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# The *Global Turn* in Legal Theory

Mikhail Xifaras

Familiar legal theories are epistemologically and politically stato-centric theories; they aim to rationalize intra- and inter-national legal systems. If this Westphalian approach were abandoned, then its replacement might be called *Global Law*, which invites theorizing that is not stato-centric. When that change happens, one would talk about a *Global Turn* in legal theory.

Describing this turn is the aim of the present paper. To this end I am going to present two ideas and three intuitions—not to mention a couple of ambiguities. The two ideas concern the history and the geography of Global Law. The three intuitions are about the fate of legal theory itself in this new emerging context. What follows is neither a substantial or positivistic analysis, nor a prediction or a wish. I point out tendencies, things that are happening more and more.

## *What is Global Law?*

The term “Global Law” is a catchall term the definition of which varies considerably depending on the author who uses it and the context in which it is used; it was exactly the same for the term “State” before its scientific rationalization was attempted. This flexibility is precisely the reason why its various uses should be taken seriously. Global Law, as both a scientific object and a new paradigm, is a process of solidifying the notion as an explicative and unifying mixture of a large number of disparate legal phenomena. The notion may be confusing simply because it designates heterogeneous legal phenomena.

The term has been stigmatized to such an extent that William Twining wisely prohibited his students at the University of London in his “Globalization and Law” class from using the “*g word*”.<sup>1</sup> It is not shameful, however, to presume that legal regimes and organizations whose scope or field is *supra-* or *trans-*national can be characterized as *global*. In this sense, “global” means *worldwide* but “Global Law” does not designate an independent legal order that is scheming outside of the existing legal orders. It is not a Worldwide Law, but rather the emergence of *supra-* and *trans-*national legal phenomena so inextricably tied to a dense network of legal relations that the different levels of the “sub-global” cannot be analyzed independently of one another. In what follows, the term “Global Law” will refer to this definition.

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1. William Twining, *General Jurisprudence, Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009) at 14-15.

### First Idea. A Succinct History of Global Law

Accounts of the genesis of Global Law are innumerable. Here is the one I would prefer.

Global Law is the result of a historical process of the worldwide generalization of western legalism, the triumph of civilization understood as the Empire of the Civil Law. (At this level of general discussion, when we speak of civilization, of westernization, of modernization, or still yet of legalization, we are more or less talking about the same thing.)

This process is that by which non-western societies were commanded to adopt rules, procedures, institutions, categories, and modes of legal reasoning to the point of reconfiguring their individual and collective identities by varying degrees in the terms and ways of western legalism, in any of its different versions (Common Law, Civil Law, etc.). To enter into the “concert of civilized nations”, certain imperatives had to be obeyed and certain conditions or principles had to be satisfied. These processes are now starting to be well studied and better understood.

An independent legal system had to be put in place that guarantees the dignity of the individual, the individual’s property, liberty to contract, an independent administrative system that organized the fundamental functions of society and assured basic diplomatic rules, and finally the eradication of certain practices judged as barbaric (polygamy, *suttee*, etc.).<sup>2</sup> The protocols to implement these principles vary according to the situation. Some made the distinction between “colonization” and “opening”. With colonization, a “civilized nation” would impose western legalism on a “nation to civilize”. This would be done either directly (the French way) or indirectly (the British way) or any possible nuance between the two. In the “opening”, the “nation to civilize” would be constrained by the “civilizing nation” by means of adopting western legalism (Japan, Turkey, etc.).

Beyond the variety of implementation protocols, one can sketch a general outline of the *modus operandi* that governs these processes that follow the scholarly distinctions between barbarians, savages, and the civilized.

The barbarian is recognized by the fact that he disposes of something that already resembles written Law (The Laws of Manu, Islamic Law, Criminal Statutes in China, Tokugawa Laws in Japan, etc.). He is distinguished from the savage, who does not possess anything intelligible that could possibly resemble Law (the famous “societies without history”). For the savage, laws must be created from scratch and given to him. The civilizer will start thus by distinguishing the indigenous uses and practices that are worthy of being part of civilization (albeit through transformation) from those that are too primitive to be included in a civilized legal system. The elements that are worth being kept will then be translated into the vocabulary and grammar of Western legalism under the term “customary laws” (which has since become “indigenous laws”, although no

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2. See Gerrit Gong, *The Standard of “Civilization” in International Society* (Oxford: Clarendon Press, 1984). The question is asked whether those conditions were really the ones explicitly required, or if there was something else necessary, as Japan believed to have discovered the condition of being itself a “civilizer” after 1895.

substantial changes have occurred in its operation).<sup>3</sup> Finally, the civilizer assigns these laws to their secondary, auxiliary, and derogatory role within the legal sub-order that he is building as a complement of the rules and institutions that are presumed universal such as the rules of Patrimonial Law (property, contracts) and of Public Law (sovereignty, separation of powers, more recently human rights, free elections). Family Law has been designated at least since Savigny as being more open to the manners and the spirit of the people than Patrimonial Law, and has become, under the covert accommodation and recognition of “cultural differences”, the front line and the preferred place of intense negotiations between the Universal Law of the civilizer and the so-called traditions of the civilized (the latter generally having been invented *ad hoc* during these negotiations, to the largest benefit of the local, dominant elites).<sup>4</sup>

The inhabitants of the civilized nations, whose superior culture is many centuries old, are lucky enough to have not experienced these kinds of collapses. Any trauma that they had suffered has been inflicted by themselves through religious struggles, civil wars, and other revolutions. This is perhaps why it is difficult for them to experience the tremendous symbolic violence suffered by these societies now required to express and understand themselves in the syntax and the terms of a so-far unknown language. It was a constraint interiorized little by little, eventually ending up as legitimate (because it was “modern”). They became more and more incapable of expressing and thinking of themselves “like before”, feeling that they were obliged to invent a new “before” (because no one could reasonably and decently have no “before” and also because it is useful to have a bargaining chip for the negotiating terms of submitting to the new civilized order). They had to experience both the humiliation of submission and the pride of attaining access to the highly enviable symbolic universe of the New Masters. They were obliged to inhabit these new forms of hybrid identities that were both intensely loved and hated, but still fatally flawed and insecure and that only arduously emerge from this chaos.<sup>5</sup>

These times were those, furious and heroic, of the world of before the *post*, viz., in Westphalia. Westphalia is ordinarily presented as a world structured by the binomial National States/inter-state International Law. This is not an untruth, but it must be added that this structural division has been reproduced in the form of a chiasmus within each binomial term.<sup>6</sup> The sovereignty of States

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3. When anthropologists invented customary laws, they had the excuse of not having read the critical works of legal anthropology that had been published since. See Louis Assier-Andrieu, *Le droit dans les sociétés humaines* (Paris: Nathan, 1996). Gunther Teubner & Andreas Fischer-Lescano, “Cannibalizing Epistemes: Will Modern Law Protect Traditional Cultural Expressions?” in Christoph Beat Graber & Mira Burri-Nenova, eds, *Intellectual Property and Traditional Cultural Expressions: Legal Protection in a Digital Environment* (Cheltenham: Edward Elgar, 2008) at 17-45.
  4. See Duncan Kennedy, “Savigny’s Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought” (2010) 58 Am J Comp L 811.
  5. In a mass of literature, see Franz Fanon, *Peaux noires, masques blancs* (Paris: Seuil, 1952) or in another genre, ironic, subtle and hopeless, see Junichirô Tanizaki, “L’*éloge de l’ombre*” in *Œuvres* (Gallimard: Pleiade, 1997) at vol 1.
  6. Duncan Kennedy uses the expression “nesting” to describe the phenomenon of reproduction of binary divisions within each of the terms of divisions. See Duncan Kennedy, “The Semiotics of Legal Argument” (1991) 42 Syracuse L Rev 75.

can be divided between internal *and* external. International Law can be divided between Inter-State Law that links civilized nations to each other (International Public Law) *and* the unnamed mesh of legal relationships—colonies, protectorates, unequal treaties, etc.—that link the civilized nations to the nations to civilize. Within International Public Law, the subjects are free (sovereign) and equal States, unified by formally universal and comparable legal relations that are also reversible. On the other hand, the unnamed civilizing mesh legalizes the inequality of power through the unilateral domination by sovereign states of non-states, partial-states, and those states that are presumed incapable of governing themselves. Between International Public Law and the unnamed civilizing mesh there exists a mirror relationship, a relationship where the desired fate of the unnamed mesh is to be reabsorbed into International Public Law once the civilizing mission which civilized nations assign to themselves is completed.

This is what occurred with the adoption of the Universal Declaration of Human Rights in 1948, which marks the achievement of humanity as *one* civilization. Now, every human being is a dignified and capable legal “person” who is granted fundamental rights. Every human group (at least formally) is a State or part of a State and is governed by a constitution. Western legalism has imposed itself as the language of a generally uniform cursory anthropology through which it is nevertheless very easy to perceive the non-western “historical worlds”, or at least what they became through the process of “civilizing” them.

Nevertheless, one should not rush to declare western legalism as being the last horizon of the History of Humanity. Neither should it be said that we are observing the End of History, as civilizations might have a tendency to be stubborn. In this new order, however, the internal chiasmic or intersecting structure of Westphalian International Law has collapsed. The concept of “International Public Law” has lost its counterpart: the unnamed civilizing mesh that was its dark side. By losing its dark side, International Public Law also lost its function as a model, as there was officially nothing more to model. The historical dynamic that carried it until now has concluded.<sup>7</sup> For the sake of convenience, one may label what follows as “Global Law”. However, the least we can say is that what follows is certainly not very clear. Here are two ambiguities.

### ***Ambiguity 1: Global Law and Globalized Capitalism***

Global Law is often associated with the promotion of universal human dignity, property, and the freedom to contract. It is also associated with the uniformization of the world through the diffusion of the Common Law, the standardization of legal practices by large transnational law firms (model contracts, etc.), to the phenomenon of forum shopping, to the recourse to private justice (arbitration, conciliation, mediation) in international commercial relationships, and to the production of legal rules by the private actors themselves. In the same vein,

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7. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001).

Global Law would herald the triumph of commercial interests and/or of the managerial vision of the world and/or of the legal structure of globalized capitalism and/or of liberalism and/or of the Empire. Some would rejoice at this prospect because they consider that the advent of Global Law is likely to create a kind of impending radiant future for humanity, one that is characterized by open markets that ensure (sustainable) development and (environmentally-friendly) prosperity. Commerce would civilize manners; offer everyone the benefits of peace, human rights, representative democracy, and moderate government. Others are unhappy with the phenomenon, as they associate Global Law with the explosion of inequalities, the systematic pillaging of natural resources, environmental catastrophes, the crumbling of the State, its social policies and democratic institutions, the aggressive and arrogant expansion of Western civilization, the standardization of culture, and endless wars.

Global Law has undeniably a lot to do with all that. The dominant strands within Global Law are certainly tied to those of transnational businesses. The hegemonic projects which are expressed within Global Law are generally very imperial in nature. The ideologies that saturate it are certainly not foreign to economic liberalism and managerial ways of governing. Still, Global Law is about certain systems, procedures, and legal arguments which, like all systems, procedures, and legal arguments, are governed in large part by a logic of their own that cannot be reduced to the interests, projects, and ideologies that are invested in it at one given moment. Global Law designates an ocean of practices and legal forms that are too complex to be considered as a single block, too contradictory, too full of metaphysical subtleties, too open to a multiplicity of heterogeneous interests, projects, values, and ideologies.

Global Law cannot be easily reduced to the legal institution of globalized capitalism because it does not simply institutionalize global markets and transnational firms. Since the invention of international litigation of human rights, Total's liability for the atrocities committed by the Burmese army in connection with the construction of a gas pipeline could have provoked a suit elsewhere than in front of an unsympathetic Burmese court, and there is no indication that this evolution has in any way benefited the firm in question.<sup>8</sup> The term "Global Law" also means the possible convergence, on a worldwide scale, of categories and administrative practices that certain parties hope will strengthen the State's capacity for action.<sup>9</sup> Islamic Law is globalizing. In certain ways, it presents itself as a cultural alternative to globalized capitalism (and in some ways, it is in perfect sync with it). The inter-civilizational approach to human rights is a radical critique of Euro-centrist biases and of the managerial approach to the Global

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8. On this case, see Benoît Frydman, "Total et ses enjeux" in *Liber Amicorum Paul Martens: L'humanisme dans la Résolution des Conflits. Utopie ou Réalité ?* (Bruxelles: Larcier, 2007) at 301-21.

9. See Benedict Kingsbury, Nico Krisch, & Richard B Stewart, "The Emergence of Global Administrative Law" (2005) 68 *Law & Contemp Prob* 15. See also Sabino Cassese, "Administrative Law without the State? The Challenge of Global Regulation" (2005) 37 *NYUJ Int'l L & Pol* 663. For a critique of this project, see Bhupinder Singh Chimni, "Co-Option and Resistance: Two Faces of Global Administrative Law" (2005) 37 *NYUJ Int'l L & Pol* 799.

Law of human rights.<sup>10</sup> The TWAIL (Third World Approaches in International Law) projects welcome analyses that are very openly and very radically anti-capitalist.<sup>11</sup> These projects are not any less legal and no less global than the object of their critique. Everything is globalizing, not only the institutions of global capitalism but also its critics. If we do not see that the practical and legal forms designated by the term “Global Law” play a role in the institution of global capitalism, then we miss both the trees and the forest. But by entirely reducing Global Law to the institutions of globalized capitalism, we deprive ourselves of the opportunity to understand and work out its contradictions.

### *Ambiguity 2: Global Law and the Obsolescence of the States*

The second ambiguity is related to the role of the States in the development of Global Law. We often associate, in France at least, Global Law with the loss of State influence. Global Law obviously includes a strong *supra-* or *trans-*national dimension, not only in the sense that it is deployed on a worldwide scale, but also in the sense that it takes place independently and outside of the State. Some rightly talked about *Non-State Law*. It is rare, however, that we manage to identify legal phenomena that are clearly independent of national legal orders. Most common examples are forms and practices that do not have their origin in the State, in which the role of the State is transformed, but the State does not disappear. From the perspective of Global Tax Law, which is a product of the competition among national Tax Law regimes (Law shopping), the sovereignty of the State can be a source of Law and political authority, a complex network of tax regimes and inter-state conventions, and possibly a valuable commodity. International Criminal Law causes the emergence of the “States of Justice” (those States that declare themselves as having universal jurisdiction), States that don’t play the game (those States that have not signed international treaties), and even—a newer entity in the history of Law—“Criminal States”. The *Lex Sportiva* is the product of a complex game of actors—including regional and international federations, private actors (sponsors, the media), but also States, which intervene as States, and also through their own national federations or via regional and international federations and private actors (to which they often have very strong ties). These phenomena don’t lead to the “death of the State”, but rather to its integration in a deep and radically changed legal context that puts their prerogatives into perspectives while, at the same time, offering it new mechanisms of action.

All this is rather new. The cartographer of the world before the “*post*”—before Global Law—was Thomas Hobbes. The planet was a vast jungle (“State of Nature” in philosophical terms) whence emerged various oases (the national

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10. See Yasuaki Onuma, *A Transcivilizational Perspective on International Law* (Leiden/Boston: Martinus Nijhoff, 2010).

11. See Bhupinder Chimni, James Gathii, Celestine Nyamu, Vasuki Nesiah, Elchee Noworjee & Hani Sayed, *TWAIL, Vision Statement, working paper*, 1997. This text is available in James Thuo Gathii’s “Alternative and Critical. The Contribution of Research and Scholarship on Developing Countries to International Legal Theory” (2000) 41 Int’l LJ at 263-75.

legal orders) that were tied together by customs, treaties, and a little bit of *jus gentium* (to the extent that they consented to be tied). From time to time, a State would attempt to become the *Dominus Mundi* and would inevitably fail. “Sovereignty” was the term that designated the unbridled and absolute liberty (at least by the Law) that was accorded to each State in relation to the other States. These States ended up grouped together at the Center of the World, or in other words, in the West. In this great jungle, we had also discovered (starting in 1492) bizarre entities (societies, nations, tribes, clans, etc.) that have since been linked to civilized States by an unnamed mesh of legal relations that were forced upon them (colonies, protectorates, unequal treaties, etc.). Starting from the second half of the 20th century, the landscape changes by becoming more complex.

There are still *States* (there are even more since the bizarre entities are now all presumably States, at least on paper), but these States are now integrated into a dense network of diverse legal obligations, weaved together by a myriad of entities that have authorized themselves to produce Law.<sup>12</sup> Judges have given themselves universal jurisdiction. Others (or the same) have elevated the decisions of their foreign colleagues as a source of Law in matters of domestic Law. Private international arbitrators created considerable bodies of Law that they began to codify. International organizations—including athletic associations, humanitarian associations, transnational corporations, religious institutions, and universities—produced rules and standards that are meant to be respected.<sup>13</sup>

If we want to continue with the naturalist metaphor, we can say that the mesh of legal regimes has become dense enough to form something like a complex and moving environment that now constitutes the ecosystem in which recently and formerly civilized States are now obliged to operate. The world is no longer a virgin forest in which we perceive several independent national legal orders, but a tangle of regimes, institutions, jurisdictions, prerogatives, powers, immunities, norms, labels, rankings, standards, privileges, doctrines, concepts, etc. Always a jungle, and always chaotic, but of a second nature, an urban jungle. Global Law as a worldwide legal *Metropolis*.<sup>14</sup> Global Law is thus post-State, not because States would have disappeared or would not have had any use (they have not disappeared and they are still useful), but because it is the legal environment within which States now operate. State sovereignty is no longer the unbridled freedom in the state of nature, but a more relative and constrained kind of freedom. States now must interact with other entities (state or not) in the tangle of complex legal

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12. “Everybody in Global Law can claim themselves legislators. But this is not all. Some can establish themselves as “watchdogs” of globalization, as long as they be in possession of an effective means of controlling the actions of others. Or, since it is often what happens in practice, those in a situation of control can be required by others, often against their will, to carry the burden of watching, and if the case warrants it, sanctioning the bad behavior of other agents. This mission will often be designated “responsibility,” but the word holds a different meaning than when the word is used for moral responsibility, legal responsibility, or accountability.” See Benoît Frydman, “Comment penser le droit global?” in Jean-Yves Chérot & Benoît Frydman, eds, *La science du droit dans la globalisation* (Brussels: Bruylant, 2012) 17.

13. See H Muir-Watt, “Private International Law Beyond the Schism” (2011) 2-3 *Tranat’l Legal Theory* 347.

14. See François Schuiten & Benoît Peeters, *Les cités obscures* (Paris: Casterman, 1983).



relations that they now inhabit. It is not that state savagery is now unthinkable, or improbable (far from it), but its stage is now relatively more urban.

It should be noted that these remarks are not meant to remove the ambiguities present in the term “Global Law”. To the contrary, they are meant to conserve them. Global Law is tied to the deployment of globalized capitalism as it is with the putting into the perspective of state sovereignty. But it does not lend itself to being easily reduced or being assigned a historical or political definition that is simple and unambiguous. This is also the reason why I love the term. It evokes every projection and simplification imaginable, yet it connotes a number of phenomena that turn out to be far more obscure and complicated than we could believe.

### *The Global Turn in Legal Thought*

Now we come back to the first idea. We can do *Administrative Law* by concentrating on the study of the French legal order (domestic Law), we can mirror multiple national legal orders (classical Comparative Law), or can look to render an account of everything that is left to be subsumed under the term *worldwide*. Same objects, same theories, different scale: in its first meaning, all the legal theories, even stato-centrist ones, that cover the *worldwide* legal phenomena can be considered as *global*. Indeed, this change of scale does not in and of itself condemn the famous “Westphalian Duo” (*dixit* Twining) of the domestic legal orders and International inter-state Law pairing. This structure was already global, thanks to the universality of the legal forms that it would offer, and also because of its worldwide success. The first waves of globalization of Western legal thought had diffused it to the ends of the earth throughout the 19th century.<sup>15</sup> Numerous jurists have since interpreted worldwide legal phenomena through the prism of this structure. One is never obliged to flip over into the *post*.

The term “global” might designate, however, other things than a simple change of scale. Rather, it could be that the change of scale also creates a change in the object. If we agree that Global Law is not an independent, universal Law which is separate from the diverse sub-global levels and transversal flows, but rather the interaction of these levels and flows, then the change of scale leads us to think of these legal spaces as existing in their ensemble as well as their possible means of articulation. It is not that the articulation of legal regimes at different levels is something unknown to domestic legal orders (far from it), but the problems that generally arise find their solution in the unity guaranteed by the State, a solution that is by definition lacking in the worldwide *Metropolis*. The change in scale is thus an invitation to change the object. One could decline this invitation, but it is no surprise that a number of legal scholars make the choice to accept it.

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15. Perhaps the paradoxical success of this conception having a worldwide destiny is what permits the States to be a part of the History of the World without losing their independence. The idea is suggested by Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000” in David Trubek & Alvaro Santos, eds, *The New Law and Economic Development, A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) at 19.

It may also happen that in changing the object, we need new tools. We may come to the conclusion that Comparative Law, as long as its task is primarily comparing institutions of different national legal orders, is not adequate for studying transnational circulations. The change of the object can thus promote something like a change in theoretical perspective. It can create—as suggested by Benoit Frydman—a new paradigm. We might then have to speak of a *Global Turn* as we have spoken of a *Linguistic Turn* in philosophy.

None of this is surprising. If Global Law—to repeat—is the tangle of legal relations between sub-global levels and transversal and regional flows relating to heterogeneous legal entities on a worldwide scale, and if this tangle became dense enough to constitute in itself a new ecosystem, it is hard to imagine how academic legal communities themselves (those networks of academic and research institutions that are in charge of thinking about Law) could not belong to this ecosystem. If this is indeed the case, one can bet that the empirical conditions of observation and of theorizing about Global Law have themselves been affected, and we must accept all the epistemological consequences that come with that. However, to adopt a “global perspective” on Global Law does not imply solely changing the scale or the object. It means as well adopting the epistemological perspective of Global Law when talking about the Law globally. The theories relating to worldwide legal phenomena that have adopted this point of view may be labeled *Global Theories of Global Law* (GTGL).

The number of legal scholars who have taken this Global Turn in the last century is now large. There is nothing surprising here. It is merely a chicken or egg problem between the emergence of an object and the conceptual frameworks that enable its conception, or between the emergence of a legal phenomenon and an academic community that thinks it up. We should thus not be surprised that the emergence of the *supra-* and *trans-*national organizations are tied to the academic communities who are themselves *supra-* and *trans-*national, whose members no longer perceive themselves as representatives of their national community of scholars, but as belonging to an emerging community of jurists that have adopted a “global perspective”. It is not surprising then that next to these “Global Lawyers”, who practice a wide range of legal work on the global scale, we find “Global Professors”, whose diverse range of educational, institutional and academic work is in line with the *after* of the turn.

## Second Idea: A Rough Geography of the Global Turn

To take the Global Turn is to adopt a global epistemological perspective on global legal objects on a global scale. This epistemological perspective produces legal theories through academic communities, institutions, and networks of experts and legal scholars that are themselves globalized. The first academic communities and networks of global legal scholars emerged in national academic communities before the *post*. Some of these communities, or more often some sections of these communities, have concerned themselves with scientific activity that has led them, for diverse reasons, to take this turn. Academic networks of *trans-* and

*supra*-national, which were at times entirely deterritorialized, grew. Universities, journals, research institutes, educational programs now define themselves explicitly in terms of the “Global”. The new academic communities are in the process of moving toward the scholarly side of the worldwide *Metropolis*.

These new communities might have started growing inside those national academic communities that perceived themselves as on the periphery and as dominated in Westphalia. If this were the case, these communities would have much to win and little to lose by playing the “Global” against the national and regional powers that were occupying a central place in the world of the *before*. Moreover, it is quite possible that scholarly and academic communities of the United States had very early on bet on the “global sphere” so as to have developed the reasonable hope of being in the center of it.<sup>16</sup> One should also note that middle legal powers—especially those that used to understand themselves as central—are perhaps those that were the last to understand the novelty and the importance of the transformations that were occurring. Perhaps they had already paid a high price for the harmless nostalgia of their dead hegemonies.

The global academic communities recruit their members in national academic communities, generally on the fringes, particularly from the side of those who are concerned with *supra*- and *trans*-national phenomena in the world of before. This includes the internationalists and the comparatists of course, often theorists, but also specialists in domains that are very much globalized such as Arbitration, Economic Law, Human Rights, Law and Development, Environmental Law, etc.

These communities likely started by experiencing the intoxicating solitude of the *avant-gardes*. They are now situated at the center of the production and of the expansion of intellectual and cultural space that constitutes GTGL, while the national academic communities who did not take the Global Turn, or who took it less profoundly, or more slowly, are now “importers” of GTGL that they did not produce (or little).<sup>17</sup>

The result is that the worldwide *Metropolis* is itself composed of centers (and of a Conference of centers), of peripheries and semi-peripheries. (The result is also that national communities are now divided into central and peripheral fractions, *from the perspective of the worldwide Metropolis*.) This new collection of flows in the world of legal thought does not have much to do with the Westphalian landscape. The National University of Singapore and other deterritorialized research institutes that were yesterday unknown are no doubt very central today. Previously illustrious establishments and scholarly societies in Japan and France are now, *from the perspective of the worldwide Metropolis*, obscure and far in the periphery.

16. For example see Martin Shapiro, “The Globalization of Law” (1993) 1 *Ind J Global Legal Stud* 37. See also Richard B Stewart, “US Administrative Law: a Model for Global Administrative Law?” (2005) 68:3 *Law & Contemp Prob* 63.

17. It occurs sometimes that these “importing” communities perceive the GTGL as products that are “foreign” to cultural tradition and experience violence from this importation, which is under certain aspects analogous to the violence resulting from the forced cultural integration of non-Western historical worlds into western legalism.

Like each time a new paradigm appears in a given domain of science, the Global Turn is a change that one can take or not, and that one can take to varying degrees. Thus, whatever place a national community of scholars occupies in the new hierarchy that organizes the worldwide *Metropolis*, even the more “peripheral” now find themselves directly or indirectly affected by globalization of Law and legal thought. The academic jurists, whether situated at the center or at the fringes of their community, whether massively exposed to incontestably *supra-* or *trans-*national phenomena, whether specialized into branches of their national legal order which are reputed to be more “internal” than others, now all find themselves with the obligation of taking into account the emergence of Global Law. And as the transformations do not occur without transformations in legal thought, they all find themselves confronted with GTGL, constrained to think something of it, and must face the possibility, at least in an abstract manner, of themselves taking the Global Turn.

The result is that all the scholarly jurists, be they national or global, central or marginal (in the worldwide *Metropolis*), must negotiate for themselves, their work and their teachings, the place that the global perspective will occupy. They must also negotiate the way in which they will articulate (or not) this perspective when they address the national (or regional or infra-national) arenas to which they still belong, both concerning the definition of their object and concerning the epistemic view that they will adopt.<sup>18</sup> There exists an infinite number of ways to negotiate this articulation: somewhere between those who have completely and utterly engaged themselves in the Global Turn and those who refuse to take this possibility seriously. Of course, in the beginning of legal globalization, this refusal could assume the significance of a political preference in favor of the “World of before the *post*,” something like the reasonable choice for remaining in Westphalia. But the continuing and (it would seem) irreversible development of Global Law, its impact still very much affecting domestic Law, has progressively caused any such refusal to have lost pertinence and replaced it with the appearance of denial.

To take the Global Turn boils down to exercising its professions of knowledge and teaching in a passably different way. First of all, and for some time still (but perhaps for not *that* long of a time) we address students and colleagues in English who did not have at all the same legal education, who did not necessarily experience the same joys upon reading the cryptic lines of precious judgments handed down from the *Conseil d’Etat*, who did not necessarily read the same books, who did not necessarily reason in the same way and who did not necessarily even have the same practical preoccupations. National regulation of public markets or rules of expropriation does interest actors who are dealing with public markets or proprietors who could be expropriated, but also jurists who are trying to construct a body of coherent Administrative Law in order to legally constitute the national State as understood as an administrative apparatus. But in global arenas, the questions concerning the Administrative Law

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18. See Twining, *supra* note 1.

of “my country” are only, *in and of themselves*, of very limited interest. They only make up something like one in 200 of the regulations existing in matters of public markets or of expropriation (if indeed there are 200 such States endowed with such regulations in the world, which depends on how one counts States in federalized systems). The result is not that, *from the perspective of the GTGL*, the study of such objects inevitably loses all meaning. It is simply that this meaning cannot *a priori* be assumed, and the question asked to the academic jurists who take the Global Turn is how to make these theories interesting. Doing legal science in such a context leads us to seriously wonder what would be likely to interest colleagues who populate the diverse global academic communities. (The effort required for this could prove to be immense, if we actually think that in order to understand what interests someone, it is preferable to actually know this person well.)

This question is made even more difficult by the fact that “Global Professors” do not operate (at least not all) in the supposedly homogenous sphere of a universal legal culture, for the simple reason that this culture probably does not exist. If we say that this Global Law is not global in the sense that it is universal, but rather because it employs, on a worldwide scale, a complex fabric of legal relations articulating various levels and flows, then global legal thought is not a homogenous conceptual legal space that is independent of traditions, cultures, and national contexts. The global journals, universities, and institutes, even the most deterritorialized, stem from one of several national or regional legal cultures that determine in large part the perspective that they adopt on Global Law. Even if, when they take the Global Turn, the global jurists generally subject their legal education and their careers to academic communities that are still national (or regional, etc.). Thus, one does not cease to be French, Indian, or Chinese when becoming a “Global Professor”. To put it another way, it could be that the intellectual space that constructs the GTGL is deeply fragmented, that below the objects of study and the flows of common circulation, the dominant place of the “historical worlds”<sup>19</sup> of before the *post* are strongly felt. It could be that these worlds leave their mark on institutions, rules, and legal concepts that come from western legalism, going so far as to create, from within the worldwide *Metropolis*, brand new hybrid legal cultures.

There will be varying extents to which legal scholars who took the Global Turn will no longer experience (or experience more) the feeling of belonging to their national legal community. These scholars remain largely dependent on the context and the tradition of their legal culture of origin, but cannot anymore act as if they were their official representatives in the new communities that welcome them. They became the French, Indian or Chinese *Global Professors of ascendance*. The arenas of Global Law are populated with recent immigrants, who share the condition and the problems of any recent immigrant, especially the problem of having to negotiate the departure of their own legal community. They must simultaneously belong to their own community and the one of

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19. The expression is Fernand Braudel’s.

Global Law. This is why becoming a Global Professor often leads the individual to adopt multiple professional identities, it often brings out new forms of legal multilingualism and it promotes tricky linguistic and conceptual translation problems in the academic exchange between scholars, both at the intersection of national and global arenas and within the last ones.

It should be noted that, at times, all this is a little less true for professors who are offered the possibility of believing that they are Global Professors because they travel a lot, even though they are content with carrying their unchanged perspective of their national legal community around the world. It seems to me, though I could be wrong, that this luxury is only available to professors in certain prestigious American and European institutions, and still carries a large risk of being exposed to ridicule. But just as in the matter of the Global Turn, it is still a question of more or less. Since we never truly escape ourselves, our education, and our initial experiences, it would be pointless to try and elaborate objective criteria that would definitively discriminate the various authentically global theories from those that simply project on global objects those conceptual paradigms and modes of reasoning that are too anchored to their national experience of origin to really separate them. In this grey zone, everything is a matter of nuances (more or less) and ambiguities (*this* from this perspective, *that* from that perspective), the GTGL lies everywhere (at times in a contradictory manner) between the recent adoption of an authentically global perspective and the remaining more or less unthought-of national perspectives that are analyzed on a worldwide scale. For example, one can interpret the promotion of “Global Constitutionalism” or “Societal Constitutionalism” either as a definitive rupture with the Westphalian model, in which the only constitution was that of the State, or to the contrary as the renewal of the idea (one very anchored in the national history of Western powers) that “constitutionalization” is inevitably the best response to all our legal and political problems. This promotion could also be understood as the worldwide projection of the European experience of EU Law. In the same vein, Bruce Ackerman described “his” global turn in these terms: “If anything, American practice and theory have moved in the direction of emphatic provincialism. (...) We must learn to look upon the American experience as a special case, not as the paradigmatic case. (...) I have tried to be faithful to this precept in the speculations that follow. Rather than ruminate upon two centuries of American history, I have fixed my eyes firmly on the last half-century of world history and have allowed the American story to enter only as a source of supplementary insight”,<sup>20</sup> one could not have better expressed the act of exiting from a perspective that is strictly national for thinking about global phenomena, but all the same, this “World History” from where the author is currently speaking, *whose* history is it? (Or: Is the Global Turn about decentering one’s perspective or just about expanding it?) If the distribution of “authentic globalness” is obviously a futile venture, some GTGL do sound, both in form and content, particularly less global than others. However, it is very likely that “globalness” is

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20. See Bruce Ackerman, “The Rise of World Constitutionalism” (1997) 83 Va L Rev 771.

a contested quality that is not innate, but gets lost or conserved in the fierceness and the pertinence of scientific disputes.<sup>21</sup>

Whatever the case, the Global Turn is now a theoretical possibility that offers itself to everybody. We can take it or not, take it more or less firmly, with more or less success, but what is really new, and what changes just about everything, is that we can no longer seriously deny the possibility of taking it. I am now going to specify the contours of this by developing the following three intuitions: When moving from Westphalian Legal Theories (WLT) of Global Law to the Global Theories of Global Law (GTGL), we are not talking about the same things (1), the aesthetics of the theories are no longer the same (2), and neither are the modes of reasoning (3).

### **First Intuition. What are the *GTGL* All About?**

#### *Foundations, Constructions, Limits*

The WLT had the ambition of contributing to the building of the National State by rationalizing and legitimizing the national legal systems.

The legitimizing dimension involves the establishment of “foundations” of the State; in other words, it consists of discovering and delimiting the “fundamental principles”. The candidates are well known (the conscience of the people, the power of the sovereign, general will, political liberty, public service, etc.). We also know very well that the weariness of pulling from this list speaks to the exhausting nature of the question.

Because they claim a global perspective on Global Law, the GTGL concern themselves rather little with foundations, constructions, and limitations, but instead, for reasons that I will come back to, with the beginnings and the effects attributable to the existence of legal institutions and regimes that they understand as *new*. In the Global Turn we become interested in the new, in what is happening, e.g., in what is emerging and in what is circulating.

#### *What is Emerging*

Global Law presents itself as an ensemble of new and surprising phenomena that come to derail the certitudes, the established conceptions, and the dominant theories. In the world of the *post*, there is Law without State, International Public Law outside of the State, Constitutions without States, Law without sanctions, perhaps even Law without rules of Law, even Law without jurists (at least in a certain acceptance of the term). The distinctions between domestic Law and International Law or Public Law and Private Law have lost a lot of their pertinence. Global Law thus presents itself a little like the *real* according to Lacan, where our capacity for symbolization is overloaded from not entering

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21. Moreover, it found itself a reflecting friend to decide, with excellent supporting reasons that the present article was, in certain ways, typical of state-centrism within the French legal doctrine.

into the classically admitted categories and divisions. This is why what is truly global about Global Law is that it manifests itself *through its emergence*. This is why, for the past several decades, the GTGL have continuously—in order to be constituted as *global theories*—justified the irreducibility of their objects to Westphalian conceptual frameworks, thus highlighting the importance of what emerges by overloading them: is it that the UN Charter is *actually* a Constitution? Were Nike's public declarations really legally binding? Is *Lex Mercatoria actually* Law? What of the ratings provided by credit rating agencies or the criteria for ranking universities? Are the international framework agreements *really* a new way to promote International Labor Law? The GTGL spend a lot of energy responding to these types of question. Since Savigny, we have known that in order to understand the essence (or the “legal nature”) of legal institutions, we must go back to their origins (which are often, but not always, Roman) in order to discover their fundamental constitutive principles. These were the principles that would allow these institutions to be observed in their initial state, which could in turn be used to interpret their evolution, much like the organic development of the original life form whose essential characteristic was precisely to conserve the same principles by reproducing them. This is why, on the side of Comparative Law, Legal History has always been the quintessential auxiliary knowledge to WLT.

It seems that the tracking and the studying of the emergence of legal phenomena belong to a genre that is passably different, one that goes back to what Foucault, a reader of Nietzsche, would call a Genealogy of the Contemporary: it is no longer really about the Monumental History, and the origin no longer provides a foundation. In the genealogical project, we no longer look to retrace the continuity of a legal institution, from its birth to the present, in the goal of establishing the identity and continuity of this institution's essence within the various steps of its evolution. Rather, we look to highlight the discontinuities, the bifurcations, and the contingency of encounters from where new lines stem, and subsequently, to constitute what is emerging as *events*.

Events which emerged by overloading our conceptual frameworks (if this expression makes sense) are not necessarily new. The former, the specter, the permanent, and the perpetual that have been hidden until now also present themselves as something emerging. But because the global legal phenomena are emerging (regardless of whether they are former or new), they appear as unprecedented, incomprehensible, and shocking to those who observe them. For those who wish it, it will always be possible to reintegrate these events within the frame of a Monumental History, such as the *Grands Récits* of liberalism's triumph, of the expansion of capitalism, of the improvement of democracy, or the universalization of human rights. But those who are inclined to understand that which is emerging as events will find themselves better able to make sense of the contingencies, discontinuities and temporal bifurcations that genealogists deal with. This is why the genealogical approach, which is today claimed only by a small number of historians on legal globalization, could have its entire future ahead of it.



In the Monumental History, as in the genealogic way, the starting point is the present in which the event occurs. We understand it by retracing it to its beginnings. But while the quest for origins claims to describe a single and necessary historical process that would tell us what is real and true of the origin, genealogy is used to make the past contemporary by understanding the present as the convergence point of a plurality of possible processes which become narratives only through the pen of the genealogist. This way of reporting the past as contemporary brings into memory philosophical stories that were the academic currency in the very first hours of globalization, in the second half of the 18th century, before history became the discipline as we now know. These stories were *philosophical* in the vein of *French philosophes* such as Montesquieu, Raynal or Diderot,<sup>22</sup> works that were written against the universal Histories of the World penned by theologians. They did not claim to describe linear causalities, made heavy appeals to the *exempla* and to the *topoi*, and to take a thought from Paul Veyne, they thought that to explain more was to tell better.<sup>23</sup> The GTGL already have a rich repertoire of exemplary cases (Nike, Pinochet, Union Carbide, Yahoo!, Chevron, Trafigura, Kiobel ...) and *topoi*, and they present histories of legal globalization that are neither the History of the World nor the History of Humanity. Instead, they are the edifying account of significant and interesting legal relations that maintain between themselves various powers and forces on the global scale. This is only an intuition, but the approximation is tempting: if the GTGL had to have their own regime of historicity, it might be this one.

### *What is Circulating*

Global Law is the product of increased circulation of concepts, techniques, arguments, rules, and methods, as well as jurists themselves. To study a legal phenomenon is not necessarily to dig deeply by going toward its base or its past; rather, it is to study its shifts at the surface level, to retrace the trajectories, the exchanges, the borrowings, the transplants. One of the dimensions that is preferred by GTGL might be the examination of the terms and conditions of diffusion and reception for such and such legal object and the problems of translation pertaining to it.

From this, one could map routes and circulation paths as well as the repertoire of misunderstandings and betrayals that occur in the ordinary course of such a voyage. A cartographic knowledge of movements on the surface, of horizontal and transnational flows and circulations. Some call it *Transnational Genealogies*.<sup>24</sup>

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22. See Kenta Ohji, "Civilisation et Naissance de l'Histoire Mondiale Dans l'Histoire des Deux Indes de Raynal" (2008) 129:1 *Revue de Synthèse* 57.

23. Paul Veyne, *Comment On Ecrit l'Histoire* (Paris: Seuil, 1971) at 111.

24. See Duncan Kennedy, "A Transnational Genealogy of Proportionality in Private Law" in Roger Brownsword, Hans-W Micklitz, Leone Niglia & Stephen Weatherill, *The Foundations of European Private Law* (Oxford: Hart, 2011) 185.

All this can be interpreted as geography's revenge on history. We can ask ourselves if Global Law is not what comes after history, not in the sense that something could no longer happen (the end of time), neither in the sense of a conclusion of a historical constitution process of Humanity as the Subject of History, but perhaps in the sense of the exhaustion of the belief in the truth of this process, and more certainly, of the truth of the accounts provided by the historians of World History. "Legal History" could lose its ordinary disciplines that provide the traits by which we know it today. Legal science could then lose some of the most familiar versions of its favorite "auxiliary science". It could then enlist the services of conceptual and dynamic geography for the circulation of rules, concepts, and modes of reasoning that circulate throughout the globe.

### **Intuition 2. The Aesthetics of Global Theories of Global Law**

It should be understood that what first and foremost distinguishes WLT from GTGL is a matter of style. It is customary with jurists not to place much importance on questions of aesthetic value. They could prove to be important enough, however, to warrant some attention. In order to develop this second intuition I am going to lean entirely on a magnificent article by Pierre Schlag entitled *The Aesthetics of Law*.<sup>25</sup>

#### ***The Aesthetics of Law According to Pierre Schlag***

Pierre Schlag uses the term "aesthetic" in a broad sense. It designates not only artistic activity, but also the sensible way of perceiving exterior objects. According to him, Law is an "aesthetic endeavor" in the sense that theories and legal discourse appeal to and promote a certain mode of sensible perception of the world and its objects. Without going into too much detail, his works are primarily concerned with the theories and discourses of American Law, which is associated with four distinct aesthetics.

The first is a *grid aesthetic* in which Law is presented in a space of two dimensions, divided by conjoining yet strictly delimited areas. This aesthetic has the constant burden of rigorously distinguishing legal regimes, acts, bodies, functions, and to produce identifiable criteria for these distinctions, offering a representation of Law drawn in with clear lines and well defined spaces.

The second is an *energy aesthetic*, associated with forces, their relations and conflicts, the movements, dynamics and flows that these relations and conflicts encourage. In this aesthetic, Law is marching, advancing and progressing. This march, these advances, this progress can be measured, quantified, and finally balanced. Pierre Schlag associates this aesthetic with the schools born in the wake of the New Deal when the idea of a State perpetually on the move appeared. The energy aesthetic is about the management of permanent reform; it depends on the ability to quantify magnitudes.

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25. See Pierre Schlag, "The Aesthetics of American Law" (2001-2002) 115 Harv L Rev 1048.

The third is the *perspectivist aesthetic*, which offers a representation of Law that varies with the situation of the observer. The perspectivist aesthetic declines to adopt the perspective of the omniscient narrator, assumes that legal theories are projects, permits their political character, recognizes their constructivist premises and embraces their skepticism. The pioneers of this aesthetic were Robert Hale and Charles Reich, but we find it especially developed by the feminist reconstruction and the identity approaches to Law, for which the Law is generally viewed from a given perspective. The perspectivist aesthetic is an aesthetic of relations, which are assumed to be stable (for example, in the feminist perspective: men are distinct from women, men still dominate women, and it would be best to remedy this through Law).<sup>26</sup>

The fourth and the last is the *dissociative aesthetic*. This is a radicalization (or a dissemination) of the perspectivist aesthetic. Legal phenomena are no longer understood from a single perspective adopted by the academic jurist who observes them, but from the multiple perspectives that each of the observers of Law adopts respectively within a given legal consciousness, including the practitioners and the academic jurists who produce the theory. The multiplication of perspectives prohibits the adoption of a stable definition or even of a specific shape for legal phenomena. These phenomena are always both “this” and “that”, and sometimes “a little of this and little of that”. The dissociative aesthetic extends the skepticism even to the position of the speaker of the theory, thereby preventing him from proposing a reconstruction of Law, even a partial one. This is an aesthetic of multiplicities and variations that proposes a fluid understanding of Law. It appears prominently in certain postmodern versions of Critical Legal Studies.

### *The Aesthetics of Global Theories of Global Law*

I now come to my second intuition. What follows presents itself as an aesthetic history of dominant legal theories in the United States during the last century (from formalism to realism, from realism to identity politics, from identity politics to post-modern versions of Critical Legal Studies). All this offers an exciting way of writing a History of American Legal Thought. This is however not the reason why I would like to make use of it.

It seems to me—although Schlag does not say it—that it is very possible to interpret these four aesthetics as two pairs that create a structure. The energy aesthetic, because it is an aesthetic of movement, of changing borders, and of overlapping divisions, presents itself as the internal critique of the grid aesthetic. The dissociative aesthetic is very explicitly the radicalization of the perspectivist aesthetic. The first pair is that of the static and the dynamic (A-B), the second pair that of totality and multiplicity (C-D). Inside these pairs, there is conflict. The second member of each (B and D) is respectively the critic of the first member (A and C). Thus in the first couple, viz., ‘grid/energy’, B is the

26. For more on this minimal definition of legal feminism, see Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2008).

internal critic of A; in the second couple, viz., ‘perspectivist/dissociative’, D is the internal critic of C. Each critical term (B and D) presupposes the relative hegemony of its target (A and C).

My intuition is that the aesthetic of WLT is more a part of the first couple (grid/energy) and the aesthetic of the GTGL is more a part of the second (perspectivist/dissociative). As such, the upheaval in the *post* would mark a change of aesthetic.

When we place the scientific approach in the fixed framework of a national academic community, we do not have to ask ourselves from where we are speaking and to whom. This is because we may claim to speak in the name of the universality of science and of the rationality of the State. It is because we are talking to people who are accustomed to speaking among themselves, who speak more or less the same language, learned from frequenting the same libraries, and inclined to think that this way of speaking is the only existing way to speak, or the only way available, or at the very least, the best way.

In the worldwide *Metropolis*, things go completely different. Here, it is about Global Professors who have in common the fact of having to negotiate their (at least partial) departure from their legal communities of origin, of having to all be fresh-off-the-boat immigrants who still carry marks of their heritage. This common experience does not provide a single cultural base, since the meaning and the manner of negotiating the relation with their community of origin varies considerably depending on which community of origin we are talking about, and depending on the distance that the individual has managed to take. There are as many ways to become a Global Professor as there are ways for diffusing the various versions of Western legalism and their reception within unique cultures and unique historical contexts. The recognition of this multiplicity of experiences feeds the perspectivist aesthetic (and its internal critique, the dissociative aesthetic).

It is true that the worldwide *Metropolis* certainly has a center (or a Conference of centers), peripheries, and semi-peripheries. It is true that the more we are situated at the center of this *Metropolis*, the more we are inclined to forget our own situation and to observe it through the third person, as if we could abstract ourselves from it. The more we find ourselves at the center (or at one of the centers) of the worldwide *Metropolis*, the more Global Law appears in the shape of a uniform and universal Law, indifferent to the conditions and the context of its production, a sphere without borders (or edges). In the era of the *post*, ethnocentrism has not disappeared. It has been transformed into something like *global-centrism* that faithfully repeats its shape and blindness. Before the *post*, theoretical ethnocentrism had to make a considerable effort to hide what could have suggested the existence and the value of ‘other’ symbolic universes and modes of thought. In the *post*, global-centrism spends even more energy trying to forget that the global sphere is fragmented, crisscrossed by borders and fault lines to the point of not even being a sphere. And because these borders and fault lines are stubborn, the perspectivist aesthetic and its dissociative critique are ideal candidates for providing the dominant aesthetics of the GTGL, *even at the center*.

### Intuition 3. The Rationalities of Global Law

#### *The View from Afar*

Because the GTGL looks to worldwide legal phenomena, its objects can only be viewed from afar. When the WLT is attached to the precise and meticulous construction of legal doctrines that would be comprehensive enough to provide a detailed account of a given domestic legal order, the GTGL have a tendency to bring up things “in bulk”, with a degree of generality that often leaves little place for technical subtleties. It is understandable why it is this way. Seen from China, Duguit looks more like Hauriou than when seen from Toulouse or from Bordeaux. Seen from Sudan, the composition of the French Constitutional Council does not differ all that much from the composition of the American Supreme Court. We discover the similarities when we view from *afar*, but we lose sophistication and precision. It is the reign of the great syntheses and strategic shortcuts.

Completeness is also lost. When a study on the precedent and doctrine of expropriation according to the French *Conseil d’Etat* is conducted, one can still hope to propose to readers a comprehensive bibliography and an exhaustive list of pertinent decisions. But when working on Global Administrative Law of expropriation, the fact that one does not read Chinese or Japanese prohibits one from accessing a pile of Japanese or Chinese studies and cases that are directly tied to the subject. The mass of texts and linguistic obstacles has transformed the ideal of exhaustiveness into an inaccessible dream or into a neurotic symptom. One can regret this, and think that it is the triumph of vagueness, journalism, and weak ideas. It is true that (we will come back to it) the privileged role of the legal technicalities in the world of theorization at work in the WLT has found itself weakened, and that legal technique is still largely seen as what constitutes the beauty and rigor of the legal theories in many different national academic communities. The upheaval in the world of the *post* would mean a weakening of the rigorousness and of the seriousness that is fitting of something being labeled as “Legal Thought”.

We can however also consider that what is at stake in the Global Turn is less the disappearance of rigor and seriousness than their transformation. The GTGL produce the standards and criteria of their own new modes of reasoning. These are founded on strategic acuteness, originality of theses and clarity of synthesis, the power of perspective, the prolificacy of research perspectives, and the interest of the projects these perspectives allow. We will thus interpret the Global Turn as the emergence of new forms of rigorousness and seriousness in legal thought.

I don’t have the skills necessary to expound on the question of whether there exists a “legal logic”, whether this “legal logic” is particular to legal science or whether this is only the application of a universal logic to legal phenomena, and whether the idea of a “new” logic is a logical monster or not. I would like to suggest however, in this third part, that one doesn’t exactly reason and argue in the same way in the WLT as in the GTGL... I will merely throw out some cursory thoughts.

*Normative Pluralism*

Whether in the name of the autonomy of Law, of its autotelic and autopoietic character, or by invoking the hermeneutic circularity, we agree to understand Law as a system constituted by arguments that are only pertinent if they are recognized themselves as legal. We can certainly cite political considerations or values of justice, but they must be translated *legally*. In front of a judge, one does not expect from the parties to plead the superiority of their social status or the impoliteness of the opposing party. Only the *legal* has teeth.<sup>27</sup> As a result, it is from the perspective of the internal view of Law that jurists define the separation between what is legal and what is not legal, through the recognition by the legal system of the “legality” of the jurisdiction, facts, rules, concepts or arguments in a given case. This is why, during the time when the WLT of the State (the so-called “General Theories of the State”) wanted to be *legal* Theories, their ambition was to trace with extreme precision the border that separates the State understood as a system of legal norms from a State understood as a sociological or psychological phenomenon, or as a political power. To this end, these WLT have focused, in various ways, on reducing facts to strictly *legal* phenomena and to express them in a specifically *legal* form. This mode of theorizing implied three operations: firstly, *reducing* the chaos of life to several clearly identifiable types of objects (norms, of course, but also at times, depending on the adopted ontology, concepts, ideas, acts, bodies, etc.) and secondly, the *formalizing* of these legal objects, by using concepts that were recognized as having a *legal* meaning, then, thirdly, systematically classifying them within *legally* pertinent typologies. I am going way too fast, but I believe that one will understand more or less what I mean.

It seems to me that one of the characteristic traits of Global Law is to put forward phenomena that are legal *in a certain sense*, but cannot be correctly described (or *a fortiori* explained) in the framework of a strictly legal epistemology (in the sense that this epistemology would be grounded on the reduction, formalization and classification that I just talked about). The code of conduct of a large multinational company is not real enforceable Law when it acts as a PR tool on a web site. It becomes enforceable Law when it is invoked before a judge that sees it as grounds for enforcing certain legal obligations.

Inspired by works of legal anthropology, some looked to render an account of these hybrids by talking about “legal pluralism”. The expression ordinarily designates the coexistence of positive norms (in the sense of State Law) and of non-positive norms, stemming from Living Law (Ehrlich) or from Social Law (Gurvitch). This pluralism here is classified as *legal* to the extent that these theories look to establish the recognition of the “legalness” of non-state rules, with the goal of contesting the reduction of Law to positive (State) Law. Still, even the most centralized national legal orders have always recognized the existence, within a legal system,

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27. Karl N Llewellyn & E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941) at 283.

of rules of non-state origin (customs or professional practices for example). In practice, the State has never seriously claimed a strict monopoly on normative production, but rather that State Law prevails over Living (or Social) Law. In this sense, it could be that the pluralism of Global Law largely exceeds what we ordinarily understand by the expression “legal pluralism”.

Speaking about “Living” or “Social” Law is a way to expand the sphere of the legal to the rules produced by non-State institutions but also to understand these rules as a kind of latent Law waiting for recognition by State-Law. There is no “Living” or “Social” Law out of a context where the State prevails. Furthermore, it is very likely that the prevalence of State Law in a given social context explains how social norms can be understood through patterns of thought and categories that are homologous to those conveyed by State Law. Legal analysis seizes upon the rules of court settlement in matters of divorce and treats them as rules of *Law in action* because these settlements are produced *under the shadow of the Law*, that is to say, produced in an institutional context where the conflicts that arise from the failure of “Social Law” are worked out before a judge using clauses from positive Family Law. This pluralism is *legal* because the non-legal normative orders are strengthening and complementing the prevailing legal order which is modeling them. Rules of civility between neighbors or rules for bargaining between married couples find themselves shaped into procedures, categories, and protocols of thinking that are under the purview of Law and legal thought. The notion of “legal pluralism” does not signal an exit from legalism, neither does it signal that legalism is in danger, but rather, it signals the extension of its margins and the constitution of “the social” as the negative-image version of the Law. There is no “legal pluralism” outside the uncontested supremacy of the Law. This supremacy can either be understood as a universal feature of every human culture (“property is a universal institution, therefore the Cheyenne do have property rights, even if these rights are different from ‘ours’”) or as a *jeux de mot*, every prevailing normative order in a given context being labelled “Law” (“there are no property rights for the Cheyenne, but the way they are allocating things to each other can be called “Law” since it prevails within their society”). In both of these theoretical perspectives, we lack the words for distinguishing within normative orders that prevail in “their” context, those that run on Western legalism and the others.<sup>28</sup> This lack is a problem, since the key question to answer here is not if “their” prevailing normative order shall be labeled Law or not, but rather, now that western legalism has been exported everywhere, *which* normative order (may be non-legal) is providing the tools for articulating Western Law with what remains from the non-Western normative orders which were prevailing before the encounter. Despite the axioms on which “legal pluralism” is grounded, it may very well *not* be Western Law.

Because within the normative hybrids that populate Global Law the Law of western origin does not always prevail, it might not be capable of shaping non-legal normativities the way it does with quasi-legal orders in the West. To the contrary, the Law, its rules, procedures and categories might very well find

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28. See Brian Tamanaha, “Understanding Legal Pluralism” (2008) 30 Sydney L Rev 375.

themselves shaped by other normativities, whose mode of functioning is foreign to legalism. The modes of articulating non-legal orders with the Law might very well be themselves non-legal.

It is therefore possible that the pluralism of these hybrids is not primarily or centrally legal. It could thus be more pertinent to talk of “normative pluralism”. This would lead us to wonder if Law remains Law as long as it does not prevail, or if Global Law is even still Law, in the ordinary sense that this term is used. The term “normative pluralism” is a better fit to describe these situations of *multilingualism* where the dominant normative language of a community is not necessarily the language of the Law. Sometimes, from the violent encounter of legal and non-legal normative orders, new hybrids have emerged that are neither purely “legal or “non-legal” in the sense that the structural borrowing of building blocks coming from both has produced a new normative order which *langue* (or structure) can only be understood as the result of a process of *creolization*. The term “normative pluralism” is loose enough to cover these cases.

### *Disciplinary Eclecticism*

From the perspective of the WLT, none of this is very new, neither is it very interesting. Nobody has ever claimed to actually reduce the State to its Law. Many grant themselves the time and effort to study the other normativities that are at work. All the facts, acts, norms, and legal concepts that are tied to the action of the State are, and have always been, legal from a certain point of view and not legal from other points of view. The administrative act through which the President appoints Dupont as the head of a state-owned agency is a legal act that involves theories of Public Law. However, it is also a psychological act (the president loves Dupont), a political act (Dupont is rightwing), a sociological act (Dupont and the president went to the same judo class when they were kids), etc. But specifically, what interests the *legal* theory of the State, is the *legal* aspect of what the president does. Similarly, nothing in the ontologically hybrid character of Global Law should prohibit us from trying to make a *legal* theory of Global Law. There is no reason to object to this. Global Law does not carry normative hybrids *per se*. Rather, the adoption of a global perspective on Global Law might weaken the need for promoting a specifically *legal* theory of Global Law, and strengthen the belief that being interested only in the purely legal dimension of the studied phenomena is reductive and formalistic. It might lead us to be no longer satisfied with this pure and narrow “legal” approach.

WLT mapped out legal knowledge as the juxtaposition of distinct yet complementary scientific perspectives within the ensemble of social sciences (the sociologist teaches us that Dupont and the president did judo together, the political scientist that Dupont is rightwing, the psychologist that the president loves Dupont, etc.). In this context, the work of the jurist is to produce the knowledge that specifically concerns the “legalness” of the phenomena being considered (Dupont is appointed by a decision made in the Council of Ministers, this decision is only valid if it is signed in such or such way, by such and such officials,



it can be contested under certain conditions, etc.). To the contrary, the Global Turn encourages the production of eclectic knowledge that strives to think of the various dimensions of the studied phenomena in their ensemble, relatively indifferent to the disciplinary origin and the disciplinary coherence of the theoretical tools which are mobilized.

Academic communities that dedicated themselves to the production of WLT wanted to be communities of “jurists” and recognized each other as such. We certainly find a considerable number of academic jurists whose project is to construct academic communities of *jurists* on the global scale. But this project can be interpreted as the simple reproduction on the global scale of that which preceded it on the national or regional scale. Other academics take the Global Turn more firmly and seek to adapt the nature of their knowledge to the objects that they are studying. The task is easier for those who did their studies in one or two (or three) given disciplines (not always Law), but acquired, in one way or another, some knowledge of the Law. This provides points of interest when thinking of the future of legal education. These *Global Professors* are not particularly driven to attain the status of “jurists”, and do not claim to produce knowledge that is specifically “legal”. To tell the truth, they find the disciplinary distinctions boring. These distinctions belong a little too much to the world before the *post*. What is important for them is the pertinence and the seriousness with which the required theoretical tools are mobilized. When they speak of Foucault (and it does happen that they speak of him) what is important is not so much knowing what they are doing is *really* philosophy but that they have read enough of him so that when they talk about him, it remains interesting. When they carry out economic analysis, which happens even more often, it is enough, to their joy, not to be overly mistaken about the fundamental concepts of economics, to avoid errors in calculation, and choosing the wrong statistical models. And of course, when they study the legality of a phenomenon, which happens all the time, they carefully try to avoid confusing the legal texts that are in force, to characterize the facts in a credible way, using categories and legal reasoning in such a way that an observer only sees “Law”, etc.

One could perhaps find this disciplinary eclecticism to be a regression from the perspective of trying to elaborate critical knowledge on Law. Through criticism (according to Kant), knowledge takes charge of its own conditions of possibility and deduces from these conditions the ways in which the object studied can be constructed. In the criticist approach, the constitutive formalities of disciplinary knowledge determine the objects of this knowledge. Before the *post*, and particularly in the WLT that resorted to this criticism, legal science dealt with what could be known from the point of view of *legal science*. In the worldwide *Metropolis*, the objects are dictated by the issues of real life, in other words, by the way in which various communities of actors and experts understand and construct these issues, or even by the various endeavors and projects that these actors and experts pursue. These endeavors and projects are not all (far from it) “legal”. The question of the conditions of possibility of the knowledge they produce is rarely asked.

From the diversity of these communities of actors and experts, from the multitude of endeavors and projects that emanate from these communities, emerge global legal phenomena that manifest themselves most often in shapes elaborated by other knowledge, other protocols of thinking, and other disciplinary projects than those carried out by academic jurists. All this was already largely true when legal science was practiced on a national scale, but the change of scale, the multiplication of actors, and the frightening complexity of issues and stakes that followed (how do we slow down global warming?) has, without a doubt, made it more difficult to believe in the preeminence of a single epistemic perspective for understanding and resolving global problems. Open competition between various types of expertise and knowledge does promote a relativization of authority of scientific knowledge in general (to deal with the problem of hunger in the world, do we look to economists, agronomists, or climatologists? and is this really the question to ask?). Finally, perhaps the concrete conditions in which the world is globalizing have given the first word to those other than the jurists (but it is still a chicken and egg problem, the jurists come often after the merchants and the engineers, but one often needs some kind of Law in order for this kind of commerce and engineering to exist). Whatever the case, the global forum does not promote the *isolierung* of Law. Rather, it has the tendency to endorse epistemic perspectives that mix, without too much compunction, heterogeneous knowledge, which often includes a smattering of political points. The power/knowledge is seen here in its raw state.<sup>29</sup>

### *From Whole to Fragments*

In Global Law, and this is probably the most striking contrast with WLT, we cannot anymore relay what the national institutions and bodies are doing to a single political unity—call it People, Nation, or Constituent Power. The subjects that manifest themselves are not necessarily less political but they took the shape of networks of actors and experts. The question of the relationship between Law and politics has thus been firmly changed. In the WLT, the political forces were located at the head of the State (the sovereign bodies) and at times at the base (the citizens). In this way, one can interpret the WLT as the (political) enterprise to subject the political (understood as the arbitrary nature of the Prince and sometimes of the Multitude) to legal (technical) rules and procedures. Essentially, this enterprise consisted of separating from actors and actions those who came under the domain of political and those who came under the domain of legal, the latter considered simply as technical and thus politically *neutral*, all while nevertheless

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29. “There is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations. These “power knowledge relations” are to be analyzed, therefore, not on the basis of a subject of knowledge who is or is not free in relation to the power system, but, on the contrary, the subject who knows, the objects to be known and the modalities of knowledge must be regarded as so many effects of these fundamental implications of power knowledge and their historical transformations.” Michel Foucault, “Discipline and Punish” in Julie Rivken & Michael Ryan, eds, *Literary Theory: An Anthology*, 2d ed (Malden: Blackwell, 2004) at 551.

making legal actors and their actions the product of sovereign political entities. The political (the will or the power of sovereign bodies) was thus the source of Law but its operations were depoliticized through their submission to technical rules and procedures. These operations would thus be neutral. Legal actors (and their actions) could appear as passive agents for carrying out the will of the original sovereign subject, and in return for being stripped of their political attributes (far more during the 20th century), would subject the sovereign to technical mechanisms, rules, and procedures of which they were the masters. I will not discuss here whether this endeavor was achieved in a way other than through theory, nor will I discuss whether it was actually achievable in the first place.

From the perspective of the relations between Law and politics, Global Law appears as a mesh of regimes, systems, and institutions that are at times purely technical, at times explicitly political, and at times both. Market laws, information systems, technical or accounting norms do not claim to manifest a political will or an arbitrary political nature that should be limited. Instead, they act as technical systems based on objective knowledge, politically neutral. This is likely the reason why some thought that legal globalization was “post-political”, in the sense that it would herald the triumph of experts and usher in the idea of political that we have known until today (sovereignty). This vision must be balanced by the consideration of other *supra*- and *trans*-national regimes, organizations, and legal systems that explicitly meant to achieve political projects. Environmental Law was first promoted by those who were looking to preserve the environment; International Human Rights Law was first promoted by those who made respect for human rights a political priority; development was first promoted by those who believed that they had the solutions to underdevelopment, etc. Other institutions, organizations and systems are presented as technical in their functioning but political in their goals, as being technical is sometimes the best way to be politically efficient—we defend human rights better by presenting them as objective and neutral.

Global Law thus presents itself as a legal mixture of the technical and the political that renders any attempt at their strict separation somewhat futile. It is easy to see their permanent tension at every level. Moving past the national framework does not signal the death of the political in Law, but rather its dissemination at each intersection, border, and fault line of the *Metropolis*. Politics is everywhere Law is done and thought of: in the ambivalences of each arbitrator, in the denial of each bureaucrat, in the ethic ambiguities of each expert. All this was perhaps not any less true at the national level or in the world of before the *post*, but it was much easier to simplify the issue by isolating the political at the head of the State (and sometimes at the base), which is all the more reason why we believed in it in the first place.

This dissemination is possibly the hint of a more profound mutation. The impossibility of attributing the origin of Global Law to a single subject makes it more difficult to think of it in terms of a whole (the only candidate would be Humanity itself, but Global Law does not look anything like a universal Law of Humanity). The WLT generally seeks to render an understanding of the national

legal system as an articulated, coherent and dynamic whole. These considerations are prevalent in the conversation on Global Law, but it seems to me taking firmly the Global Turn might lead one to forget about these types of aspirations. This is not so much because the proposed material would be too heterogeneous, or too fragmented, or too variable, or too disseminated, but because the endeavor of totalizing had everything to do with the wish to unify the political community by the Law under the power of an originating Sovereign, which is lacking today.

It cannot be repeated enough: the worldwide *Metropolis* is not a sphere. Global Law looks more like fragments of something than a whole, and nothing indicates that it is destined to become one. The cosmopolitan project is only, in certain global arenas, one project among others. Its advocates often recruit in national or regional communities that fancy themselves to be Empires without always having considered the extent of heterogeneity that would be involved in achieving their vision.

### *Essences, Forms, and Models*

The absence of a worldwide political community does not only prohibit the idea of a shared belonging to the same totality. It also indicates that the actors, experts, and scholars of Global Law do not share a common vision of the world. It may even indicate the absence of a mutual sharing of a sensible perception of what the world is that would make sure that we speak of the same thing within various global arenas. This pluralism goes well beyond the incredible diversity of opinions, values, projects, cultures, and theoretical approaches present, because it strikes radically against the notion of a common reality. It seems to me, that this is the human condition, but in Global Law, we can hardly discern an ontology that would be dominant enough to make us forget it.

In the absence of a shared vision of what scientific convictions could be, one may try to impose unilaterally its own, based on the sole assumption that these convictions are better than any other or—in a version even more pathetic yet more common—that they are universal and therefore meant to be universally shared, if enough time and force is given to convert those who are not convinced yet. (Think of the project of spreading worldwide the classical version of Law and Economics in the 90s, for example.) An alternative is to realize how much the heterogeneity of beliefs, ideologies, the various lifeworlds [*Lebenswelt*] and visions of the world [*Weltanschauung*] fragment the global arenas and therefore to try our best to find pragmatic ways to clumsily articulate propositions and projects that are at times heterogeneous, even to the point that they cannot be expressed in one language (about that Japanese colleague who is attending your conference on Constitutional Law: do you *really* know why he is here and what he thinks of it?).

This is perhaps the reason why, with the Global Turn, modes of reasoning that we classify as pragmatic prosper as long as they appear to be less the search for the truth and more as a practical elaboration of acceptable solutions or as the promotion of political projects presumed legitimate. This bend helps substitute,

within legal reasoning, the measuring and the balancing of interests or distributional analysis for conceptual deductions and legal syllogisms.

It is also the reason why one would prefer models that assume their constructivist premises in the production of “general theories” whose claims are explicitly grounded on dogmatic conceptions of the legal truth. That is why it is likely that this very special kind of formalism ordinarily associated with legal dogmatics will decline. But this evolution does not signal a general decline of formalism, because the models in question are able to obey very strict standards of formalization (think of Law and Economics, of various theories of decision, and of empirical studies). It also remains to be seen whether this evolution is the triumph of neo-formalism, because many GTGL are highly anti-formalistic, even sometimes explicitly irrationalist.

The flavor of pragmatism that pervades the Global Turn could promote the development of rights-oriented discourse (particularly on human rights, but of all subjective rights in general) because this discourse is very favorable to the expression of political and ideological aspirations, especially when these aspirations are a part of projects that are concerned with the recognition of political identities—what we call identity politics. These discourses have experienced such a success in the global arena that one could think that the rights/identity couple is the distinctive marker of the legal grammar particular to the Global Turn. I do not know if the Global Turn allows the identification of any dominant method or even grammar, which would be that of global legal thought in general. Rather, it seems to me that within the academic communities of Global Law, what is dominant is the eclecticism of methods and the diversity of legal languages (discourses on rights, but also the discourse of economic efficiency, of constitutionalization, of codification, etc.). The language of rights is one of these languages for sure, but never dominant enough to claim hegemony or resist interpolations. These languages interweave, colonize, and overlap each other. They are all available for the actors and can be used at the same time within the same legal reasoning.

The Global Turn seems less like a theory, a method or a given legal language, than like various ways to express methods, languages, and theories within the same mood or atmosphere, something which has been at times called a “legal consciousness”.

### ***Conclusion***

I have just presented three intuitions relating to what legal thought would be if it took the Global Turn. I do not know what they are worth, and cannot in any case claim that they are new. It seems to me that I can name dozens of colleagues who would gladly describe themselves as Global Professors. Surely what I discussed above is too intimately tied to the way in which I myself negotiate the tension between my belonging to a national academic community and global academic communities. Perhaps other ways of negotiating this tension would lead to other intuitions. One can thus also read the above as a testimony.

Nevertheless, what emerges from these intuitions is a thesis. The time of the Westphalian Legal Theory is over, and a new way of theorizing about the State and its relations with its legal environment is emerging. Global Law refers to this new environment as well as the way in which it is conceived. This thesis is fragile. It could be false, or the reflection of a transitory moment. It could be that, through the last ruse of History, the historical meaning of Global Law's emergence is to pave the way for the Universal and Homogenous State and with it, inevitably, the triumphant return of the Westphalian Legal Theory genre. This time, it would be applicable to what would be the Mega-Global State, the cosmopolitan totality finally realized. As for me, I do not believe too much in History. This scenario seems plausible, but just as plausible as many other very different scenarios. But it also seems quite a bit less plausible than others because its realization flies in the face of projects and interests that appear very strong to me. It is true that there is nothing objectionable about a ruse of History, since it is a ruse. Let's just say then that, for now, this hypothesis of the Universal and Homogenous State is not very useful. It does not allow us to think about the mesh of networks and flows, normative pluralism, or the fragmentation of lifeworlds [*Lebenswelt*] and visions of the world [*Weltanschauung*] within the worldwide *Metropolis*. Perhaps, one day, it will triumph. But this idea comes either too late or too early. Today, it is useless. After the WLT, comes the GTGL and not the GTMGS—General Theory of the Mega Global State. From now until the Universal and Homogenous State emerges from Global Law, we will have plenty of time to forget and then reinvent State-centered Westphalian Legal Theory, if ever the need arises.