduction of biodiversity, the extinction of species, the loss of agricultural production in regions of the world where it is the main source of livelihood, a rise in the level of the oceans, and increasing ocean acidification. The rise in sea level alone has affected a third of the world's farming lands, including island nations and poor small farmers living in low-lying countries such as Bangladesh.

Epistemology and Nature of Climate Change

Climate change raises a number of epistemological issues that challenge ecologists and climate scientists, as well as the economists and other social scientists who study its implications. The challenges that climate change presents to social scientists include (1) a long horizon that can extend over centuries; (2) the multiple forms and uncertainties of its impact, which are hard to predict and quantify; (3) the fact that some of its effects are irreversible; (4) its global reach, since climate change affects not only single countries, but the entire globe. Let us examine these in turn.

(1) In the modern history of the West, climate change intensified after the Industrial Revolution, and is projected to continue doing so over a long and indefinite horizon. Its socioeconomic effects over the present and future generations raise the issue of *climate justice*, posing questions such as whether the generations that caused (and are still causing) climate change should compensate those that are now suffering its effects and, if so, how. Climate change has cultural and moral implications, as well as political and economic ones. Policy makers confront questions such as the following: if *benefit-cost analysis* is used to estimate its effects in the present and future, how should weights be assigned to the welfare of different generations? In technical terms, what *discount rate* should be chosen to link the present and the future? (Pearson 2011)

(2) Climate change takes many forms that include global warming, and increasingly unpredictable and disruptive weather patterns such as storms, floods and droughts. Despite the difficulty of predicting and quantifying these effects, meteorologists, ecologists, economists and environmental scientists have made great advances in understanding the nature of climate change and analyzing its implications for human welfare.

(3) Some effects of climate change are irreversible, such as the loss of biodiversity on which the health of our planet depends, the extinction of animal and plant species, the melting of glaciers and of sea ice. The global sea level continues to rise at an average rate of more than 3 mm per year. These developments are accelerating, with ominous socioeconomic, moral, cultural and political implications for the earth and its inhabitants. Records continue to be set in both the northern and southern hemispheres for the warmest annual temperature on record. In 2016, the average temperature in the Arctic region averaged 3 °C above the level in 1951–1980. Irreversible damages to the environment and humankind occur if

natural capital is depleted at an excessive rate, endangering the survival of animal species and medicinal plants, and causing the loss of environmental sinks and ecosystems, and the exhaustion of mineral ores. The ongoing extinction of many species of flora and fauna, and other adverse developments in the earth's biosphere, call for the implementation of *safe minimum standards* for the environment to ensure viable populations for the remaining species.

(4) These effects are global in nature. Climate change is caused by the buildup in the atmosphere of greenhouse gases (GHGs) such as carbon dioxide, methane, and nitrogen oxides (here referred to as 'carbon dioxide' or CO_2 for short). Their absorption by the oceans or by carbon sequestration in the terrestrial biosphere falls short of their continuing emissions, so that the stock of GHGs keeps rising. Since gases emitted in one country eventually affect the climate of all countries, climate change is global in reach, and has become a noxious hallmark of present-day globalization.

Globalization affects climate change negatively by promoting global production and international trade. A predominant factor in the emission of GHGs is its direct relation to world gross domestic product, not only in manufacturing but also industrial agriculture and transportation. The latter includes domestic and transnational road transport, sea transport and aviation (both passengers and freight).

The Kaya (IPAT) Identity

A simplified view of the linkages among CO_2 emissions and some key demographic, economic and technological variables can be obtained via the *Kaya* (or *IPAT*) *Identity*.[1] If P is global population, G is world GDP (gross domestic product), E (*Energy*) is global energy consumption, and CO_2 is global carbon dioxide emissions from human sources, we begin with the identity

$$\begin{aligned} CO_2 &= Population \times \left(GDP / Population\right) \\ &\quad \times \left(Energy / GDP\right) \times \left(CO_2 / Energy\right) \\ &\quad \text{or} \\ CO_2 &= P \times \left(G / P\right) \times \left(E / G\right) \times \left(CO_2 / E\right) \end{aligned} \qquad (1)$$

E/G, energy consumption per unit of GDP, is known as *energy intensity*, and CO_2/E, emissions per unit of energy consumption, is known as *carbon efficiency*.

Because of the multiplicative form of identity (1), it is clear that the growth rate of CO_2 emissions is equal to the sum of the growth rates of population, per capita output, energy intensity and carbon efficiency. If growth rates are denoted by the symbol *, so that the growth of any variable x is $x^* = (\Delta x/\Delta t)/x$, (1) yields

[1] Intergovernmental Panel on Climate Change (2017).

$$CO_2^* = P^* + \left(G/P\right)^* + \left(E/G\right)^* + \left(CO_2/E\right)^*. \tag{2}$$

Globally P and G/P have tended to increase over time since World War Two ($P^* > 0$ and [G/P]* > 0, or $G^* > P^*$), while energy intensity and carbon efficiency have tended to decrease. The decrease in energy intensity (or $E^* < G^*$) is explained by the development of new energy technologies, improvements in the efficiency of existing energy production, and the increasing share of services (whose production requires less energy) in total output. The decrease in carbon efficiency (or $CO_2^* < E^*$) is explained by a gradual switch from energy produced by burning fossil fuels to 'green' energy produced by renewable sources such as solar, wind, tides, etc., and greater capacity to sequester CO_2 in energy production.
(1) can also be written as the **IPAT Identity**

$$Impact = Population \times Affluence \times Techno \log y, \tag{3}$$

where *Impact* is CO_2 emissions, Affluence is GDP per capita, and *Technology* is the composite variable.

$$Technology = \left(Energy/GDP\right) \times \left(CO_2/Energy\right) = CO_2/GDP. \tag{4}$$

Technology, a variable equal to the product of energy intensity and carbon efficiency, is also equal to CO_2 emissions per unit of GDP, and has tended to decline over time.

It is important to realize that the variables listed above as affecting CO_2 emissions are not independent of each other. For example, the growth of per capita income has spurred in most countries a *demographic transition* which has lowered both their birth and their death rates, with noticeable impact on the growth of population. Per capita income affects, and is affected by, the technology used. Global warming may result in a cataclysmic disruption of food production, leading to the forced migration of refugees and even warfare. Other interdependencies can arise.

In addition to the growth of GDP, changes in land-use patterns have promoted deforestation especially in tropical forests, so that less carbon dioxide is absorbed from the atmosphere. The decomposition of cut trees releases additional carbon and promotes desertification, which leads to water scarcity and affects the most vulnerable people and poorest regions of the planet. These effects inhibit the absorption of CO_2 and accelerate climate change.[2] Pollution by GHGs is also exacerbated by energy-intensive irrigation methods used in present-day agriculture.

Globalization can also have positive effects on the environment. These include the development of green technologies (solar, wind, etc.); the costless transfer of information concerning them to other countries; the implementation of international

[2] It has been estimated that deforestation causes one-fifth of the increase in GHGs in the atmosphere.

environmental agreements; greater public awareness of the need to reduce our ecological footprint; the involvement of civil society, including transnational, humanistic and religious institutions. Countries that have grown wealthier thanks to globalization spend increasing fractions of their income on pollution abatement, resulting in a cleaner environment.

The uncertain impact and possibly irreversible effects of climate change suggest the *precautionary principle* as a basis for climate policy. This principle states that 'Where there is a threat of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[3] In other words, when they design climate-oriented policies, policy makers should err on the safe side. The precautionary principle has been invoked in several environmental treaties such as CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora), the Rio Declaration on the Environment and Development, the revised Treaty of Rome, the UN Framework Convention on Climate Change (UNFCCC), the Montreal Protocol on Substances that Deplete the Ozone Layer, and the UN Convention on Biological Diversity.

Policies designed to combat climate change include *mitigation* and *adaptation*. Mitigation policies, such as those underlying the Kyoto Protocol of 1997 and the Paris Agreement of 2015, aim to slow the rate of global warming by limiting the emission of GHGs, but are of limited usefulness if they are implemented by a partial group of countries. To be effective, they should be global in scope, as is true of the Paris Agreement but was not true of the Kyoto Protocol.

Adaptation policies are needed to supplement mitigation policies. Since global warming will inevitably increase over time despite any foreseeable mitigation policies, countries must take steps to *adapt* to the damage it increasingly causes. Less developed countries, with fewer resources and less technical expertise, have a harder time adapting than more developed ones, and should be assisted by the latter financially and with technical expertise. Until very recently, the build up of GHGs was primarily caused by the higher levels of economic activity in the developed countries. Developing countries are now threatened by the deleterious effects of climate change which they did not cause. However, countries such as China and India have now also become major polluters of GHGs. This again raises the issue of climate justice in implementing climate-oriented policies in both sets of countries.

Globalization and climate change produce both *winners* and *losers*. These phenomena should first be analyzed separately, but then combined in order to assess their joint effects. The synergisms between the impacts of climate change and globalization are important for specific social groups or regions. These phenomena can hit the poor—whether individuals, regions, countries or social groups—much more than those who are better off, and hence better able to protect themselves.[4] Regions and social groups within countries can be *doubly exposed* to these phenomena. For example, Najam et al. (2007, 16) point out that small fishers in the Caribbean face a

[3] Article 15 of the 1992 Rio Declaration on Environment and Development.

[4] Pope Francis (2015).

Table 1 Impacts of climate change and globalization on four social groups A, B, C and D

	Positive impact of globalization	Negative impact of globalization
Positive impact of climate change	Group A	Group B
Negative impact of climate change	Group C	Group D

drastic reduction in the availability of fish in the ocean as well as the globalization-spawned effects of competition from large-scale fishing enterprises, due to their advanced extraction technology and ability to refrigerate their catch.

Table 1 shows that in a world composed of four social groups A, B, C and D, group A is positively affected by both climate change and globalization, while group D is negatively affected by both (as in the above-mentioned case of small fishers). On the other hand, groups B and C are positively affected by one phenomenon and negatively affected by the other, so that their overall welfare may rise or fall.

What steps has the international community undertaken recently to combat climate change and alleviate its effects? The most important occurred as a result of the United Nations Climate Change Conference that took place in Paris and led to the Paris Agreement of 2015 on the reduction of anthropogenic GHG emissions. This Climate Change Conference, sponsored by the UN Framework Convention on Climate Change (UNFCCC), followed the Sustainable Development Summit of September 2015 that adopted the United Nations *Sustainable Development Goals* (SDGs). The SDGs build on the United Nations *Millennium Development Goals* (MDGs), and embody the UN's post-2015 development agenda. The thirteenth of the seventeen Global Goals is *Climate Action*, which urges countries to 'Take urgent action to combat climate change and its impacts.'

Atmospheric carbon dioxide (CO_2) concentration has been steadily rising since the Industrial Revolution. Before 1750, it was 280 ppm (parts of CO_2 per million). In 1960 it was 315 ppm, in 1990 it reached 350 ppm, and on March 4, 2017, 407.5 ppm. Human-caused emissions and their effects will rise further in the future. According to some ecologists, the precautionary principle suggests a boundary of 350 ppm to avoid serious future effects from climate change. In fact, a higher benchmark of 400 ppm has already been transgressed. At the current rate of growth of emissions, it is likely that CO_2 concentration in the atmosphere will double with respect to pre-industrial times well before the end of this century. Besides the burning of fossil fuels, another source of increased emissions arises from land-use changes such as the clearing of forests. Since several 'planetary boundaries,' in addition to climate change, should not be crossed if the earth's ecological stability is to be ensured, a reduction of GHG emissions is a necessary but not a sufficient global policy target to combat climate change: the biosphere in all its dimensions needs to be protected.[5]

[5] Rockström and Klum (2015) identify nine *planetary boundaries* whose violation places the future of our planet at risk. They believe that four of these (including climate change and biodiversity loss) have already been transgressed.

In policy terms, the globalism of climate change points to a need for *international environmental agreements* (IEAs), such as those reached in Kyoto and by the Paris Climate Conference. IEAs are difficult to devise, monitor and implement. There is the ever-present danger of 'free riders:' countries that plan to benefit from the mitigation of GHGs implemented by other countries, but refuse to join the IEA because of the economic sacrifices required to reduce CO_2 emissions. This raises again the thorny issue of a possible antagonism between the interests of industrial countries (ICs) and less developed countries (LDCs). Since the ICs caused most of the buildup of GHGs affecting the entire planet, they face a credibility gap if they preach to LDCs the importance of fueling their own economic development with green technology instead of cheaper fossil fuels, so as to moderate the buildup of GHGs. Leaders of ICs should recognize that those of LDCs stake their reputation on their ability to raise their country's standard of living toward the levels enjoyed by ICs, rather than to contribute to the ecological health of the planet. Thanks to the decision of China and India to adhere to the Paris Agreement, there are hopeful signs that some LDCs are willing to pursue both goals. Coal use in China has recently declined, which helps to stabilize global human-caused emissions from energy and industry. However, the trend of these emissions in coming decades remains an open question. ICs should assist LDCs to develop their economies in a sustainable way, as elaborated in the next section.

Economic Growth and Sustainable Development

Climate change and global resource degradation have called into question the paradigm based on economic growth that has been favored by Western policy makers and economists since World War Two. Instead of a steady increase in domestic consumption as the criterion of economic success, the focus shifted to sustainable economic processes. The term *sustainable development* (also known as *sustainability*) first appeared in *Our Common Future* (World Commission on Environment and Development 1987), which defined it as 'development that meets the needs of the present without compromising the ability of the future to meet their own.'[6]

One of the earliest examples of sustainability was in the economics of forestry, where the physical and financial viability of forest products for present and future generations requires a forest estate to be maintained indefinitely by having trees replanted after they are cut. Another example occurs in fisheries, whose optimal management aims to avoid the depletion of fish that has often been observed around the globe. It yields the concept of *maximum sustainable yield*, which results in the highest stable catch of fish over time.

The concept of sustainability has been generalized beyond that of particular sectors or industries. In the significantly titled essay 'The Economics of the Coming Spaceship Earth,' Kenneth E Boulding (1966, 303) calls the open economy of

[6] See also Bartelmus (2013).

present-day ICs a 'cowboy economy,' and contrasts it to the 'spaceman' or closed economy of the future 'in which the earth has become a single spaceship, without unlimited reservoirs of anything, either for extraction or for pollution, and in which, therefore, man must find his place in a cyclical ecological system which is capable of continuous reproduction of material form.' According to sustainability advocates, national output is something to be moderated and capped rather than maximized. The measure of an economy's success is not its aggregate production or consumption, but the nature, extent, quality, and complexity of its total capital stock, including natural capital and the state of human bodies and minds.

The terms *sustainability* and *sustainable development* entered both ecological and environmental economics, ecological economics being regarded as the more fundamental of the two. Ecological concerns have priority over economic ones such as economic development, since the latter cannot occur in the absence of the necessary conditions for terrestrial life on an inhabitable planet. Because of the fundamental importance of resource stocks to continued life on earth, the *stock* concept is regarded by ecologists as more fundamental than the *income* concept.

A country's economy is an open subsystem of the earth's ecosystem, which is a closed system. Whereas an economy can grow for some time, resource limitations and the pollution caused by economic activity (including global warming) prevent it from growing forever (Daly and Townsend 1993). Some observers believe that sustainability makes sense for an economy if it is understood as 'development without growth,' a qualitative improvement of the physical economic base. In commenting on the difference between development and growth, Georgescu-Roegen (1975, 243) argues that 'any economic change consists of two entirely distinct types of phenomena–*growth* and *development*.' Using slightly different terms, Alfred Marshall anticipated both him and Joseph Schumpeter in highlighting the same distinction:

> 'Progress' or 'evolution,' industrial and social, is not mere increase and decrease. It is organic growth, chastened and confined and occasionally reversed by decay of innumerable factors, each of which influences and is influenced by those around it; and every such mutual influence varies with the stages which the respective factors have already reached in their growth. In this vital respect all sciences of life are akin to one another, and are unlike physical sciences. And therefore in the later stages of economics, when we are approaching nearly to the conditions of life, biological analogies are to be preferred to mechanical, other things being equal. (Marshall 1898, 42–3)[7]

The paradigm of sustainable development is conceptually related to concept of the *stationary state* advanced by the classical school of economists. In the *Wealth of Nations* Adam Smith observed:

> It deserves to be remarked, perhaps, that it is in the progressive state, while the society is advancing to the further acquisition, rather than when it has acquired its full complement of riches, that the condition of the labouring poor, of the great body of the people, seems to be the happiest and the most comfortable. It is hard in the stationary, and miserable in the declining state. The progressive state is in reality the cheerful and the hearty state to

[7] Marshall (1920, xiv) made the memorable claim that 'the Mecca of the economist lies in economic biology rather than in economic dynamics.'

> all the different orders of the society. The stationary is dull; the declining, melancholy. (Smith 1776, 99)

The classical economists defined the stationary state as the equilibrium state that an economy reaches after a period of economic development. They believed it could be maintained forever, as the term 'stationary' implies. After Smith, the concept of a stationary state was taken up by Thomas R Malthus in his *Essay on the Principle of Population as it Affects the Future Improvement of Society* (1798), where he associated it with a wage that in the long run is driven to the subsistence level. He argued that population growth would nullify any incipient improvement in a society's standard of living. In his *Principles of Political Economy* (1817), David Ricardo borrowed the same idea from his friend and colleague Malthus. Their most notable successor in the classical school of thought, the philosopher and political economist John Stuart Mill, wrote in glowing terms about the inevitability and advantages to humankind of attaining a stationary state that features zero population growth and continued possibilities of societal improvement (Mill 1848, Book IV, chapter 6).

In the course of the nineteenth century, faced with noticeable improvements in the standard of living, economists of the neoclassical school abandoned the idea of the stationary state and its subsistence wage. Much later the related notion of limits to economic growth was advanced by the Club of Rome in *The Limits to Growth* (Meadows et al. 1972), which stirred up considerable opposition from some economists including Nobel Laureate Robert Solow (1974). Herman Daly, a student of Georgescu-Roegen, also posited in his *Steady-State Economics* (1991) that economic growth must eventually cease, giving rise to a steady-state economy similar to the classical school's stationary state.

Bioeconomics: A New Paradigm

Georgescu-Roegen's work on consumer choice and production theory in the 1950s helped to establish his reputation as a first-rate economist. As was also true of Marshall, Georgescu-Roegen's interest in the latter part of his career gravitated away from mechanics and toward the biological side of social science (Georgescu-Roegen 1974). Paul Samuelson, in his Foreword to Georgescu-Roegen (1966), characterizes him as 'a scholar's scholar, an economist's economist.' After starting his career as a mathematical economist, Georgescu-Roegen rejected the neoclassical school of economic thought that is now embraced by most economists. One of the favorite targets of his criticism is the mechanistic epistemology that inspired analytical economics since its beginnings, and implies that economic processes are reversible. After any change undergone by an economic system, the *status quo ante* can be restored by the simple expedient of running the process in reverse. He ranks himself among "those economists who, like Marshall, have been fond of biological analogies and have even contended that economics 'is a branch of biology broadly interpreted'." (Georgescu-Roegen 1966, 97)

To take the place of neoclassical economics, Georgescu-Roegen (1975) proposed an economic paradigm that he called *bioeconomics*.[8] It takes into account the biophysical limitations on economic activity in terms of energy needs, the means to satisfy them, and their consequences. It implies that economic processes are unidirectional, being characterized by an input of natural resources (low-entropy materials) and an output that includes high-entropy waste products. Only a fraction of the latter can be recycled, subject to some degradation and additional cost. Georgescu-Roegen deplores

> the indisputable fact that, except for some isolated voices in the last few years, economists have always suffered from growthmania. Economic systems as well as economic plans have always been evaluated only in relation to their ability to sustain a great rate of economic growth. The very theory of economic development is anchored solidly in exponential growth models. (Georgescu-Roegen 1975, 21)

In his magnum opus *The Entropy Law and the Economic Process*, Georgescu-Roegen (1971) refutes not only the idea that economies can grow indefinitely, but even the possibility that the stationary state postulated by Ricardo, Mill and other classical-school economists could endure over time. He approves of modern authors who advocate limits to growth, and rejects the view that a stationary state can be maintained forever:

> Because, like Malthus, they were set exclusively on proving the impossibility of growth, they were easily deluded by a simple, now widespread, but false syllogism: since exponential growth in a finite world leads to disasters of all kinds, ecological salvation lies in the stationary state. H. Daly even claims that 'the stationary state economy is, therefore, a necessity.'
>
> This vision of a blissful world in which both population and capital stock remain constant, once expounded with his usual skill by John Stuart Mill, was until recently in oblivion. Because of the spectacular revival of this myth of ecological salvation, it is well to point out its various logical and factual snags. The crucial error consists in not seeing that not only growth, but also a zero-growth state, nay, even a declining state which does not converge toward annihilation, cannot exist forever in a finite environment. (Georgescu-Roegen 1975, 22–23)

Georgescu-Roegen believes that the entropy law is so important to economics that he devotes a whole book (1971) to it, where he voices his regret that 'economists have failed to pay attention to this law, the most economic of all physical laws' (p. 280). He applauds Marshall's efforts to view the economic system in evolutionary terms, in accord with Joseph Schumpeter's observation that '[Marshall's] thought ran in terms of evolutionary change—in terms of an organic, irreversible process' (Schumpeter 1951, 101). Like Schumpeter, Georgescu-Roegen laments the fact that Marshall's vision is no longer shared by the economics profession. He argues that the dialectical concepts espoused by Hegel and Marx are eschewed by neoclassical economists precisely because they cannot be expressed in quantitative terms:

> The obvious truth … is that the economic system continuously changes *qualitatively*. The most important aspect of the economic process is precisely the continuous emergence of novelty. Moreover, the novelty always represents a qualitative change. Nature thus has an

[8] Grinevald and Rens (1995) introduce and translate into French several key writings of Georgescu-Roegen.

> infinite number of properties. It is because of this fact and because of the ever-present emerging novelty that the human mind cannot grasp actuality with the aid of analysis alone; it also must use dialectics. (Georgescu-Roegen 1979, 321–2)

Georgescu-Roegen's insights into the entropy law led him to propose an original flow-fund model that specifies the process of production in terms of an irreversible use of the low-entropy natural resources available to humankind in finite amounts, and the generation of high-entropy waste products (Georgescu-Roegen 1971, 228–34). He later noted that "Given the entropic nature of the economic process, waste is an *output* just an unavoidable as the input of natural resources. The truth is that, like recycling, disposal of pollution is not costless in terms of energy." Moreover, "our efforts notwithstanding, the accumulation of pollution might under certain circumstances beget the first serious ecological crisis." (Georgescu-Roegen 1975, 13–5).

Georgescu-Roegen underlined the need to replace the energy embodied in fossil fuels with the solar energy freely available on a daily basis. Marshall anticipated him as well as the Club of Rome's *The Limits to Growth* in warning of impending worldwide shortages of energy and other resources when he observed that 'Nature's opportunities cannot long retain their present large generosity; for the world is small … Ere very many generations have passed, the limitation of agricultural and mineral resources must press heavily on the population of the world, even though its rate of increase should receive a considerable check' (Marshall 1919, 2). Although Marshall did not anticipate the bioeconomic paradigm that Georgescu-Roegen bequeathed to the economics profession half a century after Marshall's death, he was a significant source of inspiration and motivation for his work (Maneschi 2010).

Georgescu-Roegen's warnings, concerning the limitations on economic growth imposed by the entropy law, were further developed by Serge Latouche (2009) who espoused the paradigm of 'degrowth.' Degrowth has been described as 'a political, economic, and social movement based on ecological economics, anti-consumerist and anti-capitalist ideas. It is also considered an essential economic strategy responding to the limits-to-growth dilemma.' (Wikipedia) Like Georgescu-Roegen, Latouche believes that sustained economic growth is impossible in the long run, and growth should be reduced or eliminated. Latouche credits Georgescu-Roegen as 'a main theoretical source of degrowth.'

References

Bartelmus P (2013) Sustainability economics: an introduction. Routledge, New York, NY

Boulding KE (1966) The economics of the coming spaceship earth. In: Jarrett H (ed) Environmental quality in a growing economy. Johns Hopkins University Press, Baltimore, MD

Daly HE (1991) Steady-state economics. Island Press, Washington, DC

Daly HE, Townsend KN (1993) Sustainable growth: an impossibility theorem. In: Daly HE, Townsend KN (eds) Valuing the earth: economics, ecology, ethics. MIT Press, Cambridge, MA

Georgescu-Roegen N (1966) Analytical economics: issues and problems. Harvard University Press, Cambridge, MA

Georgescu-Roegen N (1971) The entropy law and the economic process. Harvard University Press, Cambridge, MA
Georgescu-Roegen N (1974) Mechanistic dogma and economics. Methodol Sci VII(3):174–184
Georgescu-Roegen N (1975) Energy and economic myths. South Econ J 41(3):347–381. Reprinted in Georgescu-Roegen N (1976) Energy and economic myths: institutional and economic essays. Pergamon Press, New York, NY
Georgescu-Roegen N (1979) Methods in economic science. Econ Issues 13:48–59
Grinevald J, Rens I (1995) La décroissance: entropie, écologie, économie. Editions Sang de la Terre, Paris
Intergovernmental Panel on Climate Change (2017) IPCC Special report on emissions scenarios, Chapter 3. http://www.grida.no/climate/ipcc.emission/050.htm
Latouche S (2009) Farewell to growth. Polity Press, Cambridge
Malthus TR (1798) An essay on the principle of population. Cambridge University Press, Cambridge
Maneschi A (2010) Nicholas Georgescu-Roegen and the Mecca of the economist. In: Raffaelli T et al (eds) The impact of Alfred Marshall's ideas: the global diffusion of his work. Edward Elgar, Cheltenham
Marshall A (1898) Distribution and exchange. Econ J 8(1):37–59
Marshall A (1919) Industry and trade. Macmillan, London
Marshall A (1920) Principles of economics, 8th edn. Macmillan, London
Meadows DH et al (1972) The limits to growth. Universe Books, New York, NY
Mill JS (1848) Principles of political economy. Longman, Green and Co, London
Najam A et al (2007) Environment and globalization: five propositions. International Institute for Sustainable Development, Winnipeg, MB
Pearson CS (2011) Economics and the challenge of global warming. Cambridge University Press, Cambridge
Pope Francis (2015) Laudato Si'. On care for our common home
Ricardo D (1817) On the principles of political economy and taxation. In: Sraffa P (ed) The works and correspondence of David Ricardo, vol I. Cambridge University Press, Cambridge, p 1951
Rockström J, Klum M (2015) Big world. Small planet: abundance within planetary boundaries. Yale University Press, New Haven, CT
Schumpeter JA (1951) Ten great economists. Oxford University Press, New York, NY
Smith A (1776) An inquiry into the nature and causes of the wealth of nations. Clarendon Press, Oxford, p 1976
Solow RM (1974) The economics of resources or the resources of economics. Am Econ Rev 64(2):1–14
World Commission on Environment and Development (1987) Our common future. Oxford University Press, Oxford

Explaining the Production and Dissemination of Global Corporate Governance Standards: A Law and Economics Approach to Corporate Governance Codes as a Global Law-Making Technology

Sophie Harnay

Abstract The chapter questions the production and dissemination of global standards of corporate governance across OECD countries in the recent decades. It argues that convergence around similar corporate governance principles—defined in broad terms and at a high level of generality—was made possible due to deep changes in law-making technologies occurring over the same period. In the recent decades, traditional legal technologies became inefficient in meeting the new legal needs of economic agents generated by economic globalization and the increase of cross-border investment. In the field of corporate governance, this resulted in increased reliance on soft law, and especially corporate governance codes. We argue that the specific features of codes as a legal technology (characterized by a self-regulatory production process, legal standards rather than detailed rules, strong reliance on the comply-or-explain principle, and the use of non-legal sanctions) may have facilitated the emergence and dissemination of global corporate governance standards across OECD countries.

Introduction

The recent decades have been characterized by cross-country convergence towards similar corporate governance principles across OECD countries. Despite local dissimilarities in the implementation of general principles of corporate governance, broad principles of governance have been adopted all over the world by most countries with regard to the exercise of power within firms (AMF 2016). Key corporate

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governance principles most often focus on the internal distribution of power within firms, including the relationships between three groups of agents, *i.e*. managers, shareholders and—albeit sometimes to a lesser extent—workers. They also insist on the necessity to have effective checks and balances to outweigh the managers' power within firms. They also emphasize the primacy of shareholders, the importance of protecting minority shareholders and other stakeholders, and the key role played by boards and independent and, more recently, diverse directors in good governance. Legal convergence also takes the form of a shift towards a set of common principles, such as transparency, fairness, and accountability.

The raging debate that used to prevail in the last decades to determine whether national corporate governance systems were about to converge *vs*. path-dependent and characterized by persisting local diversity thus seems to have grown less problematic, and a consensus has emerged to acknowledge that national corporate governance systems have partly converged nowadays, at least in broad terms and at a high level of generality (Braendle and Noll 2006; Gilson 2001; Hansmann and Kraakman 2001; Wymeersch 2002). Of course, this is not to say that national corporate governance systems have become identical, which would be clearly untrue. On the contrary, some diversity can still be observed at the national level, with alternative models of corporate governance prevailing in different countries, at least partly due to the specific needs of domestic firms or national and historical or cultural idiosyncrasies. However, these alternative models do rely on several common uncontroverted principles, such as the importance of having the management controlled by a supervisory board or independent directors. More generally, empirical evidence now provides conclusive elements showing that, at a broad level, national systems of corporate governance are now characterized by some key common features that countries may implement adequately at the local level.

Gradual convergence towards a shared set of common standards can thus be interpreted as a major development in the recent history of corporate governance. Therefore, it is undoubtedly important to question and study the mechanisms that made convergence actually possible. A straightforward explanation for legal convergence is that it may have been driven by the needs of international and professional investors in globalizing markets. Yet, this explanation falls short of accounting for the ways through which common standards of corporate governance were able to emerge and become effective in highly dissimilar countries. It also fails to account for the deep changes having occurred not only in economic markets, but also in the very process of law-making in the field of corporate governance.

The purpose of this chapter is therefore to understand the emergence and dissemination of global standards of corporate governance across OECD countries, arguing that convergence towards common corporate governance standards, conceived as a peculiar illustration of economic globalization, was only made possible because deep changes occurred in law-making technologies over the same period. The argument is threefold. First, we argue that economic globalization may have created a need of economic agents for a shared set of rules likely to encourage and

facilitate international business—economic globalization may indeed have prompted a legal need for common corporate governance regulations meeting the informational demand of investors in financial markets. Second, we argue that traditional legal technologies, such as state-made law, proved unable to meet the new legal demands of agents and markets, therefore fueling increased reliance on self-regulation and soft law in the field of corporate governance. Third, we argue that the characteristics of codes as a legal technology geared to the specificity of corporate governance may have facilitated not only the promotion and dissemination of common corporate governance standards, but may also have impacted on their very content.

In that view, economic and legal globalization movements are narrowly intertwined. The chapter therefore develops a law and economics analysis to highlight the mutual effects of economic and legal changes on each other. The first section analyzes the demand for global corporate governance regulations and discusses the inadequacy of traditional legal production processes to meet the new legal demand of economic agents in a global framework. The second section provides an analysis of corporate governance codes and discusses their capacity to precisely meet these new legal demands. The third section examines how increased reliance on codes in the field of corporate governance may have encouraged the dissemination of common ideas and principles across OECD countries and may also have had an impact on the very content of corporate governance.

The Demand for Global Corporate Governance Regulations

This is now well documented that recent economic and financial globalization has prompted a need for regulations able to take the global dimension of economic agents' activity into account. In the corporate governance area, traditional legal production technologies, including state-made law, are usually considered as inefficient to meet the new legal demand for global standards generated by a massive increase in agents' cross-border activity.

The Need for Global Corporate Governance Standards

When they interact in markets, economic agents have to bear transactions costs. Transaction costs can be roughly defined as coordination costs and refer to the costs in time, effort, or information incurred by agents in the process of exchanging with other agents (Coase 1937). They usually increase when agents do not use the same legal rules as their contractual partners, as it is costlier for them to reach an agreement then—for instance, they have to invest in a lot of time and effort or engage in legal

expenses to agree on the set of rules that will regulate their transaction precisely. On the contrary, agents using similar rules bear lower transaction costs. Hence, the expected effect of using common regulations is to facilitate interactions and exchanges, and thereby to increase economic activity and wealth for the benefit of all.

In financial markets, investors incur information costs when they make their portfolio choices. In particular, they need relevant and reliable information on the corporate governance characteristics of the firms whose equity they plan to buy, as the positive impact of good corporate governance practices on the economic and financial performance of firms is now well documented and acknowledged in the economic and management literature. Valuable information on corporate governance within a given firm is therefore of utmost importance in the eyes of investors, as it informs them on the institutional quality and economic performance of firms and provides them with a relevant proxy on their future expected gains.

Thus, both investors and firms take benefit from the adoption and use of a common set of corporate governance principles across firms and countries. On the one hand, shared standards of corporate governance reduce the cost of information for investors and, thereby, the cost of decision-making. More precisely, shared standards define a set of good practices that are considered as the right ones within the business community. They therefore allow for the production of standardized, homogeneous information and function as a benchmark for investors to assess not only firms' governance choices, but also to compare their economic and financial performance in relation to these governance choices (Leuz and Wysocki 2016). Corporate governance standards that are common to different marketplaces and countries thus reduce the cost that investors have to bear to acquire information on the corporate governance practices prevailing in every country, thereby facilitating international investment. From this informational standpoint, the emphasis put on the key principle of transparency in corporate governance principles worldwide is easily understandable: because transparency reduces information costs for investors, thereby increasing market efficiency, it has become a cornerstone in corporate governance.

On the other hand, firms also take benefit from the adoption of common corporate governance standards. As common standards provide investors with low-cost information on their corporate governance practices, they also enable firms to easily signal themselves as complying with the rules that are more commonly promoted by business circles. This improves their reputation and investors' trust in their quality, resulting in a lower cost of capital for these firms. Through this lens, the adoption of OECD corporate principles in a country enables domestic firms to easily inform foreign investors on their compliance with best (or widely accepted) corporate governance practices. In the same manner, claiming that a set of corporate governance regulations applies at the national level in federal states can help domestic firms and market and/or public authorities to inform market participants on current regulations at a lower cost. In a nutshell, thus, common corporate governance standards reduce comparison costs for investors and the costs of signaling their quality for firms. They can therefore be expected to foster investment and create wealth.

The Failure of Classical Legal Technologies to Supply Global Corporate Governance Standards

However, although global corporate governance standards are beneficial to both firms and investors and enhance the efficient functioning of markets, traditional legal production processes, including governmental regulations, statutes, or judge-made law, most usually fail to fully meet the legal demand of economic agents for such global standards. The reasons for this failure are twofold.

First, traditional legal technologies may fail to provide economic agents with common standards in the field of corporate governance due to the incapacity of national laws to meet the global needs of firms and markets operating at a larger scale. The scope of governmental regulations is usually limited to a well-defined, restricted territorial jurisdiction. Yet, as aforementioned, investors and firms operating at a global scale may demand global corporate governance standards in order to enhance information flows and facilitate exchanges in markets. Governments and traditional law-makers thus appear incapable of meeting these needs, owing to limited territorial jurisdiction.

Second, global corporate governance standards can be defined as a global collective good (Kindleberger 1986; Kaul et al. 1999). Collective goods are characterized by non-excludability and non-rivalry, meaning that individuals or firms cannot be excluded from use on the one hand and that the use by one individual or firm does not reduce availability to others on the other hand (Samuelson 1954). Corporate governance regulations obviously fall within the scope of collective goods, as users cannot be excluded from use and rules can be used by several users simultaneously. A consequence of both properties is however that the users—either firms or investors—have no incentive to pay for the production of rules, which usually results in a suboptimal level of regulation, or an inefficient supply by private agents. In such situations, public economics classically recommends the collective good be produced by states or public authorities.

The idea of global collective goods extends the concept of collective good beyond the country's level to which it is restricted traditionally. According to Kindleberger (1986), global collective goods are not only characterized by non-excludability and non-rivalry, but they also have an international or transnational scope and possibly entail an intergenerational dimension. Global corporate governance standards thus obviously qualify as global public goods, as they are associated with spillover effects and externalities that go beyond a country's borders. The trouble with global collective goods is that governments and national law-makers are usually unable to produce them. On the one hand, national authorities are likely to face a collective action problem at the international level. They may thus lack sufficient incentive to issue optimal—either quantitatively of qualitatively defined—regulations in the field of corporate governance. Hence, although aware that regulations would be profitable at the collective level, national authorities adopting a non-cooperative behavior and motivated by the well-being of national agents only

may prefer not to bear the cost of producing regulations themselves, but to free-ride on regulations issued—and financed—by others. On the other hand, prohibitive costs may also be associated with the cost of producing common corporate standards at the international level, therefore deterring national authorities from trying to reach a collective agreement.

Eventually, due to the global collective good nature of corporate governance regulations, traditional legal production technologies appear unable to fully meet the demand of economic agents for global standards, as their scope of jurisdiction is usually limited to the national level. This raises the question of how to produce global corporate governance regulations suiting the needs of global economic agents and makes it necessary to think of alternative legal production processes suiting the characteristics of global regulations.

The following section defines corporate governance codes as an innovative legal technology with legal and economic properties tailored to meet the needs of economic agents with a global activity.

Corporate Governance Codes: An Innovative Legal Technology Able to Meet the Demand for Global Corporate Governance Regulations

Codes can be defined briefly as a set of best practices recommendations with regard to the exercise of power within firms. They have been the most widely used method to create and promote corporate governance regulations since corporate governance has become a prominent issue at the center stage in the late 1980s and early 1990s (Aguilera and Cuervo-Cazurra 2009). Thus, an overwhelming majority of countries—around 150—now refers to one or several corporate governance codes. This dissemination of codes as a legal technology used to regulate corporate governance issues can be traced back to the writing of a first code in Hong-Kong in 1989 and in Ireland in 1991, but codes actually started to expand with the Cadbury code in the UK in 1992—a code that is usually considered as a milestone in the history of corporate governance codes, as it was actually followed by an array of subsequent codes later on.

The corporate governance principles conveyed by codes most often take the form of large principles that are very similar across countries. This is all the more surprising since many codes are issued at country level, but do usually contain global legal standards that do not reflect national diversity—or only partly. An important question is therefore to identify those specific features of codes as a legal technology that makes the emergence and adoption of common corporate governance standards across countries possible despite national divergences. We identify three main features of codes (Harnay 2006; Harnay et al. 2016) that may account for their success in promoting global corporate governance standards in the recent decades.

Self-Regulated Codes, a Legal Technology Encouraging the Production of Global Corporate Governance Standards

Firstly, and very often, codes are made of self-regulated rules. This means that they are issued and (at least partly) enforced by those very agents to which the regulations will apply, including business circles. Various private entities are thus in charge of writing codes in different countries or are closely associated to the process of law-making in the field of corporate governance. A consequence is therefore that the very producers of codes are most often also those agents who will use the provisions contained within codes. This is the case for instance in Luxemburg where stock exchanges and stock-exchange listed companies are narrowly involved in the process of writing codes. In the same manner, associations of securities issuers are very active in the process of code-writing in France or Switzerland, as are investors, other stakeholders and private committees in Italy, the Netherlands, and Sweden, or joint private and public sector committees in Germany and Belgium, regulatory authorities in the United Kingdom, Spain, and Argentina. These situations delineate a range of various regulatory processes. A purely self-regulatory process can be defined as a situation in which legal production is entirely delegated to private agents. This is especially true in France, Italy, Luxemburg or Finland in which governmental authorities are not directly part in the corporate governance regulatory process. By contrast, co-regulation derives from the joint participation of both private and public agents in the regulatory process. Lastly, some other countries entrust public authorities exclusively with the mission of writing their codes of corporate governance.

A straightforward consequence of self- or co-regulation is that codes are usually considered as more likely to meet the specific needs of economic agents than alternative legal technologies that do not rely on the involvement of private actors, since the agents to whom codes apply are also those who have participated in the very definition of the rules. In particular, from an economic standpoint, self- and co-regulation help reduce the informational asymmetries between regulators and regulatees that are usually considered as undermining the efficiency of regulation. In the recent decades, several economists have argued that regulatees may be better informed than regulators on their conditions of activity and environment than an external regulatory authority (Laffont and Tirole 1993). Building upon this argument, recent law and economics literature has highlighted the informational advantages associated with self-regulation, arguing that the delegation of a regulatory mission to regulatees themselves may entail potential efficiency gains due to their superior information (Gehrig and Jost 1995; Ogus 1995, 1999, 2004; Grajzl and Murrell 2007). Along this line, a self-regulating authority should be entrusted with the regulatory mission rather than an external regulator, owing to lower information costs borne by self-regulators for the formulation and interpretation of rules. Accordingly, delegating the writing of codes to firms and investors in the field of corporate governance may thus prove more efficient than governmental regulation using classical legal technologies.

Within this framework, self- or co-regulated codes of corporate governance may also increase the incentives for agents to adopt code provisions, for several reasons. Firstly, self- and co-regulation can be expected to provide agents with the insurance that rules will actually reflect their own concerns and needs.[1] Then, agents can be expected to be more willing to comply with them more spontaneously, owing to lower costs of compliance: agents having directly participated in enacting rules can reasonably be expected to incur a lower cost of information on rules than in a situation where they have not; in this view, the reduction in their informational cost may outweigh their cost of participating in the legal production process (negotiation cost, cost of writing the cost…) and therefore encourage them to comply with regulation. Secondly, also because they improve compliance, self- and co-regulation may also reduce the social cost of enforcing codes and the cost of monitoring private agents' behavior for governmental and public authorities in charge of legal enforcement.

Hence, deliberate full or partial delegation of the law-making power to private agents in charge of issuing corporate governance codes may be more efficient than alternative regulatory technologies, as long as private agents—who can be seen as both users and producers of codes at the same time—enjoy higher expertise, superior information, and technical knowledge of business practices as compared to external regulatory bodies (Ogus 1995). In a context where national governmental authorities have proven unable to properly provide private economic agents with the global rules they need, or to collectively agree on common global standards, self-regulated corporate governance codes may thus provide agents with a legal technology able to overcome the deficiencies associated with classical legal production processes. In other words, while regulatory action by national governments at the domestic level may stumble over insufficient information and a collective action problem, codes may provide better informed private agents with legal tools capable of overcoming the flaws and drawbacks of classical regulatory devices. 'Market modernization of law' by 'intermediate institutions' may then substitute for former 'political modernization' (Cooter 1996).

The Comply-or-Explain Principle: A Device Supporting Legal Convergence Around Core Corporate Governance Standards

Secondly, most corporate governance codes rely on the comply-or-explain principle (Aguilera and Cuervo-Cazurra 2009).[2] According to this logic, compliance with rules is voluntary, optional, and non-binding and firms are therefore free to decide

[1] The other flip of the coin is however that in some situations, self-regulation of corporate governance rules may result in the capture of rules by interest groups able to influence and bias the legal production process and its outcomes in favor of their own private interests (See Stigler's theory of capture 1971 and Stigler and Friedland 1962).

[2] However, some countries promote a rather different conception and use of codes that are enshrined

either to comply with the code or not—in the latter case, they have to explain why they decided not to obey the code's provisions (Arcot et al. 2010; Boncori and Cadet 2013; Fasterling and Duhamel 2009; MacNeil and Li 2006; Poulle 2011; Refait-Alexandre et al. 2014).

We argue that the comply-or-explain principle may help explain the general convergence towards global corporate governance standards in the recent decades. Indeed, within such a non-binding framework, one may rightly expect that firms will adopt codes' provisions only when it is profitable for them to do so (for instance, when compliance with the code is expected to increase managerial efficiency and/or financial gains, or can provide a signal of a firm's high-quality governance to investors and markets). On the contrary, firms can be expected to depart from codes when they find it profitable—because provisions in codes are ill-suited to their needs, inappropriate, or economically inefficient. In this view, and under the assumption that similar regulations yield similar outcomes everywhere, the comply-or-explain principle may well account for efficiency-seeking firms adopting similar standards of corporate governance across the world: firms concerned with the search for efficiency can indeed be expected to adopt common corporate governance standards provided that these standards are supposed to maximize their gains. If similar standards actually yield efficient outcomes everywhere—or if agents believe this to be true—then agents can be expected to converge towards common corporate governance standards worldwide.

In the same manner, firms' concern for their (good) reputation sustained by the positive gains derived from such good reputation may explain why they accept to comply with global standards of corporate governance. In a context of asymmetric information (and especially adverse selection) between firms and investors, with the former being better informed on the actual quality of governance than the latter, firms' compliance with the prevailing standards of corporate governance enables them to send a positive signal of their actual (high) quality to investors (Spence 1974). If global corporate governance standards reflect a general agreement of economic and financial agents on the principles that a firm should obey, and if firms can derive positive gains from manifest observance of these principles and best practices, under the form of a lower cost of capital, this again explains convergence towards similar corporate governance standards at the global level.

In addition, a firm's adoption of certain standards of corporate governance may be driven by the purpose of being listed for trading on an exchange, whenever listing imposes the respect of specific requirements contained in a code on listed firms (Hopt 2011). In the current context of legal competition across countries and marketplaces, such listing requirements may provide firms with an incentive to comply with the codes endorsed by dominant stock exchanges and financial centers. Again, this may account for the recent trend towards global convergence in corporate governance standards.

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in the legislation and are therefore mandatory—for instance, this is the case in the United States with the 2002 Sarbanes-Oxley Act.

As a consequence, the comply-or-explain principle makes it less costly for firms and, more generally, for private entities impacted by corporate governance standards to accept some degree of convergence towards shared principles. It is not only less costly to produce broad standards (Kaplow 1992), but it is also less costly to adopt them… when the possibility remains for firms not to actually comply with common standards in practice (subject to the obligation to provide an explanation for such non-compliance)! Clearly, the possibility not to comply reduces the compliance costs incurred by firms, as it explicitly allows them not to abide a rule that they would consider as ill-suited to their own situation. Alternatively, it allows them to adopt and implement only those provisions in codes that they hold for efficient with regard to their own case and peculiarities. Hence, as a consequence of such discretionary choice, firms may lack sufficient incentive to resist the production and enforcement of global corporate governance standards, as they are fully aware that codes will be non-binding and yield no cost to them. In other words, while an agreement on a set of global corporate governance standards could be expected to be costly to achieve due to heterogeneous agents and the variety of interests at stake, the comply-or-explain principle makes it actually possible for agents to reach an effective solution— non-compliance is no longer considered (and sanctioned) as non-cooperative behavior in a prisoner's dilemma setting; on the contrary, the full acceptation of uncooperative behavior is a condition that makes the very production of corporate governance standards—defined as a global collective good—possible.

Codes and Non-legal Sanctions

Thirdly, we argue that codes are also characterized by specific methods of enforcement that may facilitate the emergence and dissemination of global corporate governance standards across various countries.

An apparent paradox of codes is that, despite their reliance on the comply-or-explain principle, they nevertheless engender actual constraint and coercion on firms at the individual level. Whereas one could expect firms to take benefit from the discretion opened by the comply-or-explain principle, a majority of them nevertheless decides to comply with most corporate governance principles (Arcot et al. 2010; Refait-Alexandre et al. 2014). Certainly, compliance may be driven by firms' own private interest. But it may also derive from a range of non-legal sanctions that are associated with corporate governance codes. Non-legal sanctions are usually exerted on firms through variations in stock prices and firm's reputation. Hence, they do not directly emanate from government but are, instead, enforced in a decentralized way and usually without any intervention of a central authority. Hadfield and Weingast (2012, 3) define 'decentralized enforcement' as 'the imposition of penalties result[ing] from individual decisionmaking among ordinary agents acting

independently, not the decisionmaking of official legal actors such as police or judges nor the result of express pacts for collective action. Decentralized enforcement may also include voluntary compliance (in the sense that the individual "punishes" himself or herself for engaging in wrongful conduct), individual punishment […]), or collective punishment (as when a set of individuals, acting independently, collectively refuse to deal with someone who has done something wrong)'.

In the field of corporate governance, thus, a firm not complying with the 'right' corporate governance principles (that is, with the best practices expected and approved of by investors in financial markets) will therefore incur the risk of a reputational loss resulting in a fall in stock prices. Such market discipline therefore incentivizes firms initially reluctant to comply with the dominant standards of corporate governance to implement them in their own interest. Thereby, it induces them to adopt the 'right' corporate governance practices such as contained in the corporate governance codes. Market discipline then substitutes for the classical legal sanctions that are usually associated with traditional regulatory technologies.[3] Furthermore, while classical legal technologies have been proved inefficient to create the global corporate governance standards demanded by agents in global markets, market discipline and the corresponding decentralized method of enforcement make it possible to produce and implement global legal standards at the international level. They thus provide a remedy against the failures and limitations of classical legal technologies.[4]

We have thus shown that the specific features of codes as legal technologies (characterized by self- or co-regulation, reliance on the comply-or-explain principle, and a massive use of non-legal sanctions) may facilitate the emergence and dissemination of global corporate governance standards around the world. The increasing use of codes to create and promote common corporate governance principles at the global level in the recent decades can therefore be explained by their capacity to provide effective legal solutions in the field of global corporate governance. This is to be contrasted with the inefficiency of classical legal technologies and their incapacity to supply economic agents with global corporate governance regulations.

The following section argues that the substitution of corporate governance codes for classical legal technologies may not be without effect on the very content of corporate governance principles.

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[3] However, one should not overestimate the opposition between legal and non-legal sanctions. In practice, legal and non-legal sanctions usually go together, the former being frequently used to reinforce the latter. According to Hopt (2011, 15), this combination provides "an interesting technique that lies between self-regulation and regulation by law, and may be described as 'self-regulation in the shadow of the law'".

[4] In practice, market sanctions may nevertheless lack effectiveness. In particular, market agents may lack sufficient information to actually monitor firms' choices of governance and performance (Goncharov et al. 2006; Weir and Laing 2000).

Codes and the Production of Corporate Governance Standards: An Explanation for Convergence Towards Global Corporate Governance?

Increased reliance on codes in the field of corporate governance may also have impacted on the very content of regulations. We argue that the features of codes as a legal technology may have facilitated the production of broad corporate governance standards. This may explain the dissemination of some common conceptions of corporate governance endorsed in codes across different countries that were initially characterized by dissimilar legal traditions and corporate governance models.

Self-Regulating Agents' Private Interest in the Production of Broad Corporate Governance Standards

Self-regulating agents—including firms and investors—may have a vested interest in the production of broad standards of corporate governance standards for two main reasons.

Firstly, self- or co-regulated codes relying on the comply-or-explain principle and non-legal sanctions allow economic agents for the production of flexible, adaptable corporate governance standards. According to the economic analysis of law, flexibility and adaptability are desirable properties in the economic life because they ensure that regulations will be responsive to the possibly changing needs of agents over time. In this view, corporate governance standards issued through a self- or co-regulated process are usually considered as more flexible than alternative legal technologies, as they guarantee that regulation will be in line with agents' needs and that law-makers will pay attention that law quickly adapts to changing circumstances (Miller 1985). In practice, codes are more or less frequently revised, contingent on the demand for changes expressed by economic agents and following either a formal or an informal procedure (Riskmetrics 2009).

Secondly, the fact that codes are frequently self-regulated and optional or non-mandatory may help explain why they are most often made of broad standards of corporate governance rather than more precise rules. Indeed, the initial cost of formulating broad standards is lower than the cost of producing more precise rules (Kaplow 2000). Rational self-regulating agents may thus be willing to minimize the costs of law-making. They may then prefer codes made of broad standards to more precise rules, whenever the production of precise, detailed rules (standards) of corporate governance is associated with a higher (lower) cost of production. Then, private self-regulating agents willing to avoid bearing high costs of law-making can be expected to purposely issue broad standards in their own interest. Along the same line, broad standards are also usually less costly to comply with for private agents, as they allow them some leeway in implementation. This again explains why codes are most often made of broad standards: law-makers—also the users of codes—willing

to avoid high costs of legal enforcement can be expected to adopt corporate governance standards more purposely than more precise rules, as they anticipate standards to be more malleable law and less costly to apply. At the end of the day, this explains the current form of corporate governance codes as a set of broad standards.

Furthermore, although more precise rules providing greater specification in advance are usually associated with a higher degree of *ex ante* deterrence for agents, as they supply them with a larger amount of information on prohibited *vs*. authorized behavior, they may also depreciate over time more rapidly as far as activities and areas associated with high levels of innovation (especially, institutional innovation in the field of corporate governance) are concerned. By contrast, broad legal standards are less prone to rapid depreciation, owing to their general scope and their less detailed content—in particular, they are able to include or 'absorb' changes without any formal modification of codes' provisions. This again may explain the interest of private self-regulating agents for the production of broad standards of corporate governance.

Convergence Towards Global Corporate Governance Principles as a Consequence of Legal Standardization

As a direct consequence, the fact that codes are most often made of broad standards may facilitate the production and world-wide dissemination of similar corporate governance principles across different countries. On the one hand, if broad standards are less costly to produce and to comply with for private self-regulating agents, it is very likely that all self-regulating authorities in various countries will be tempted to issue standards rather than bear the cost of issuing precise rules. On the other hand, we have argued above that common standards improve agents' information and comparability in financial markets and that better information benefits all agents (see section "Introduction"). Logically, then, self-regulating agents can be expected to issue similar or compatible standards, resulting in global convergence in corporate governance principles at the global level.

In addition, the fact that most codes are made of broad standards may also facilitate global convergence in the field of corporate governance for another reason. Indeed, corporate governance standardization through codes may help reconcile the need of economic agents for legal convergence and homogeneity together with firms' heterogeneity and local diversity. In this view, a positive side of broad standards is that they are large enough to encompass highly heterogeneous behaviors in their effectiveness area, as by definition they do not impose any precise constraint on agents, but only supply behavioral guidelines. In addition, reliance on the comply-or-explain principle also facilitates firms' commitment to global corporate governance standards, as they are authorized to deviate from these principles explicitly if they hold them as unsuitable for their own private situation. Hence, the combination of broad standards together with the possibility not to comply and to

follow specific rules at the local level instead enables firms to avoid the cost of enforcing codes' provisions if necessary while taking benefit from the standardization effect associated with common corporate governance principles. Such flexibility obviously encourages the production and dissemination of similar corporate governance standards across different countries.

Yet, it may be costly for local agents (firms) to obey broad corporate governance standards that are too far away from their legal tradition and cut-off from day-to-day practices. Furthermore, a drawback of broad standards is that they are associated with a higher level of legal incompleteness as compared to more precise rules. Such incompleteness is likely to entail future costs for users if they are put in a situation where they have to interpret or clarify the standard and decide upon their own past conduct *ex post* (Ehrlich and Posner 1974; Landes and Posner 1976; Kaplow 2000). Accordingly, detailed rules may be useful and needed under some circumstances at the local (national) level.

In this setting, standards may thus be preferred when economic agents are characterized by highly heterogeneous practices, while more precise rules may be rather used when agents' behavior is characterized by important regularities. The combination of standards together with the comply-or-explain principle, their plasticity and the possibility to complement them with more detailed rules more in accordance with local legal tradition and agents' needs may therefore account for corporate governance standardization at the global level coexisting with persisting local diversity. They might also be a key factor of the codes' success and capacity to supply global corporate governance regulation: broad standards make it possible for firms to comply with common global principles of corporate governance without giving up the benefits of diversity at the same time, as they can adjust the content of the standard to their own specificity and can therefore claim to conform to the standard without bearing a high cost of adoption. As a consequence, the specific features of codes as a legal technology may help conciliate global standards and local diversity and encourage firms to adopt codes and global principles of corporate governance. In other words, the outcome of a massive use of codes in the field of corporate governance may thus be formal convergence towards common corporate governance standards at the global level, but allowing for diversity and specificity at the local level.

Conclusion

The chapter has questioned the production and dissemination of global standards of corporate governance across OECD countries in the recent decades. It explains that convergence around similar corporate governance principles—defined in broad terms and at a high level of generality—was made possible owing to deep changes in law-making technologies occurring over the same period. More precisely, it argues that economic and financial globalization have generated a major transformation in the nature and form of corporate governance regulation, due to the

development of cross-border exchanges and investment and to the changing needs of agents in the field of corporate governance. It then argues that changes in legal production technologies and increased reliance on codes in the field of corporate governance have gone with changes in the very content of law. As a consequence, it concludes that the changes having occurred in both legal production processes (the writing of codes) *and* in the content of corporate governance standards have facilitated the emergence and diffusion of *global* principles of corporate governance across different countries. The analysis thus highlights a two-way relationship, with codes as legal technologies developing as a response to economic and financial globalization on the one hand, and economic and financial globalization being facilitated by corporate governance codes on the other hand.

References

Aguilera RV, Cuervo-Cazurra A (2009) Codes of good governance. Corp Gov 17(3):376–387

AMF (Autorité des marchés financiers) (2016) Etude comparée: les codes de gouvernement d'entreprise dans 10 pays européens

Arcot S, Bruno V, Faure-Grimaud A (2010) Corporate governance in the UK: is the comply or explain approach working? Int Rev Law Econ 30(2):193–201

Boncori AL, Cadet I (2013) Le comply-or-explain, un avatar de l'accountability. Revue Française de Gestion 8(237):35–55

Braendle UC, Noll J (2006) On the convergence of national corporate governance systems. J Interdiscip Econ 17(1-2):57–81

Coase RH (1937) The nature of the firm. Economica 4(16):386–405

Cooter R (1996) The theory of market modernization of law. Int Rev Law Econ 16(2):141–172

Ehrlich I, Posner RA (1974) An economic analysis of legal rulemaking. J Legal Stud 3(1):257–286

Fasterling B, Duhamel JC (2009) Le Comply or explain: la transparence conformiste en droit des sociétés. Revue Internationale de Droit Économique 23(2):129–157

Gehrig T, Jost PJ (1995) Quacks, lemons, and self-regulation: a welfare analysis. J Regulat Econ 7(9):309–325

Gilson RJ (2001) Globalizing corporate governance: convergence of form or function. Am J Compar Law 49(2):329–357

Goncharov I, Werner JR, Zimmermann J (2006) Does compliance with the German corporate governance code have an impact on stock valuation? An empirical analysis. Corp Gov 14(5):432–445

Grajzl P, Murrell P (2007) Allocating lawmaking powers: self-regulation vs government regulation. J Comp Econ 35(3):520–545

Hadfield GK, Weingast BR (2012) What is law? A coordination model of the characteristics of legal order. Harvard J Legal Anal 4(2):471–514

Hansmann H, Kraakman R (2001) The end of history for corporate law. In: Roe M (ed) Convergence and persistence in corporate governance. Cambridge University Press, Cambridge, pp 33–67

Harnay S (2006) L'évolution des modes de gouvernement d'entreprise européens: les apports de l'analyse économique du droit au débat sur la convergence, mimeo

Harnay S, Llense F, Rebérioux A (2016) L'analyse économique des codes de gouvernance d'entreprise: une analyse coûts-avantages des codes comme technologie juridique. In: Harnay S, Sachs T, Deckert K, (eds) L'efficacité des codes de gouvernance: perspectives comparées et pluridisciplinaires. Report for the French Ministry of Justice, GIP Droit et Justice, pp 17–67

Hopt KJ (2011) Comparative corporate governance: the state of the art and international regulation. Am J Compar Law 59(1):1–73
Kaplow L (1992) Rules vs standards: an economic analysis. Duke Law J 42(3):557–629
Kaplow L (2000) General characteristics of rules. In: Bouckaert B, De Geest G (eds) Encyclopedia of law and economics. Edward Elgar, Cheltenham, pp 502–528
Kindleberger CP (1986) International public goods without international government. Am Econ Rev 76(1):1–13
Kaul I, Grunberg I, Stern M (1999) Global public goods: international cooperation in the 21st century. Oxford University Press, Oxford
Laffont JJ, Tirole J (1993) A theory of incentives in procurement and regulation. MIT Press, Cambridge, MA
Landes WM, Posner RA (1976) Legal precedent: a theoretical and empirical analysis. J Law Econ 19(2):249–307
Leuz C, Wysocki PD (2016) The economics of disclosure and financial reporting regulation: evidence and suggestions for future research. European Corporate Governance Institute (ECGI)–Law Working Paper no 306/2016; Chicago Booth Research Paper no 16-03
MacNeil I, Li X (2006) "Comply or explain": market discipline and non-compliance with the Combined Code. Corp Govern 14(5):486–496
Miller J (1985) The FTC and voluntary standards: maximizing the net benefits of self-regulation. Cato J 4:897–903
Ogus A (1995) Rethinking self-regulation. Oxford J Legal Stud 15(1):97–108
Ogus A (1999) Self-regulation. In: Bouckaert B, De Geest G (eds) Encyclopaedia of law and economics. Edward Elgar, Cheltenham, pp 587–602
Ogus A (2004) W(h)ither the economic theory of regulation? What economic theory of regulation? In: Jordana J, Levi-Faur D (eds) The politics of regulation. Institutions and regulatory reforms for the age of governance. Edward Elgar, Cheltenham, pp 31–44
Poulle JB (2011) Réflexions sur le droit souple et le gouvernement d'entreprise: le principe 'se conformer ou expliquer' en droit boursier. L'Harmattan, collection Entreprises et Management, Paris
Refait-Alexandre C, Duhamel JC, Fasterling B (2014) La recherche de légitimité par la conformité aux codes de gouvernance d'entreprise: une analyse des déclarations de conformité des sociétés françaises du SBF 120. Manag Avenir 3(69):32–51
Riskmetrics (2009) Study on monitoring and enforcement practices in corporate governance in the member states, European Union, Contract ETD/2008/IM/F2/126
Samuelson PA (1954) The pure theory of public expenditure. Rev Econ Stat 36(4):387–389
Spence M (1974) Market signaling: informational transfer in hiring and related screening processes. Harvard University Press, Cambridge
Stigler GJ (1971) The theory of economic regulation. Bell J Econ Manag Sci 2(1):3–21
Stigler GJ, Friedland C (1962) What can regulators regulate? The case of electricity. J Law Econ 5:1–16
Weir C, Laing D (2000) The performance-governance relationship: the effects of Cadbury compliance on UK quoted companies. J Manag Govern 4(4):265–281
Wymeersch E (2002) Convergence or divergence in corporate governance patterns in Western Europe? In: McCahery JA et al (eds) Corporate governance regimes: convergence and diversity. Oxford University Press, Oxford

Part IV
Anthropology

Human Rights and Their Extra-Legal Circulations: Some Anthropological Reflections

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Abstract This paper builds on some anthropological reflections on human rights and addresses three questions that guided my participation in the Workshop *Global Phenomena and Social Sciences* (Jean Moulin Lyon 3 University, February 4th 2016): (1) How have laws and legal professionals dealt with increasingly intense movements and flows of people and goods? (2) Is it possible to say that these movements and flows are out of control? (3) Is it possible to legislate about what is moving and in flow? Among the conclusions, the paper stresses that classic political-juridical categories and institutions, such as *people*, *state*, *nation* and *individual* fall short of addressing contemporary questions about collective agents and agencies, whose power dynamics is network-based. Anthropology can contribute to widening present horizons, by opening up to the perception and the understanding of these collective subjects; by establishing a dialogue with other fields of knowledge; and by making possible a ethics human-rights based.

Preliminary Thoughts

It is commonplace to remark on the temporal insignificance of the *Homo sapiens*. It is estimated that Earth is about 4.5 billion years-old, whereas the Universe is around 13 billion years-old. The oldest known *Homo sapiens* remains is a cranium, dated about 200 thousand years-old, found in Eastern Africa (current Ethiopia). All archaeological findings indicate that the species survived due to its migratory capacity, its adaptability and its great bio-psycho-social diversity among and withing human groups. Most of these characteristics, by the way, are shared by other species

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that succeed in living for millennia. Thus, it seems beyond dispute that movement and plasticity contribute to the continuity and maintenance of life.

In the second half of the nineteenth century, Charles Darwin made the concept of biological evolution more sophisticated, by demonstrating that unpredictable mutations lie at its core. Still, among intellectual groups in European urban-industrial centers, a *common sense* (Geertz 1975, 5–26)[1] idea consolidated according to which human social evolution necessarily evolved from simple (savages) to complex (civilized) forms, in a sequential, cumulative, unidirectional movement towards the implacable rational, technical and scientific improvement of mankind. Nevertheless, even at the peak of late nineteenth century scientism, the problems that came along with such progress were already evident.

Shortly after the end of World War II, in the aftermath of the creation of the United Nations Organization (UNO) in 1945 and its 1948 Universal Declaration of Human Rights, UN's educational branch, United Nations Educational, Scientific and Cultural Organization (UNESCO), published a collection of essays aimed at fighting ethnic and racial prejudice. Anthropologist Claude Lévi-Strauss collaborated with 'Race and History'. In this paper, one of his main arguments is that

> (…) 'progress' (…) is neither continuous nor inevitable; its course consists in a series of leaps and bounds, or, as the biologists would say, mutations. These leaps and bounds are not always in the same direction; the general trend may change too, rather like the progress of the knight in chess, who always has several moves open to him but never in the same direction. Advancing humanity can hardly be likened to a person climbing stairs (…); a more accurate metaphor would be that of a gambler who has staked his money on several dice and, at each throw, sees them scatter over the cloth, giving a different score each time. (…) [I]t is only occasionally that history is 'cumulative', that is to say, that the scores add up to a lucky combination (Lévi-Strauss 1952, 21–22).

Besides these opening considerations, it is also worth noting how recent the invention of writing is in human history.

Once again in opposition to the *common sense* of those days, which restricted the ability to make 'progress' and accumulate acquisitions to writing societies, Lévi-Strauss observes that one of the most creative periods in human history was the Neolithic, when agriculture, the domestication of animals and other arts were developed. The onset of these creations

> (…) must have had behind it thousands of years during which small societies of human beings were noting, experimenting, and passing on to one another the fruits of their knowledge (…) at a time when writing was quite unknown (Lévi-Strauss 1961, 291).

Even when it comes to technique, Lévi-Strauss argues that

> (...) the architecture of the Egyptians or the Sumerians was no better than the work of certain American Indians who, at the time America was discovered, were ignorant of writing. Conversely, between the invention of writing and the birth of modern science, the western

[1] According to anthropologist Clifford Geertz, '*common sense*' is to be understood as a cultural system, such as religion or art: a system which is ruled by 'an ingenerate order […] capable of being empirically uncovered and conceptually formulated' through the inventory of its varying forms in different cultural contexts (Geertz 1975, 25).

> world has lived through some five thousand years, during which time the sum of its knowledge has rather gone up and down than known a steady increase (ibidem 291–292).

Although Lévi-Strauss recognizes that it is not possible to conceive the development of science in the nineteenth and twentieth centuries without writing, he considers it to be a necessary condition, but insufficient to explain that development. And he assertively concludes that the only phenomenon invariably linked to writing

> (…) is the formation of cities and empires: the integration into a political system, that is to say, of a considerable number of individuals, and the distribution of those individuals into a hierarchy of castes and classes. (…) the primary function of writing, as a means of communication, is to facilitate the enslavement of other human beings. The use of writing for disinterested ends, and with a view to satisfactions of the mind in the fields either of science or the arts, is a secondary result of its invention—and may even be no more than a way of reinforcing, justifying or dissimulating its primary function" (ibidem 292).

These statements certainly incite much debate on a number of issues, such as the close relation between the knowledge of writing, power and domination:

> (…) the European-wide movement towards compulsory education in the nineteenth century went hand in hand with the extension of military service and the systematization of the proletariat. The struggle against illiteracy is indistinguishable, at times, from the increased powers exerted over the individual citizen by the central authority. For it is only when everyone can read that Authority can decree that 'ignorance of the law is no defense' (ibidem 293).

We shall return to these issues throughout the text, and especially in the final section.

Laws, Legal Professionals and the Movements and Flows of People and Goods

The 9/11 terrorist attacks in United States, followed by President George W. Bush's statements on the inevitability of the invasion of Iraq, due to the presumed existence of lethal chemical weapons in that country, gave an apocalyptical tone to the early twenty-first century. Once again, mankind faced its own insignificance in cosmic and geological terms. Just as it had occurred with the bombing of Hiroshima and Nagasaki years before, the destruction of the species and of the planet itself became a possibility again.

But as the war took place—entirely in Iraqi territory, without the support of many European countries to the United States and with heavy control by the media—the sense of an imminent end of the world gradually faded. Nevertheless, besides the thousand of casualties, the debris from the war included certain concepts and explanatory models used in social sciences, which had been slowly eroding for decades.

Clifford Geertz and Adam Kuper, two of the leading Anglophone anthropologists of the second half of the twentieth century, were among the first ones to reflect upon

the helplessness of certain concepts and theoretical models in face of the global changes and events taking place at the end of the millennium—respectively, in Geertz's essay 'The world in pieces: culture and politics at the end of the century' (Geertz 2001b) and in Kuper's *Culture: the anthropologists' account* (Kuper 1999).

Geertz's paper is controversial. It starts by denouncing that political theory often presents itself as a universal analysis of power, legitimacy and justice, although it is no more than an array of punctual approaches, aimed at immediate issues. According to him, after the fall of the Berlin Wall, the world could no longer be seen as composed of compact powers, antagonistic blocs, arrangements and rearrangements of macro-alliances, for a much more complex and plural pattern of relations among peoples had emerged, whose form, nevertheless, remained vague, irregular and worryingly indeterminate, thus producing a general sense of inconstancy and uncertainty.

According to Geertz and Kuper, in a world marked by ethnic conflicts, the 'multiculturalization' of international capital, linguistic separatism and the fraying of social relations, a growing sense of dispersion, of particularity, of complexity and of decenteredness prevails. This scenario produces new gains, such as certain advances related to peace and 'civility', but also indicates new, surprising losses, for example, the deepening of provincialism, xenophobia and 'piracy'. In face of this new, shattered sociopolitical context, Geertz questions whether it is still possible to indicate what is general or global, and how to approach and conceptualize new collective agencies. Similarly, I ask, how have laws and legal professionals responded to increasing movements and flows of people and goods? What is there to gain or lose for the principles contained in the Declaration of Human Rights?

I agree with Geertz that one should not adopt theories that propose the reconstruction of macro-level contentions, through the use of totalizing concepts, such as *tradition*, *identity*, *religion*, *ideology*, *nation*, *culture*, *society*, *state* and *people*. In a shattered world, rather than trying to reassemble the shattered figure or using the broken pieces to compose new figures, one should observe how new figures can be spotted amid the layout of the scattered pieces. That is Geertz's proposal, which still does not entirely refuse new general theories or ideas about politics, economics or law.

Geertz criticizes attempts to replace old totalizing concepts by new, even more encompassing ones, such as 'civilizations', along with more large-scale, dramatic stories, as Samuel Huntington did when he stated, prior to 9/11, that the 'clash of civilizations' would mark the twenty-first century (Huntigton 1996). Geertz also discards post-modern radicalism, which abandons the search for comprehensive patterns to give room to diverging stories, expressed in irreconcilable idioms. Other postulates, such as the 'end of history', the claim that all search for knowledge are nothing but bids for power, as well as genetic fates or explanations, are all equally refuted by Geertz as sterile and implausible theoretical options.

Instead, he observes the emerging of a new dialogue between political theory and anthropology, one which is based in what Taylor (1993) calls 'deep diversity': a plurality of ways of being and belonging that do not exclude a real sense of bonding among people, even if they are not linked in a comprehensive, uniform, primordial, or immutable way.

From this perspective, both political theorists and anthropologists (and, I would also add, legal scholars) will have to invent a new way of thinking, one that is receptive to particularity, to individuality, to strangeness, but also capable of recognizing mutable levels of belonging, typical of new sociopolitical settings, which are made of unstable forms of heterogeneity. With this in mind, it is of little use to insist on talking about old cultural unities such as Europe, Latin America, Russia, Protestants, Catholics, the urban, the rural, Iraqis, North Americans, and even on concepts like culture, state, territory, country and nation. But what about human rights? What is there to say about its 'universal' character?[2]

When discussing the relation between the work of anthropologists and political theorists, Geertz suggests that the latter seem to float over a thicket of conflicts, searching for generalities, whereas the anthropologists immerse themselves into the thicket, looking for specifics and producing ethnographies. His metaphor helps to think about the existing tensions between a floating, speculative panoptical view, typical of codes and laws, which tend to overlook heterogeneity and shattered pieces, and a microscopic view, obsessed with the eloquence of particularities, typical of the demands of identity groups.

By following Geertz's thinking, it seems plausible to think about the possibility of drawing a middle term—one might suggest a metaphorical 'lighthouse'—in which comprehensive perceptions are combined with thorough observation (Schritzmeyer 2005).

Therefore, political theory, law, anthropology, and the anthropology of law, in particular, can and should shed light on each other, without opposing the delicate process of revealing variations to the also delicate effort to elaborate general figures and establish affinities. One should remember that ethnography is not merely a method of collecting data, but rather a theoretical and empirical production, with high critical and analytical potential, that challenges the classic divide between subject and object and, thus, the illusion of scientific neutrality and its effects (Peirano 2014).

In this 'lighthouse' for interdisciplinary debate, there is room *neither* for theories rooted in encompassing genres that are opposed to that which is multiple, mixed, irregular, changeable and discontinuous, *nor* for minutiae and details that are not transferrable to wider contexts. From the viewpoint of this 'interdisciplinary lighthouse', spread between the earth and the air, the United States—Iraq conflict would not be observed just as a war between states, peoples, societies or—even less—civilizations, but between supranational interests, movements and organizations.

In the face of a world both globalized and divided, interconnected and compartmented, cosmopolitan and provincial, it is necessary to investigate the logics of these divisions and differences in order to understand the many levels of cultural heterogeneity among and within nation-states in the twenty-first century (it is worth noting there were around 50 countries by the end of World War II, while they are

[2] Several Brazilian anthropologists addressed this and other associated questions, in a publication coordinated by De Souza Lima 2012: *Antropologia & Direito: temas antropológicos para debates jurídicos*.

around 200 now). Countries emerged out of the post-colonial wreckage, drawn by borders that are like scars on the land resulting of the disputes of old European blocs, with no relation to ethnic borders or other local matters.

Maybe considering the idea of *ethnic group* instead of *country* is a way out to understand the superposition of powers and its locally disparate bodies, while keeping some wholeness in the analysis. This is not an easy intellectual task, considering that ethnic groups are also surrounded by a new political conjuncture that dates back to at least 1945.

Anthropologists, legal scholars and political theorists, besides scholars of social life, may be somehow successful by thinking together on matters that used to be thought of separately, polishing shattered concepts or even abandoning them altogether.

Another puzzling question emerges at the end of this section. If the issue is not about achieving consensus anymore, but rather, about finding a viable way of doing without it (Geertz 2001b, 223); or, if there is a need for new theories that analyze possible, yet unstable, political-cultural reconciliation, will liberalism and human rights be up to face this challenge?

However, criticized the liberal concepts of law, rule of law, or the proposals for national and international human rights movements may be, Geertz considers it is viable to develop a new kind of liberalism. In his opinion, it is possible to explore the potential of liberal discourse in face of the new dimensions of heterogeneity:

> The argument that I set out (...), that political theory is not, or anyway ought not to be, intensely generalized reflection on intensely generalized matters, (...) but should be, rather, an intellectual engagement, mobile, exact, and realistic, with present problems presently clamorous applies with particular force to liberalism, given as it sometimes has been to a certain indifference to the actuality of things, a certain taking of wish for accomplishment (Geertz 2001b, 226).

Avoiding this heated controversy, I use Geertz's comments as a point from which to introduce some brief thoughts on how the issue of human rights entered and gained space within anthropology.

Anthropology and Human Rights

The first chairs of anthropology were created in German, English, French and American universities in the heyday of positivism, scientism and colonialism at the end of the nineteenth century, at that time, the discipline was inspired by mechanistic and organicist models borrowed from the physical and natural sciences.

Anthropology's inaugural question, although politically constrained by imperialist projects, was daring in its scientific dimension: to define *mankind* (which would later become a key concept in the field of human rights). Should mankind encompass a whole set of apparently distinct groups, that nevertheless shared fundamental features? Did all groups have a common origin? If so, how could their glaring differences be explained?

These questions were initially addressed by studies of evolutionist inspiration that mapped and compared several human groups and societies in different periods and regions. As the first anthropologists hardly ever left their offices to do fieldwork, rather collecting and analyzing accounts produced by other sources (travelers, missionaries, colonial administrators, clerics, botanists, painters, etc.), their style of research would be known as *armchair anthropology*.

Cultural evolutionism was the theory these anthropologists proposed in order to systematize these accounts. As already pointed out by Lévi-Strauss, cultural evolutionism differed from biological (Darwinian) evolutionism, for it presupposed a linear, sequential, cumulative and unidirectional sense of progress. Thus, all human heterogeneity was divided into categories such as savagery, barbarism and civilization. On top of the evolutionary ladder were the European and North-American political elites: monotheist, monogamist, white, urban, literate, industrial and organized into states. On the other hand, cultural evolutionists were innovative to argue in favor of the *human psychic unity*, countering strong convictions that were dominant at the time, according to which certain social groups, like aborigines, belonged to the domain of *animality* (Carneiro da Cunha 1986).

In the beginning of the twentieth century, with the growing practice of ethnographic fieldwork, based on the direct contact between anthropologists and the groups they studied, the stability of the evolutionist model was shaken by ethical concerns and theoretical controversies.

In the writings of pioneer ethnographers, the first criticisms emerged of the ethnocentric aspect of the evolutionary method, despite certain paradoxical passages that also show the struggle involved in paradigm shift:

> The study of rapidly vanishing savage races is one of those duties of civilization – now actively engaged in the destruction of primitive life (…). The task is (…) not devoid of considerable practical value, in that it can help the white man to govern, exploit and 'improve' the native with less pernicious results to the latter (Malinowski 1926, xi).

Malinowski also argues:

> The rash, haphazard, unscientific application of our morals, laws and customs to native societies, and the destruction of native law, quasi-legal machinery and instruments of power leads only to anarchy and moral atrophy and in the long run to the extinction of culture and race (ibidem 93).

Until this epistemological turn, 'savages' were classified, at best, as exotic and worth being displayed in world's fairs, such as 1899 Paris' *Exposition Universelle* (Darmon 1991, 11), or were the target of projects aimed at preserving their *primitive state*. Most of times, all sorts of interventions were justified in the name of their own progress.

Criminals, women, children, physically and mentally disabled, blacks, indigenous, non-heterosexuals, were all equally object of comprehensive *scientific treatises*, in order to have their *absences*, their *defects* and their *illnesses* detected and, presumably, corrected (Fry 1983, 1985).

Malinowski himself, along with many of his contemporary fellows, quickly took a stand against this approach that defined primitive societies by what they supposed

lacked, trying to demonstrate, instead, the complexity of their various and specific forms of social organization.

During the following century or so, as anthropology unfolded into many schools of thought or *styles* (Cardoso de Oliveira 1988), new studies explored the themes of human *universality* and *particularity*, and expressed in different ways their *mea culpa* about the colonialist birthmarks of the discipline (Laplantine 1988).

Both in the centers where anthropology emerged and in the former colonies, geopolitical, artistic, academic, and juridical-democratic changes rearranged anthropological knowledge and geared it towards a growing and stronger criticism of ethnocentrism.

Nowadays, nearly every Western national constitution embodies the liberal ideals inherited from the French Revolution, strengthened by both the Universal Declaration of Human Rights, after World War II, and by more recent discourses with a relativistic, anthropological basis. In several of these countries, many anthropologists coupled their research with the support of minority groups' struggles for political, economical, social, ethnic and gender rights. Thus, *human rights* entered the arena of anthropological concerns, renewing the old dilemma about the recognition of specificities in face of the advent of *universal* guarantees and principles.

In those countries deemed *peripheral*, as Brazil, and in other South American ex-colonies, anthropology has emphatically turned its attention to local inequalities and to the ethnographic detailing of marginalized groups, such as indigenous societies, slavery descendants, laborers, peasants, children, women, the elderly and other minorities (Peirano 1999).

After the end of the military rule in Brazil, in the middle of the 1980s, alongside the 'minority studies', much research was aimed at the 'elite groups', their dynamics and their command and control exerted in the executive, legislative and judiciary powers, police institutions, state prosecutors' offices and big corporations. This led to a growing increment of subareas of research, such as the *anthropology of law*, *political anthropology*, *anthropology of institutions*, *anthropology of professions*, among others.[3]

This increasing body of scholarship, based in new concepts and models, of relativistic, culturalist, dialogic and polyphonic inspirations–had difficulties entering the discourses of common sense, the media, pedagogical school materials, universities and especially law schools (Schritzmeyer 2004, 55–82).

In the decades that followed the foundation of the University of São Paulo's Law School, there was a paradoxical combination of a somehow *façade liberalism* with hierarchical ideas from *social Darwinism*, which, in practice, were at odds with the egalitarian liberal principles and discarded issues of citizenship and individual free will (Adorno 1988; Schwarcz 1993). To this day, in many Brazilian law schools, classes and doctrinal books are embedded with evolutionist, Lombrosian tones. Narrow representations of family (as nuclear, monogamist and hetero-parental) or generic references to *Indians* (as if their plurality could be encompassed in an ethnically homogeneous, inferior category) persist and remain hegemonic inside and outside law schools.

[3] I discuss the field of anthropology of law in Brazil more thoroughly in other writings (Schritzmeyer 2010a, b, 2013a; Schritzmeyer et al. 2016).

Because of its initial bonds with the context of colonialism, anthropology, be it in Brazil or elsewhere, still often pose the question about the presumed *Western-centrism* (Panikkar 1992) implied in defending human rights values, as they result from a specific cultural arrangement that dates back to eighteenth century Enlightenment and the French Revolution.

Are there, after all, universal values that surpass cultural constraints? Is it possible to define *human nature*, human dignity or even humanity without adopting the assumptions of a specific set of values?

According to Brazilian anthropologist Luiz Eduardo Soares, there are seven basic responses to this dilemma (Soares 2002).

The religious response states that we are all brothers and sisters, whose rights are indicated in sacred and doctrinal texts. It is by means of a *catechist mission* that such rights shall be implemented.

For biology, we are all *humans* because we are all of the same *nature* or *species*, meaning that scientists have the duty to clarify any questions concerning what is *human nature*.

Rationalist approaches, in their turn, sustain the existence of *pure reason*, free from passions and, therefore, capable of enunciating universal rights, which is *legalist-positivist mission*.

Neoevolutionist scholars argue that the fittest cultural arrangements survive. *Civilization,* thus, will keep replacing barbarism, as a *civilizational mission* guides *mankind* towards its necessary and univocal *progress*.

There is also a Marxist-orthodox response, according to which both pillars of bourgeois democracy—formal equality of all people under the law and impartial justice—are nothing but a disguise of real inequalities—which means that, in practice, there will always be those who are more and those who are less human. A *political mission* of confronting and unmasking these pillars is thus needed for enlightenment and transformation.

Finally, for most anthropologists, human rights are a typical historical arrangement of modern, Western culture, whose presumed universality must be demystified by anthropological discourse.

Soares adds a seventh viable response to the issue on universal values and cultural constraints: one that implies a *critical adoption of* human rights, that is, the acknowledgment that intervening in other cultures, in the name of values expressed by these rights, is inherently ethnocentric, but nevertheless could mitigate scenarios of crisis and enable dialogue and negotiation.

Still according to the author, these seven responses entail seven basic problems.

For different religions and their respective sacred texts, 'rights' are acquired only by those who adhere to their faith. This has triggered, throughout history, contexts of exclusion, disputes, conflicts and even *holy wars.*

The biological response considers *nature* itself to be a 'natural argument', instead of a philosophical-political construct, and ends up leaving aside both the egalitarian and the totalitarian discourses previously underpinned by such argument.

Rationalists, in their turn, do not admit that the supposition of *pure reason* works as a sacred dogma that obscures its mundane, historical origin.

As for the neoevolutionist response, it does not avoid confusion between political power and moral superiority, or between technological progress and justice, whereas there is striking evidence that *civilizational missions* can disrespect human rights altogether, as it has happened in the above-mentioned USA-Iraq conflict that followed 9/11.

The Marxist-orthodox approach generally circumvents the existence of juridical pluralism in the context of 'bourgeois law'. It avoids considering that 'bourgeois law institutions' can counter economic elites interests and establish alternative orders within the prevailing capitalist order.

Likewise, the anthropological approach to human rights, while clarifying the historical and ideological foundations of their universalism, and highlighting that such universality was never fulfilled due to its ethnocentric limits, establishes a thorough relativistic endorsement of any and every cultural arrangement, which leads, in many cases, to theoretical and political paralysis in the face of urgent questions of great relevance and social impact.

Hence, Soares suggests that a *critical, unashamed adoption* of human rights is the most viable way for an activism that strives for communication among those who are different, and for agreements, concessions and convergences that may result from such communication.

Perhaps this proposal can be rephrased as follows: if we optimize the ethical aspects of human rights and assume the resulting responsibilities and challenges, we can make their principles more viable and effective. I understand that anthropology may contribute to that.

Anthropological Contributions: Optimizing the Ethical Aspects of Human Rights

There are complex philosophic debates over the notions of law, ethics and morals, which cannot be thoroughly exposed in the limits of this paper. However, it is worth highlighting the key importance of these concepts, as pointed out by philosopher Renato Janine Ribeiro.

Ribeiro traces a distinction between ethics (from the Greek *ethos*), meaning character, and morals (from the Latin *mores*), which in turn relates to custom. Following dominant customs, therefore, is a moral behavior, whereas taking a stand, as well as responsibilities, in the face of complex questionings and doubts, is an ethic issue.

Reminding us that it was during the eighteenth century Enlightenment that ethics, morals and religion were untied, especially in Kantian philosophy, Ribeiro argues that

> The idea that, in order to be moral, one has to believe in God (that is, in a punishing, fearsome God: the God from hell), is questioned in the name of a human ethics, that should be applicable despite the fear of eternal punishment (Janine Ribeiro 2006).

Kant's decisive step was to enunciate the principle that every human being is an ethic legislator, given that every action implies the recognition of the rights and duties of others in acting similarly. In order to avoid the prevailing of social chaos,

every ethical legislator, when acting, must take into account the reciprocal effects and the consequences of their acts to the others, so as to assume their responsibility.

There is a strong egalitarian assumption supporting this Kantian statement: ethic legislators perceive themselves as members of a group within which they are devoid of privileges, unable to set rules for their own benefit because, for instance, anyone who humiliates or kills is subject to be humiliated or killed as well.

In the field of anthropology of law in Brazil, it is precisely at this point that the concepts of *individual* and *person* come into play, revealing various ambiguities and tensions pointed out in several ethnographies. In Brazil, a recent, fragile republican and democratic order, anchored in individualism and in the premise that all are equal under the law, coexists with a strong, persistent traditional hierarchical order, guided by patronage and conducted by privileged, legally exempt *persons* favored by their gender and ethnic markers, educational degrees, professional status, kinship relations, among others (DaMatta 1983; Kant de Lima 1991, 1993). In Brazil, political, legislative and juridical functions and actions, are far from attending to public interest. Rather, those responsible for those functions and actions tend to sustain proposals and actions for the benefit of private interests, which reinforces the markers that distinguish those who are 'more' and those who are 'less' human (Fonseca, Cardarello 1999).

As Ribeiro suggests, '(…) human rights, strictly speaking, can only be implemented in a democratic state', which is not the same as a republican state, since "(…) the essential aspect of a republic is the capacity each one has to give up their own personal interests and desires in favor of the common good, of the public affairs, of the *res publica* (...)'. In turn, the leading force behind democracy is the desire of the people to obtain what they do not have. Thus, the republic and democracy are at the same time opposing and complementary to each other: The former acts as a means of controlling the desires which are mobilized by the latter: '(…) the republic must be able to hold on to democracy (…), however, (…) without the claims of the dispossessed for what they do not have, (…) [a] political regime becomes superficial and lifeless' (Janine Ribeiro 2003, 154).

If so, would republican-democratic laws be a mechanism capable of containing desires in favor of 'common good', checking them without suffocating them?

It is worth remembering, in dialogue with Ribeiro, that laws aim at the maintenance of a certain social order, but can also be obeyed by those who do not agree with (or support) this order, because laws are generally associated with surveillance and punishment. Obeying laws, be them republican and democratic or not, simply because of the fear of surveillance or punishment, is not an ethical behavior in itself. It is merely obeying the law.

It is very different, however, to respect an ethical principle (be it legal or not) for believing in its value and for trusting that it can contribute to a better social life. When a law is obeyed because it is respected, one has both ethics and legality. Subjects, nevertheless, may commit illegal actions because they respect ethical principles countered by the law: these are ethical subjects, even if acting illegally (Janine Ribeiro 2003, 151–153; 2008, 163).

One of the major problems with juridical-legal systems, for Ribeiro, is that its texts and policies are nearly completely focused on evaluating the reasons that lead to the disobedience to the law. Instead, from an ethical standpoint, what matters the most are the desires and motivations that guide subjects in respecting certain principles. Following this train of thought, Ribeiro argues:

> We got used to associating law—and even ethics—to what is prohibited, instead of what is imperative. It is sad to think that ethics has been reduced to the abstention of unethical conduct and does not generally consubstantiate in an effort for an ethical conduct (Janine Ribeiro 2003, 152).

Therefore, we can conclude, from these brief mentions, that a new ethical sociability can be constructed if the main principles of human rights are not only consolidated in laws and 'obeyed' due to surveillance and sanctioning, but rather debated, understood and accepted because of a sense of social responsibility to which citizens are motivated to adhere to: responsibility and aspiration for a quality collective life, not merely in terms of material goods, but mainly in terms of immaterial ones.

Let us examine this question a little further by recalling Lévi-Strauss, in a brief passage in which he approaches the subject of human rights:

> the simple statement that all men are naturally equal and should be bound together in brotherhood, irrespective of race or culture, is not very satisfactory to the intellect, for it overlooks a factual diversity which we cannot help but see; (…) the weakness of the great declarations of human rights has always been that, in proclaiming an ideal, they too often forget that man grows to man's estate surrounded, not by humanity in the abstract, but by a traditional culture, where even the most revolutionary changes leave whole sectors quite unaltered (Lévi-Strauss 1952, 12–13).

Geertz takes a step in the same direction, as he agrees with Lévi-Strauss that various forms of ethnocentrism are more present in social life than egalitarian practices. Both authors recognize that ethnocentric practices, indeed, can value and safeguard diversity itself, but they also warn about the risk of ethnocentrism leading to attitudes towards otherness that could menace human diversity. Geertz mentions that ethnocentrism may produce two opposing, equally damaging positions in social interaction: on the one hand, exacerbated 'moral narcissism', that can lead to destruction; and, on the other hand, exacerbated 'moral entropy', that results in an indifferent and disinterested relativism that produces invisibilities (Geertz 2001a, 68–95).

Is there a viable middle term between these opposing standpoints?

Is It Possible to Legislate About What Is Transitory and Fluid? Are Contemporary Movements and Flows of People and Goods Out of Control?

From everything that has been argued to this point, it is possible to conclude that movements and flows of people and goods are the rule, not the exception in human history. And, if we keep observing and analyzing such movements through concepts

and theories that conceive power as centripetal or pyramidal, embodied and centralized in easily identifiable people or groups, all we shall see are lack of control and broken pieces, while, actually, new forms of organization and control already exist.

If legislating is not the mere imposing and punitive register of the interests of the lawmaker's specific group, but rather a civic, republican, and democratic task performed by 'ethical lawmakers', with real compromise to the common good, it is desirable that laws aim at establishing ethical parameters to what is transitory and fluid, to what escapes from conventional hierarchical, repressive, and punishing controls. For example, establishing ethical parameters for the so-called *dialogical justice* (Beraldo de Oliveira 2010)—such as mediating, conciliatory, restorative and negotiating practices—implies an attempt to escape 'adversarial justice', which exacerbates antagonism among the parties and thus polarizes arguments instead of looking for possible convergences.

The principles that guide human rights, expressed in charters, treaties, plans and guidelines, work better with ethical parameters under debate, negotiation and construction, that is, transitory and unstable, than with stable, prescriptive, punitive codes and laws. This opens up a wide and plural field of policies aimed at education in human rights (Schritzmeyer 2013b), though not simply in the sense of purely solidifying certain values

> as if they were already given, and as if the question of values should be measured by how solid they are, and not, precisely, by the construction of subjects who are able to deal with doubt. (…) education should aim at making people as able as possible to deal with a world full of doubts and ambiguities. This is important both from a psychological and from an ethical point of view (…). Even today the ability to deal with instability is not as valued as it should be. If we pay attention to everyday language, we realize there is more value attributed to stability, density, balance…in a world in which everything is under terrible threat (Janine Ribeiro 2003, 158–159).

It is precisely in face of some of these threats that humanitarian movements are network-based and increasingly led by collective subjects, like *Médecins Sans Frontières* and *Greenpeace*. A close pattern is followed by the traffic of arms, drugs and human beings, different kinds of national and international corruption, legal and illegal financial capital flows, as well as many other movements of people and goods, which are facilitated by the new digital and informational technologies that can transport *virtually* everyone and everything in *real time*.

In his conference at the 30th Meeting of the Brazilian Association of Anthropology,[4] anthropologist Gustavo Lins Ribeiro mentioned that, according to some estimations, there will be around nine billion mobile phone accounts in use in 2020. Each one of them means a smartphone whose movements and flows, as interpreted by algorithms, will allow tracing, consulting and controlling users' profiles and networks. As well pointed by Lins Ribeiro, this represents a massive amount of free work to corporations that, having established a 'social oligopoly', can capture

[4] O preço da palavra. Capitalismo eletrônico-informático, economia da isca e googleismo, 2016, 6 August. Available at: http://agreste.blogspot.com.br/2016/08/conferencia-gustavo-lins-ribeiro-na-30.html.

and capitalize a huge amount of creativity and knowledge that transits and flows amid millions of users.

Do these super technologies for data collection mean that anthropology's classic methodological use of *informants* has its days numbered? I do not think so. As declared by Lévi-Strauss in his conversations with Charbonnier:

> When you study different societies, it may be necessary to change your reference system – and that involves somewhat painful mental gymnastics, which furthermore can be learned from experience in the field. (…), there are contradictions, however, that we have to get used to, intimately and resignedly learning to live with them (Charbonnier 1989, 15).

The perception of different 'reference systems', through rational, sensory and emotional experiences; the evaluation of possible connections and translations among these systems; the respectful resignation mentioned by Lévi-Strauss; all these aspects exemplify a whole set of things which cannot be reached, analyzed, controlled and managed by algorithms alone. The sensible world, the domains of the symbolic, the humanities and the arts, have not been totally captured and controlled yet. And we hope this remain so.

Concluding Considerations

If, nearly a century ago, anthropology could make a break with its evolutionist and imperialist birthmarks and, amid considerable resistances, managed to propose new ways of understanding otherness, could the principles, practices and discourses concerning human rights perform a similar movement, beneath and beyond the laws, in order to also question its birthmarks and assume the task of becoming a means of communication and comprehension between conflicting particularities?

Rather than drawing a decisive conclusion, I finish my remarks with another passage from Renato Janine Ribeiro and a few thoughts on it:

> The world as it is may become unsustainable (…) this refers to all of us, to humanity. In ethics, material gains come collectively. As individuals, it may be the case that we have to lose (…) there is no other way out: either we act ethically, expecting nothing in return, or the world ends (Janine Ribeiro 2008, 169).

Perhaps, if we look more closely and frequently at our temporal, cosmic and geological insignificance, and become capable of breaking with the Enlightenment anthropocentric notion that the human species is superior to all others, we may diminish the risk of our own extinction.

It is no accident, then, that the last decades have witnessed not only the creation and the strengthening of human rights movements, but also of mobilizations for the rights of nonhumans, and even for a *holoethics*: the responsibility of humans towards themselves and all natural resources of the planet, which are, contrary to what many still believe, exhaustible and irreplaceable (Martins Da Silva and Gonçalves de Oliveira 2015).

It may be that, just as unexpectedly as those mutations that, according to Darwin, moved biological evolution, new collective subjects, committed to this *holoethics*, emerge, amidst many current struggles and catastrophes: planetary subjects-citizens, capable of ethically disobeying the perverse laws of capitalism, because they respect and understand diversity as a driving force towards possible complementariness, instead of unavoidable inequalities.

References

Adorno S (1988) O bacharelismo liberal na política brasileira. Paz e Terra, Rio de Janeiro

Beraldo de Oliveira M (2010) Justiças do diálogo: uma análise da mediação extrajudicial. Tese de Doutorado em Ciências Sociais. Instituto de Filosofia e Ciências Humanas da Universidade Estadual de Campinas (Unicamp), Campinas

Cardoso de Oliveira R (1988) Tempo e tradição: interpretando a antropologia. In: Sobre o pensamento antropológico Rio de Janeiro, pp 13–25

Carneiro da Cunha M (1986) Pensar os índios: apontamentos sobre José Bonifácio. In: Antropologia do Brasil: mito, história e etnicidade. Brasiliense, São Paulo, pp 165–173

Charbonnier G (1989) Arte, linguagem, etnologia: entrevistas com Claude Lévi-Strauss. Papirus, Campinas

DaMatta R (1983) Carnavais, malandros e heróis: para uma sociologia do dilema brasileiro. Zahar, Rio de Janeiro

Darmon P (1991) Médicos e assassinos na Belle Époque: a medicalização do crime. Paz e Terra, Rio de Janeiro

De Souza Lima AC (2012) Antropologia & Direito: temas antropológicos para debates jurídicos. Contracapa; LACED; ABA, Rio de Janeiro, Brasília

Fonseca CE, Cardarello A (1999) Direitos dos mais e menos humanos. Horizontes antropológicos 5(10):83–121

Fry P (1983) Febrônio Índio do Brasil: onde cruzam a psiquiatria, a profecia, a homossexualidade e a lei. In: Eulálio et al Caminhos Cruzados: linguagem, antropologia e ciências naturais. Brasiliense, São Paulo, pp 65–80

Fry P (1985) Direito positivo *versus* direito clássico: a psicologização do crime no Brasil no pensamento de Heitor Carrilho. In: Figueira Sérvulo A (ed) Cultura da psicanálise. Brasiliense, São Paulo, pp 116–141

Geertz C (1975) Common sense as a cultural system. Antioch Rev 33(1):05–26

Geertz C (2001a) Os Usos da Diversidade. In: Nova luz sobre a Antropologia. Jorge Zahar, Rio de Janeiro, pp 68–95

Geertz C (2001b) O mundo em pedaços: cultura e política no fim do século. In: Nova luz sobre a Antropologia. Jorge Zahar, Rio de Janeiro, pp 191–228

Huntigton S (1996) The clash of civilizations and the remaking of world order. Simon & Schuster, New York

Janine Ribeiro R (2003) Ética e Direitos Humanos. Revista Interface (Botucatu) 7(12):149–166

Janine Ribeiro R (2006) Uma ética humana. Folha de S Paulo, Caderno Opinião, 23 Dec 2006. Available at: http://www1.folha.uol.com.br/fsp/opiniao/fz2312200609.htm

Janine Ribeiro R (2008) Ética ou o fim do mundo: Entrevista. Revista Organicom year 5(8):161–169

Kant de Lima R (1991) Ordem pública e pública desordem: modelos processuais de controle social em uma perspectiva comparada (Inquérito e *jury system*). Anuário antropológico 88:21–44

Kant de Lima R (1993) Bureaucratic rationality in Brazil and in the United States: criminal justice systems in comparative perspective. In: Hess DJ, Damatta RA (eds) The Brazilian puzzle: culture on the borderlands of the western world. Columbia University, New York, pp 241–269

Kuper A (1999) Culture: the anthropologists' account. Harvard University Press, Cambridge
Laplantine F (1988) Aprender antropologia. Brasiliense, São Paulo
Lévi-Strauss C (1952) Race and history. UNESCO, Paris
Lévi-Strauss C (1961) A writing lesson. In: Tristes Tropiques. Criterion Books, New York, pp 286–297
Malinowski B (1926) Crime and custom in savage society. Harcourt, Brace & Company Inc./ Kegan Paul, Trench, Trubner & Co. Ltd, New York/London
Martins Da Silva L, Gonçalves de Oliveira D (2015) Holoética: paradigma para uma cidadania planetária descentralizada. ESFERAS (Revista Interprogramas de Pós-graduação em Comunicação do Centro-Oeste), no. 6:109–119
Panikkar R (1992) Is the notion of human rights a western concept? In: Sack PG (ed) Law and anthropology. New York University Press, New York, pp 387–414
Peirano M (1999) Antropologia no Brasil (alteridade contextualizada). In: Miceli S (ed) O que ler na ciência social brasileira (1970–1995). ANPOCS/CAPES, Brasília, Sumaré, São Paulo, pp 225–266
Peirano M (2014) Etnografia não é método. Horizontes Antropológicos (Porto Alegre), year 20, n. 42 (July–December):377–391
Schritzmeyer ALP (2004) Sortilégio de Saberes: Curandeiros e Juízes nos Tribunais Brasileiros (1900–1990). IBCCRIM, São Paulo
Schritzmeyer ALP (2005) Balonistas e mateiros ou teóricos da política e antropólogos: reflexões sobre a construção de um farol interdisciplinary. In: Kritsch R, Ricupero B (eds) Força e legitimidade: novas perspectivas? Associação Editorial Humanitas, São Paulo, pp 161–170
Schritzmeyer ALP (2010a) O ensino da antropologia jurídica e a pesquisa em direitos humanos. In: Nalini JR, Carlini AL (eds) Direitos Humanos e Formação Jurídica. Forense, Rio de Janeiro, pp 137–153
Schritzmeyer ALP (2010b) Por que um dossiê voltado para a Antropologia do Direito? Rev Antropol 53:441–448
Schritzmeyer ALP (2013a) Breve panorama da antropologia do direito no Brasil. Revista Cadernos de Campo 22(22):223–224
Schritzmeyer ALP (2013b) Anthropologie, droit et médiation au Brésil: un champ dialogique en construction. Jurisprudence Revue Critique:59–71
Schritzmeyer ALP et al. (2016) Presentatión. Revista Euroamericana de Antropología. Dosier Antropología del Derecho en Brasil, no. 2 (June):3–6. Available at: https://iiacyl.com/2016/07/16/rea-no-2/
Schwarcz L (1993) O espetáculo das raças: cientistas, instituições e questão racial no Brasil (1870–1930). Companhia das Letras, São Paulo
Soares LE (2002) Algumas palavras sobre Direitos Humanos e diversidade cultural. In: Alencar C (ed) Direitos mais humanos. Garamond, Rio de Janeiro, pp 67–70
Taylor C (1993) Shared and divergent values. In: Reconciling the Solicitudes: essays on Canadian Federalism and Nationalism. McGill/Queen's University Press, Montreal/Kingston, pp 155–186

What Is 'Global' for Anthropology? A Focus on Circulation, Between 'Flows' and 'Systems'

Lionel Obadia

Abstract This paper deals with the issue of 'Global' and 'globalization' in anthropology, as seen as crucial approaches to 'circulation'. The discipline, familiar with the study of 'remote', 'primitive', 'isolated' and non-Western societies and culture, has recently jumped in the train of Globalization Studies. But while many scholars believe that Globalization is responsible of a 'mobility turn' in anthropology, this paper recalls that, rather explicitly or more discreetly, the idea and concept of circulation and the corresponding methodology are as ancient as anthropology itself. Yet, one must recognize that the issue of 'Global' has nevertheless induced profound changes in the way of making anthropology, and not only in terms of circulation.

Issues in Globalization and Mobility

Over the past two decades, 'Globalization' has become commonplace for social sciences. Nevertheless, although they are widely used, the terms *global* and, even more so, *Globalization*, are steeped in controversy. While both of them are essential to the recent developments of social and historical sciences (without them, Globalization Studies would not have had a chance to develop, in the 1990s), there is still little consensus on what the terms actually mean, or the realities they refer to (GEMDEV 1999). The 'Global' is a topical term that indeed takes on a variety of slightly different meanings. And above all, it has engendered contrasting attitudes—enthusiastic promotion or violent rejection. In academic milieu as well as in public discussions, globalization has become a buzzword with a wide lexical surface and ramified semantic resonance (Waters 2001). According to a review of literature conducted in the early 2000s, half of the scholars at the time had a very critical conception of globalization, and doubted it even existed as a singular process (Guillen 2002). The term, however, according to sociologist James Beckford, borrowing from Lévi-Strauss, is a concept that is 'good to think with,' (Beckford 2003) insofar as, however prejudiced the critics may be, it nonetheless shapes a

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series of reflections that lead to the paradoxical conclusion of 'globalization' simultaneously existing *per se* and being a category constructed by language and as such, much more a representation than a reality. As a consequence, it is ontologically disputable.

These arguments have called for a more precise and accurate definition of the terms and the semantic networks in which they are embedded. Among the many attempts to circumscribe this new repertoire, one of the most quoted is Ulrich Beck's distinction between 'globalism', which represents the global perspective on social and historical realities; 'globalization', which labels the processes by which things are becoming 'global'; and 'globality', which defines the state of the world as it is, in the context of globalization (Beck 1999). Further developments in these epistemological considerations can be found in Martha Van der Bly's delineation of the meanings, uses and regimes of ontology of Globalization, between *imagination* and *reality* (Van der Bly 2005). In a rather different style, other scholars in sociology and social studies have put more emphasis upon the descriptions and analyses of processes and/or forms of Globalization, rather than undertaken a thorough investigation of the term. Yet, despite the fact that the discussion has relocated to more empirical grounds, epistemological issues still remain, while paving the way to other concerns. Roland Robertson ranks among the first 'global' sociologists to have drawn a model of the dynamics of Globalization. He portrays Globalization as the 'universalization of particularism and the particularization of the universal' (Robertson 1992). In Robertson's idea, the 'global' equals the 'universal', and 'globalization' corresponds to 'universalization.' But the very concept of 'universal' has been criticized for depending too much on its roots, i.e. European culture, and as being hardly applicable (if ever) to non-Western realities. Nevertheless, evidence points towards the fact that, while some processes of globalization did indeed come from the worldwide extension of the standards of European (Victorian) culture and political models, these elements have, in the end, become so widespread ('universalized') that their origin has taken on a less consequential weight than their extension and use (Jameson and Miyoshi 1998). Still, however, globalization processes are likely to disclose geopolitical issues and especially the 'imperialist' and colonial domination of the West over the rest of the World. Subaltern voices (from the dominated countries in the South and especially from India under British influence) have contested the hegemony the West imposes on the universal narrative of history (Chakrabarty 1992). In a way that slightly differs from sociology, and which moves closer to *Cultural Studies* and *Subaltern Studies*, anthropology, faithful to its (moderate) relativistic posture, has distanced itself from the paradigm of the 'Westernization of the World.' Nowadays, anthropology not only considers Globalization processes as they are viewed from the South, but also highlights the schemes of non-Western imagination on Globalization. As such, it leaves room for 'Southern' conceptions of the Global, and for scenarios of Globalization against the hegemonic posture of Northern academies and scholars to emerge.

Globalization in/of Anthropology

Up until recently, anthropologists had barely considered the issue of Globalization as relevant to their discipline. In just the same way as, prior to that, they had been reluctant to adhere to the theories of modernity (Hefner 1998). Several reasons come to play into this. Arjun Appadurai, who is a renowned figure of anthropology in *Globalization Studies* and is consequently associated with the concept of 'Global,' regards globalization not only as a new conceptual framework, but also as a 'source of *anxiety*' (Appadurai 2001). Global (economic, political, technological) forces are indeed responsible for the instability of social forms and cultural traditions. As a consequence, they destabilize the subject-matters and models that anthropology had framed to study them. But Appadurai's diagnosis, expressed in the early 2000s, was also motivated by the urge to reform anthropology and to move it into a 'Global turn'—and it was a bit overly pessimistic. Indeed, as a discipline, anthropology has since turned global. Despite the initial suspicion of anthropologists against large-scale and all-embracing theories such as those of modernity and globalization (Hefner 1998), it is now being practiced in many countries outside Western areas. Anthropology has for a long time been considered (even by anthropologists themselves) as the study of the 'primitive' within the modern world, leaving aside the study of modernity itself to sociologists. But in the 1950s and 1960s, in a context of global decolonization processes and under the influence of sociologists, issues in modernity and modernization have been critically recaptured by anthropologists.

They took into account the new conditions of anthropological work, the study of 'societies on the move' in different sites—and the need to develop a 'multi-sited ethnography' (Marcus and Fischer 1986). Furthermore, in the 2000s, 'globalization' quickly became the new fashionable buzzword (Waters 2001), and the opportunities for anthropology to escape this new paradigm and trend were few and far between. There was no justification, however, for anthropologists to jump on the 'globalist bandwagon' without prudently engaging into a critical assessment of the benefits and disadvantages of adopting a globalist perspective. In addition, this was complicated by the fact that 'globalist' views are all but unified, and somewhat contradict each other. In the end, in contemporary anthropology, the ontological status of 'globalization' sways between the *subject-matter* of the studies on the one hand, and on the other, the *encompassing context* in which anthropological studies take place. And this marks the clear difference between the anthropology *of* globalization and anthropology *in* globalization (Obadia 2007).

Social Sciences in Motion for Societies 'On the Move'

For many (contemporary) anthropologists, 'the global' (be it labelled 'globalization' or 'globality') is related to issues in mobility and to the new status of cultures and societies, shifting from 'sedentary' to 'nomadic.' Yet, not all anthropologists believe

that Globalization is limited to the statement than we live in the 'world of flows' described by Appadurai (1990). If the first meaning of 'global' is linked to 'circulation,' the same term assumes other, somewhat differing, meanings: for example, it can carry the connotation of 'geopolitical orders,' or of 'world-system analysis,' which are opposed to and compete with static conceptions of the global. While the idea of 'movement' and the related issues that spring from it (migration, diffusion, circulation, internationalization, transnationalization…) are anything but new, an innovative paradigm emerged in the 1990s and 2000s under the umbrella category of 'mobility' (Hannam et al. 2006). This new paradigm may even be considered as having set up the milestones for a further-reaching 'mobility turn' to appear (Blunt 2007). According to this perspective, anthropology has embraced the conversion to new subject-matters and new empirical objects, especially as they show evidence of a 'mobile' character. Cultural ideas, human beings, social practices, food habits or symbols and beliefs: almost everything that is spreading or 'on the move' can therefore be studied in anthropological terms. However, one issue remains central to the development of the field: are these 'new' objects moved by *traditional* mobility in global times, or do they materialize the outcomes of definitely *modern* and even *hypermodern* mobility? (Tomlinson 1999). According to Clifford, 'traveling cultures', mobile societies and human nomadism have become the rule, when they used to be the exception (Clifford 1992). But a (Western) culture of mobility has also created immobile societies (Hannam et al. 2006). And when it comes to examining the moral geographies of the Other, Western imagination has been influential in the location of 'the East.' One illustration can be found in the territory of 'mystical' traditions and 'natural-born believers', which are considered as insensitive to the ideals of Modernization, Rationality and Secularism, or reluctant to adopt them.

A Tradition of Mobility in Anthropology

The main domain for which anthropology is recognized is the study of 'the local.' Anthropologists have always put a strong methodological and theoretical emphasis upon the *location* and *territorial embeddedness* of cultures and societies in the study of Man. Monographs were the perfect illustration of such a perspective: on the basis of the prerequisite that 'primitive' or 'traditional' societies were circumscribed by distinct, culturally encoded and socially produced territorial boundaries, the work of the ethnographer was limited to the study of 'one group in its geographic and geological settings.' Maybe better than any other, Marcel Mauss' notes on methodology (written in 1947 and published in 1967 (Mauss 1967)) epitomize this conception, which is associated with a so-called 'classical' anthropology, against which new generations of scholars have opposed new 'experimental' methods (Marcus and Fischer 1986) and more 'mobile' conceptions of Man and society (Clifford 1992; Appadurai 2001). But a closer look at the way in which anthropological research has been conducted from the early days up to now, demonstrates quite the reverse: anthropologists have always been conscious that *motion* is a force

that shapes the structure of societies and, as a consequence, causes changes in the course of their history. These views, however, were ancillary with regards to the ascendance of 'static' models of societies within the frameworks of functionalism and structuralism. Yet, it is somewhat puzzling that these two theories, which are accountable for the epistemological and methodological convention of localism, are the very theories that facilitated the assimilation of the 'Global turn' in anthropology: functionalist and structuralist approaches indeed provided the grounds for the theory of global-systems that is being championed by the new generation of anthropologists, such as Jonathan Friedman, for instance (see Friedman 1994). But anthropology can also pretend otherwise, as having framed large-scale theories that resemble embryonic theories of 'the global,' which were necessarily rudimentary; these were inspired by an all-embracing philosophy of history, as it was practiced and prominent in the eighteenth century. Such examples of this can be found in Turgot's *universal history* (1751), Condorcet's *Progresses of Human Spirit* (1795) or Hegel's *Lectures on the Philosophy of History* (1822). This (social and cultural) evolutionist school of anthropology that began to take shape in the second half of the nineteenth century and became prominent at the turn of the twentieth century, is represented by authors such as Tylor (*Primitive culture*, 1871), Morgan (*Ancient Society*, 1877) and Frazer (*Golden Bough*, 1890). The evolutionist scope was the largest possible: it sought to determine and define the 'universal', seized as 'processes' running through the flow of history. It can as such be considered as a 'global' avant-garde—although the very term 'global' was not being used within the conceptual repertoire of evolutionist anthropology at that time.

Likewise, but in a somewhat different vein, there is a parallel intellectual tradition which has also focused on wide-scale cultural or social phenomena, not in terms of time or history, but in terms of space and geography. Theories of *diffusion* are contemporary with evolutionist ones (i.e., in the late nineteenth century). They originated in Boas's reflections on human diversity (Boas 1930) and progressed in the early twentieth century in the North-American and, to a certain extent, British school of anthropology, before the latter joined the paradigm of functionalism. The henceforth called 'diffusionist' approach in anthropology nourished the same ambitions as the evolutionist school: to write the history of *all* cultures and societies, but by emphasizing contacts between societies and diffusions between cultures. Starting from a local/regional study of the spread of culture traits, Boas and his followers (Kroeber, Sapir) wanted to widen the scale of analysis, with the open aim of reaching a *global* view on the geographic processes involved in the history of cultures. 'Classical' anthropological perspectives on diffusion cannot however be entirely associated with more recent efforts of the discipline to tackle modern circulations and their forms, circuits, intentions and effects, i.e. an anthropology of mobility and of deterritorialized societies (as in Clifford 1992, and Appadurai 2001). In the context of late globalization, anthropology has become more interested than had previously been the case in circulation *per se*, justified by an ontological shift in foundations: societies are nowadays perpetually, rather than occasionally, 'on the move,' just like cultures have, from locally bound settings, become more 'traveling' and 'nomadic.'

This is one of the reasons why traditional mobility should not be confused with modern mobility, even though, following Tomlinson (1999), it is obvious that the image of isolated societies fixed in time and space, unaware of the whole world they belong to and unable to connect with one other, participates in the construction of a local/territorialized primitive against the global/moving modern. This 'interconnectedness' between societies, and their participating in supra-local networks and the global civilization, is nothing new (Lévi-Strauss 1955). But these relations have gained a tremendous importance in the dynamics of contemporary societies (Amselle 2001). Yet, in diffusionist anthropology, 'circulation' was not exactly a subject-matter *per se*, but a tool to access, depict and understand other realities: changes in cultures, new modalities of social relationships, new modes of human communication and exchanges, and so on. Therefore, the meaning of 'global' in anthropology is torn between historical and geographical repertoires, and is rooted in the early developments of anthropological knowledge. Even if, paradoxically, the above-mentioned schools of evolutionism and of diffusionism are the ones in which the idea of global was first coined (or at least, in which the idea of global first arose), they are not the ones from which theories of globalization found their anthropological legitimization. Similarly, the idea of circulation *in* society, *amongst* societies and *of* culture was designed in the early stages of the academic history of anthropology. But within the context of Globalization, the issue has expanded and developed in a brand-new way. Methodologically speaking, it is interesting to note that circulation can be either the principal and theoretical subject-matter of studies, or simply an aspect in the background of the study. When it comes to ethnographic research, it can be a *concept* or a *context* (Obadia 2007).

Global Processes and New Anthropology

Since the 1980s, then, in the strive for more relevance, anthropology has been refashioned in order to align with and correspond to a world that has turned 'global,' a world in which cultures and societies are 'in motion.' Scholars have distanced themselves with what was called 'classical' anthropology, which allegedly carried the guilt of crystallizing societies and cultures within time and space, defining them as fixed systems that were unresponsive to changes and closed off in insularity. The theoretical and methodological emphasis nowadays is upon *flows* insofar as they shape *global landscapes*, as in Appadurai (1990); upon circulations as they contribute to shape 'hybrid cultures' of modernity in global times (Garcia-Canclini 1995); upon 'transnational connections,' defined as the new circuits of elite and subaltern people which bypass political borders and geographic boundaries, living in unremitting displacement (Hannerz 1996); and finally, upon deterritorialization, the dislocation of the relations between societies, cultures and spaces, and the relocation of societies alongside new 'fluid' networks and modalities: extra-territoriality (living far from a soil), as well super-territoriality (living without a soil) and plural territoriality (living between different locations at the same time). Anthropologists are

witnessing a decisive shift in the geography of societies and cultures, which stands in stark contrast with the way they used to be circumscribed. And few still believe that these significant transformations of the landscape of cultures have nothing to do with the forces of Globalization (Appadurai 2001).

However, phenomena which pertain to the transformation of societies and cultures, and more than anything else, the variations in scale of their extension (especially the geographic scale, which is obviously most affected by the logics of globalization), are not necessarily related, whether entirely or partially, to globalization itself. This directs the reflexion towards the need to differentiate what has become 'global' (under which conditions and to what effects) from what hasn't become 'global,' i.e. what has remained local, even if traditions or practices have been reorganized under the influence of globalization (such as eating habits, clothes, religious preferences or musical taste, tourism, etc.). With the exponential development over these past years of discussions around the fiercely debated concept of 'globalization,' coined by Roland Robertson, what has emerged is a concern with the relations between various scales in societies and in the perceived realities of individuals (although they may not necessarily be conscious). And these relations have indeed been transformed: the local is nothing more than a transposition of the global, and in return, the global is shaped by local forms (Robertson 1992). Canadian sociologist Peter Beyer, for example, demonstrated this aspect as it relates to the field of religion: he showed that the original, characteristic source of the 'worldwide religious system' is (or, rather, may be) European Christianity (Beyer 1994). And according to sociologist Saskia Sassen, who also specializes in the phenomena of globalization, in fact these scales are not at work in the relation going from the individual (local *par excellence*) to the world (global by nature), but rather it operates in the relations from individual and collective actors at interregional levels. To her, such is the true extension of globalization (Sassen 2009).

All these debates have brought about visible modifications to anthropology as a discipline that still concentrates on observing the world it seeks to describe, and is still interested in working on the evolution of its theoretical models—even if the models it uses have first been formulated within the structure of other disciplines. Nevertheless, anthropology remains centered on the relation between the particular (what can be observed by ethnography, the 'small', the 'local', the 'microscopic') and the general (what is established by more abstract forms, the theoretical models of reality). It seeks to introduce the dialectic conceptualization of 'global-local,' understood as a nexus that structures and organizes knowledge in the disciplines of Globalization Studies in anthropology were facilitated by the fact that 'global' not only matched a primary theoretical term, 'universal,' but also a methodological term, 'general.'

But it would however be false to state that anthropology did not undergo changes in its methodology when it converted its objects to the new perspectives brought about by globalization. Quite the contrary: while the principle that has been formulated earlier remains true, the techniques of investigation and their reach have been deeply reformed. And according to some, it is a theoretical and methodological

revolution that is taking place, to which anthropology is committed, subsequent to the revolution brought about by modernity.

First of all, the 'classical' model of ethnography, the monographic type, as encouraged by Mauss (1967) as well as Franz Boas, Edward Evans-Prichard and Bronislaw Malinowski, in other words, by the greatest authors in the discipline, is impacted. Monographs were based on local, long-term and long-winded field investigations, through a patient immersion which allowed for the most exhaustive possible learning of habits and customs of a society that was, ideally, removed from the others and strongly territorialized, which carried an original culture unadulterated by modern, Western influences, in other words, a society constructed as the ideal local, cultural isolate. In a context where the world is described as constituted of a multitude of 'branching points,' (Amselle 2001) and where any form of local culture is likely to be expressed on the global scale, especially due to electronic and mediatized modes of communication (Warnier 1999), the 'local' model cannot hold its ground against the lens of a global perspective through which it is reframed. But Lévi-Strauss already highlighted the extent to which the localist model, when it is mistaken for cultural isolationism, is removed from the truth of human societies—all human societies (Lévi-Strauss 1955). This means anthropology has long come to terms with the fact that all local cultures participate in a common global movement of humanity through history.

Coming back to the issue of method, modern ethnography has abandoned the monographic work on one single society (small in dimension, generally not larger than a village), to devote itself to studies that are better suited to the pressures of a world in movement: multi-sited ethnography has emerged, and is deployed over several areas of social and cultural life, as long as they pertain to a single, common reality as it is lived by the social actors (migrants, expatriates, nomads and the displaced, in particular). This methodology is more relevant when it comes to understanding deterritorialized societies, which are structured in the shape of transnational networks and 'detraditionalized' cultures. To sum up the argument, it may be said that anthropology, like other fields of knowledge involved in Globalization Studies, studies societies in (geographic) movement, and processes in (historical) making.

As opposed to other conceptions of globalization, however, anthropology does not necessarily express a keen interest in what does make up the most studied forms, which are probably the most global *per se*: rules, laws and political contexts at the scale of the planet. Anthropologists generally file these under the section of 'conditions' of globalization—although *political* anthropology has been quicker than *cultural* anthropology in grasping these global dimensions which provide the background foundation to the current lives of cultures (Abélès 2008). Once again, what matters to anthropology, even in its modern incarnation, is what pertains to social, cultural, symbolic or ideological circulation and, more often than not, only insofar as it allows for social and cultural changes to be revealed and explained, including changes which affect or are determined by legal norms, judicial standards, or political principles. So, the global norms and international standards which are nowadays applied to many spheres (agriculture, diet, health, industry, education,

ecology, etc.) are globalized as much as they are globalized, reworked by the dialectical link between the local and the global. As such, they do provide an interesting object in and of itself to anthropology (Hours 2002). But anthropology is also interested in the globalization of behavior norms (consumption, for example), of cultural models (female beauty, social exemplarity, financial success), of ideological standards (the new norms of emergency ecology) and of beliefs and worldviews (religious norms)... (Obadia 2015).

Systems Against Flows

Whether they are philosophical foundations, theoretical approaches or methodological injunctions, these various conceptions give structure to 'the global,' as well as turning it into a methodological tool or an illustration of a dimension of reality. They have given birth to a specific debate in anthropology, which pits against one another the partisans of two schools of thought and of two different approaches to globalization in the discipline: those who champion structuralism-functionalism on the one hand, and those who defend diffusionism on the other. The first orientation has been, for many years, strongly supported by Peter Beyer, for example. According to him, globalization is a 'system of systems' (Beyer 1994). As such, only the first level is truly global, since it is made of the others, which are local (Beyer 1998). This global system is therefore controlled by functions which are essentially unique to the local systems. Jonathan Friedman, one of the most influential figures of the systemist current in anthropology, has often repeated—and the argument holds steady ground—that the global can only be systemic. And he has also explicitly countered diffusionist approaches, according to which global is not a form (as in structure, or system, or 'conditions' (Beck 1999)), but a process (of geographic expansion). According to him, the existence of systems (what constituted the reality of the global), refutes the very idea of diffusions, defined as the processes on which the anti-systemists base their theory of the global (Beyer 1994). Friedman also launched an attack against everything he called the 'vulgate of globalization,' such as mobility (Friedman 2002), and the shift from 'roots to routes,' from territorialized to deterritorialized societies and fieldworks, that are implied in such theories. Beyer and Friedman, each in his own way, escort the parallel developments of a geography of worldwide systems.

Indeed, systems provide a new global geographic frame to which people and societies can identify themselves and through which they can define themselves, as exemplified by the center-periphery articulation. As a consequence, '*positionality*' replaces '*position*' in the repertoire of Global Studies, just as '*networks*' replaced '*circulations*,' and so on. But in such systemic models, the global is an ideological battlefield, as Immanuel Wallerstein described it. Global systems are shaped both by social conflictuality, ethnic tensions, wars, collective violence, economic competition, which relate to rules and norms applied to global phenomena, and by, as a counterbalancing force, cooperation,

alliances, consortiums, etc. But for its staunchest champions, all these elements only confirm that the world is now *globally* molded in systemic logics. And as such, its furthest-reaching limit is that of systems, as individuals and societies are being integrated into international economy and exchange networks (Wallerstein 1990). This is considered as the ultimate reality of a globalization of late modernity.

It is obvious that the rigid posture of scholars' promoters of systemic approach, who consider that globalization, behind its chaotic appearance, does produce order, is opposed by the diffusionist *topos*. The diffusionist argument ripostes that the effects of systems in the world are not to be brushed off as trivial. But they are far from rendering the reality of circulations and flows that cross the world through and through, which confer onto the notion of 'global' a fluid and dynamic character—that of the movements of men, objects, practices, ideas (Appadurai 2001). Can the two positions, despite the fact that they appear irreconcilable at first sight, be nonetheless brought together? After all, they both abide by a legitimate and operational conception of the notion of 'global,' and they both carry a heuristic character. Following Appadurai (2001)): is it possible to overcome the alternative that is often presented as either/or choice in anthropology, i.e. should flows be considered **or** should systems be considered? The most logical response strives to capture the complexity of the world: 'flows **and** systems,' meaning they cohabit in a common world. But if one is to take Friedman's idea seriously, that a system is better suited than a flow to represent globalization (Friedman 1994), then another possibility emerges. The problem may be resolved by adding a third option: that of 'flows **in** systems.' This opens up the possibility of considering the global *both* as static (in the form of political, economic, technological systems, etc.) and dynamic (made up of as many circulation processes… which are now located *in* the system and use its circuits). It should also be added that, from the point of view of systemic analysis, systems can be considered as *realities* (for instance, when they epitomize alliances between societies and/or individuals) or *models* of social and cultural realities (which are made of interdependent relationships).

This perspective is not without bringing to mind Amselle's 'branching points.' As opposed to Hannerz's 'connections,' they do not formalize eminently modern relations between human societies and cultures as the product of globalization. Quite the contrary, the 'branching points' reactualize very ancient modalities and conditions—so ancient, actually, that they may represent an anthropological invariant as defined by Lévi-Strauss. Again, it appears that a society that is absolutely isolated from all others in history is an exception, rather than a norm (Lévi-Strauss 1955). So, with little possible doubt, there appears to be a form of relative, age-old universality in these connections, whether 'international' as described by Mauss, or 'supra-local' as Christian Bromberger depicts them (Bromberger 1987). But these connections also take on new shapes and forms and, as a consequence of this observation, are necessarily modeled by new forces and pressures. As such, they are subjected to the effects and logics of systems.

As a Final Conclusion: Is Anthropology Relevant to the Study of Global Circulations?

As has been seen, the extent to which anthropology has invested meaning in the notions of 'global' and 'circulation' points at their relevance in the discipline's history: anthropology has always been interested in these dimensions, found in the lives of societies and the dynamics of cultures. At the turn of the twentieth and twenty-first centuries, anthropology fully entered the realm of Globalization Studies by focusing its attention on the phenomena of mobility, in which it had long specialized but which were now subjected to renewed interest due to globalization: amongst others, migrations, medialization, transnationalization, missions… (Csordas 2009). Yet, is the anthropological perspective relevant for global issues? The local-global nexus, the specialization of ethnographers on specific case-studies, and the sense of contextualization (the restitution of conditions or frameworks within which global processes occur), obviously facilitate the participation of anthropology to a field of knowledge to which it was 'invited' in the early 1990s (Robertson 1992), but to which it had long be reluctant to adhere and which it strongly resisted.

As opposed to what a simplistic representation of anthropology may lead one to believe, anthropology is not only designed to highlight cultural phenomena. Beyond culture and society, it also offers a certain approach to mobility, sheds a certain light empirical realities, and proposes a certain way to conceptualize them. Added to these aspects is a special taste for reflexivity—although sometimes, to the point of excess—which leads to realizing that as it studies social and cultural practices, their contexts of expression and the collective representations that they are associated with, it simultaneously questions the epistemological foundations of its scientific practice. As such, it examines the idea of global as it is imagined and lived by the actors encountered during field investigation, and it interrogates the coherence and suitability of its analytical categories, by refashioning the notion of global within the frame of its theorization. This is the reason why the notion of globalization is not only torn between the champions of the systemic approach and the partisans of the diffusionist perspective, but also between different and differentiated worldviews: those that consider globalization as an 'open' world of nomads and flows (Appadurai 1990), and those who position themselves in opposition to such a view, with the vision of a 'not-so-open' world, replete with borders and frontiers (Hannerz 1997). In the end, has the 'global turn' really influenced and impacted anthropology? And, should this question be answered positively, to what extent?

Globalization has only partially transformed the focus and subject-matter of social and cultural anthropology, accustomed as it was to studying the migration of men, ideas, practices and objects. Its influence, however, is visible in the reshaping of the *location* of culture and societies, and in the reformatting of the ways of doing ethnography. Such a situation calls for epistemological prudence, and leads to the need to ask two questions. Firstly: *what is global?* Replying to this looks not at the issue of *nature*, but rather at the issue of *extension*: it highlights the issue of the scales of observation, and the scales of analyzing cultural and social facts. The

second question is: *is it global*? Is 'global(ized)/(izing)' really the most relevant concept to describe the kind of phenomena that is being studied? The concept of globalization is rather new to social sciences (1990s). The idea traces a little bit back more in time (1920s). So far, academic milieu of anthropologists will have to wait for more years of research to have the required epistemological distance to appraise the relevance of the new lexicon and the new subject-matters of Globalization studies, and especially of 'the global.'

References

Abélès M (2008) Anthropologie de la globalisation. Payot, Paris
Amselle JL (2001) Branchements. Anthropologie de l'universalité des cultures. Flammarion, Paris
Appadurai A (1990) Disjuncture and difference in the global cultural economy, theory, culture and society, vol 7. Reedited in Featherstone M (ed) Global culture. Nationalism, globalization and modernity, 8th edn. Sage Publications, Thousand Oaks, London; New Delhi, 1999, pp 295–310
Appadurai A (ed) (2001) Globalization. Duke University, Durham
Beck U (1999) What is globalization? Polity Press, Cambridge
Beckford JA (2003) Globalization and religion. In: Social theory and religion. Cambridge University Press, Cambridge, pp 103–149
Beyer P (1994) Religion and globalization. Sage, London
Beyer P (1998) The religious system of global society: a sociological look at contemporary religion and religions. Numen 45:1–29
Blunt E (2007) Cultural geographies of migration: mobility, transnationality and diaspora. Prog Hum Geogr 31(5):684–694
Boas F (1930) Some problems of methodology in the social sciences. In: Race, language and culture, vol 1961, 7th edn. MacMillan, New York, pp 260–289
Bromberger C (1987) Du grand au petit: variations des échelles et des objets d'analyse dans l'histoire récente de l'ethnologie de la France. In Chiva I, Jeggle U (eds) Ethnologies en miroir: la France et les pays de langue allemande Maison des Sciences de l'Homme, Paris Collection 'Ethnologie de la France', cahier n° 7, pp 67–94
Chakrabarty D (1992) Postcoloniality and the artifice of history: who speaks for 'Indian' pasts? Representations 37:1–26
Clifford J (1992) Travelling cultures. In: Grossberg L et al (eds) Cultural studies. Routledge, New York, pp 96–116
Csordas T (ed) (2009) Transnational transcendence: essays on religion and globalization. University of California Press, Berkeley
Friedman J (1994) Cultural identity and global process. Sage, London
Friedman J (2002) From roots to routes: tropes for trippers. Anthropol Theory 2(1):21–36
Garcia-Canclini N (1995) Hybrid cultures: strategies for entering and leaving modernity. University of Minnesota Press, Minneapolis
GEMDEV (1999) Mondialisation. Les mots et les choses. Karthala, Paris
Guillen M (2002) Is globalization civilizing, destructive or feeble? A critique of five key debates in the social science literature. Annu Rev Sociol 27:235–260
Hannam K et al (2006) Editorial: Mobilities, immobilities and moorings. Mobilities 1(1):1–22
Hannerz U (1996) Transnational connections: culture, people, places. Routledge, London
Hannerz U (1997) Frontières. Rev Int Sci Soc:154:597–609
Hefner RW (1998) Multiple modernities: Christianity, Islam, and Hinduism in a globalizing age. Annu Rev Anthropol 27:83–104

Hours, B. (2002) D'un patrimoine (culturel) a l'autre (genetiqe). les mutations du sujet et des objets de l'anthropologie medicale, *journal des anthropologues*, 88–89, pp. 21–28
Jameson F, Miyoshi M (eds) (1998) The cultures of globalization, 4th edn. Duke University Press, Durham
Lévi-Strauss C (1955) Tristes tropiques. Plon, Paris
Marcus GE, Fischer MJ (1986) Anthropology as cultural critique: an experimental moment in the human sciences. The University of Chicago Press, Chicago
Mauss M (1967) Manuel d'ethnographie. Plon, Paris
Obadia L (2007) Mondialisation et culture: brefs éclairages anthropologiques. In: Obadia L, Miliani H (eds) Art et transculturalité au Maghreb Editions Archives contemporaines. Agence Universitaire de Francophonie, Paris, pp 11–21
Obadia L (2015) Floating territories of religion(s): shifting paradigms, erratic theories, volatile realities? Stud Law Relig 18:43–64
Robertson R (1992) Social theory and global culture. Sage, Thousand Oaks
Sassen S (2009) A sociology of globalization. Norton, New York
Tomlinson J (1999) Globalization and culture. Polity Press, Blackwell Publishers Ltd, Cambridge
Van Der Bly M (2005) Globalization: a triumph of ambiguity. Curr Sociol 53(6):875–893
Wallerstein I (1990) Culture as the ideological battleground of the modern world-system. Theory Cult Soc 7:31–55
Warnier JP (1999) La mondialisation de la culture. Syros. La Découverte, Paris
Waters M (2001) Globalization, 2nd edn. Routledge, New York

Part V
Law

The Circulation of Legal Phenomena: Past Lessons and Recent Issues

Jean-Louis Halpérin

Abstract Specialists in comparative law are studying for a long time what is called 'legal transplants', what means the circulation of legal phenomena from one space to another. The debates remain open about the characters of these circulations, especially in a globalized world. This contribution proposes to distinguish the transfer of legal statements (1), the diffusion of legal ideas (2) and the worldwide acculturation of legal theories (3) in order to understand what are the features and the range of these circulations. It is the matter of recognizing the possibility of these circulations, their strong impacts during the nineteenth and the twentieth centuries, their transformations and their limits in the today world.

Introduction

From more than 40 years, comparative law specialists have dealt with legal transplants, what means about the circulation of legal phenomena from one area to another area, generally from one country to another country. The idea that many countries have borrowed some rules of their legal order from a foreign legal order was not completely new in the 1970s. Even the metaphor of 'transplantation' has been used since the 1920s by a Scottish professor F.P. Walton (Cairns 2013). Initially the publication by the Scottish Academic Press in 1974 of Alan Watson's seminal book, *Legal Transplants: An Approach to Comparative Law*, got a weak impact: in a first time, the thesis of a broad disconnection between legal phenomena and socio-economic structures, that would be triggered by massive borrowings to foreign laws, appeared as a plea for the autonomy of law directed against the Marxist theories. One has to wait the years 1990s and the second edition of Watson's book (Watson 1993) to see the development of a larger discussion among comparative lawyers, to approve (Ewald 1995), to nuance (Teubner 1998) or to frontally criticize (Legrand 1997) the idea that legal transplants could exist and would be a major cause of the evolution of legal systems. At the same time the debates began about the legal effects of the intensive globalization that has characterized the turning

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point between the twentieth and the twenty-first century, notably with the development of the World Trade Organization since the 1994 Marrakesh agreement. Gerhard Teubner is one of the legal writers who discussed in the same time the issue of legal transplants and the one of the emergence of 'global law' (Teubner 1997).

If these topics have given rise to an ample literature, it seems possible to renew the discussion about the circulation of legal elements as a global phenomenon, what is not exactly the same question that the one of a possible 'global' or 'transnational law' (Lhuilier 2016). The first reason to distinguish the two questions is an historical one: if one admits the outlines of Watsons's thesis, legal transplants had an essential part in legal history a long time before todays' globalization, for example with the reception of Roman law during the Middle Ages. One has to take account of these past lessons to consider which kinds of legal phenomena circulated from an area to another from the Antiquity until the twentieth century. The question also arises if the great epoch of massive legal transplants—linked with the impact of codification movement or the pregnant empire of colonization—is not behind us, with the emergence of new kinds of multilateral circulations. The second reason to continue to deal with legal transplants is the relative weakness of the lawyers' reflection about the nature of the phenomena that are likely to circulate from a legal system to another. If one takes the example of the 1996 Constitution of South Africa, the sentences of this constitution as 'we the people' (Preamble), Bill of Rights (s. 7), 'everyone is equal before the law' (s. 9.1), 'the state may not unfairly discriminate directly or indirectly against anyone' (s. 9.3) can be explained by the circulation of legal phenomena. But are all these borrowings, from the 1950 Constitution of India, from the 1787 US Federal Constitution, from the 1689 British Bill of Rights, from the 1215 *Magna Carta*, from Henry II's legislation that was inspired by Roman models, parts of the same set of circulations in the legal field? I would like to plead for a stronger differentiation between legal statements (1), legal ideas (2) and legal theorizations (3) to reinforce the connexion between past lessons and recent issues concerning the circulation of legal phenomena.

Dealing with the Circulation of Legal Statements Rather than Legal Rules

The discussion about legal transplants has focused about the possibility or the impossibility that legal rules could travel (Legrand 1997). It would be fruitful to make a distinction between legal statements and legal rules. Legal statements are discourses endowed with a legal authority in one determined legal order. Legal statements can be found in the texts of constitutions, of codified or un-codified statutes, and of judgments. The meanings of these acts of will give birth to rules or norms through different processes of interpretation by official authorities, notably through the rulings (an expressive word about the transformation of an individual norm in a general norm) of Courts (Kelsen 1967). Based on Kelsens's second

edition of the *Pure Theory of Law*, this 'expressive' way to understand the relationship between the legal statements, as authoritative discourses, and legal norms, as mandatory rules inserted in a determined legal order, has been defended, in recent years, by Guastini (2004)) and by Troper (2001). Whereas the first considers that the number of interpretations of legal statements is limited by the respect of a minimal frame, the second one thinks that an undetermined range of interpretations of the same statement is possible, even if some legal constraints (like the hierarchy of courts) prevent the judges to adopt the most capricious meanings. So, this realistic theory of interpretation can be declined according to diverse nuances and in accordance with a large spectrum of historical configurations. Empirical studies can show that, in a certain time and in a determined legal order, the 'final say' is rather given to one interpreter or to another.

Such a distinction between legal statements and legal norms helps to explain many phenomena in legal history and comparative law. In the field of legal history, it can be frequently observed that a legal statement, though abrogated or no more in force, has continued to be quoted and used to construct a norm of positive law. In some cases, an article of a repealed constitution or statute, as well as a statement of Roman law has remained as the basis of a legal norm through courts' rulings. In the 1910 Congress of German sociologists, Max Weber said that a past norm had to be studied by historians in a legal perspective (Verhandlungen des ersten Deutschen Soziologentages vom 19.-22. Oktober 1910 in Frankfurt am Main 1911). It could be clearer, in our vocabulary, to say that a legal statement remains a legal statement, endowed with a minimal authority (the one of having been positive law at a certain time), even if there are no more norms issued from this legal statement.

Concerning comparative law, the distinction legal statement/legal norm justifies the possibility of legal transplants. The legal transplants consist in the circulation of one or more legal statements from one legal order to another legal order. Some legal statements were imposed, as authoritative norms, by the rulers who had conquered or colonized the territory of another country. Generally, these legal statements were introduced in the subjected country through the language of the rulers: in French language for the annexed territories in Belgium, Germany or Italy during the Napoleonic Great Empire, in English language for the British crown colonies. In most of the cases, these legal statements were also translated in indigenous language and more or less adapted to the characters of the subjected territories. These territories had be the basis of a kind of subordinate legal order that was not completely integrated in the legal order of the conquerors or colonizers. It means that the legal norms were not exactly the same in the two legal orders, the 'imperial' one and the subjected one. Furthermore, when the subjected peoples reacquired their autonomy, their rules often kept a great number of legal statements formerly imposed by a foreign country. By this way, the same legal statements (for example, the text of the Napoleonic Civil Code) gave birth to different interpretations and to diverse legal norms in France, in Belgium, in Rhineland (until 1900) or in African countries that continue to apply part of this code (like Cameroun). In other cases, the rulers of an independent countries chose to borrow some legal statements of a foreign country, to make them translated and transformed in domestic legal norms: it was the case in South America and in Japan for many parts of the European codifications. The

theory of legal transplants has always taken account of this difference between imposed transplants and chosen transplants. It must be nuanced in considering the situation of semi-colonized countries submitted to an external pressure to transform (or 'modernize') their legal systems and in rejecting the too simple metaphor of reception in importing countries from rules coming from exporting countries (Twining 2004).

On this basis, the circulation of legal statements from one legal order to another can be explained as a special kind of interpretative processes transforming legal statements in legal norms. Inside legal systems, indigenous legal statements are subjected to various interpretations (according to times, to territories or to courts) and can give birth to different norms. Of course, the process of transforming external legal statements in indigenous legal norms is more complex. In most cases, legal statements had to be translated and were transformed to be integrated in a new (and different) legal order. From these legal statements borrowed for a foreign legal arose new norms, which were formally (as pieces of another legal order) and substantially different from the norms first originated, in their indigenous context, on the basis of the same legal statements. As Pierre Legrand has written, 'rules cannot travel' (Legrand 1997), but, contrary to Legrand's idea of impossibility of legal transplants, legal statements can circulate. These circulations consisted, during the nineteenth century and the first half of the twentieth century, in massive imitations of Western legal statements, copied and translated *verbatim* in some cases: civil codes of the Grand-Duchy of Bade, of pre-unitarian Italian States, of Latin American States, of Belgium modelled on the Napoleonic Code, the 1926 Turkish civil code imitated from the Swiss civil Code, the constitutions following strictly the American or the Belgian models. One can observe that these massive transplants are relatively old and that the end of colonization was accompanied by a stronger feeling of independence from States, which are no more prone to imitate as a whole a foreign code or constitution, and even a part of it. But some of these legal transplants, like the Civil Code of Belgium or of Chile (the new 2001 Civil Code of Turkey is not completely different from the one of 1926), remain in force and constitutional transplants have continued to be practiced after 1945, for example in the rulings of the 1946 Japanese Constitution about the judicial power imitated from the US Constitution or the wordings of the 1996 South Africa Constitution largely inspired by the Indian Constitution. The US economic hegemony can explain the transfer of commercial technics like takes over bid, stock options or rules of corporate governance. If these borrowings are less massive that the previous ones, they show that the mechanism of copying a foreign legal statement into a new legal statement continues to work in the creation of norms.

Distinguishing the Circulation of Legal Statements and of Legal Ideas

As we have seen legal statements consists in sentences, or of group of sentences, that are endowed at a certain time and in a determined legal order with an authority linked with the competence of the producer of these statements (a legislator or a

judge). In some cases, that are the most distant from the examples of massive transplants like parts of codes or of constitutions, the legal statement is reduced to a few words (like 'we the people') and can be identified with a noun of concept. However, I propose to distinguish between legal statements and legal ideas in order to clarify the debates about the circulation of legal phenomena. What I call 'legal ideas' can be identified with legal concepts in a broad way. It is matter of abstractions that are expressly or implicitly defined as expressive wordings or signifiers that refer to the same signified. Each speaker using a vocabulary that is in the same time particular and common (to be meant by other persons), there is no identity between a concept and the noun of this concept, even in one language. The same noun can be applied to different concepts, as well as different nouns can qualify the same concept. But, in all cases the concept is expressed by one word or a few words, which are not endowed by themselves with a legal authority. If I say, to describe a group of linked persons, 'we the people', the meaning is not the same as in the US Constitution. Of course, legal concepts can be inserted in legal statements (the legislator or the judge are using the vocabulary corresponding to concepts), but in that case, there are transformed (as *concepts in the law*) in parts of legal statements. On the contrary, legal concepts that are invented by legal writers are deprived of any authority in positive law. These *concepts of the science of law* are only tools to describe, to analyze or to reform legal norms: they are proposed and not imposed. Their status changes when these concepts are recognized by a legislator or a judge and established as *concepts in the law*. I admit that the frontier can be thin when the same person (a ruler of a judge) has first invented the concept and has succeeded in inserting this concept in a legal statement (generally through convincing other persons who are legislators or judges to adopt this concept). But, the distinction remains between two stages (the 'private' production of the concept and the 'public' recognition of this concept) and between two discourses (the noun of the concept and the legal statement containing this concept, which is a longer ruling).

Different kinds of words and of concepts are used by the jurists and likely to be inserted in legal statements. Here, I do not speak with the common vocabulary that is used by non-jurists as well as by jurists, to describe some corporeal or abstract things (for example, a vehicle or a vote). What I call legal ideas concern specific or esoteric (Angenot 2014) ideas that use a vocabulary created by jurists and often understandable only by jurists. For example, mortgage, adoption, genocide, ultra vires act, judicial review are legal ideas and not elements of the current political or ideological debate. These legal concepts are defined trough other legal words and are combined in complex institutions (like obligations, property, criminal offence, constitutional law) or theoretical conceptions (real property as opposed to personal property or obligations, felonies as distinguished from misdemeanors, Parliamentary sovereignty v. supremacy of the constitution as higher law). All these legal ideas were created and continue to be created in a historical context associating different jurists: if one jurist can create a neologism to identify a new concept (as Bentham has made many times), it is necessary that other jurists adopt this noun and this concept so that it becomes a *concept of the science of law*.

Concerning the circulation of these legal ideas, it means that a legal concept is invented, in one language, by a community of jurists, which is generally a national community. It is not impossible that jurists of different countries could act separately from each other while inventing the same concept. For example, it is not sure that the American jurists who first used the concept of contracts of adhesion has known Saleilles's 1912 text before using the same concept (Patterson 1919). Of course, legal concepts can be known and interpreted outside the frontiers of the legal order they have been conceived for. The knowledge of foreign legal ideas supposes information: the circulation needs access to books, direct borrowings from the original texts or translations. This circulation can be attested by quotations, at least in modern times, when the academic milieu used to give references to the use of new concepts. One task of legal historians is to track these relationships, knowing that some jurists are very discrete about their sources. One has also to take account of reinterpretations, misunderstandings, gaps in the information to evaluate the circulation of legal ideas. As for legal statements, the results of the circulation of legal ideas are often very different from the point of departure.

Even if legal ideas originate in a national context (and in this national context, they can be heterodox or minority ideas), they have no 'owner' and their national coloration is less pregnant than the one of legal statements. It does not mean that legal ideas circulate in a better and quicker way than legal statements. But legal ideas are neither imposed nor chosen like legal statements. Legal ideas are rather transported from one legal field to another and the frontier between indigenous and exogenous factors is less marked than for legal statements that are linked with a legal order. Different combinations between the circulation of legal ideas and legal statements can be found in legal history. Besides the classical scheme of the transfer of exogenous legal statements giving birth to domestic legal statements (and to new norms) and the simple circulation of 'foreign' ideas transformed in 'familiar' (sometimes transnational) ideas, two other configurations are possible. The presence of legal ideas in legal statements of one national legal order (what has been called concepts in the law) can have inspired the circulation of this idea, without giving birth (at least in a first time) to another legal statement and to a new norm in another country. For example, the mention of the abuse of rights in the German Civil Code (BGB) was one of the factor of the apparition and of the development of a French current of ideas about this abuse of rights in property or procedural law. In other cases, foreign legal ideas that were not incorporated in legal statements inside their originating country can give birth to new legal statements in another country. For example, Pothier's 1762 *Traité des obligations*, after being translated in English, provide legal ideas to inspire judicial rulings in Great Britain and later in South Africa (Zimmermann 1996). It can be added that the circulation of legal statements (for example, parts of a foreign code) could have been accompanied by the circulation of legal ideas (for example, legal ideas contained in the treatises of commentators of the French civil code that could travel with the Napoleonic Code). This complex association between legal statements and legal ideas can be conciliated with Sacco's theory of legal formants, highlighting the pack of legal statements and of explanations of these statements (Sacco 1991).

What are the advantages of this distinction of the circulation of legal statements and legal ideas? First, the ways of circulation are different: the transplant is 'official' imposed by foreign authorities (in the case of conquest and of colonization) or chosen by domestic rulers in the case of legal statements, whereas the circulation is 'private' or cultural for the legal ideas. Secondly, this distinction can help successive situations in recent history: the circulation of legal ideas can continue and develop even after the ends of colonial or semi-colonial configurations. Today circulation is rather a circulation of ideas, for example of technics of commercial law or of constitutional law, than a circulation of legal statements. However, I would like to introduce a third element in the analysis of legal phenomena, with the construction of legal theories.

Construction and Circulation of Legal Theories in Analyzing the Legal Globalization

Legal theories are also likely to circulate from their point of origin (the country where was located the author of the theory) to another space in the world. Apparently, there is no reason to deal differently with the circulation of legal theories than with the circulation of legal ideas. Legal theories are complex constructions associating different ideas to explain or to criticize one part or the totality of the legal order. If these legal theories were set up and qualified with a specific name by a legal writer in one part of his/her work or in his/her whole life (it is the matter of the coherence or incoherence in the legal theories supported by the same jurist), they are not the property of their initiators. As for ideas, the circulation of legal theories, in a transnational field as in a national context, implies a diversified set of diffusion, acculturation, vulgarization, cross-fertilization and misrepresentation that is linked with the variety of interpretations and reinterpretations triggered by the circulation of complex ideas and the creation of 'movements of ideas'. As examples in legal history until today, we can give such legal theories as the separation of powers, the human rights protection, judicial review, the notion of social law, antitrust law according to the School of Chicago, the hierarchy of norms, the distinction between primary and secondary rules, the role of detention orders in penal law, strict liability, the ways of solving conflicts of laws or of applying foreign law in determined cases. The theory of legal transplants, as well as all those which concern international law or transnational law, has also circulated from its British origins (in the language of Walton, then in Watson's books) towards the multilingual comparative law literature.

The circulation of legal theories can be combined with the transplant of legal statements that have used the concepts constructed by legal theorists (for example, the French Council of State is using, since the 1990s years, Kelsen's wording of hierarchy of norms) or that have been influenced by these theories (it is the case of all the constitutions invoking the theory of separation of powers, the origin of which is in Montesquieu's *Esprit des lois*). In all these situations, the circulation is not

limited to one legal phenomenon but to a complex bundle of statements, ideas and theories. As well as the effects of massive (the ones that concern full parts of codes or of constitutions) transplants could have been significant and lasting for a legal order, the impact of the circulation of legal theories could transform the structure, or the way to think the structure of legal order.

The historical study of the circulation of legal phenomena cannot dispense with recognizing that the legal model of the national state, linked with a national legal order applicable in its territory and in relationship (through treaties concluded with other States) with international law, has triumphed during the nineteenth and the twentieth centuries. It is not the case to say that Kelsen's theory, with its complete identification between the national legal order and the State, has been adopted everywhere in the world. But the process of diffusion of a 'vulgar' or 'popular' normativism, in fact a reduced and often simplistic transformation of Kelsen's ideas, has accustomed many jurists to explain legal rules as a hierarchy of norms inside the State (with the constitution as summit of this hierarchy) and to justify the force of international law as a consequence of States' wills based on the accepted idea of a primacy of international law towards domestic law. Is this ideal model so far from the practice of national and international judges and of the empirical data concerning national and international norms? It is difficult to give a negative answer: our legal world is full of States (almost all these states recognized inside the United Nations Organization) that have accepted some universal or quasi-universal treaties and that have recognized a minimal power to national and international judges. All the processes integrating, through a 'download of norms' (Frydman 2014), international or regional (for example European rules from the ECHR or from EU law) rules into the national legal orders, are based on this state-centered model and on this Western discourse about legal orders. It is quite impossible to explain the circulation of borrowed statements or ideas, as well as the application of foreign law in some conflict of laws cases, without the conviction that legal orders are formally separated (norms cannot circulate and a national norm is contextually different from a foreign legal statement that seems identical) and substantially porous. The circulation of the state-centered and internationally-linked State has succeeded all over the world and remains the basis of law teaching.

It does not mean that this State-model is eternal (it is an historical construction that did not exist or prevail before the seventeenth century) and that it is not contested and even considered as outdated since a few decades by an increasing number of legal theorists. These theorists argue that there exists a great array of non-state law, that the pluralism of legal orders is not limited to national and international law, that the frontier between legal norms and other norms is blurred and, last but not least, that the nowadays globalization has created a transnational or global law crossing the national borders (Zumbansen 2012). There is no doubt that this theory (or these theories because the conceptions of this global law are diverse) finds today much support in large parts of the legal field and can lean on the growing importance of international contracts (between private partners or between companies and States) and of international arbitration giving birth (in commercial and investments law) to awards that are recognized and can be applied all over the world. It is not the

goal of this paper to determine the issue of this debate. The advocates of a transnational law new model have good arguments about the importance of international arbitration especially in the fields of commercial law and investment law, about the production of private norms through multinational corporations' codes of conduct or NGO's guidelines. The defenders of the remaining forces of the State model can on the contrary rely on the choice of a national law made by the great majority of international contracts and awards (Cuniberti 2014), or on the need of recognition from national judges for giving the positivity to transnational rules.

The idea of circulation remains very important in this evaluation of contemporary phenomena in the legal field. International contracts and international arbitration create 'normative spaces' that cross the borders of States and, in some cases, seem to be disconnected from any territory. In these normative spaces, legal statements and legal ideas are circulating and give birth to norms. The question remains if these norms are only 'individual norms', as decisions linking the parties, or can be transformed in 'general norms' likely to be applied to future cases. These normative spaces can be studied and these transnational situations can be resolved according to the rules of 'private international law' or of conflicts of law. This classical (since the nineteenth century) legal issue or subject has been considerably renewed during these last decades by a reflection about transnational phenomena. Whereas these questions concerned only few people (as nineteenth century wealthy cosmopolitans who could have access for their litigation to national courts applying different national laws) during the past, they are today extended to a multiplicity of cases involving commercial, social, environmental and human rights interests. Academic jurists have to continue to analyze and to evaluate these transnational phenomena with a sociological approach. Instead of saying only that their number increases or that they remain marginal in comparison with national norms, it will be more and more useful to count international contracts and awards, to measure the diffusion of published or non-published awards (Fernández Arroyo 2014) and to consider if the global circulation concerns new kinds of legal phenomena. Besides decisions linking only the parties and general rules recognized as binding norms, is there a room for the circulation of soft law statements that would be something more than legal ideas? The question remains open.

References

Angenot M (2014) L'histoire des idées. Problématiques, objets, concepts, méthodes, enjeux, débats. Presses Universitaires de Liège, Liège

Cairns JW (2013) Watson, Walton and the history of legal transplants. Ga J Int'l Comp L 41:637–649

Cuniberti G (2014) The merchant who would not be king. Unreasoned fears about private lawmaking. In: Muir-Watt H, Fernández Arroyo DP (eds) Private international law and global governance. Oxford University Press, Oxford, pp 141–155

Ewald W (1995) Comparative jurisprudence. The logics of legal transplants. Am J Comp L 43:489–510

Fernández Arroyo DP (2014) Private adjudication without precedent? In: Muir-Watt H, Fernández Arroyo DP (eds) Private international law and global governance. Oxford University Press, Oxford

Frydman B (2014) A pragmatic approach to global law. In: Muir-Watt H, Fernández Arroyo DP (eds) Private international law and global governance. Oxford University Press, Oxford, pp 181–200
Guastini R (2004) L'interpretazione dei documenti normative. Giuffrè, Milano
Kelsen H (1967) Pure theory of law. Translation by Knight M. University of California Press, Berkeley
Legrand P (1997) The impossibility of 'legal transplants. Maast J Eur Comp L 4:111–124
Lhuilier G (2016) Le droit transnational. Dalloz, Paris
Patterson EW (1919) The delivery of life-insurance policy. Harv Law Rev 33:198–222
Sacco R (1991) Legal formants: a dynamic approach of comparative law. Am J Comp Law 39:1–35. 344–401
Teubner G (ed) (1997) Global law without a state. Dartmouth, Aldershot
Teubner G (1998) Legal irritants: good faith in British law or how unifying law ends up in new divergences. Mod L Rev 61(1):11–32
Troper M (2001) Une théorie réaliste de l'interprétation. In: Jouanjan O (ed) Théories réalistes du droit. Presses Universitaires de Strasbourg, Strasbourg, pp 51–66
Twining W (2004) Diffusion of law: a global perspective. J Legal Plur 36:1–45
Verhandlungen des ersten Deutschen Soziologentages vom 19.-22. Oktober 1910 in Frankfurt am Main (1911) Mohr Siebeck, Tübingen
Watson A (1993) Legal transplants. An approach to comparative law. The University of Georgia Press, Athens
Zimmermann R (1996) The law of obligations. Roman foundations of the civilian tradition. Clarendon Press, Oxford
Zumbansen P (2012) Defining the space of transnational law: legal theory, global governance and legal pluralism. In: Handl G, Zekoll J, Zumbansen P (eds) Beyond territoriality. Transnational authority in the age of globalization. Martinus Nijhoff, Leiden

Border Crossing Phenomena and the Law: Which Method?

Jean-Sylvestre Bergé

Abstract Even though its development has been extraordinary in recent times, the movement of persons and goods between territories is described by the act of inter-territorial circulation in nothing other than ordinary terms. Numerous solutions for this border crossing phenomenon can be found under international law in its broadest sense. However, it is remarkable to observe that lawyers have interpreted the notion of movement inadequately, whereas it could be used to support and assist with the issues we face today. This article takes up example from developments in the legal handling of 'movement situations.'

Introduction

Internationality occupies a choice position in the constructions of international law in its widest sense (public and private international law, transnational law, European law-type regional law, etc.). Each time a situation requires a legal mechanism to be implemented because an element of internationality or 'foreignness' is involved, it could be said that the law makes this international phenomenon the subject of its treatment.[1]

This treatment is often singular or at least different from that which prevails for strictly local or national situations. In a given territory, a foreigner or non-resident is not necessarily treated under the same rules as a national or local resident, and an international contract observes specific rules that do not apply to an internal contract and the same goes for international arbitration, whether this involves the State or the private sector, etc.

Legal approaches to internationality are wide-ranging. This is particularly the case of the abundant studies produced by lawyers on the geopolitical movements of

[1] See particularly on this theme, Poillot-Peruzzetto and Marty (2002). Compare Wyler and Papaux (1999).

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globalization[2] with their many variations, each one more modern than the next (trans-nationalization,[3] fragmentation,[4] regionalization,[5] globalization,[6] etc.).

All of these movement phenomena have the common characteristic of highlighting a weakness in the central role accorded to modern States—That came into being in the fifteenth to sixteenth centuries according to the analysis generally advocated by historians—and to domestic state laws. The most recent work referred to above attests to the dynamism of this research, including within such areas as private international law, which for a long time remained rooted solely within state frameworks since they existed first.[7]

On a much more basic level, internationality describes an act of movement between the territories—one which could be described simply as 'the act of cross-border movement'—occurring when persons or goods move between territories.

This perfectly commonplace phenomenon of border crossing, understood in the classic sense of 'state borders', but the approach may be naturally sophisticated with a more complex vision of borders and territories that are not simply limited to state institutional realities but also, and once again at a basic level, geophysical realities and experienced realities, has seen unprecedented development in our modern society, given the volume and speed at which people (individuals or legal entities) and goods (in their widest sense, tangible and intangible, including services and capital) move around.

Common or newer movement phenomena are the consequence of material reality (travel and displacements) and social reality (the organization of a sector, a network). The law knows how to deal with them, not only as bare facts—For example, human activity gives rise to cross-border pollution, the law incorporating it into the legal category of crime, subject to certain conditions of the specific regime of 'complex crime'—but also as often complex social constructions—For example, cross-border pollution by a radioactive cloud—the explosion, the resulting cloud, its movement and its fallout into various locations like splashes of paint—should not

[2] On which, see in particular: Kessedjian and Loquin (2000), La mondialisation entre illusion et utopie (2003), Halpérin (2009), Ruiz Fabri and Gradoni (2009).

[3] We would mention four significant contemporary publications that consider the phenomenon in constitutional law and in private law: Joerges et al. (2004), Callie and Zumbansen (2012), Maduro et al. (2014), Lhuilier (2016).

[4] The theme has developed significantly. See, in particular: Thouvenin and Tomuschat (2008), Forteau et al. (2011), Young (2012).

[5] On the regionalization of law arising from the development of European law, see in particular: Poillot-Peruzzetto and Idot (2004), Graf Vitzthum et al. (2006), Robin-Olivier and Fasquelle (2008), Le Barbier-Le Bris (2012). On the other forms of regionalization and the impact on public international law, see Doumbé-Billé (2012). For collective research of this type in private international law: Bergé et al. (2015).

[6] There is considerable literature on the subject. For different approaches to the phenomenon in various legal disciplines: Teubner (1997), Basedow and Kono (2000), Auby (2010), Faure and van de Walt (2010), Chérot and Frydman (2012), Frydman (2014), Muir Watt and Fernández Arroyo (2014), Basedow (2015).

[7] To cite only two significant recent examples, see Muir Watt and Fernández Arroyo (2014), Basedow (2015).

simply be the subject of legal action in its unprocessed form. The law is also interested in all of the social constructions generated by that event and which, by way of contagion and ripple effect, can have a full dimension: the displacement of populations, consumption bans and/or the destruction of contaminated assets, the decision of certain countries to phase out nuclear energy, etc. That which is true for the unprocessed act is all the truer for the socially established act: contractual practices and common practices that they produce in a given company, for example, a mercantile society with the hypothesis of *lex mercatoria* or even a mafia organization of a channel for clandestine migration and waste or the large-scale organized movement of data such as that practiced by Internet search engines, etc.—even if it should be acknowledged that the latter do not fit as easily into the legal sphere as the former.

It is this basic act of inter-territorial or cross-border movement that we would like to develop here by questioning the method the lawyer employs to tackle it. We would like to demonstrate, (I) that lawyers do not sufficiently mobilize this act of cross-border movement in their constructions, (II) whereas this cross-border movement fuels the highly topical questions and concerns of today, relating particularly to the legal treatment of movement situations.

I. The Current Legal Treatment of Cross-Border Movement

In a general sense, as is required at this point, it is possible to define three current underlying trends used by lawyers when dealing with cross-border movement. These three trends can be summarized as follows: (A) lawyers carry out insufficient research into the cross-border movement phenomenon (B) legal subject areas deal with the phenomenon in an essentially specialized way, and (C) the phenomenon is dealt with using an unorganized plethora of legal techniques.

(A) Lawyers Carry Out Insufficient Research into the Cross-Border Movement Phenomenon

An international lawyer, it might be said, albeit a little brutally, does not generally, and even less systematically, study cross-border movement.

There are many circumstances that back up this assertion, from which we are not claiming immunity. Books on international law (*lato sensu*) rarely, if at all, focus on the phenomenon itself, the subject generally being disposed of in the introduction. Legal conferences organized on the particular theme of movement, in the sense as we understand it here (for example of persons, services, goods, capital etc.) rarely attempt to present, quantify and qualify the phenomenon the law offers as a study subject, other than as a preliminary remark.

There are exceptions, of course. But these are limited to highly specialized multidisciplinary works[8] or focus on a strictly legal subject, which is not connected to the reality of cross-border movement as envisaged here.

This very general observation translates into two positions whose future must be called into question. The first originates in the lawyer's outdated approach to cross-border movement. To highlight this, we could also ask whether, in France for example, the *Matter doctrine*[9] fossilized understanding of the movement phenomenon once and for all. Such a judgement may be excessive. For example, reflections on the *lex mercatoria*, transnational law and global law demonstrate that lawyers, undoubtedly in greater numbers than we would often like to think, prefer to review the facts on the basis of which the most solid and rich legal constructions have been established.

However, it may simply be observed that movement is rarely mobilized in these works. The term is absent from specialized dictionaries,[10] it does not appear in the index of books other than with specific relation, as we will see, to the development of the law governing free trade and particularly the freedom of movement within Europe (on the subjects' approach to movement, see explanations below, II(B)).

The second position relates to the very general situation of legal doctrine (particularly in France, but we could also give numerous counter-examples) that does not have available or has not created specific discussion forums for the study of the movement phenomenon. It is difficult to imagine these forums not being multidisciplinary. The lawyer may have a particular understanding of the phenomenon of movement: movement of concepts, of norms, of legal decisions, etc. On the one hand, this understanding is not exclusive of others': alongside the lawyer is the geographer, the historian, the sociologist, the anthropologist, the political scientist, the economist, the manager, the mathematician, the computer scientist (etc.), all who have knowledge to bring to the table on the study or phenomena of movement. On the other hand, the lawyer's thinking must be able to break through into other disciplines and not remain isolated in its own sphere. To remedy this type of partitioning, tools, such as institutional tools, exist to enable multidisciplinary research to be developed where each remains autonomous in developing its constructions but agrees to be open to the reflections of others. As far as we are aware, no research forum to date has sought to understand the cross-border movement phenomenon in broad and general terms.

[8] To cite just three recent examples: Darnovsky and Beeson (2014), Faure et al. (2015), Supiot (2015).

[9] This expression is used to denote the conclusions of Judge Matter in the case of *Pélissier du Besset* (Civ. 17 May 1927, DP 1928 I. 25, note H. Capitant). To define international situations (here in payment matters), this senior French judge stated: 'The contract must operate as an ebb and flow of movement above the borders.'

[10] For example, the verbo 'movement' does not appear in the Dictionary of globalization (Arnaud 2010).

(B) The Legal Subject Areas Deal with the Phenomenon in an Essentially Specialized Way

Cross-border movement is not a legal subject in its own right incorporating all aspects of the phenomenon's legal treatment. Although there is a rule of civil law, sport law, fundamental freedoms law, etc. There is no rule of law governing cross-border movement.

However, we can identify three specialist legal fields that recognize movement as a subject matter.

The first is established by *the right of movement*. In the area of transport, for example, we know that territorial areas are subject to varied and restrictive rules to enable ordered movement along terrestrial, sea, river and air transport routes. This right of movement is present at all levels; local, national and international. It spreads into as many branches and sub-branches as the object that is moving and the route it is taking.

The second legal field is the *right of free trade*. This right originating in state and interstate dealings has a long-standing history. It has gathered significant momentum on the institutional stage since the Second World War with establishment of the GATT 1947 and the creation in 1994 of a specialized international organization with a dispute settlement body (DSB). This right, deriving from international trade law, has experienced significant regional and inter-regional development across every continent. Even though there may be elements of dispute, we can say that it has never been more powerful.

This leaves the third field, *the right of free movement*, which must not be confused with the above right of free trade. This right characterizes the process of regional integration, with the world's largest example being that of our European Union. A fundamental right of free movement has been created in a period of 60 years. Individuals can directly enforce their rights in Member States to assert a commonly defined imperative around the free movement of persons, goods, services and capital.

Beyond these three fields, the whole of international trade law is more generally based on dynamic exchanges and, consequently, on movement. Books written on this subject necessarily include economic thinking, which contains the majority of legal policies we recognize in this field.[11] But as mentioned above, the phenomenon of movement is not understood as such in general terms. It is most often dealt with through a specialized domain.

[11] In recently published books, note in particular that of Kessedjian (2013), whose introduction includes a comprehensive exposition on the subject. In earlier books, see, often cited, Lerebours-Pigeonnières which in the 5th edition of its precis (Précis de droit international privé 1948), talked about the 'demands' of private international trade (No. 207). The expression was later toned down to a consideration of the 'needs' of private international trade (6th ed., 1954, No. 207).

(C) The Phenomenon Is Dealt with Using an Unorganized Plethora of Legal Techniques

The legal subjects' approach to cross-border movement is limited. Outside these established domains, such an approach leaves an important role to an undoubtedly incalculable number of legal techniques for understanding and grasping any particular expression of movement. In terms of the public sphere and without this list being in any way exhaustive, we might give a few examples. For ease of presentation, we will begin with the main specialties of international law understood in their widest sense.

In private international law, the movement of situations is governed by specific mechanisms. We use the theory of 'mobility conflict' for the hypothesis were a lawyer has to decide whether to take account of a change in connecting factor occurring as a result of movement or change affecting a person, an asset or, potentially, a written instrument 1980 Hague Convention on the civil aspects of international child abduction that organizes, as everyone knows, a mechanism for returning the unlawfully removed child).[12] We also use conventional mechanisms specially designed to enable certain movements of persons or documents, for example (1961 Hague Convention abolishing the requirement of legalization for foreign public documents with the aim of encouraging movement). In a wider sense, the place given to an individual's choice as to the law to apply in their private law relations is an example of the legal techniques that could allow a greater flow of movement.[13]

In public international law, various texts declare a right of movement, even if, at the same time, they grant States the option of restricting or influencing its scope (for example, art. 12 of the 1966 International covenant on civil and political rights). Some texts try to regulate the possibilities of movement from one territory to another (1989 Basel Convention on the Control of transboundary movements of hazardous wastes and their disposal) or aim to stop cross-border crime (2000 United Nations Convention against transnational organized crime) and organize mechanisms for the restitution or return of unlawful exports (1995 UNIDROIT Convention on stolen or unlawfully exported cultural objects).

The situation is even more pronounced in European Union law. Within the European 'Internal market' and 'Freedom, security and justice' areas, the movement of situations forms part of the reality that the European institutions are in a better place to deal with then national institutions, which do not hold an overarching position in relation to cross-border movement situations.[14] We have lost count of the amount of secondary legislation whose aim it is to provide a framework for movement: exhaustion of intellectual property rights (For example, Directive No. 2008/95/EC of the European Parliament and the Council of 22 October 2008

[12] For a relatively recent analysis of the institution in the context of a Ph.D. thesis, see with the numerous references quoted: Souleau-Bertrand (2005).

[13] See, for example, in the recent Mélanges en l'honneur du Professeur P. Mayer (LGDJ, 2015), contributions on the theme of Gaudemet-Tallon (2015), 255; Kinsch (2015), 377; Lequette (2015), 478 and Niboyet (2015), 629.

[14] See on this theme, the commentary of Jobard-Bachellier and Bergé (2003), 182 et seq.

approximating laws of the Member States on trademarks),[15] cross-boundary media (Directive No. 2010/13/EU of the European Parliament and the Council of 10 March 2010 relating to the coordination of certain legislative, regulatory and administrative provisions of the Member States on the provision of audiovisual media services), return of unlawfully exported cultural objects (Directive No. 2014/60/EU of the European Parliament and the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State), export of personal data (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC), circulation of judgements within the European area (Regulation No. 1215/2012 of the European Parliament and the Council of 12 December 2012 on the jurisdiction, recognition and enforcement of judgements in civil and commercial matters).

Nevertheless, these numerous techniques for dealing with the cross-border movement phenomenon are not sufficient to fill a gap: the lack of a legal construction to unite them. These techniques are interested in movement. But, as far as we are aware, no reflection exists on connecting them together, making them coherent, particularly given the reasons behind them and the cumulative chain reaction or effects they produce. In summary, cross-border movement is there, present. But the lawyer either does not deal with it or does little to deal with it despite it offering some very interesting potential.

II. Potential for New Developments: The Legal Treatment of Movement Situations

To outline out new potential for developing lawyers' mobilization of cross-border movement, we need to explain the objective behind research of this type that, put simply, consists (A) of introducing a reality into the law which it is currently does not acknowledge (B), before then identifying two legal treatments for movement situations: constraint and recognition (C).

(A) The Objective: To Introduce the Act of Cross-Border Movement into the Law

To imagine the place of cross-border movement in law, one must consider a situation where a phenomenon exists 'antecedent' to the law, to take an author's well-known expression.[16]

[15] See the explanations and bibliographic references put forward in our book: Bergé (2015), spec. Nos. 119 et seq.

[16] On the use of this expression regarding 'the fact of social order,' see Romano (1945) translated

As we stated above, the law can draw conclusions from a movement situation. We can also say that it fuels the phenomenon of movement with its rules. But it does not make movement a legal subject, i.e. a legal construction (notion, concept or category). At the most, it is interested in its features: *free* movement, *regulated*, *legal* or *illegal* movement.

A legal approach to movement could take one of many paths. We will present two of them, of which only the second will be developed.

One path would be to characterize the study subject in law. The expression 'act of cross-border movement' covers a considerable number of different realities. It would be a mistake to believe that the law could deal with all of them using an encompassing legal concept. Similarly, we might doubt the operative value of such a legal concept in so far as the realities described, which are of a widely diverse nature, should not have to adhere to a unique or common legal regime. On first reflection, we would need to define the study subject if we want to create a useful tool for the lawyer deriving from its legal conceptualization. The concept must be accurate. It must target specific, without doubt few, circumstances in order to justify new legal treatment, different from those more common realities that already exist. It's what we call for a long-term research 'Full movement beyond control and the law'.

The second path, more modest but still difficult, would be to accommodate movement at the center of legal constructions. For this, movement situations in the sense that we initially understand the term here—the act of cross-border movement—must be perceived and questions asked as to whether movement could define a legal mechanism capable of explaining this state of movement.

Such an approach must remain sufficiently wide so as not to trigger the above complaint of movement being treated in only a specialist context by a branch or field of international law. As far as possible, it must describe existing realities if we want to demonstrate its usefulness.

By combining these various requirements, we could say that in current substantive law, movement could attain legal status through two ways: movement constraint and acknowledgement of movement situations.

(B) Introducing a New Reality into the Law: About the Long-Term Research 'Full Movement Beyond Control and the Law'

It should be acknowledged today that the existing legal mechanisms do not deal with both the full and incontrollable nature of certain movement phenomena. Even if the law is able to mobilize a full legal arsenal for each movement situation, it does not do so both in consideration of the fullness of the act of movement and of its uncontrollable dimension. It does not designate such movement as a phenomenon in itself.

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by François and Gothot, re-ed. 2002, spec. 30, in footnotes. For a recent commentary on this work, see with this editor, the collection Tiré à part, volume 13, 2015.

More often than not, the law addresses its effects, at best, in a partial, badly anticipated or unplanned way, as if the situation were neither 'total', nor 'uncontrollable'.

Let me take three significant examples. The first concerns the movement of waste. The portion of waste that circulates and escapes the control of the operators (public and private, legal and illegal) occurs just about everywhere in the world in varying proportion, depending on the areas in question. The rule of law does not address these situations of full movement beyond control as they exist. The law seeks to monitor movement. But it does not seek to address situations in which, by nature, movement escapes the control of all the operators. The second example is the movement of personal data through digital networks. There is an enormous chasm between the reality of this movement, whose full and uncontrollable level can be technically proven in numerous hypotheses, and the architecture of the national, international or regional (notably European) rules of law, which fail to define the phenomenon in its full and uncontrollable dimension. The same is true for the mass demands for asylum, where the host states are overwhelmed both in terms of actual flow management as in attempting to apply rules designed for less voluminous flows.

What is missing in our society and in law in particular is a key concept to define the phenomenon of full movement that stretches beyond the control of the operators concerned. The objective of this research is to make it a clear-cut and pronounced subject of law. If we want to be able to discuss it and organize its legal treatment in other specialized areas of law (public and private law, local, national, international, regional and transnational law), the notion of uncontrollable movement must be given a designated legal name.

The most modern expressions of the ancient process of globalization and its various forms (for example internationalization, trans-nationalization) gives the research on 'full movement beyond control and the law' its relevancy and pertinence.

Let us take an example. During high agenda discussions at United Nations Conferences on climate change (such as COP21 in Paris in December 2015), the central issue is what public and people-orientated policy measures should be taken, first, to reduce global carbon gas emissions in the hope that global warming remains below a certain threshold over a defined timescale, and second, to adapt the locations, particularly the megacities, which are already threatened by the effects of these emissions and particularly by rising water levels.

This research project (the research is already supported by the Institut universitaire de France (2016–2021). See http://www.universitates.eu/jsberge/?p=21027) would involve inviting this type of forum to bring up a second major issue for discussion. It would involve responding to the following question: how do we anticipate the hypothesis of the global movement of greenhouse gas reaching uncontrolled levels? This question should be asked in addition to the first and not instead of it, literally doubling the scope of the discussion and therefore the public, corporate or citizen-based governances. No-one would any longer pretend to believe that the causes and/or effects of the phenomenon could be contained. The question would be asked openly of what measures should be taken in the face of a phenomenon of full and uncontrollable dimension.

That which applies in the crucial issue of global warming also applies in a whole series of currently pertinent topics. In addition to the cited cases of the movement of data (the big data), waste (displacement of plastic islands in the China Sea or the Gulf of Mexico), migrant populations (political and climate refugees), the full, uncontrollable movement of multinationals, capital, goods or services, considered as a whole or in any specific situation, also needs to be designated by a legal concept to be capable of treatment in real terms.

The law deals with movement. But it never deals specifically with the phenomenon of full movement beyond control.

Currently, various areas of law approach the phenomenon of movement just as well as legal techniques. By areas of law, we can identify movement law, particularly transport law, free trade law that comes under international economic law and the law of free movement, which is a characteristic of integrated judicial areas like the State or especially the European Union. The areas of law have only a limited approach to movement. There is enough room outside these established domains for a large number of legal techniques designed to address particular movement situations. The public sphere provides us with some examples. For ease of presentation, we will begin by using three important specialties of international law in its broadest sense. Private international law, although not in the sense of its modern European context, has its own legal mechanisms to deal with the movement of situations, such as the theory of 'mobile conflict' where the lawyer must decide whether to take a change of connecting factor into account pursuant to the movement of a person, asset or potentially a document. There are also statutory mechanisms specially designed to allow certain movements of persons (e.g. return of wrongfully removed children) or documents (e.g. foreign public documents). Under public international law, various texts herald a right to move, even if they give States the simultaneous option to put restrictions or conditions on its scope. Many texts try to create a framework for movement possibilities from one territory or another or aim to address cross-border crime and arrange mechanisms for restitution or return in cases of illicit export. The European Union is also very present; within 'internal market' and 'freedom, security and justice' areas, movement situations are realities that the European institutions seek to address from many angles (for example, cross-border media, return of a legally exported cultural objects, export of personal data, movement of judgements within the European area).

Nevertheless, the many ways in which positive law succeeds in addressing movement situations does not make up for those in which it fails. The law is incapable of taking a firm grip on the phenomenon of movement in a general sense, and more specifically, the phenomenon of full movement beyond control.

In general, an act of movement is 'antecedent' to the law, to take the famous expression of an author who was referring to an act of social order (Romano 1918, 1945). A lawyer spends a lot of time dealing with movement, but movement is not a legal concept. Taken in its general sense, the term does not appear in the index of legal books. It does not occupy a significant position in legal dictionaries or books whose aim is to examine the global phenomenon using renewed and in-depth methods. Movement is deemed to be an act with no place in general legal vocabulary.

This initial impression is underpinned by a series of specific observations. Let us mention two of them. The first is taken from an experience that we nourished during a previous research project where we noticed that legal theory did not give any explanation of a lawyer's obligation in a modern globalized society to apply the law in a plurality of contexts, localized at potentially different levels (national, international or European). It therefore had to be built around that which we called the 'legal constraint of movement'. A second similar observation is the lack of the law's engagement with a strong concept of legal movement in cases where such movement is immediately produced by a rule of law. Remarkably, this is true in relation to mechanisms for the mutual recognition of foreign legal acts (such as judgements, public documents or private debt securities), which are reviewed as a matter of policy or legal technique, but never seen as creating possible phenomena of full uncontrolled legal movement.

In summary, it can be seen that even if movement is naturally present in the realities with which lawyers are faced, it is not a phenomenon that gives rise to legal reflection. A lawyer may draw potential legal consequences from movement, whether or not that movement is the consequence of a rule of law. But he or she does not seek to classify or categorize this movement in law as a reality needing to be addressed (even though not all realities deserve direct legal intervention).

This shortcoming creates gaps in the law and deficiencies in its effectiveness that much more profound research into the law cannot fill or make up for until movement beyond control is designated as a potential subject of law.

It is this research we are proposing to undertake.

The conviction in the research is that if lawyers claim to have an unquestionable ability to treat the concept of full movement beyond control in law, they have, except in specific cases, an utterly limited grasp of the reality of the corresponding material and social phenomena. As a lawyer, I am not able to think of a way out of this predicament. It is therefore necessary, before any legal approach is taken, to leave the law and widen the lawyer's knowledge of an act of movement by using a multidisciplinary understanding of such a notion. The law is still part of this comparative exercise. But it considers its perception of full movement beyond control alongside that of other disciplines.

This step consists of submitting the currently non-conceptualized idea of full uncontrollable movement to various disciplines in such a way as to identify the vocabulary and analytical methods that each discipline might use.

Research into other disciplines may reveal a conceptual dimension, such as that pursued under this project in relation to law. But this is not what the project is proposing. Each discipline remains completely autonomous. If full uncontrollable movement calls for abstract research in fields of knowledge other than the law (for example, a mathematical theory able to model an act of full movement), it is no doubt a good thing for the project. But it is not to be recommended for lawyer who can only work within his own means.

Rather, the research that needs to be done is that of finding a starting point common to the various disciplines.

The only way we can see of achieving this is to begin with a sample of diverse situations. Research of this nature is meaningless unless it can extend beyond a narrow domain. In fact, if one wants to be able to create a concept with a general scope, in this case a legal concept, it is indispensable to carry out a broad range of study. A common concept can only be created when circumstances in differing environments are addressed and dealt with in the same way. Human and social science frequently take this approach. Although less frequently used in law, we do have past experience of employing it.

These research subjects can have wide or narrow scopes. For example, full movement beyond control can be perfectly assessed at building, district, town, country, continent or global level. The key point of the research is to reach an understanding of how each discipline describes with its own words and methods situations in which movement escapes the control of its operators.

In this regard, we should consider three categories of operator: public authorities (the State and its structures; international and European organizations), companies (in their legal dimension (particularly the multinationals) or illegal dimension (Mafia-type organizations)) and citizens (especially in their modes of self-organization (social networks) and collective organization (NGO, association, think-tank)). We can well imagine that the perception of full movement beyond control varies widely from one operator to another. Neither one is favored. Each operator will give a potentially equal amount of indication as to its perception of full movement in order to characterize the phenomenon. The study is not to be given a general scope because the field would be far too wide. It will carry out surveys on concrete and clearly identified situations.

Prior to legal analysis, the first phase considered here must remain open and, at the same time, retain modest objectives. In the first instance, our goal is not to set out on interdisciplinary, or even transdisciplinary research into the phenomenon of full movement beyond control. Our goal is to enrich the lawyer's approach through contact with other disciplines by suggesting these disciplines take a kind of sidestep, opening themselves up to the idea of 'full movement beyond control' which may not necessarily form part of their current vocabulary. This comparison of approaches taken by the various disciplines considering the same practical circumstances should be mutually enriching. For example, the law has its own perception of full movement beyond control where a case involving high mobility is referred in parallel to several national, international or regional courts or in the case described above of the automatic cross-border recognition of legal documents and situations. This perception is worthy of being presented to other disciplines, which can in turn communicate their own, and so on.

In order to understand the fundamental dimension of this project in law, it is worth considering an instance when a concept foreign to the law succeeds in entering the legal sphere.

There are an infinite number of examples of this occurring because in a positivist view of the law, shared by the majority of lawyers around the world, the law takes an act, transforms it into a legal notion by classifying it, potentially creating a new category if a suitable cannot be found upon classification, and regulating it. For

example, man causes cross-border pollution, the law integrates it into the legal category of illicit acts (criminal offences), classifies it as a 'complex crime' in certain conditions (an event giving rise to damage in several locations) and, as a consequence, to a specific legal regime.

However, not all acts gain access to the legal sphere so easily. Take the case of genocide, which, it can be said, became a subject of law (international law in this case) in 1948, after the Second World War. Genocidal phenomena already existed prior to legal recognition of the phenomenon and the law only received this reality after a long and hard journey made possible only at the cost of an intellectual, insistent and in-depth process. In this case, an individual (Raphaël Lemkin) highlighted the specific legal nature of a factual reality which, up until that point, had not been designated in law. This meant the individual was therefore unable to rely on the phenomenon as such. There are many other examples; in the past with the *lex mercatoria* (literally, the 'law of merchants' which develops its own practices), today with corporate social responsibility and all the practices it generates. All of these realities ask the tough question of their reception into the law. Past experience has shown that the path is always difficult, wrong routes numerous and the lawyer's capacity to shut out possibilities on the grounds that these realities are extraneous to the law, immense….

We do not imagine that it will be any different for full movement beyond control. There is a reason for this. This act, whatever its origin, is not likely to be of any real interest for the law other than as an established social reality. If we say an act of movement beyond control is full, we mean that at any given place and time, all the institutional and private operators are incorporating the phenomenon in their collective organizational methods more or less voluntarily. However, the phenomenon's force lies in the fact that full movement surpasses the stage of being simple material act. It is more likely to be the result of a socially established movement, often even several movements that interact with each other and therefore give it its uncontrollable dimension. A real chain of causalities develops. For example, the unstoppable act of cross-border pollution caused by a radioactive cloud—the explosion, the resulting cloud, its movement and its fallout into various locations like splashes of paint—should not simply be the subject of legal action in its unprocessed form. The law is also interested in all of the social constructions generated by that event and which, by way of contagion and ripple effect, can have a full dimension: the displacement of populations, consumption bans and/or the destruction of contaminated assets, the decision of certain countries to phase out nuclear energy, etc. That which is true for the unprocessed act is all the truer for the socially established act: the mafia-type organization of a channel for clandestine migration and waste, the large-scale organized movement of data such as that practiced by Google, etc.

At one time or another and in specific circumstances, all of these processes can escape not only their instigators but all the other operators, whether they are public or private. They are uncontrollable full movements.

Full movement beyond control is therefore very often and undoubtedly in essence a particularly complex reality that develops notably in crisis situations. It will not

enter the law in its unprocessed state. In-depth work into the law is needed to enable it to make space for the phenomenon.

This work progresses through various stages: identification of a legal category, legal classification of the act and its equipping with a legal regime.

Without wishing to anticipate this research, which is at the heart of the multi-annual project, we will attempt to outline these stages.

There are several ways to identify a legal category. It might be said that the phenomenon of movement could create a legal category of its own, of which full movement beyond control would be a subcategory. Alternatively, one could start with existing legal categories (force majeure, the management of risk or the state of emergency, for example) and accommodate the phenomenon of full movement beyond control with each of them, potentially with a specific legal regime. At this stage of the project, our intuition is that the phenomenon would produce too much disorder in the existing categories for a simple re-configuration to work. Force majeure requires there to be an external element that could well be lacking in the particular case of full movement beyond control and the only unforeseeable event that does not require this external condition offers pretty narrow avenues for treatment. The management of risk requires that the risk remain manageable whether at the level of an individual, a company or a State, which is not certain in our case. A state of emergency presumes, among other things, the existence of a threat for the State, which is not always clear with full movement beyond control, as it could easily play to the advantage of public authorities. The available possibilities are so numerous that tests must be done in an attempt to adjust the legal categories so they accommodate the phenomenon in the best way possible.

For a lawyer to be able to classify an act of full movement beyond control in law, he must be able to formulate the characteristics of an act of full movement beyond control fulfilling a series of conditions that must be met to authorize use of a legal classifier. Given the three-fold composition of the phenomenon in question—movement—full—beyond control—, we do not imagine at this initial point in the research that there can be a single characteristic and therefore a single condition. It will necessarily involve considering the elements of the classification that can be used and testing all possible combinations.

Finally, to grant full movement beyond control a legal regime will also demonstrate a certain amount of imagination. It could be considered that an act of this type derogates from the usual applicable rules, as is the case in crisis situations initiated through emergency or necessity. When faced with such phenomena, it might be worth considering whether existing legal rules need equipping with some sort of reversibility (undoubtedly of a temporary nature); movement that was legal becomes illegal and vice-versa. That which was free of charge becomes payable and vice-versa. That which was channeled is no longer so, etc. Beyond the material legal regime for full acts of movement beyond control, it is their procedural requirements that must be invented. Full movement beyond control is a highly evolving act. Regular assessment of both its full and uncontrollable nature must be subjected to specific procedures, enabling a decision to be re-assessed in light of the most recent developments. The legal treatment of these situations could also comply with regu-

lation processes. There should be a balance found between coercive and restrictive legal tools and regulatory, even auto-regulatory tools.

A lawyer's work does not stop at the formulation of a category, a classification or a legal regime. In a final phase, he must concern himself with the implementation of his constructions and naturally their consequences.

'Full movement beyond control' calls for a special effort by the lawyer to be open to other perspectives to complete his task well.

An initial perspective is to take a quantitative approach to the flows. To define an act of full movement beyond control, it must be capable, in certain hypotheses, but probably not all, of being quantified. The policymaker (public or private) will undoubtedly need to fix a threshold above which full movement is deemed uncontrollable. And it is easy to imagine that this threshold could vary considerably from one operator to another and from one situation to another. Once a threshold has been defined, it must be applied. In order to do this, a set of indicators would be required. It is difficult to see how a lawyer could provide them. He must have recourse to an expert, which is always a very sensitive matter. The threshold of fullness and non-control of an act of movement could be partly measured from quantitative data indicating levels of flow that can be observed at a single moment in a given area.

On a similar theme, a lawyer would have to enquire specifically into patterns of movement to localize the phenomenon. A large number of scientific specialties seek to represent networks of movement in this way. It is difficult to see how a lawyer could fail to be aware of the existence of this available knowledge which would give him a better understanding of the reality he is seeking to address.

There may also be other perspectives at work when assessing the consequences of legal measures designed to react to an act of full movement beyond control. These measures, as we have said, could be severe. If, for example, it was decided to make a legal rule reversible, a political scientist, manager or anthropologist, for example, might ask questions concerning the social and political consequent and potentially harmful effects of this reversibility. It would therefore be necessary to follow-up on the consequences to enable the stakeholders, especially the decision-maker (political player, business leader, court), to reassess its decision in light of the effects it produces.

(C) The Legal Treatment of Movement Situations: The Example of Movement Constraint and the Recognition of Movement Situations

Legal constraint of movement is a construction that we have developed during research on the contextualization of cases of global legal pluralism.[17] This expression attempts to provide a legal explanation for the obligation often weighing upon

[17] Bergé (2013), spec. Nos. 149 et seq. In collaboration with Mrs. G. Helleringer, an adaptation in

the lawyer in modern society to apply the law in many different contexts and at potentially different levels (national, international or European level).

Such an explanation was not available in legal thinking. It had to be developed. In order to do this, we were inspired by the theory of legal constraints,[18] which we adapted to our hypothesis of applying the law at different levels.

The blueprint is as follows: a situation is treated in a legal context at a certain level and a legal mechanism might require it to be further examined in another legal context at another level. The lawyer therefore observes that the same situation could be dealt with in two contexts and at two different levels. This movement of the situation from one context to another will produce a constraining effect on his work. The lawyer draws conclusions from mobility as he knows that the situation he is dealing with could or can be treated in another context.

There are many illustrations of this legal movement constraint[19]: the international arbitrator who anticipates mandatory provisions being later applied in a European or national context; the European or international judge who, in his legal frame of reference, takes into account information from national, international and European law applicable in the context of the national referring judge (for the ECJ) or of the national judge who ruled before him (for the ECHR or the ICJ, for example); the national judge who draws conclusions at his level from the law applied previously at European or international level in the case referred to him, etc.

In these different scenarios, movement does not describe a simple factual or even cultural phenomenon from which the law would mechanically or metaphorically draw conclusions. It describes an intellectual process for the construction of a legal solution. This process is not solely led by the desire of one advocate to be open to legal solutions other than his own. It is the consequence of a legal movement constraint that, in certain but an increasing number of cases, influences the solution. This constraint exists every time it is imposed by a rule of law: referral by a national judge following the intervention of an international authority (private arbitrator or public authority); obligation for such national judge to ask a European court for a preliminary ruling (the ECJ today and maybe tomorrow, also the ECHR); option, and sometimes right, for States or individuals to refer the matter to a supra-national court after exhaustion of domestic remedies, etc.

This initial development on the legal constraint of movement shows that movement can, in certain circumstances, have an explicative and supportive value that no other legal notion brings.

The recognition of situations is central to one of the most important reflections to have shaken the doctrine of private international law at the beginning of the twenty-

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English of this book is in preparation: Operating Law in a Global Context, Edward Elgar Publishing, to be published (June 2017).

[18] Troper et al. (2005). The theory of constraints is part of a realist approach to the law that gives the interpreter, particularly the judge, a central role in legal construction.

[19] Having carried out this research, we were able to refer to the various case studies in the book cited above (Bergé 2013, spec. No. 149). For an adaptation in English of this 'movement' aspect of the work, see Bergé and Helleringer (2013/2014), 11.

first century.[20] In 2016 the subject has provoked submission of no less than two communications to the French private international law Committee (contributions of our colleagues d'Avout in March 2016, and Moura Vicente in June 2016). It has become established following long-term arguments on the recognition of judgements and other foreign public instruments. It asks the blunt but essential question of whether a State should legally recognize a situation that has developed abroad, without applying its own conflict rule to check that the situation is valid.[21]

The issue that we would like to raise in our reflections on cross-border movement within these prolific discussions is what place movement could hold as a legal construction.

We have already made the general comment that lawyers mobilize movement very little. We deal here and there with movement (movement of persons or written instruments) but in a narrow sense (the EU freedoms of movement in particular) or not in a specifically legal sense. In the vast array of literature on the subject, the enabling concept is none other than recognition and the underlying notion of an established or an acquired situation.

In order to test the potential offered by movement in the general cases envisaged by the recognition technique, we would suggest trying to counteract the general trend by use of the expression: 'recognition of movement situations'.

Before considering what this formula might cover, it would be helpful to establish a link between the above development on the (legal) constraint of movement and the present development on the (legal) recognition of movement situations.

We can see the same legal phenomenon occurring with regard to the hypotheses described above (II(B)) and those examined here. In fact, in all of these cases, we witness what we might call dissociation between the invocable law and the applicable law. Given that a situation moves from one context to another, the law applicable or applied in context A becomes invocable in context B even though it is not necessarily applicable in context B. Movement enables a unique process to be defined whereby a law applicable in a given context is invoked in another context in which it is not necessarily applicable.

This dissociation between the applicable law and the invocable law, which we have studied in the particular case of an application of the law in a global context, is true for more general recognition mechanisms. To recognize a foreign degree, a foreign certificate, a foreign judgement, a foreign civil status certificate, a factual situation established abroad, is to accept that this degree, this certificate, this judgement, this civil status certificate, this situation may potentially produce effects in the host country under a law that is applicable and, subject to verification, applied, in the home country, but is not necessarily applicable in the receiving country.

It is interesting to compare these two important scenarios. It gives a first indication of the use that could be made of a legal concept of movement, not only in the

[20] Lagarde (2008), 481; also Pataut (2009), 71; on the first elements of discussion, see particularly or also: Lagarde (2004), 225; Mayer (2005), 547; Pamboukis (2008), 513. See most recently, or the contributions assembled by Lagarde (2013). As well as Lagarde (2014), 9.

[21] Definition inspired by Lagarde (2015), 441.

above cases of constraint of movement, but also in the recognition of movement situations of interest here.

This initial response allows us to look more directly at the utility of the expression 'recognition of movement situations' as compared to the shorter, generally used, expression 'recognition of situations'.

The response leaves no doubt in our minds. To talk about the recognition 'of movement situations' is to ask the direct question of whether the rule of law, here the rule of recognition, should or should not apply to the movement of situations. The perspective opened up is wider and more interesting than that offered by the simple 'recognition of situations'. It becomes not so much a question of encouraging or objecting to a material movement situation that the law would seek to establish as a *fait accompli* by the technique of recognition, with the limited possibilities for discussion offered by a later intervention.[22] It becomes rather a question of reflecting on the phenomenon of movement, much further upstream of the rule of recognition.

This movement phenomenon could have two types of relationship with the legal mechanism of recognition.

One approach would be to understand the rule of recognition as a legal tool that creates legal movement. This approach to the mechanism of recognition is not new. For example, the historic European law of judicial cooperation in civil matters has been considered as a tool to encourage the movement of judgements in Europe.[23] But it is intriguing to see that the issue of movement is mobilized so little today. We could, for example, conduct a study on all movement effects produced by the mechanisms of recognition in private international law. The wider this recognition, the more automatic it is and the more the lawyer is faced with and should place the phenomenon of the legal movement of situations at the center of his analysis. How many situations are moving? Between which areas? Does this legal movement correlate with material movements (goods or persons) or is it happening mechanically, in a disconnected way, with no link to the geophysical and social realities, before going on to produce an uncontrolled chain reaction?

However, the reality is quite different. The main part of the discussion is on the place of the mechanism of recognition in relation to the competing mechanisms in private international law (conflict of laws in particular). In these discussions, the movement phenomenon, to which the law contributes to a large degree especially in situations of automatic recognition, has barely been worked out, whereas it could effectively be the starting point of an analysis on the theoretical and practical meaning, value and scope of the movement of those instruments and situations by a wider legal mechanism of recognition.

[22] Reference is made to the contribution of Lequette (2015).

[23] See the historical presentation of Gaudemet-Tallon (2015), spec. No. 7 that quotes the case *Krombach* (ECJ 28 March 2000, Case C-7/98).

A second approach would be to say that the rule of law does not *a priori* represent recognition of movement situations. The rule is faced with an overwhelming factual and complex phenomenon of movement. Here, the question is whether the expression 'recognition of movement situations' rather than the simple 'recognition of situations' gives a more direct understanding of whether the rule of law should adopt a potentially full and uncontrollable movement situation or not.

Such hypothesis exists—in the case of surrogacy.[24] Movement is omnipresent in situations of this type. It has a strong legal dimension from the moment a situation occurring abroad produces legal effects in France when we know that French law does not authorize surrogate motherhood on her soil. The authors deal with this type of situation by way of in-depth and detailed discussion on which mechanisms to prioritize (for example, recognition subject to conditions) or to relegate (e.g. the mechanism of fraudulent evasion of the law). But little attention is given, at first analysis, to the importance of the movement phenomenon in these 'outlawed' surrogacy situations. This movement is multifaceted, however: movement of the so-called parents' intention, the surrogate mother, the gametes, the child, the medical certificate, the civil status certificate, the adoption decision, etc. Multi-disciplinary and comparative research, conducted under the auspices of the Law and Justice public interest group (*GIP Droit et Justice*), is currently underway taking its starting point from the study of movement phenomena and trying to explain how they lead to a neutralization of a certain number of regulatory legal mechanisms.[25] It is uncertain whether all the conclusions of such an investigation will have merit. However, it is highly likely that of all the surrogacy situations that can exist, some explain better than others the state of our current substantive law, by the sheer scale of the movement phenomenon that mobilizes them.

In conclusion, we will note that the objective of this work was none other than to question the method of a lawyer who, faced with an international phenomenon, mobilizes the concept of movement very little on balance. In order to be truly operative, research into this matter needs to be carried out. It is not so much the fact of movement in general that the law needs to accommodate than its most singular manifestations, those which explain the difficulties with which our law, particularly international law (*lato sensu*), deals in situations involving movement. These situations are more and more frequent. The phenomenon of movement must be at the center of the legal mechanisms used to deal with these movement situations.

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[24] In addition to the various references quoted above, see in particular the most recent studies published on this equally prolific subject: Bollée (2014), 215; Fulchiron and Bidaud-Garon (2015), 1; Sindres (2015), 429.

[25] GIP Justice (Decision 14.18)—Ministère français de la justice, CNRS, Mission Droit et Justice—Project « Legal and Sociological Analysis of the French Context considering Foreign Practices (Belgium, United-Kingdom, Israel) Related to Filiation of Children conceived through Surrogacy Abroad »—2015–2017—EHESS—Co-piloting of the project: M.A. Hermitte, K. Parizer-Krief, S. Mathieu and J.S. Bergé.

References

Auby JB (2010) La globalisation, le droit et l'État. Montchrestien, Paris
Basedow J (2015) The law of open societies–private ordering and public regulation in the conflict of law. Brill Nijhoff, Leiden
Basedow J, Kono T (eds) (2000) Legal aspects of globalization. Kluwer Law International, The Hague
Bergé JS (2015) La protection internationale et européenne du droit de la propriété intellectuelle. Larcier, Bruxelles
Bergé JS et al (eds) (2015) Boundaries of European private international law. Bruylant, Bruxelles
Bergé JS, Helleringer G (2013) L'application du droit national, international et européen–Approche contextualisée des cas de pluralisme juridique mondial. Dalloz, Paris
Bergé JS, Helleringer G (2013/2014) Operating international law in a global context: taking circulation seriously. Span Yearb Int Law 18: 11 et seq.
Bergé JS, Helleringer G (2017) Operating law in a global context: comparing, combining and prioritising. Edward Elgar Publishing, Cheltenham
Bollée S (2014) La gestation pour autrui en droit international privé. Travaux du Comité français de droit international privé (CFDIP), Pedone, Paris
Callie GP, Zumbansen P (2012) Rough consensus and running code–a theory of transnational private law. Hart Publishing, Oxford
Chérot JY, Frydman B (eds) (2012) La science du droit dans la globalisation. Bruylant, Bruxelles
La mondialisation entre illusion et utopie (2003) Archives de Philosophie du Droit. Dalloz
Darnovsky M, Beeson D (2014) Global surrogacy practices. In: Cheney KE (ed) ISS working paper series/general series: 601. Available at http://repub.eur.nl/pub/77402
Arnaud AJ (2010) Dictionnaire de la globalisation. Librairie générale de droit et jurisprudence (LGDJ), Paris
Doumbé-Billé S (ed) (2012) La régionalisation du droit international public. Bruylant, Bruxelles
Faure M et al (eds) (2015) Les mouvements transfrontières de déchets dangereux. Bruylant, Bruxelles
Faure M, van de Walt A (2010) A globalization and private law. Edward Elgar, Cheltenham
Forteau M et al (2011) La fragmentation du droit applicable aux relations internationales–Regards croisés des internationalistes privatistes et publicistes. Pedone, Paris
Frydman B (2014) Petit manuel pratique de droit global. Académie royale de Belgique, Bruxelles
Fulchiron H, Bidaud-Garon C (2015) Reconnaissance ou reconduction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts *Labassée*, *Mennesson* et *Campanelli-Paradiso* de la Cour européenne des droits de l'homme. Revue critique de droit international privé: 1 et seq
Gaudemet-Tallon H (2015) Compétence et exécution des jugements en Europe, 5th edn. LGDJ, Paris
Gaudement-Tallon H (2015) L'autonomie de la volonté: jusqu'où? In Mélanges en l'honneur du Professeur P. Mayer. Librairie générale de droit et jurisprudence (LGDJ), Paris
Graf Vitzthum VW et al. (eds) (2006) Europe et Mondialisation–Europa und die Globalisierung Presses universitaires d'Aix-Marseille (PUAM), Aix-en-Provence
Halpérin JL (2009) Profils des mondialisations du droit. Dalloz, Paris
Jobard-Bachellier MN, Bergé JS (2003) La réception du droit communautaire en droit des conflits de lois. In: La réception du droit communautaire en droit privé des États membres. Bruylant, Bruxelles
Joerges C, Sand IJ, Teubner G (2004) Transnational governance and constitutionalism. Hart Publishing, Oxford
Kessedjian C (2013) Droit du commerce international. Presses universitaires de France, Paris
Kessedjian C, Loquin E (2000) La mondialisation du droit. Litec, Paris
Kinsch P (2015) Quel droit international privé pour une époque néolibérale? In: Mélanges en l'honneur du Professeur P. Mayer. Librairie générale de droit et jurisprudence (LGDJ), Paris
L'internationalité, bilan et perspectives (2002). Lamy: Supplement No. 46 (February)

Lagarde P (2008) La reconnaissance, mode d'emploi. In: Mélanges en l'honneur de H. Gaudemet-Tallon, Vers de nouveaux équilibres entre ordres juridiques. Dalloz, Paris
Lagarde P (2004) Développements futurs du droit international privé dans une Europe en voie d'unification: quelques conjectures. RabelsZ: 225 et seq.
Lagarde P (ed) (2013) La reconnaissance des situations en droit international privé. Pedone, Paris
Lagarde P (2014) La méthode de la reconnaissance est-elle l'avenir du droit international privé? Conférence inaugurale, session de droit international privé. Recueil des cours de l'Académie de droit international de La Haye (RCADI) 371: 9 et seq
Lagarde P (2015) Sur la vulnérabilité des situations juridiques. In: Mélanges en l'honneur du Professeur P. Mayer. Librairie générale de droit et jurisprudence (LGDJ), Paris
Le Barbier-Le Bris M (ed) (2012) L'Union européenne et la gouvernance mondiale–Quel apport avec quels acteurs? Bruylant, Bruxelles
Lequette Y (2015) De la 'proximité' au 'fait accompli'. In: Mélanges en l'honneur du Professeur P. Mayer. Librairie générale de droit et jurisprudence (LGDJ), Paris
Lerebours-Pigeonnières P (1948) Précis de droit international privé, 5th edn. Dalloz, Paris
Lerebours-Pigeonnières P (1954) Précis de droit international privé, 6th edn. Dalloz, Paris
Lhuilier G (2016) Le droit transnational. Dalloz, Paris
Maduro M et al (2014) Transnational law. Cambridge University Press, Cambridge
Mayer P (2005) La méthode de la reconnaissance en droit international privé. In: Mélanges en l'honneur de Paul Lagarde. Dalloz, Paris
Muir Watt H, Fernández Arroyo DP (eds) (2014) Private international law and global governance. Oxford University Press, Oxford
Niboyet ML (2015) De l'optimisation juridique dans les relations civiles internationales. In: Mélanges en l'honneur du Professeur P. Mayer. Librairie générale de droit et jurisprudence (LGDJ), Paris
Pamboukis C (2008) La reconnaissance-métamorphose de la méthode de reconnaissance. Revue critique de droit international privé:513 et seq
Pataut E (2009) Le renouveau de la théorie des droits acquis. In: Travaux du Comité français de droit international privé (CFDIP) 2006–2008. Pedone, Paris
Poillot-Peruzzetto S, Idot L (eds) (2004) Internormativité et réseaux d'autorités: l'ordre communautaire et les nouvelles formes de relations entre les ordres juridiques. Petites Affiches:199–200 (special editions)
Robin-Olivier S, Fasquelle D (eds) (2008) Les échanges entre les droits, l'expérience communautaire: une lecture des phénomènes de régionalisation et de mondialisation du droit. Bruylant, Bruxelles
Romano S (1918–1945) L'ordre juridique, 2nd ed. Translated by François L, Gothot P, re-ed. alloz, 2002
Ruiz Fabri H, Gradoni L (2009) La circulation des concepts juridiques: le droit international de l'environnement entre mondialisation et fragmentation. Société de législation comparée, Paris
Sindres D (2015) Le tourisme procréatif et le droit international privé. Journal du droit international:429 et seq
Souleau-Bertrand M (2005) Le conflit mobile. Dalloz, Paris
Supiot A (2015) L'entreprise dans un monde sans frontières–Perspectives économiques et juridiques. Dalloz, Paris
Teubner G (ed) (1997) Global law without a state. Dartmouth, Aldershot
Thouvenin JM, Tomuschat C (2008) Droit international et diversité des cultures juridiques. Pedone, Paris
Troper M et al. (eds) 2005 Théorie des contraintes juridiques Bruylant–LGDJ, Bruxelles–Paris
Wyler E, Papaux A (1999) L'extranéité ou le dépassement de l'ordre juridique étatique. Pedone, Paris
Young M (ed) (2012) Regime interaction in international law–facing fragmentation. Cambridge University Press, Cambridge

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