moving from dissociation to correlation and finding the legal mechanisms that, in the presence of chaotic movements (integration/disintegration, internationalisation/renationalisation), can effect a balance apt to lead to transforming the very concept of legal order.

Conclusion
In the Land of Organised Clouds?

STUDYING THE INTERNATIONALISATION of law as movement, focusing on processes of interaction, organisational levels and speeds of transformation rather than their results, borders on calling into question the concept of legal order, perhaps even destroying the intuition that a legal order even exists and resists law’s internationalisation and globalisation. In this regard, I am once again following Bachelard, who wrote that ‘[i]ntuitions are very useful: their purpose is to be destroyed’.1 But I have not forgotten that his *Philosophie du non* (The Philosophy of No) does not result from a simple desire to negate. ‘It does not negate just anything, any time, in any old way,’ but includes, or envelopes what it negates. For example, ‘non-Euclidean geometry envelopes Euclidean geometry, non-Newtonian physics envelopes Newtonian physics, wave mechanics envelopes relative mechanics.’2

From this perspective, it would seem that the Euclidean (‘modern’) view of the legal order—identified with the state and represented as a system of norms and institutions at once hierarchical, territorial and synchronised—is now enveloped by a non-Euclidean (so-called ‘postmodern’) conception. With the proliferation, diversification and dispersion of sources,3 the state has been challenged in its principal forms: the centralised state has been weakened by the decentralisation of sources and the public-sphere state by their privatisation; but above all, the nation-state, which expresses the sovereignty of a community comprised of entwined interests and

---

2 Ibid., p 137.
identical aspirations, has seen this sovereignty eroded by law's internationalisation. Not only is the state 'no longer the sole captain on board', but we're beginning to wonder whether there is a captain and if so, who?

In the preceding chapters I have shown that interactions lead not only to integration, but to the disintegration of the legal order; changing levels between various areas—national, regional and global—produces contraction as well as expansion; and changing speeds can either facilitate gradual synchronisation or desynchronise rhythms between trade law and human rights law. In other words, each of the three axes (normative order, space and time) characterises a potential dynamic, a setting in motion, and dissociating them produces apparently contradictory, non-linear, disorganised movements. Like clouds on a windy day, new legal ensembles seem to disperse as soon as they've formed, even before we've discerned their shapes.

To get from disorder to order, to 'organise the clouds', the legal ensembles taking shape must be made a little more stable and sustainable, though excessive stability reduces sustainability. In addition to traditional instruments that produce stability through normative and institutional hierarchy, there are several mechanisms that contribute more to legal ensembles' equilibrium than to their stabilisation, and perhaps therefore to their sustainability. The issue then is, what would a land of 'organised clouds' look like?

The mystery of the one and the many will not be solved by the hegemonic practices omnipresent today, which impose legal transplantations that cannot be called pluralist, nor by so-called ultra-liberal practices, which are increasingly common and consist of juxtaposing presumably self-regulating autonomous systems. As for the hypothesis of ordered pluralism set out in the introduction, it would no doubt require a transformation, literally speaking, as it involves replacing the simple conception of the legal order with a complex or even 'hypercomplex' conception.

---

5 On the distinction between normative order and normative area, see G Timiri, Les Noms de la loi (Paris, PUF, 1986).

---

Disorganised Movement: Like the Clouds

The cloud metaphor seems particularly well suited to the European legal ensemble, which is constantly changing shape: who could possibly trace the outlines of the Europe created by superposing the Community and Union treaties as revised by the Nice Treaty? Depending on one's personal experience and centres of interest, one is familiar with various fragments, but the complete outline eludes us all.

The Constitutional Treaty had the indisputable merit of providing the means to unify the legal framework. However, it would have eliminated neither variable geometry nor multiple speeds, as its preamble asserted that Europe is 'united in diversity'. Its drafters may therefore be reproached for having given up too easily on teaching complexity as was expected of them, opting instead for the slightly demagogic discourse of simplification. Complexity seems inherent in any attempt to combine the one and the many and the CT should have more explicitly provided the means to organise these unstable, volatile—in a word, cloudlike—ensembles. Despite its failures, or perhaps thanks to them, Europe constitutes an extraordinary laboratory for studying the internationalisation of law: it illustrates, even sometimes caricatures, the disorder caused by interactions within the legal order and changes in organisational levels and time.

Interactions: Integration/Disintegration

Integrating external norms begins with horizontal interactions: non-hierarchical cross-references. As old as it is, this practice is both developing, thanks to new technologies that facilitate access to the law, and being updated to include not only foreign law but also the law of international ensembles. These cross-references seem to constitute the primordial fluctuations within which legal matter begins to extend beyond the national sphere into a global area comprised, essentially, of black holes of unknown composition and characteristics, in terms of energy or inertia. If I had to write a short treatise on legal cosmogony, I would start with these cross-references because they very likely contribute to transforming normative masses into normative areas in the structural sense used above. This comparison is not really pertinent, however,
since, unless I go back to the big bang, my study would be limited to today's horizontal interactions and their occasional verticalisation, from coordination to subordination.

As I discussed above, international co-operation between European states seemed to lead inexorably to the European Union via principles such as mutual recognition and the approximation of national laws based on common supranational norms (see the list of offences in the European Arrest Warrant framework decision). This type of harmonisation, which constitutes an initial verticalisation of interactions, can be taken a step further to unification by hybridisation in areas where no national margin of appreciation is recognised (as in a portion of the draft Corpus juris). But at the global level, harmonisation and unification are limited to just a few areas, such as international criminal justice.

Horizontal interactions are also frequent among non-state actors, both private (such as transnational corporations) and public (international organisations or courts). Cross-references to case law both within and across regions (between the European Courts of Human Rights and of Justice or the European and Inter-American Courts of Human Rights) are just one example. Even the WTO has joined the game and integrated certain rules of environmental law,7 and the recent debates on reforming the WTO lead me to think that the issue of integrating fundamental rights will soon be raised. Their recognition as universal standards could lead the DRB to impose both a social clause and a human rights clause on member states,8 which could encourage interactions between the WTO and both the UN Human Rights Committee and the ILO.9 Such exchanges and interactions remain horizontal, however, as verticalisation requires establishing a hierarchy that favours imperative norms (ius cogens) or

---


---

concepts such as global public goods, both of which are still subject to debate.

But this type of interaction can also develop between different normative levels. As the 'dialogue of judges on the death penalty' shows, horizontal, non-hierarchical exchanges are multiplying between national courts (Supreme Courts of Canada, South Africa and the United States, for example), regional courts (ECHR and IACHR) and global judicial or quasi-judicial bodies (ICJ and UN Human Rights Committee). Similarly, cross-references are developing among national courts (the House of Lords' innovative decisions regarding former officials' immunity in the Pinochet case have been cited frequently10), regional human rights courts, international criminal tribunals and the ICJ.

These cross-references depend, however, on judges' goodwill, or benevolence as former First President Canivet calls it. Without hierarchy, the movement is incomplete. While too rapid and too rigid a verticalisation might be rejected and result in disintegration, horizontal interactions do not suffice for normative integration. At best, through mutual information, they may facilitate changing levels.

Changing Levels: Expansion/Contraction

The word 'internationalisation' very explicitly refers to a change from the national to the international level, but the movement is not linear and is as disorganised as integration is. And through premature, poorly prepared or poorly controlled expansion, international organisations can cause a contrary movement of contraction, as the debate on Europe shows.

While internationalisation implies institutional and normative autonomy in relation to member states, it also requires that power struggles be neutralised and cohesion factors strengthened, as they alone make it possible to follow itineraries of convergence. Moreover, the trajectories of these itineraries must be discussed in advance; one of the misunderstandings created by the Constitutional Treaty stems from the fact that the principle bifurcations were taken without consultation, namely during successive enlargements (the

---

10 See also, on the petition of Rigoberta Menchu and other plaintiffs for crimes committed in Guatemala, the decision of the Spanish Tribunal Constitucional, Second Chamber, of 26 September 2005 overturning the Supreme Tribunal's ruling conditioning the exercise of universal jurisdiction on the presence of Spanish victims. The Constitutional Tribunal refers explicitly to several decisions, namely German and Belgian, as well as of the ICJ.
largest one occurring with the Nice Treaty). Along with prior treaties, the Nice Treaty contributed to setting the ‘institutional’, if not ‘constitutional’, framework for the EU, which is almost as difficult to modify as a constitutional treaty. Even if the CT improved on a few points, such as organising powers (first part) or incorporating prior treaties (third part), the option of ratification by referendum chosen by most countries, including France, permitted only a binary response, which is ill-suited to the complexity of the issues raised.

So that contradiction does not lead to disintegration of the European area, the major issue must be raised of inserting the Charter on Fundamental Rights into the EU’s legal framework independently of the Constitutional Treaty. Precisely because these rights are indivisible (the Charter ‘reunites’ them in six chapters linking economic, social and cultural rights with civil and political rights), they could either form the subject of an agreement or be rejected entirely. But the Charter’s significance lies less in defining the content of each of these rights, the scope of which will partially depend on the use made of the Charter, than in signalling the value choices made at the regional level that condition building a legal order.

If the Charter were inserted into a binding legal framework, instead of a simple ‘normative area’ of free trade characterised by a market without internal borders, Europe would constitute a true ‘legal order’ between the two poles ‘market’ and ‘human rights’. This order would not be completely autonomous—it would be added on to national legal orders that will not disappear—but the collective preferences expressed in the Charter would render it internally consistent. Until now, despite the expression ‘Community order’, the law of the European communities and the EU is not itself consistent; its fragmentation was in fact underscored by the Maastricht Treaty’s creation of three subject-matter pillars. With or without the CT, however, adopting the Charter would entrench the de facto bipolarity (market/human rights) that has developed within the EU through cross-references between the courts in Strasbourg and Luxembourg. And bipolarity would be further reinforced by the EU’s ratification of the European Convention on Human Rights, which is provided for in both the Constitutional and the Lisbon treaties. Such entrenchment of a bipolar order would be a first in the international area.

At the global level, establishment of a bipolar order does not seem so close at hand, especially since expanding involves changing the

order’s essence as well as its scale. Expansion over the entire planet leads to inclusion without exclusion, a normative organisation without external enemies—at least no humanly identifiable enemies—unless we consider ourselves, as well as natural and man-made disasters to which we might contribute, as enemies.

But beyond the ontological question and from a solely legal point of view, such expansion requires a specific structure. Interdependence makes globalisation more than simply a piling up of independent and competing national, regional and global organisations. These organisations need legal links, which in turn require new regulatory instruments, particularly since different normative levels must be combined and different rhythms synchronised as changes in speed create further disorder.

Changing Speeds: Synchronisation/Desynchronisation

Polychrony—different speeds within a single area, such as the Schengen, Kyoto and WTO areas—may seem to generate diversity and protect both pluralism and orderliness. But to do so, it must be implemented according to objective criteria (enabling clause) and its effects must be set out either in advance (Kyoto schedule), progressively, through a moving carpet effect (an automatic mechanism that advances constantly), or post hoc, through an irreversible ratchet effect (incorporation of the Schengen apparatus into the acquis communautaire).12

Without a legal framework, a multi-speed area conceived as an avant-garde that each state may join if it wants and if it can (opt in clause) risks becoming an ‘à la carte’ area in which each state may opt out of certain obligations. Instead of anticipating integration, time-based differentiation then acts as a brake and can even foster disintegration, the danger of which is increased by asynchrony between trade and human rights. Comparing the gradual balancing of these two areas in Europe to the growing divide between them at the global level reveals that better synchronisation requires revising the relationships between levels, as well as between legal powers and political and economic powers. But to be flexible enough to be compatible with national sovereignty, these relationships require a new kind of legal mechanism that allows for readjusting to achieve balance: to put the clouds in order, so to speak.

Balancing Mechanisms: Putting the Clouds in Order

Like ‘bricolage’, though more neutral, the term ‘balancing’ evokes oscillation in the exercise of power, be it executive (European or global governance), legislative (the fuzzy), or judicial (the weak and the soft). It brings to mind the billiard-player’s gesture described by Barthes and suggests a new conception of legal mechanisms. As if, to resist the world’s great disorder without taking refuge in falsely reassuring uniformity, the “insurrection of the imagination” I mentioned in the introduction had to be encouraged: “tremulous thought . . . is neither fear nor weakness, nor is it irresolution (think globally, act locally), but the assurance that it is possible to approach this chaos, to last and grow in this unforeseeability, to go against these certainties cemented into their intolerances, to “throb with the very throbbing of the world” that is to finally be discovered.”

In the legal field as well, we need this assurance to approach chaos and respond to the unforeseeability of a law that is internationalising according to variable geometry at multiple speeds and producing unstable forms. We will also need ‘tremulous thought’ to resist the ‘stiffening up of thinking about systems and the angry fits of systems of thought’. This is why it is so important to learn to use the new instruments that have appeared in the legal sphere: regulatory concepts like subsidiarity and complementarity for flexible integration through adjustments and readjustments between the national and international levels; fine-tuning techniques, such as the national margin of appreciation and variability indicators to avoid excessive flexibility which, in the guise of differentiation, can lead to disintegration; and evaluation and monitoring mechanisms to try to reduce the risk of arbitrariness.

Regulatory Concepts: Adjustment and Readjustment

To adjust the national to the regional or global level, positive law had to invent new mechanisms to leave some give between the supranational norm and its incorporation at the national level. It is well known that the hierarchical principle of the primacy of international law constitutes a frontal attack on state sovereignty. Indeed, neither the Constitutional nor the Lisbon Treaty treats it as a principle, but refers to it only discreetly: ‘The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States’ (Article 1-6 CT). As if to excuse this audacity, a declaration was annexed to the Constitutional Treaty noting that ‘Article 1-6 reflects the case law of the ECJ and Court of First Instance’. The Lisbon Treaty is even more shy: a declaration annexed to the treaty merely recalls ‘that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law’.

The ‘principles’ of subsidiarity and proportionality, however, were given prominent display in the first part of the Lisbon Treaty under the title devoted to ‘Common provisions’ (Article 5 (3) TEU): ‘Under the principle of subsidiarity, in areas which do not fall within the exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.’ Applicable only in the area of shared competences, subsidiarity is paired with proportionality: ‘Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’ But as research into the origin of the term has shown, subsidiarity is not limited to the purely formal distribution of competences. As Denys Simon has written, it is a ‘regulatory concept’ that serves to both justify and limit Community action. In other words, subsidiarity functions as a dimmer switch increasing integration if the member states do not attain Union objectives and decreasing it if they do. Because it requires constant comparison of actions envisaged by European legislative acts with EU objectives, it has a more political than legal function. However, the review procedure instituted by the Lisbon Treaty to ensure EU compliance with the principles of subsidiarity and proportionality, which includes not only the political re-examination by legislative authorities but also a right to petition the ECJ for violation of the subsidiarity principle, calls for adjustment to determine the width of the margin left to the member states.


\[14\] Ibid., p 128.


The same is true for the complementarity principle in the ICC Statute. The ICC has only complementary, or subsidiary, jurisdiction to try alleged perpetrators of international crimes. That is, it can take jurisdiction only when the state otherwise competent cannot or will not exercise jurisdiction (ICC Statute, Article 17). This too is a balancing mechanism, which can be used in a very flexible way when a third-party state examines the possibility of exercising universal jurisdiction. In the case brought in Germany against former American Secretary of Defense Donald Rumsfeld under the German Code of International Crimes, for example, the German federal prosecutor refused to take the case because the United States had opened an investigation into the ‘situation’ in Iraq. As I mentioned above, however, the Spanish Constitutional Tribunal considered that Guatemala was not able to try the case brought by Rigoberta Menchú and others. As for the ICC, when determining whether or not to exercise jurisdiction, it looks to see not only whether an investigation has been opened, but whether or not the suspects are actually being sought. Indeed, in preparing the report on Darfur that enabled the Security Council to refer the case to the ICC, the Inquiry Commission presided by Antonio Cassese examined not only the existence of a national criminal justice system, but also its effectiveness and legitimacy in terms of independence, impartiality and due process. Complementarity is therefore not only a formal principle for assigning jurisdiction; it is also a ‘regulatory concept’ leading indirectly to a certain harmonisation, that is, to states’ aligning their criminal justice systems with international norms.

In this regard, complementarity is similar to principles designed to effect integration more directly, such as ‘functional equivalence’. Explained in the commentary on the OECD Convention on the corruption of foreign agents in international commercial transactions, this term refers to achieving the goal of fighting corruption ‘without requiring uniformity or changes in fundamental principles of a Party’s legal system’. The OECD working group on bribery combines a general appreciation of the functional effectiveness of texts and practices with more formal tests of internal consistency. The issue is still open, however, with regard to whether the evaluation should include tests of external consistency, that is, legitimacy criteria measuring respect for fundamental rights: assuming they were effective, would torture or the death penalty be acceptable?

A final ‘regulatory concept’ is the principle of mutual recognition, which was introduced at the Tampere summit and incorporated into the Nice Treaty with respect to the ‘area of freedom, security and justice’. The idea is that mutual trust between countries subscribing to the same values can provide a basis for mutual recognition of judicial decisions and, if necessary, approximation of laws. But the practical applications, such as the European Arrest Warrant framework decision, have been called into question by several constitutional courts, as if the European legislature had overestimated the efficacy criterion to the detriment of common values and fundamental rights.

These examples show that it is not enough to develop instruments designed to accelerate integration (such as, in Europe, third-pillar framework decisions and now first-pillar directives); braking instruments are also needed to protect fundamental rights at the supranational level. The problem is that until the Charter on Fundamental Rights can be directly invoked, the European Union will have no brakes. Given how slowly appeals to the ECtHR progress, it is no wonder national judges want to replace this system and its faulty brakes.

In short, assuming they also adapt to changes in speed, regulatory concepts introduce the flexibility needed to adjust to international norms. But too much flexibility can create imbalances and a risk of arbitrariness. Fine-tuning techniques then become useful.

Fine-tuning Techniques

The term might come as a surprise. Norms are theoretically created according to a hierarchical principle such that adjustment and fine-tuning are a single operation: incorporation of the international norm by the national receiver. But only techniques like the national margin of appreciation and indicators of variability provide for pluralist fine-tuning of all movements.

---

20 See S. Manacorda, ‘Judicial activism, dans le cadre de l’espace de liberté, de justice et de sécurité de l’Union européenne’ (2005) Revue de science criminelle 940 (discussing decisions by the Polish Constitutional Court (27 March 2005, declaring the text contrary to the Constitution but suspending the decision’s application), the Belgian Court of Arbitration (13 July 2005, requesting a preliminary ruling from the ECJ), and the Bundesverfassungsgericht (18 July 2005, finding unconstitutional and invalidating the German law transposing the European Arrest Warrant)

21 See case C-176/03 (13 September 2005). See also above text accompanying ch I n 9 and ch 4 n 20.
Unlike the judicial margin of appreciation, which weakens the hierarchical principle without questioning the continuity between superior and inferior norms, the national margin of appreciation enables partial integration, understood as the simple approximation of national norms: harmonisation without unification. In the European treaties still in force, this is the difference between regulations, binding in their entirety, and directives, which are binding as to the result to be achieved but which leave to the national authorities the choice of form and methods. It is unfortunate the term ‘national margin of appreciation’ was not explicitly used, both to give full voice to the clause’s underlying premise and to avoid the confusion that arose with respect to directives and regulations.

In fact, the national margin of appreciation, invented by the ECJ in a jurisdictional self-limitation, may be used in other international contexts, such as the OHADA, WTO and the Kyoto area, but it requires a change in logic. Whether explicit or implicit, legislative (in a broad sense) or jurisprudential, the national margin of appreciation seems to preclude the disjunction proper to binary reasoning. It replaces conformity, according to which any difference, no matter how small, results in a judgment of non-conformity, with compatibility, which allows differences from one country to another. It involves reasoning according to fuzzy logic or, more broadly, gradation logics; integration can be measured in degrees, so partial integration is possible. But not all differences are acceptable: the margin also marks a boundary not to be crossed. This requires setting a compatibility threshold, which reintroduces a binary disjunction, though it can vary across space and time. Only if fine-tuning obeys explicit variability indicators will such variability avoid becoming arbitrariness.

So far, only the ECHR has tried to set out variability indicators. Systematised, fine-tuning techniques could be extended to various ‘regulatory concepts’. But the very notion of fine tuning cannot be entirely controlled by the norm’s transmitter. As Jean-François Coste and I underscored with respect to fuzzy logic, switching from binary to gradation logics, which involve a more complex decision-making process based on compatibility thresholds, transfers power to the norm’s receiver. Evaluation and review mechanisms are therefore essential.

Evaluation and Review Mechanisms

If the national margin of appreciation is determined by variability indicators, it can join regulatory concepts to vary normative intensity to adapt as smoothly as possible to observable data, somewhat like light-sensitive glasses darken or lighten depending on the ambient light. But such a mechanism’s complexity can lead to perverse results: either excessive integration, when the international legislature exceeds its powers and does not respect the subsidiarity principle (an oft-heard reproach in Europe); or, conversely, insufficient integration, when the national authorities, on the pretext of transposing the international norm, renacionalise it (as is the case with international criminal law).

Peer evaluation is one response to this problem. In the struggle against transnational corruption and money laundering, for example, peer evaluation has resulted in the elaboration of variability indicators that can facilitate judicial review in domestic courts. But more binding mechanisms are not only possible, they are undoubtedly necessary, as is shown, independently of ICJ review (which is limited by the states parties’ discretion), by the development of international review mechanisms, from arbitration (ICSID) to dispute resolution (WTO) to judicial review (ECHR, IACHR, ECJ, ICC, etc.). However, the current dissymmetry must be corrected: existing mechanisms serve primarily to ensure proper adjustment of the national to the international level, whereas a mechanism such as the Lisbon Treaty provides is needed to review the use of subsidiarity in both directions.

---

23 The same difference appeared in the Constitutional Treaty (Art 1-33) as European laws and framework laws.
But to truly generate diversity, economic and social indicators will have to be integrated with respect to both place (inter-national diversity) and time (evolving compatibility threshold). The ECHR began to do this with respect to criminal prosecution of adult homosexuality,²⁹ for example: despite the fact that the cases concerned a moral issue and there was no legal common denominator among member states, the Court found that social attitudes were converging towards greater tolerance, in light of which the Court narrowed the national margin almost to the point of extinction. But without more rigorous analyses, the variety of variability indicators weakens legal pluralism, which contributes to an implicit social pluralism that seems to reduce judicial objectivity.³⁰

In sum, legal balancing mechanisms provide for accompanying normative integration, but they only very imperfectly control its correlation to other movements. With respect to both expansion (enlargement) and synchronisation (acceleration and braking), a new legal order must be built.

Models of Transformation: In The Land of Orderly Clouds

I first used the metaphor of orderly clouds with respect to a common, pluralist law after a visit to China where, as an obedient tourist, I looked at the clouds engraved in the stone steps to the Forbidden City and the Summer Palace. These clouds obeyed the imperial command for immutable order, and I had to explain in an afterword³¹ that I wanted to illustrate not this static view of order, but on the contrary, an unstable and changing vision based more on Karl Popper's paradigms contrasting clouds and clocks, or the work of Henri Atlan on complex systems, between crystal and smoke.³² The Forbidden City's motionless clouds have the merit of underscoring the plurality of possible models for a future world legal order and encourage us to seek a new relationship, needed now more than ever, between law and politics.

³⁹ See Dudgeon v United Kingdom Series A no 45 (1981). See also Norris v Ireland, Series A no 142 (1988).
³¹ See Delmas-Marty, Pour un droit commun, above n 3, pp 283-4.

Multiple Models

The representations most commonly used in domestic legal orders today are based on the pyramid and network paradigms popularised by François Ost and Michel van de Kerchove. The pyramid is organised vertically according to a hierarchical relationship (subordination), while the network is constructed through interactions that may or may not be hierarchical. The 'dialectic' theory these authors develop leads them to conclude that 'contemporary law constantly oscillates between the potential universality of networks and very locally anchored pyramids', and that this oscillation translates 'a modest and preliminary ethic of complex societies in the network age'.³³ In fact, both paradigms also illustrate a shift from a simple (closed and stable) to a complex (open, unstable and polymorphous) structure. Transposing these paradigms to the study of the internationalisation of law, that is, to the phenomena accompanying the expansion of the national legal area to a regional or global partially integrated area, produces even more diversified representations of the legal order.

Expanding according to a pyramidal model leads to a fusional order conceived as a simple structure organised according to hierarchical principles. It is doubly simple, in fact, because the legal order (in terms of the process of producing norms) is predetermined by the hierarchical principle and because consistency is guaranteed by a sort of 'natural' correlation between normative integration, organisation levels and speeds of transformation. Apparently satisfying the condition of legal certainty that foreseeability of norms requires, this is a politically formidable model: it openly contradicts state sovereignty and, on the pretext of fostering the emergence of a global order, risks legitimating hegemonic integration.

Expanding according to a network model, however, seems easier to accept in terms of sovereignty; but it is ambiguous in that it can lead to two types of legal orders depending on whether expansion favours horizontal interactions (international or transnational, organised between public or private actors) or combines them with vertical interactions (through harmonisation or hybridisation).

The first variation would be organised only through horizontal interactions. It would be complex in that the structure is interactive:

³³ See F Ost and M van de Kerchove, De la pyramide au réseau? Pour une théorie dialectique du droit (Brussels, Facultés universitaires Saint-Louis, 2002).
its movements would spontaneously correlate with each other. It would therefore be a self-regulated order, as ultraliberalism claims to be, bearing the risk of giving preference to more subtle forms of hegemony benefiting private economic powers. But a truly pluralist order is ‘hypercomplex’: it must combine horizontal and vertical interactions and correlate this variable-geometry integration with other movements occurring at several levels and several speeds.

Hypercomplexity reveals the limits of ‘legal’ reasoning. To be sure, as the first 50 years of European construction illustrate, it can absorb a certain amount of complexity, but it does so without guaranteeing political legitimacy. The temptation for jurists is to revel in this delicious complexity while citizens reject a system they discovered late and do not understand well. This may be what is happening today to the legal Europe we were so proud of: it has been caught up, and sometimes trampled, by politics. We must therefore go beyond models to find a flexible relationship between law and politics that will make the future European and world orders at least sustainable, if not entirely stable.

Beyond Models

The principle choices are political, since modelling the legal order will not put an end to the discussion of which model to choose because reason must obey science. Indeed, science tends to describe what is and reason is at its service. But law is ‘normative’: it says what must be and therefore calls for willpower, or even voluntarism. This is why the legal reasoning in the major human rights texts seems to sometimes contradict reality, as if protesting against it, proclaiming, for example, that ‘[a]ll human beings are born free and equal in rights’ (UDHR, Article 1) when empirical evidence does not support this conclusion.

The gap between the descriptive and the normative can be crossed only by a leap into the unknown, a wager on the future, an attempt to abolish chance: before concluding in the Coup de dés (roll of the dice) that ‘every thought rolls the dice’, Mallarmé announces that a roll of the dice ‘NEVER abolishes chance’. But he qualifies that statement, adding ‘EXCEPT PERHAPS at the altitude ... of A CONSTELLATION’ and finally evoking a ‘total count taking shape’. Because the total legal order taking shape also involves rolling the dice, it cannot be left to jurists alone, nor remain cloistered in the law. In other words, because it takes willpower, transforming the national legal order into a supranational, or ‘alternational’ order requires returning to politics.

The road to take is thus becoming clear. To avoid leaving the movements of law’s internationalisation in total disarray, unforeseeable and uncontrollable, actors must be reintroduced and powers redistributed. Then will come the most difficult task: determining whether legal and other symbolic systems share common values. Only then will it be possible to dream of a day when blowing as one, these values organise, without immobilising, the clouds.

---


36 See JL Quermonne et al, L’Union européenne en quête d’institutions légitimes et efficaces (Paris, La Documentation française, 1999).