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Legal Globalisation as a Conceptual Key for Capturing the Legal Functioning of the World: is it Still Relevant?

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Abstract:

This article asks whether the concept of legal globalisation is still a useful key for grasping the legal functioning of the world. Legal globalisation is understood here not as the mere internationalisation of law but as a strong, multi-directional interconnection between legal systems. Its effects run deep: the erosion of the normative primacy of states, the rise of non-state actors (multinational firms, NGOs, and the digital giants), a convergence around shared principles, and the reshaping of the relationships between legal orders. The stakes are as broad as they are varied, spanning sovereignty, economic regulation, the protection of fundamental rights, and transnational governance. Yet the balance that once existed is now being disrupted by financial crises, pandemics, war, populism, and the growth of artificial intelligence. Beneath these disruptions, the interconnection of the world endures, so that the concept of legal globalisation might still remain valid.

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The concept of legal globalisation is far from being unanimously accepted. Like many, though, I regard it as a valuable tool for understanding and describing the legal functioning of the world in the modern era, by characterising it in very broad terms as follows: the movement of globalisation has been added to an era of significant internationalisation of the law, introducing a dimension of strong interconnection between legal systems, in all directions. I shall explain below what all this means (I).

The problem is that the political, economic and social realities of life around the world have for some time been undergoing a period of severe turbulence, which is affecting the very foundations of what we might call globalisation. This turbulence has implications for the law—implications that are, in fact, already partly visible—leading us to question whether the concept of legal globalisation can still legitimately be used. My feeling is that it can, although the components of the mechanisms driving globalisation are nonetheless undergoing a phase of significant transformation (II).

I. Globalisation of law as a conceptual hypothesis

1. The idea of globalisation

Globalisation is a difficult phenomenon to characterise, because it is a complicated interplay of factors; identifying its general directions demands a certain amount of effort.

A good way to sum it up is the notion that globalisation places political, economic, social etc. systems in a state of growing interconnectedness; one may subscribe to the rather effective definition given by David Goldman, who characterises it as 'the increasing interconnections amongst things that happen in the world'.[1]

What does this mean more precisely?

a) The globalisation trend is, first and foremost, obviously economic in nature. It has derived from an opening, an expansion of international trade. From the end of the Second World War to the end of the twentieth century, international trade has grown by 6.5% per annum in real terms, faster than world production.[2]

Subsequently, economic globalisation was fuelled by other realities, in particular a drastic increase in the mobility of operations and firms—which have also more frequently become multinationals. A corollary to the expansion of such transnational economic activity was the rise of the world economy's financial dimension.

These trends are joined by a characteristic phenomenon of spatial dislocation or deterritorialisation of economic activities, particularly financial and communication activities: as is typically shown by the modern globalisation of financial markets, these economic functions tend to be exercised sometimes with almost no tie to a specific location, across networks—the internet, in particular—which are absolutely global, and in the op-

1 Goldman, D., 'Historical Aspects of Globalisation and Law', in Dauvergne, C. (ed.), *Jurisprudence for an Interconnected Globe*, 2003, Ashgate, p. 43. Another way to express the same notion is to say that, in a globalising world, there is a sort of 'universal immediacy': Innerarity, D., *El nuevo espacio público*, 2006, Espasa, p. 224.

2 de Senarclens, P., *La mondialisation*, 2005, Armand Colin, 4th edn., p. 75.

eration of which the location of operators is of relatively little importance.

b) As essential as they are, the economic developments do not constitute globalisation in its entirety. There are other dimensions to globalisation. There is a cultural and ideological reality to globalisation.[3] That reality is founded on a technical underpinning the development of powerful communication tools (e.g. the internet, satellite television) which have breathed life into the 'global village' prophecy made by Marshall McLuhan long ago. These broadly common communication tools are a vehicle for the shared values of cultural and ideological globalisation—and they are shared, even if understood, and still more often embodied, in varying ways. Global values encompass economic competition and the consumer society on a global scale, but also the rule of law, the ethics of fundamental rights, the protection of the world's ecological heritage... The latter values are an equal part of a global ideology, on a par with those of opening up trade or competition, which surround economic globalisation.

There is also a social dimension to globalisation, consisting in movements directly affecting the lifestyles and working habits of the planet's inhabitants. Globalisation generates new migratory flows and sometimes leads to proactive policies of emigration—one may cite the examples of South Korea and China, in recent times—or immigration, while illegal immigration and human trafficking thrive.[4]

c) There is debate as to whether the globalisation movement was an unprecedented phenomenon. Some argue that the world witnessed an initial and similar trend during the Renaissance; others associate it instead—or even both—with the birth of capitalism in the 19th century;[5] still others make the same assertion about ancient times.[6]

There is quite naturally a great deal to debate here, which a lawyer is ill-placed to settle. Nevertheless, an examination of the various alternative views gives the impression that, even though history provides earlier examples of periods in which, for instance, trade opened up, in ways evoking what we know today, the current realities are of a particular intensity and nature. While arguing that the world experienced wide-ranging globalisation in the 19th century, C.A. Bayly acknowledges that current globalisation presents three unique characteristics: it is polycentric; the Nation State has weakened while markets have grown more powerful; and, lastly, the digital revolution has made the world's transitivity unparalleled in scale and dimension.

With the strong expansion of international trade, and that of communications does indeed constitute an unprecedented development that is absolutely strategic in terms of scope. 'The world is flat',[7] explains Thomas Friedman. Communication between individuals has been revolutionised in three stages: firstly, with the invention of the personal computer; next, the arrival of the Internet; and, lastly, the creation of communication standards (such as FTP and HTML) in the 1990s, which make computer software interoperable and allow users to work on content with anyone anywhere.

d) In order to form a clearer idea of the nature of the globalisation phenomenon, one

3 Leclerc, G., *La mondialisation culturelle. La civilisation à l'épreuve*, 2000, Presses Universitaires de France; Appadurai, A., *Modernity at Large: Cultural Dimension of Globalisation*, 1997, University of Minnesota Press.

4 Dauvergne, C., "Illegal Migration and Sovereignty", in Dauvergne, C. (ed.), *Jurisprudence for an Interconnected Globe*, 2003, Ashgate, p. 187.

5 Eg.: Bayly, C.A., *La naissance du monde moderne (1780-1914)*, 2006, Editions de l'Atelier.

6 Eg.: Bederman, D.J., *Globalisation and International Law*, 2008, Palgrave Macmillan.

7 Friedman, T., *The World is Flat: A Brief History of the Twenty-First Century*, 2005, Farrar, Strauss and Giroux.

must remember that it has its own specific players, and a great many of them. Firstly, there are those from international institutions (be they regional or global) that promote or regulate the economic, social and ideological openings in which the globalisation phenomenon consists. A significant proportion of international organisations are concerned here, but especially those which are in charge of economic exchanges worldwide, or the international protection of fundamental rights. Next come the world economic and/or cultural operators, including multinational corporations. Lastly, there are the numerous non-governmental organizations, including those which are guardians of fundamental rights or of the environment, and which are not always powerless against the power of those players mentioned above: Greenpeace, for instance, now has some 26 independent national and regional offices and a total of 55 offices in 55 countries, while its annual revenue stands at US$324 million.[8]

e) That said, the deeper nature of globalisation has also lain in the (social, economic, etc.) processes that it sets in motion, and which are quite unlike anything our civilisations had grown accustomed to.

The most striking aspect in this respect is that which relates to the spatial dislocation, the 'deterritorialization' of economic and social activities and mechanisms.[9] Alongside this, globalisation has also brought about a process of denationalisation of companies and of the world as a whole. Globalisation contributes to a decline in the centrality of the State in our societies.

The third characteristic process is the expansion of transnational realities and mechanisms.

f) In order to characterise the globalisation phenomenon, further indications of a broadly morphological nature could be added to the above.

The essential point is as follows: globalisation must not be assimilated to its global, universal aspects; it acts on many other levels—including regional integration and, in particular, the European integration —that will have to be situated within our discussion. It is, by its very essence, 'multi-level'.

g) Finally, globalisation is not a phenomenon positioned 'above' national systems or local societies. It also spans systems and societies 'horizontally', by creating the openings discussed above. It strengthens the fabric of transnationality, whether it concerns transnational economic activities, intergovernmental networks, transnational activism, etc.

Naturally, it also has a vertical dimension as it spans systems and societies 'vertically', producing its effects on all levels: local and global, regional and national. As we shall see below, it redistributes the legal cards between these various echelons, sometimes causing surprising role reversals between the various levels.

8 de Senarclens, P. (2005), *La mondialisation*, op. cit., p. 47.

9 Badie, B., *La fin des territoires*, 1995, Fayard; *Un monde sans souveraineté*, 1999, Fayard.

2. *The globalisation of law*[10]

a) In order to have an idea of the The tensions that globalisation elicits within the law, the essential realities of the phenomenon itself are a good starting point. They mainly consist of moves towards deterritorialisation, denationalisation, transnationality, in the economic order but not exclusively so, and the rise of new players (multinational companies, NGOs, individuals, especially).

These realities naturally exert certain kinds of pressure on the law.

They generate a tension towards the development of norms, of legal mechanisms, indifferent to the spatial location of the objects to which they apply.

They create a pressure to the effect of legal harmonisation of rules, a reduction in the control over those rules wielded by the plurality of national systems.

There is necessarily a tension, in the sense of the denationalisation of the law, associated with the developments discussed above. A law that is less sensitive to national legal variations is naturally a law that is less dependent on specific State intentions. This does not mean that global law operates outside States—we shall return to this. It means that States have less control or involvement in it.

b) In a globalised world, there is a second tension towards the development of norms—of compulsory rules or legal standards—addressing not States, as is traditionally the case under international law, but individuals, private groups (companies, NGOs, etc.), even sub-national public authorities.

Highly characteristic of this development is the international and regional law protecting human rights, which has moved well beyond what more traditional international law envisaged becoming a branch of law that mainly concerns individuals and private groups—both as beneficiaries of those rights and as players in their protection—and in which States are increasingly spectators, especially where there are legal penalties that elude them.

Conversely, this goes hand in hand with the emergence of non-governmental regulators, making rules and standards without being intergovernmental bodies or public international organisations.

c) In the globalised world, there is a third tension in the sense of a growing acknowledgement and development of transnational legal realities.

The economic, social, cultural etc. interpenetration of national systems naturally results in such tension. Multinational companies are in essence transnational legal realities even though, taken individually, the legal mechanisms—found under corporate law, taxation law, etc.—on which their organisation rests are almost all borrowed from national

10 Auby, J.-B., *Globalization, Law and the State*, 2017, Hart Publishing; *La globalisation, le droit et l'État*, 2020, Montchrestien, 3rd edn; Basedow, J. & Kono, T. (eds.), *Legal Aspects of Globalization*, 2000, Kluwer Law International; Bolewski, W., *Diplomacy and International Law in Globalized Relations*, 2007, Springer; Cassese, S., *Lo spazio giuridico globale*, 2003, Editori Laterza; Chauvier, S., *Justice et droits à l'échelle mondiale*, 2006, Vrin & EHESS; Gessner, V. & Budak, A.C. (eds.), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, 1998, Ashgate/Dartmouth; Loquin, É. & Kessedjian, C. (eds.), *La mondialisation du droit*, 2000, Litec; Mockle, D. (ed.), *Mondialisation et État de droit*, 2002, Bruylant; Morand, C.-A. (ed.), *Le droit saisi par la mondialisation*, 2001, Bruylant; Berman, P.S. (ed.), *The Globalization of International Law*, 2005, Ashgate; Teubner, G. (ed.), *Global Law without a State*, 1997, Dartmouth; Wiener, J., *Globalization and the Harmonization of Law*, 1999, London and New York, Pinter; Zifcak, S. (ed.), *Globalization and the Rule of Law*, 2005, Routledge.

law. Cross-border pollution is regulated thanks to an interlocking of mechanisms borrowed from the national laws concerned, sometimes combined with elements of international law.

d) It is quite easy to understand that the phenomena just touched upon bring about profound changes to the relationships between legal systems. These changes are closely related to a factor that is also easy to understand, as follows. The more legal systems face external consequences, the more they themselves will produce external consequences, the less they are suited to controlling the legal processes that pass through them and, at the same time, the less their mechanisms remain confined to what is specific to them: they become both insufficient in scale and externally relevant![11]

Perhaps even more than the rules of which it is composed, legal globalisation is then characterised by the relationships between systems found therein. Three trends strike us as characteristic here. First, the trend of "permeabilisation" affecting legal systems: globalisation renders legal systems more vulnerable to the influx of external norms or rules. Next, the trend of competition between legal systems: globalisation makes their differences and similarities, advantages and disadvantages, both more visible and more significant in the eyes of the growing numbers of players who find themselves, or may find themselves, immersed in a variety of legal contexts. Lastly, the trend towards the harmonisation of legal systems: confronted with and interpenetrated by each other, legal systems tend to harmonise their disparate solutions concerning the activities and phenomena affected by globalisation.

e) It is important to bear in mind that the phenomena linked to globalisation can be both vertical and horizontal in nature.

The current importance of horizontal flows of legal transnationality is easy to understand. The numbers of players and situations straddling national legal systems continue to grow, bringing with them new legal challenges, be it by their nature or by their scale.

Legal globalisation also crosses legal systems 'vertically'. It imbues them with international norms, but it also increasingly places the onus on legal systems for the practical implementation of those norms. It modifies the allocation of responsibilities between national systems and international legal bodies.

f) It is worth having in mind that, on various aspects, the European construct is a vehicle for legal globalisation. It frequently serves as a kind of 'transmission belt' for global law—and that does not apply solely to international trade law, or the law of the WTO. In other areas, the European Union serves as a tool in rendering compulsory for all Member States various norms of global law that did not bind all of them this is what happened, for instance, in 1982, with the 1973 Washington Convention on the International Trade in Endangered Species of Wild Flora and Fauna.[12]

It also acts as a 'fire-break' in that it works in adapting legal globalisation trends to the specific imperatives recognised by European nations—or at least it does so clearly in economic matters and in relations with the WTO, in matters regarding genetically-modified organisms, for instance. As regards the globalisation of human rights, however, the quest for autonomy and particularism is traditionally less significant, the desire for harmonisa-

11 On this last point, see in particular: Battini, S., "The Globalization of Public Law", *European Review of Public Law* 2006, vol. 18, nº 1, p. 27.

12 Gautron, J.-C. & Brard, L., "Le droit international et la construction européenne", in Société française de Droit international, *Droit international et droit communautaire: perspectives actuelles*, 2000, Pedone, p. 11.

tion being especially strong; but we know that, since *Kadi*,[13] the European Union has reserved the right to assert its own specific heritage in the field of fundamental rights protection against global law when necessary.

3. *Practical implications: the states' position*

One of the most obvious consequences of legal globalisation is that it has led to an erosion of the normative primacy of states. However, one must consider this development with caution, as it has not been a straightforward process. In spite of the undeniable decline in their legal power, states have maintained their regulatory functions at a high level. Nevertheless, globalisation inevitably calls for reflection on how sovereignty might evolve.

a) There is no doubt that globalisation brings with it a decline in the economic and political power of States. Decisions made by the latter are increasingly fenced in by international constraints, be they global or regional. Their economic might is challenged by that of large corporations. In terms of legitimacy, they have to compete with various other entities devoted to seeking the public interest, from NGOs to local authorities. Transnational situations, mechanisms and entities are flourishing and increasingly tend to elude State control.

Globalisation is, of course, only one of many factors in this decline, and finds itself challenged by other factors. For instance, contrary to what is sometimes asserted, globalisation is not the root cause of the privatisation policies led here and there, particularly in the industrialised world, which have significantly reduced the scope for State intervention in economic matters. Globalisation has simply supported and disseminated those policies: for instance, in the funding provided by the World Bank, which is particularly favourable to public-private partnerships, a growing share of which has recently funded schemes pairing governments with private-sector partners.

In those areas where its influence is most strongly felt, globalisation also brings with it—partly as a corollary, partly through a distinct trend a decline in the State's legal power. This decline, which we noted above, may be characterised by various factors, which may be linked to the common idea of the State's loss of legal centrality.[14]

The most extreme symptom of this evolution relates to scenarios in which States have consented to genuine surrenders of sovereignty to international bodies: the most advanced example of these being the European Union, in which sovereignty is actually shared between the Union and Member States.[15]

Under globalisation, States are also competing with other lawmakers, both public and private. The case of the latter will be referred to below.

In addition to the above, there is the fact that, in the sphere of legal globalisation, States have increasingly agreed to the creation of 'deposits' of norms that are theoretically under their remit, but which operate largely independently of them. An accentuated form of the phenomenon can be found in those cases where States endow international institutions with the possibility of producing secondary legislation. The European Union

13 CJEU, Case C-402/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

14 Walker, N. (ed.), *Sovereignty in Transition*, 2002, Hart Publishing.

15 Jacqué, J.-P., *Droit institutionnel de l'Union européenne*, 2004, Dalloz, 3rd edn, p. 90 ff.

is clearly the main example here. To a lesser extent, ECHR law, together with WTO law,[16] present the same characteristics as legal entities/'vessels' that have largely severed their ties with the legal authority of the States that created them.

Naturally, in all of these scenarios, States theoretically retain the option of withdrawing from the corresponding organisations, but, in general, such an action would appear to be quite out of proportion.

One of the effects of legal globalisation is the entry of external norms into national legal systems, which increasingly come into contact with legal rules and mechanisms situated near the top of the hierarchy within those systems. EU law—like ECHR law, for that matter—intersect with with constitutional principles. In *Sirdar* and *Kreil*, the Court of Justice stated that the Community rule on equal treatment of men and women in the context of their professional activities applies to access to military posts; this directly contradicts German constitutional law, which excludes women from the armed forces—the combat units, at least.[17]

Various conventional sovereignty instruments are framed by a variety of external legal constraints. The states' power to intervene in economic matters has been altered by the limits imposed on the provision of public financial/economic aid by WTO rules, or EU rules on state aid. Their power to impose and collect taxes is limited by a number of agreements, particularly those adopted at the request of the OECD, and by EU constraints for EU Member States.[18]

States are sometimes legally framed in another sense: by the combination of internal and external forces that can 'sandwich' them. This is the case for environmental protection groups relying on international conventions to combat inertia in ecological matters on the part of their home States. It is also the case for national courts relying on international norms in order to extend their margin for review, where they consider it too narrow.

Until recently, domestic legal players generally pulled more in the direction of safeguarding/protecting the national system—through greater awareness/better knowledge, at the very least—and it was often the State that forced them to adapt to international legal innovations. Nowadays, those same players have not infrequently used international norms—including, on occasion, decisions handed down by international courts—in order to gain greater independence vis à vis the State. Furthermore, where necessary, the latter has responded by encouraging the creation of new international instruments, which simply perpetuates the cycle.

b) That said, it must be acknowledged that, despite globalisation, the power of nation states remains considerable.

Despite common assumptions, the economic weight of the states has continued to

16 Bederman, D.J., "Diversity and Permeability in Transnational Governance", 57 *Emory Law Journal* 201, 2007-2008: 'What distinguishes the WTO and a handful of other international organizations is the extent to which they have diverged from their original state-centered modes of operation and have, instead, sought legitimacy from, and accountability to, a wide variety of international stakeholders, while also pursuing goals and embracing values that might be divergent from many (if not most) states. Another distinguishing factor for these international entities is the degree to which they can compel states to obey their decisions without recourse to domestic enforcement mechanisms' (p. 215).

17 Schwarze, J., "Constitutional Perspectives in the European Union with Regard to the Next Intergovernmental Conference in 2004", *European Public Law* 2002, vol. 8, nº 2, p. 241.

18 Bouvier, M., *Introduction au droit fiscal général et à la théorie de l'impôt*, 2003, Librairie Générale de Droit et de Jurisprudence, 5th edn., p. 158 ff.

grow. In the 1980s, the share of public expenditure in GDP rose on average from 36% to 40%. Studies conducted by the OECD have shown that, between 1990 and 1995, State power grew significantly in industrialised countries, owing to the increase in transfers and subsidies.[19]

Moreover, the State has made something of a comeback in some domains, some international institutions having been convinced that the former remained a key factor in maintaining balance in the complex tangle of economic and political relations created by globalisation. The UN subscribed to that idea.[20] More strikingly, the World Bank, which had been a proponent of small government, also rallied to the cause, as was shown in its 1997 Annual Report which emphasised the importance of state institutions while pointing out ways to increase credibility and efficiency.[21]

Anyway, it appears that the State remains by far the most—and sometimes the only—appropriate entity for performing a number of essential functions. Peace and collective security rest with the State. It remains the 'indispensable focal point of political debate'.[22] It determines national structural policies on competitiveness; and it is the State that ensures, for the most part, economic and social regulation and risk management in our open economies.

The State remains the regulator—or, at the very least, the main regulator, of legal relationships between domestic/internal and external systems. Whatever the scale of transnational legal relations, whatever the scale of legal systems 'permeabilisation', States continue to control the majority of legal flows between internal and external systems. International law always leaves States a great deal of freedom in deciding who can enter their territory,[23] as a general rule, States retain the power to designate the legal realities that they consider as belonging to their system: nationality, legal personality, etc.

States remain the near-exclusive guardians of the enforcement powers, even when it comes to implementing rules of international origin.[24]

c) Nevertheless, it is difficult not to admit that globalisation has rendered necessary a re-examination of the very concept of sovereignty.

Certainly, if one settles for a formal view of this notion, one may consider that nothing has really changed. As stated by Lord Bridge in one of the decisions handed down by the House of Lords in *Factortame*, '[w]hatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary'.[25]

19 de Senarclens, P. (2005), *La mondialisation*, op. cit., p. 82; see also Gilpin, R., *Global Political Economy: Understanding the International Economic Order*, 2001, Princeton University Press, p. 362 ff.

20 Daudet, Y. (ed.), *Les Nations unies et la restauration de l'État*, 1995, Pedone, p. 79.

21 Shihata, I., "The Changing Role of the State and Some Related Governance Issues", *Revue européenne de droit public* 1999, vol. 4, nº 4, p. 1459.

22 Crépeau, F., "Introduction", in Crépeau, F. (ed.), *Mondialisation des échanges et fonctions de l'État*, 1997, Bruylant, p. 12.

23 Dauvergne, C., "Illegal Migration and Sovereignty", in Dauvergne, C. (ed.), *Jurisprudence for an Interconnected Globe*, op. cit.

24 Scott, J., "Member States and Regions in Community Law: Convergence and Divergence", in Beaumont, P., Myones, C. & Walker, N. (eds.), *Convergence and Divergence in European Public Law*, 2000, Hart Publishing, p. 19; Jans, J. et al. (eds.), *Europeanisation of Public Law*, 2007, Europa Law Publishing.

25 See Craig, P., "The Impact of Community Law on Public Law", in Leyland, P. & Woods, T. (eds.), *Administrative Law Facing the Future: Old Constraints and New Horizons*, 1999, Blackstone, p. 271.

From the same formal perspective, we may accept that 'international law is a law made by States, even where they are divested of their power, as such detachment is an act of sovereignty'.[26]

But one cannot help but feel that this formal vision does not account adequately for realities arising from globalisation, in which the State's legal powers have been reduced, challenged, or transferred; or, if it does account for these, it is just through a mere statement of principle.

Thus, various different lines of reasoning have been put forward by a number of authors.[27]

The first one focuses on the essential mediation functions that the State performs under globalisation: functions involving the regulation of legal flows, guaranteeing legal certainty, or as the legal authority over the market etc. From this point of view, sovereignty would appear to be as much a responsibility as a right. In the world of legal globalisation, the State performs a number of essential intermediary tasks in the service of global public interest,[28] while also guaranteeing its domestic/internal equilibrium.

The second path focuses on the fact that, to an increasing extent, sovereignty appears to be shared. Obviously, this is especially evident in the relations between the European Union and its Member States. In the context of the European Union, sovereignty is therefore shared: Member States have kept one part exclusively but exercise the other part in conjunction with the Union, i.e. with the States as a collective whole.[29] Yet is is a broader phenomenon. In various areas impacted by globalisation, we may also see the growing obligation incumbent on States collectively to exercise their attributes of sovereignty: one study demonstrates the increasingly divided nature of state sovereignty with regard to nationality.[30] Sovereignty is 'mutualised' to an ever-increasing extent.[31]

This naturally leads to consider a conception of 'inclusive' or 'co-operative' sovereignty, which corresponds to the following notions. Bearing in mind the scale of transnational legal realities, the extent of legal systems' 'permeabilisation', as well as the powerful phenomena associated with multi-level governance which we shall soon discuss, the traditional definitions of sovereignty, which define it as an exclusive power, are not really tenable. Hence the position, defended by Ulrich Beck,[32] under which a concept of inclusive sovereignty is emerging, in which the State's power is not defined independently of its transnational confines.

Indeed, sovereignty must increasingly be conceived as a relational resource rather than a sphere of autonomy. According to Robert Keohane, '[*s*]*overeignty is less a territorial-*

26 de Béchillon, D., "La structure des normes juridiques à l'épreuve de la post-modernité", *Revue interdisciplinaire d'études juridiques* 1999, nº 43, p. 1.

27 Jacobsen, T. et al. (eds.), *Re-envisioning Sovereignty*, 2008, Ashgate; Shan, W. et al. (eds.), *Redefining Sovereignty in International Economic Law*, 2008, Hart Publishing.

28 Penhaler, P., "The New Function of Small States in a World that Gets Connected", *Revue européenne de droit public* 2000, vol. 12, nº 1, p. 63.

29 Chaltiel, F., *La souveraineté de l'État et l'Union européenne. L'exemple français. Recherches sur la souveraineté de l'État membre*, 2000, Librairie Générale de Droit et de Jurisprudence.

30 Bosniak, L., "Multiple Nationality and the Postnational Transformation of Citizenship", *Virginia Journal of International Law* 2002, vol. 42, p. 979.

31 Bayart, J.-F., *Le gouvernement du monde. Une critique politique de la globalisation*, 2004, Grasset, p. 53 ff.

32 *Beck, U., What is Globalization?,* 2000, Polity Press, *p. 132 ff.*

ly defined barrier than a bargaining resource for a politics characterised by complex transnational networks'.[33]

Modern sovereignty, it could be argued, should be understood as co-operative: no longer a negative principle of independence, but a positive one reflecting membership of the international community and the duty to make an active contribution to its development.[34]

4. *Practical implications: the rise of non-state actors*

One of the key features of legal globalisation is that, building on and significantly intensifying a trend already begun in the previous phase of internationalisation, it brings numerous non-state actors into the international legal sphere where states previously held a monopoly.

To fully understand this phenomenon, it is important to recognise that it operates on three levels: some non-state actors have gradually established themselves as addressees of international norms, others have become actors in legal globalisation while others still have reached the position of regulators.

While international standards, traditionally drawn up by states, are aimed at states—it is to them that their provisions are directed—we have seen a growing number of these standards being directed at non-state entities, which can be individuals, or other kinds of private actors, or even sub-state public institutions. International human rights law most often provides individuals with rights they can invoke. International economic law is increasingly becoming a resource that economic can utilise. And local public bodies are increasingly subject to international rules, for example in the area of procurement.

Second, certain private entities have effectively established themselves as actors in legal globalisation: they have gained the ability to mobilise international legal resources to further their objectives.

This refers to a range of emerging players. Among them are: some large and therefore influential multinational companies, some international associations of businesses (in the construction field, notably), various non-profit non-governmental organisations (sometimes also quite big, like Greenpeace), contracted out entities (entrusted by international organisations with part of their duties), infra-statal public entities (local governments).

The third level concerns entities that have genuinely attained the status of regulators, and the ability to contribute to the development of internationally recognised rules.[35] It applies to two categories of entities. The first consists of non-state actors that nevertheless have some links with state institutions. The most striking examples of this are: the Basel Committee on Banking Supervision, a regular gathering of central bank heads, which has the power to adopt prudential rules concerning the functioning of banks, ICANN, which

33 "Hobbes' Dilemma and Institutional Change in World Politics: Sovereignty in International Society", in Holm, H.-H. & Sorensen, G. (eds.), *Whose World Orders?*, 1995, Boulder, Colorado, Westview Press, p. 165. See also McGrew, A., "Global Legal Interaction and Present-Day Patterns of Globalization", in Gessner, V. & Budak, A.C. (eds.), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, op. cit., p. 325.

34 Perez, F.X., *Cooperative Sovereignty: From Independence to Interdependence in the Structure of International Law*, 2000, Kluwer Law International.

35 Peters, A. et al. (eds.), *Non-State Actors as Standard Setters*, 2009, Cambridge University Press.

has the power to allocate Internet domain names; and ISO, an international federation of national standardisation bodies. All three have a private law legal nature: the Basel Committee and ISO are associations; ICANN is a firm registered under Californian law.

The second category comprises NGOs that have gained the ability to become genuine standard-setters. Some NGOs, in effect, have acquired such a high level of legal expertise in their field that they are sometimes associated—without voting but sometimes with real influence—with the elaboration of inter-state conventions, or secondary law: in environmental law, human rights…More What is more interesting: they sometimes draft private texts or propose norms: codes of conduct, guidelines, interpretative treaty commentaries…. Examples of this are: the Limburg Principles on the Interpretation of the International Covenant on Economic, Social and Cultural Rights of 1997, the Montreal Principles on Women's Economic Social and Cultural Rights of 1997, the Princeton Principles on Universal Jurisdiction of 2000.

5. *Practical implications: convergence around shared values*

One of the most striking features of the contemporary evolution of legal internationality is the development and constant enrichment of a common body of general principles to which states—or a large proportion of them—adhere or pretend to adhere. In the movement towards legal harmonization brought about by internationalisation and globalisation, convergence through principles plays a significant role.

These principles, around which a kind of legal consensus has been forming, vary in scope and reach, but it is clear that at their core lie the essential principles of the protection of fundamental rights. What is remarkable is not only the convergence around the recognition of these now diverse principles—ranging from the prohibition of torture to the protection of children and gender equality…—but also the convergence in the instruments of protection: a common legal framework, which affects the jurisdiction of judges—universal jurisdiction, to which we shall return—judicial remedies—such as habeas corpus, amparo…[36]—and the powers of judges—proportionality review—is becoming increasingly widespread.

Closely linked to the issue of fundamental rights are the principles relating to the rule of law, which is also becoming a commonly recognised value.[37]

It is worth adding that principles are emerging which are not general in the sense of being situated at the pinnacle of the corresponding legal system, but rather in the sense of being prominent principles within a particular sector of law. Environmental law, in its international, European and national dimensions, is a perfect illustration of this.[38]

It should also be emphasised that these general principles around which the international community more or less converges have different legal statuses. Some are strictly recognised as general principles within the legal system to which they belong: international law contains general principles 'recognised by civilised nations',[39] European Union

36 della Cananea, G., *Due Process of Law beyond the State*, 2016, Oxford University Press.

37 See, eg.: Zifcak, S. (ed.), *Globalization and the Rule of Law*, 2005, Routledge.

38 Beurier, J.-P., *International Environmental Law*, 2010, Pedone, 4th edn.; Birnie, P., Boyle, A. & Redgwell, C., *International Law & the Environment*, 2009, Oxford University Press.

39 Kaczorowska, A., *Public International Law*, 2024, Routledge, 6th edn., pp. 56 ff.

law has developed its own general principles,[40] and certain national administrative laws make provision for 'general principles of law', which serve to fill the gaps in statutory law regarding the protection of citizens.[41]

Others play a pivotal role within their legal systems, without being formally recognised as such. The two approaches can, moreover, coexist: thus, European administrative law relies on a number of principles which play an indisputable role as general principles within it, without necessarily constituting 'general principles of law' of the Union in the sense adopted by the Court of Justice: proportionality is one such example.[42]

The trends towards internationalisation and globalisation have thus given rise to a sort of common heritage of general principles that runs through the legal internationality of modernity and, in particular, the common European legal architecture. Some point out that these common principles are often subject to divergent interpretations—one need only consider the issue of gender equality. The extent to which they are genuinely upheld in the various systems that embody them naturally varies. It is true that, in this regard, Europe does have a fairly good track record.

This does not detract, however, from the marked phenomenon of ideological convergence towards a shared heritage of general principles.

6. Practical implications: changes affecting inter-systemic relationships

Through various channels, the trend towards internationalisation, and subsequently globalisation, has had consequences—some obvious, others less so—on the relationships between legal systems.

a) The key point is that this trend has increased the level of permeability of national systems, and the openness with which they embrace external standards. Strikingly, most of them have readily opened themselves up to external influences: the phenomenon is, of course, particularly pronounced in the European sphere.

Another notable aspect of this trend is that it increasingly places external norms in direct conflict with the highest norms of national legal systems and thus with the more or less fundamental principles of their constitutions.[43]

This means, on the whole, that the boundaries between international and domestic law have become more porous. This obviously does not prevent them from remaining essentially distinct, but it does have some implications for their vertical and horizontal relationships.

b) It is also important to emphasise that the intensification of relations between legal systems, brought about by the twin trends of internationalisation and globalisation, has also had 'horizontal' consequences; that is to say, consequences that affect segments at the same level within the three normative spheres whose interrelationships we are examining.

Firstly, one can observe a growing complexity in the territorialisation of law.

40 Xenou, L., *General Principles of European Union Law and French Administrative Case Law*, 2017, Bruylant.

41 della Cananea, G. & Auby, J.-B. (eds.), *General Principles and Sector-Specific Rules in European Administrative Law*, 2024, Oxford University Press.

42 On the principles of European administrative law: Galetta, D.-U. & Ziller, J., *EU Administrative Law*, 2024, Edward Elgar, p. 121.

43 Auby, J.-B. (2017), *Globalization, Law and the State*, op. cit., p. 104.

The relationship between law and territories in the international sphere has never been entirely straightforward, even in the Westphalian era. The demands of international trade have long countered the all-too-hasty assumption that legal systems coincide with state borders, forging that fabric of extraterritoriality which is, in essence, private international law.[44]

Public law, on the other hand, seemed firmly confined within state borders—or multi-state borders in the case of acts undertaken jointly by several states, whether within an international organisation or not. This principle, however, had to yield ground, for example to the extent indicated by the Permanent Court of International Justice on 7 September 1927 in the *Lotus* case: the law of one State may be applied on the territory of another State if there is some justification for doing so—a link of nationality concerning persons and vessels, as in the *Lotus* case itself, for example—provided that the former does not seek to exercise any act of coercion on the territory of the latter.

One could say more about the nuances of the link between law and territories in the classical organisation of the world and, for example, about the subtle realities that lie beneath the concept of a border.[45]

The fact remains, however, that modern trends towards internationalisation and globalisation have introduced powerful factors that have made this link more complex.

To be pragmatic, one might say that these factors sometimes relate to the concrete objects to which the rules of law apply, and sometimes rather to a movement inherent in the law itself.

The best possible example of the first scenario is environmental law, whose international and European developments increasingly tend to disregard state borders: for instance, by addressing the problems posed by an entire sea—the Mediterranean and plastic—or a particular transboundary wetland.[46]

The second is illustrated, for example, by the principle of universal jurisdiction, for it is indeed a specifically legal concern to enable the universal prosecution of certain crimes considered particularly serious that gives rise to this concept, accepted by certain states at certain periods in their history[47] and which constitutes the most flagrant negation of territoriality.

It is also illustrated, to take another example from a very different context, by the principle of mutual recognition that EU law has embraced since the 'Cassis de Dijon' judgment, born of the concern to ensure that states do not hide behind the supposed particularities of their local trademarks to obstruct the free movement of goods.[48]

These scattered examples, which could be supplemented by various others, are now joined—overarching them, one might say—the digitisation of our civilisation and its uni-

44 Bureau, D. & Muir Watt, H., *Droit international privé*, 2007, Presses Universitaires de France, vol. I, nº 74 ff.

45 de Visscher, C., *Problèmes de confins en droit international public*, 1969, Pedone.

46 Boisson de Chazournes, L., in Alland, D. (ed.), *Droit international public*, 2000, Presses Universitaires de France, pp. 727 ff.: 'Environmental protection requires... transcending the spatial division of territoriality defined by political borders. New strategies based on the concepts of the ecosystem and the biosphere have therefore been put in place, highlighting the ecological interdependence of the components of these systems at regional, pan-regional and global levels'; Jolivet, S., *La conservation de la nature transfrontalière*, 2015, Mare & Martin.

47 Klabbers, J., *International Law*, op. cit., pp. 101 ff.

48 CJEU, 20 Feb. 1979, Case 120/78, [1979] ECR 649.

versal coverage by the Internet,[49] which add a further, highly significant layer to the increasing complexity of the relationship between law and territories: to the point of creating a sort of 'de-spatialisation' of human activities, which become more difficult to locate and therefore to regulate through the law.

c) The (relative) weakening of the territoriality of law in the contemporary era is accompanied by various phenomena of legal spillover, which are broadly of two kinds.

They sometimes stem from legal effects agreed between the systems concerned, possibly imposed by one of them.

At other times, they result more from conceptually inspired effects: the growing intensity of links between different legal systems, particularly those reflected in judicial dialogue, makes the era of globalisation a period of constant and intense legal benchmarking, in which individual systems compare themselves with their counterparts and, here and there, adopt their solutions.

Phenomena of legal extraterritoriality are not absent at the global level. These include, by virtue of the unilateral decision of certain state systems, as in the case, already mentioned, of universal jurisdiction, and as in the extraterritorial application of US legislation aimed at sanctioning certain countries, particularly for acts of corruption, compliance with which is imposed on companies from third countries wishing to conduct business within the United States.[50]

At the global level, the circulation of ideas on constitutional matters, particularly regarding the guarantee of fundamental rights, is intense and fuelled by the actions of various public and private entities.[51]

Situations of legal influence are also found in relations between the European Union and the rest of the international community.

Legal extraterritoriality is present here, albeit with a slightly different meaning from what has just been described. European Union competition law and its data protection law—the GDPR—do indeed apply to non-European companies, but only with respect to their activities on European soil, not because of the stance they may take towards third countries.

However, EU law also has international spillover effects in cases where compliance is not mandatory. Particularly worth mentioning here is the 'Brussels effect', as described by Ann Bradford,[52] which encourages companies from third countries to voluntarily comply with certain European regulations simply in order to maintain their long-term access to the European market.

d) Legal globalisation, which fosters interrelationships between legal systems, inherently gives rise to situations of legal transnationality: that is to say, scenarios in which legal actors subject to two different systems find themselves involved in a transnational legal situation, whether because they belong to a common transnational institution, are part of the same procedural chain, are engaged in the same litigation, and so on.

Naturally, in the sphere of private law, these situations are not without precedent, as they have long been addressed by private international law. However, the same does not apply in the sphere of public law, and this is due to the traditionally accepted principle

49 Maurel, R., *Droit de l'Internet*, 2024, Bréal.

50 Dupuy, P.-M. & Kerbrat, Y., *Public International Law*, 2018, Dalloz, 14th edn., nº 103 ff.

51 Ginsburg, T. & Dixon, R. (eds.), *Comparative Constitutional Law*, 2011, Edward Elgar, pp. 387 ff.

52 Bradford, A., *The Brussels Effect: How the European Union Rules the World*, 2020, Oxford University Press.

of the territoriality of public law: the idea that its application in principle[53] stops at the borders of the State it governs.

Relations between public authorities belonging to different states are, in part, diplomatic in nature and fully governed by international law; but they are also, in part, relations not covered by international law, even if they may be partially addressed by international conventions. Of particular relevance here are administrative relations which, even though they involve political authorities, do not themselves fall within the scope of international law: as in the case of intergovernmental agreements.

New efforts are currently being made to develop a body of law capable of regulating these transnational legal relationships, which private international law and public international law address only marginally. This is the approach being pursued in the field of transnational administrative law.[54]

The aim of this doctrinal approach is to clarify the law governing situations in which public authorities from different states interact without being part of a relationship governed by international law, because they are engaged in administrative tasks or, more broadly, executive functions, which in a sense remain below the threshold of true internationality.

Such situations are, of course, extremely common, including for trivial reasons: the joint management of a border river, but also quite simply the organisation of respective customs checks at an international airport or railway station. But it also concerns more unusual and potentially legally thorny cases, such as those found, for example, in relations between international organisations.[55]

The European Union is a model for transnational public law, in that its functioning relies on the cooperation of states—in good faith, in accordance with the treaties—for the implementation of its standards and policies. This can also be seen by observing that the architecture of the Union's construction relies ever more each day on a European administrative space, an interweaving of mechanisms, procedures and institutions that contribute in practical terms both to the implementation of the Union's standards and policies and to the daily provision of the public goods it delivers.[56]

The theory of transnational administrative law endeavours to analyse systematically the conditions under which the transnational situations it considers arise and the principles governing them. It soon encounters the problem of the law applicable to these situations, an issue on which it does not yet possess the sophisticated theoretical and positive legal framework that private international law has constructed.

Within the framework of the European Union, the subject has nevertheless matured in certain respects concerning cross-border cooperation.[57] The corresponding frameworks are governed by conventions which determine the national law applicable, in principle, to each of them.

In this field lies a quite concrete yet straightforward evolution of legal globalisation.

53 On the nuances associated with this principle, see in particular: Mayer, P., "The Role of Public Law in Private International Law", *Revue internationale de droit comparé* 1986, nº 2, pp. 467-485.

54 Auby, J.-B. et al. (eds.), *Traité de droit administratif transnational*, 2025, Bruylant, Droit administratif/Administrative Law series.

55 Klabbers, J., *An Introduction to International Organizations Law*, 2022, Cambridge University Press, 4th edn.

56 Chevalier, E. et al., in Auby, J.-B. & Dutheil de la Rochère, J. (eds.), *Traité de droit administratif européen*, 2022, Bruylant, 3rd edn., pp. 905 ff.

57 Bachoue-Pedrouzo, G. & Colavitti, R. (eds.), *Cross-Border Governance*, 2022, Bruylant.

7. *Value of the legal globalisation concept*

One can state that alongside legal globalisation, there are two types of alternative theory that may account for the phenomena it seeks to characterise. Some may be called theories of the internationalisation of law, while others may be dubbed theories of the convergence of laws; neither type strikes us as being able to account for the current legal configuration of the world.

It is quite tempting to say that, in order to characterise that legal configuration, it is quite simply marked by an increase, in terms of international norms, in the regulation of legal relations within global society. The particularity of today's legal world simply lies in the fact that law is drawn towards international law, domestic norms increasingly giving way to international norms.

As an example, Giuliana Ziccardi Capaldo's work, *The Pillars of Global Law,*[58] is fairly characteristic of that line of thinking. The author argues that what characterises the contemporary situation is nothing more than a sort of completion of the historic project under public international law, in the sense of the 'verticality', legality, integration and development of collective guarantees.

The phenomena of internationalisation, the increasing overtaking of national rules by international norms are self-evident and indisputable. However, if we settle for simply stating that what we are witnessing is merely an internationalisation of law, the world's national laws being drawn towards an international dimension, and the subjugation of the world's laws to shared international values, we run the risk of missing at least two realities.

The first one is that, if we look closely, we find that it is increasingly through domestic law that international norms—which are steadily growing, admittedly—have an impact. The determining feature here is the fact that, particularly through direct effect mechanisms, international norms come to find within national legal—and particularly judicial—mechanisms a springboard for effectiveness that they struggle to find on an international level. It is an odd sort of 'internationalisation of law' whose secret depends so much on domestic law!

The second one is that, if we look closely yet again, we can see that this international law, whose influence is increasingly felt in domestic law, has a growing tendency to distance itself from international concerns in order to busy itself increasingly with domestic issues: particularly practical issues, often of an administrative nature, concerning the environment, immigration, economic regulation... It is an odd sort of 'internationalisation of law', in the context of which international norms are increasingly concerned with issues of domestic law.

A fortiori, theories that see the triumph of public international law—or, on the contrary, of private international law—in today's realities appear to be thoroughly unsuitable.

Have we been witnessing the triumph of public international law, of the management of things, beings and law by the international community through its political bodies? This is quite difficult to accept both for the general reasons mentioned above and because, indisputably, in what is unfolding before our very eyes, there is much that rests on private relationships, private mechanisms, a social and economic fabric in which States

58 Ziccardi Capaldo, G., *The Pillars of Global Law,* 2008, Ashgate.

are largely absent. The internet, international trade, the standardisation broadly regulate themselves outside the scope of the mechanisms of public international law.

Are we witnessing the triumph of private international law which, particularly because it broadly holds in its hands the extremely important reality that is international trade, could be the principal regulator of the new legal world? This is equally difficult to accept, again for the general reasons cited above, and also because, in what is happening today, so many phenomena are linked to the public sphere, public governance, public law. There is not a lot of private law in the globalisation of environmental law, or that of fundamental rights, for example.

As regards the views that can be grouped together under the umbrella term of 'theories of convergence of laws', the core of what is taking place in the modern legal world can be characterised as a movement of convergence of laws towards common standards, even the progressive creation of a global *ius commune*.

In truth, there are two versions of these conceptions. The first, which may be deemed optimistic, and which is an embodiment of cosmopolitanism sees in this trend of internationalisation of law the signs of humanity's irresistible—though chaotic—progression towards a common law, the core or spirit of which will be the internationally-recognised corpus of fundamental rights. Mireille Delmas-Marty's work embraces this view.[59]

In the pessimistic version of these theories of convergence of laws, what is currently playing out is more the gradual subjugation of all laws to principles and standards inspired by neo-liberalism, essentially North American in origin. This is particularly the theory of "hegemonic globalisation", the most famous spokesman of which is Boaventura de Sousa Santos.[60]

In both cases, these theories may be considered simplistic.

The former is simplistic in terms of its idealistic register. A certain amount of good will is required in order to think that international society would be guided on any significant level by a draft law. Furthermore, the theory of convergence of laws towards a common law tends to ignore the irreducible pluralism which is the very essence of any legal system; the international legal community has no reason to be more homogenous than domestic systems already are if we examine them closely.

The latter is a sort of conspiracy theory, which we can only accept if we ignore the fact that it is based on a combination of factors. It distorts reality by presenting the link between the opening-up of international relations and the progress of liberalism as a logical sequence. In such a conceptual framework, how can we explain China's position, which currently appears to be one of the systems best adapted to economic globalisation and cannot readily be accepted as a liberal system? Naturally, there is a sort of historical coincidence between the advances made, during the 1980s and 90s, with international economic opportunities on the one hand, and the neo-liberal policies of certain States on the other. However, even in accepting that each of these fuelled the other, the two phenomena were separate in nature, which proves that some national systems remained separate from the latter whilst participating in the former.

Theories of legal globalisation are more realistic—and more relativistic. They regard the globalisation process as a complex, uneven evolution, separate from any comprehen-

59 Delmas-Marty, M., *Trois défis pour un droit mondial*, 1997, Le Seuil.

60 de Sousa Santos, B. & Rodríguez-Garavito, C. (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, 2005, Cambridge University Press.

sive project. They themselves are not homogenous. Their proponents sometimes disagree on issues of particular importance. For example, on that concerning the place to be granted to the State: for some, we have already reached a stage of 'law without the State';[61] for others, the State remains an essential regulator in legal globalisation, although this may be subject to different modalities.[62] They commonly place the focus on the growing interconnectedness in the legal architecture and functioning of the world.

II. Is the Concept of Legal Globalisation Still Relevant

The world is currently undergoing such a period of upheaval that the analyses presented above could be significantly contradicted by the developments now unfolding. Prudence dictates that we pose a few final questions in this regard. A brief review of the current destabilising factors is necessary (1) in order to then attempt to identify their main possible consequences, as things currently stand (2), and the prospects they seem to open up (3).

1. Globalisation is in a phase of decline or reorientation

We are experiencing a new phase of post-modernity in international relations. A phase that is turbulent in various respects. It can be roughly defined as beginning with the 2008 financial crisis, then it was fuelled by other crises, including the Covid crisis, the disasters that climate change is causing here and there, along with the return of war in Europe with the Russian-Ukrainian conflict. All of this is capped by the rise to power in various major states—including the world's greatest power—of populist leaders who take nonconformist stances on international affairs and their regulation by law.

In light of what gave rise to the legal architecture born of the internationalisation and globalisation of law, as seen from Europe, one can, in very simple terms, suggest that these current chaotic developments are causing the world to regress in at least two significant directions.

On the one hand, while previous periods had made the world increasingly open and interconnected—and had correspondingly eroded the centrality of states—the current era is leading us to observe a certain tightening of the world around the power of states. This was very evident during the 2008 financial crisis as well as during the Covid crisis: in both cases, states regained the upper hand, and with unexpected force.

Conversely, some of the factors driving global openness have stalled, and this has been the case with economic globalisation. While it has not collapsed, global trade has declined, and the current battles over tariffs are likely to reinforce this trend.[63]

2. Practical implications: states

We are currently witnessing a paradoxical evolution of the state institution and its role within the international architecture of the world.

61 Teubner, G. (ed.), *Global Law without a State*, 1997, Dartmouth.

62 See, eg., Jarrod Wiener's demonstration (in *Globalization and the Harmonization of Law*, 1999, Pinter), in which he argues that legal globalisation does not occur through an international unification of law, but rather through a harmonisation of solutions presented by national legal systems.

63 See, eg.: Védrine, H., *Nouveau dictionnaire amoureux de la géopolitique*, 2025, Plon, entry on Globalisation (*Déglobalisation*).

In some respects, there are signs of a sort of resurgence of the state. The various crises have given rise to renewed state interventionism. This is reflected, first and foremost, in a very concrete manner through the constant strengthening of sovereign institutions—the police, the army...—and of states' intelligence capabilities.

This development has, moreover, been accepted even in contexts where attempts had been made to limit state intervention: evidence of this is, for example, the fact that European Union law has favoured a relaxation of restrictions on state aid and, conversely, has expanded the scope for states to oppose foreign investment.

However, conversely, various factors have contributed to a weakening of state power. Firstly, the rise of major private actors, to which we shall return.

But new wars, crises of all kinds, and climate emergencies have also created constraints. The internal erosion of various democratic regimes under the influence of populist movements has played a part as well.

It is not easy to say how this evolution will stabilise. The ups and downs of their power do not prevent states from retaining, domestically, the monopoly on legitimate coercion, from essentially controlling the normative function—such as the regulation of internal and external relations—and from controlling the essential levers of legal certainty.

3. Practical implications: non-state actors

As regards non-state actors, the current era presents us with a phenomenon of considerable significance: the emergence on the international stage of massive private entities that have flourished thanks to digital development—the GAFAM. These entities are becoming formidable powers, whose economic scale exceeds that of many states.

These new players do not claim to be law-makers—except where their internal regulations are concerned—but have entered into a constant tug-of-war with national and European regulatory authorities to ensure that these do not unduly restrict their activities. This struggle is particularly evident between the European Union and the GAFAM, which believe that the 2016 GDPR imposes excessive restrictions on their activities.

4. Practical implications: values

The relative consensus that was in the process of emerging on a foundation of values concerning democracy, the rule of law, and fundamental rights is nowadays strongly attacked, caught between the pressure of those who never truly embraced them and, where these values seemed to prevail, the pressure of populist ideologies that challenge them to varying degrees.

This is certainly the area where legal globalisation seems to be retreating most markedly. A growing scepticism affects not only the idea of globalisation, but even, beyond that, the internationalism developed after the Second World War.

In the same vein, the rule of law is being frequently questioned at both international and national level.

Some consensus factors remain strong, however. Among them: the need for climate action. The broad convergence on this is demonstrated by the widespread use of the courts around the world as a means of reminding governments of the urgency of climate change ('climate justice'), also the needthe need for developments providing a legal framework for artificial intelligence.

But it is true that the slow shift towards a kind of 'Rule of Law' in global governance

that had been discernible has certainly been halted.

International law is being severely shaken. The president of the world's leading power declares that he has 'no need' for it, his own morality serving as a sufficient guide. The other two major world powers, China and Russia, currently do not place much stock in it.

Yet behind these formal attitudes lie more complex realities. What the great powers are calling into question today is perhaps less international law in and of itself—it has been noted, for example, that in the highly tense Arctic region, states' economic zones are strictly respected—than a certain form of international law that has, in essence, been the dominant legal ideology since World War II: 'Kantian' international law, promising world peace through respect for fundamental rights and the values of the rule of law.[64]

The vision towards which we might be moving today may reflect less a rejection of law than a desire to move—or return?—towards a more realistic conception, in which international law appears more as a 'referee of brawls'. An international law that would focus on bilateral relations rather than on the search for global consensus: one that, in other words, would reconnect with its historical contractual essence, countering the evolution that has drawn it towards a somewhat legislative nature, towards the frantic pursuit of global public goods.[65]

In the foreseeable future, it is reasonable to assume that the European Union and its law will remain the principal guardian of the ideas of democracy, the rule of law, and good governance… as they can be translated into international law.

5. *Practical implications: inter-systemic relationships*

The attacks currently being levelled against international law might lead one to believe that this trend is also affecting the vertical and horizontal interpenetration of legal systems, which is such an essential feature of legal globalisation. And it is certainly true that many international legal instruments have lost, or are in the process of losing, some of their practical weight due to the prevailing climate of scepticism towards international law: this is certainly the case with various international mechanisms for the protection of human rights, which today inspire nothing but indifference in certain major powers, when they are not directly attacking them, as the United States are doing with the International Criminal Court.

But it must be clearly understood that, in the meantime, the concrete links of economic, social and cultural interconnection across the world are not diminishing significantly. At a time of major international trade battles, the World Trade Organisation regularly welcomes new members. International trade agreements, generally speaking, are being reoriented but are no less extensive.

In fact, the level of legal interconnection in the world is probably not reduced overall. The ties of legal globalisation are being reoriented rather than regressing as a whole. As some authors have written, we are witnessing 'reglobalisation' rather than 'deglobalisation'.[66]

64 Giudicelli, J., "International Law as a Project", *Revue de la Recherche Juridique - Droit prospectif* 2004, nº 1, pp. 1-29, hal-01943867.

65 Verhoeven, J., "Souveraineté et mondialisation: libres propos", in Loquin, É. & Kessedjian, C. (eds.), *La mondialisation du droit*, 2000, Litec, p. 43.

66 Benedikter, R., Gruber, M. & Kofler, I. (eds.), *Re-Globalization: New Frontiers of Political, Economic and Social Globalization*, 2022, Routledge; Bishop, M.L. & Payne, A., *Reglobalization*, 2021, Routledge.

6. *Is the concept of legal globalisation still valid?*

On the whole, it can be argued that the trajectory which, for at least a century and a half, has led the legal functioning of the world from internationalisation towards globalisation—that is, towards a high level of legal interconnection (which does not imply harmony, clear hierarchies, etc.)—has not been interrupted.

Now, the current upheavals force us to ask whether the concept of legal globalisation actually characterises the current legal functioning of the world, and whether it remains a key to understanding it.

To be honest, this depends on how one understands the concept of globalisation.

Some have a, shall we say, 'political' conception of it: globalisation would be an ideological project linked to neoliberalism (the withdrawal of states) and tending to lower the international protections of states and societies, which has been reflected in the law through a decline in state power and the growth of non-state actors and mechanisms, to the benefit of the major international powers.

If one shares this view, then one may feel that the era of globalisation and legal globalisation has been superseded by a different state of the world. The problem will therefore be to define this new era: what are its characteristics, compared to those of the era of globalisation?

The assessment differs if one adopts a more 'neutral' perspective and defines globalisation as a movement towards increasing interdependence and interconnection of the world, in its economic, social, cultural and, consequently, legal aspects. This alters the respective positions of the actors, the mechanisms of law-making and enforcement, and the relationships between legal systems, rendering them more complex. Without all this moving in a single political direction.

We must therefore accept that today's world is no less interconnected than it was in the past, despite the rifts that have emerged. Russia continues to trade with the rest of the world, albeit through different channels. New countries continue to join the WTO as mentioned earlier, whilst, despite its divisions, the Council of Europe has adopted a framework convention on artificial intelligence. International agreements on environmental issues—biodiversity, plastic in the seas, etc.—are regularly signed; and cross-border cooperation is developing everywhere.

The interconnectedness of the world is not merely an ideology; it is a social fact of postmodernity. It would take upheavals of great magnitude to undo it.

It continues to have an impact on the law, because the law is a very important social component of international relations, even if we sometimes have the impression that it is fragile at the international level because its proper application often depends on the goodwill of the actors.

The mistake lies in forming judgements based on the major global political issues, when the reality of international legal relations consists mainly of day-to-day dealings (in diplomatic, commercial, administrative and other spheres) that are not greatly affected by political upheavals.

If we consider these day-to-day relations, the hypothesis of globalisation and the concept of legal globalisation still appear valid.