

# **The Brussels School of Jurisprudence, Global Law and the Competition of Normativities<sup>1</sup>**

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The first part offers a little contribution to the analysis of the history and dynamics of contemporary legal thought. It briefly presents the Brussels School of Jurisprudence (BSJ). It has played a significant role in contemporary French speaking legal theory, which belongs by now to the periphery. I focus on the “argumentative turn” that characterizes the transition from the social model to the contemporary model. The story of BSJ and its influence largely confirm Duncan Kennedy’s models of legal thought. I will also show how US philosophy contributes indirectly and quite oddly to this movement, which has also been called the “New Rhetoric”. The reader who does not have a strong interest in the history of legal thinking and jurisprudence, especially in Europe, may move on directly to the second part of this paper.

The second part is devoted to the theory of Global Law. I intend to summarize the results of several researches carried out during the last fifteen years at the Perelman Centre for Legal Philosophy in various fields of emerging global normativities. I briefly explain our method and the main theses of our theory. I argue that the current phase of globalization requires us to enlarge the province of jurisprudence. We should extend our analyses and critiques to other kinds of norms and normative devices that are complementing, sometimes replacing but more often competing with classic legal rules and institutions in the global environment.

## **I. A little contribution to the history of contemporary legal consciousness: the Brussels School of Jurisprudence (BSJ)**

The Brussels School of Jurisprudence (BSJ)<sup>3</sup> generally refers to a group of Belgian legal philosophers, law professors and legal practitioners, attorneys and judges, gathered around Chaïm Perelman. They met first in the National Centre for Research in Logic (CNRL<sup>4</sup>), and then in the Centre for Philosophy of Law of the Université Libre de Bruxelles (ULB), founded in 1967. Today, this Centre is named “Perelman Centre”.

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<sup>3</sup> In French, more simply “l’Ecole de Bruxelles”; in Spanish : “La Escuela de Bruselas”.

<sup>4</sup> Centre National de Recherches de Logique. The legal section of this Centre was created by Perelman.

The BSJ movement, also called the “New Rhetoric”, played a significant role in the argumentative turn of contemporary legal method, both in Belgium and in the French-speaking world, especially in France. Its theses and methods have been largely discussed and received with some interest in Europe and elsewhere, especially in Latin America. In a broader sense, BSJ designates a school of thought developed at the University of Brussels (ULB) from the beginning of the 20<sup>th</sup> century by Perelman’s predecessors and the professors of his predecessors. These first generations undoubtedly participated to what Duncan Kennedy calls the “social model” of legal consciousness<sup>5</sup>. The philosophical bases of this movement may be characterized in three keywords: positivism, sociology and, more surprisingly, pragmatism.

Positivism is indeed an ambiguous word, with equivocal links to both law and philosophy. BSJ positivism is deeply embedded in the agnostic and anticlerical doctrine underpinning the identity of the “Free” University of Brussels. The legal positivism of the BSJ contrasted sharply with the “Metaphysical School” of the Catholic University of Louvain, which did promote, at that time, a neothomist theology and philosophy that included a concept of idealistic natural law. From the beginning of the 20<sup>th</sup> century<sup>6</sup>, BSJ acknowledged law was a social phenomenon, i.e. a set of facts contingent by nature and thus varying over time and across spaces. As a consequence, BSJ developed a strong interest in comparative law as well as in legal anthropology<sup>7</sup>. It held the study of law should focus on the observation of societies and the experience of law in practice rather than on abstract notions and general systems. BSJ followed the method of “libre examen”, which was theorized at the ULB in 1909 by the French scientist and mathematician Henri Poincaré and became since then the *moto* of our University<sup>8</sup>.

According to Auguste Comte, the founding father of positivism, law and politics would eventually be replaced by a true science that will govern societies and

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<sup>5</sup> D. Kennedy, “Two Globalizations of Law & Legal Thought : 1850-1968”, *Suffolk University Law Review*, 36 (2003), 631-679. – D. Kennedy, “Three Globalizations of Law and Legal Thought : 1850-2000, in *The New Law and Economic Development. A Critical Appraisal*, David Trubek and Alvaro Santos, eds., Cambridge, 2006, 19-73. – For a European view on the sociological model of legal reasoning : B. Frydman, *Le sens des lois. Histoire de l’interprétation et de la raison juridique*, Bruylant, 2011 (3rd ed.), ch. 7, 431-505.

<sup>6</sup> This was made possible after Tiberghien finally retired in 1897. He had taught philosophy and natural law for more than fifty years at the University of Brussels and imposed a spiritualist conception of law that was actually close to the positions of Louvain. In addition, Tiberghien fiercely fought against the appointment of agnostics within the department of philosophy. He was replaced by the René Berthelot, who introduced pragmatism at ULB (see below).

<sup>7</sup> Belgium is a small country at the border between Latin and Germanic Europe. It had a large colony in Africa, Congo.

<sup>8</sup> H. Poincaré, « Le libre examen en matière scientifique », réédité dans *Revue de l’Université Libre de Bruxelles*, 1955, pp. 95-272. Poincaré was granted a doctorate honoris causa at the ULB in 1909 during the ceremony celebrating the 75th anniversary of the University. Article 1 of the by laws of the University states: « The Free University of Brussels bases its teaching and research on the principle of « libre examen » ».

peaceful channel transformations by combining harmoniously order and progress. After Siéyès, who first used the word, Comte called this science to come “sociology” and made it the subject of the last lessons of his monumental *Cours de philosophie positive*. At the end of the 19<sup>th</sup> century, Comte had still many disciples notably in France and Belgium who would play a significant role in the development of modern sociology<sup>9</sup> as well as of the “social model” in legal theory<sup>10</sup>. Among them, François Géný, who declared in his very influential book *Méthode d'interprétation et sources en droit privé positif*, published in 1899, that “law is a branch of applied sociology”<sup>11</sup>. In the same book, Géný expressed his disappointment with Durkheim’s conception of the new science<sup>12</sup> and his preference for a normative method that will allow judges to decide objectively conflicts of rights, interests and values. Accordingly, Géný defined the principles of a new method for judicial reasoning and adjudication, which he called “la libre recherche scientifique” (LRS). This method was soon generalized and radicalized by his Belgian disciple, P. Vander Eycken<sup>13</sup>. In each case, the judge would first balance the interests in conflict. He would favor the interest most valuable for society and try, at the same time, to find a balanced solution to pacify the social conflict. Only then he would check the legal sources in order to find a confirmation of his solution<sup>14</sup>. Géný’s book was a best-seller in Belgium and had a tremendous influence not only on academics but also among the most prominent lawyers and judges. The LRS method was strongly promoted by BSJ and was responsible for major innovations in Belgian case law during the following decades, among them the theories of abuse of rights and strict liability. The balancing of interests test by LRS significantly differs from the one advocated by utilitarians. Competing interests were not to be evaluated on the bases of money and compared from an economic point of view, but categorized and prioritized from a moral point of view. Faithful to Comte’s philosophy, the supporters of LRS believed in the establishment of an objective scale of values that would help them to solve moral dilemmas. This thesis was heavily criticized, even in their own camp, both by moral pluralists and by moral skeptics. The project of an objective scale of moral values was eventually abandoned and replaced by the argumentative model, which was deemed to be more compatible with pluralism.

The third important word that defines BSJ is pragmatism. Pragmatism was imported to BSJ, not directly from the United States but oddly enough by a French philosopher, René Berthelot. Berthelot was appointed at the ULB in 1897 and while

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<sup>9</sup> Ernest Solvay, an ingeneer and a rich business man, created the Institute of Sociology as soon as 1894 (the same year Durkheim published *Les règles de la méthode sociologique*). The Institute was soon attached to the ULB. For many decades, the Institute hosted most of the research centres in social sciences, including law.

<sup>10</sup> See above note 6.

<sup>11</sup> F. Géný, *Méthodes d'interprétation et sources en droit privé positif*.

<sup>12</sup> Durkheim had published *Les règles de la méthode sociologique* in 1894.

<sup>13</sup> P. Vander Eycken, *Méthode positive de l'interprétation juridique*, Brussels, 1906.

<sup>14</sup> This is the radical version promoted by Vander Eycken. Géný was more cautious but he nevertheless commented favorably on the work of his Belgian disciple.

teaching there only for ten years, he had a strong and lasting influence<sup>15</sup>. At that time, Berthelot was working mainly on pragmatism. He published from 1906 a series of three books on pragmatism, which was most likely the most comprehensive study on pragmatism by then in the world. Berthelot included in the scope of his study not only American philosophers, Peirce and James, but also the so-called French modernists, Bergson, Poincaré, and even the German philosopher Nietzsche. Berthelot was not a pragmatist himself and heavily criticized several aspects of pragmatic philosophy. Nevertheless, he generated a strong interest in this philosophy among his faithful Belgian followers. The philosopher and sociologist Eugène Dupréel, Perelman's master, contributed to rehabilitate the Sophists, as the ancestors of pragmatists<sup>16</sup>. Later, De Page and Perelman would claim lawyers were the sophists of today's world. They took side with the sophists in their battle against philosophers. Dupréel and Perelman privileged rhetoric over philosophy and argumentation over formal logic. *The New Rhetoric : A Treatise on Argumentation*, first published in 1958, had an influence on philosophy and social sciences. It was translated in several languages and has been recognized as a major contribution to the argumentative turn<sup>17</sup>.

During the 1960s and the 1970s, Perelman and his colleagues from BSJ applied the argumentative paradigm to the analysis of legal cases and judicial reasoning. They refuted the traditional model of “judicial syllogism”, which was still the official model of legal logic at the time. They revealed the richer range of argumentative tools used by judges in their opinions. Going back to Aristotle, Perelman's tried to show that argumentation was still the best model at hand to solve conflicts of interests and values in a context of pluralism and democracy. Moreover, BSJ won a crucial battle against orthodox positivists on legal sources. When deciding a case, judges would not restrict themselves to legal rules anymore but would be allowed to appeal to general principles of law, moral values and fundamental rights. Paul Forières used a bold oxymoron to call these norms: “natural positive law”<sup>18</sup>. Under BSJ influence, the Belgian *Cour de cassation* admitted general principles among the catalogue of formal sources of law and subjected itself to the rulings of European Courts, especially the European Court of Human Rights<sup>19</sup>. Members of BSJ were among the firsts Presidents and Vice-Presidents of the latter court<sup>20</sup>. The

<sup>15</sup> Berthelot spent most of his academic career at ULB. In 1907, he went back to Paris and retired from teaching. He was still a member of the Belgian Academy of Sciences. Dupréel, Smets and De Page among others acknowledged Berthelot's influence on their own work.

<sup>16</sup> E. Dupréel, *La légende socratique et les sources de Platon*, éd. Sand, 1922. - E. Dupréel, *Les sophistes*, éd. du Griffon, 1948. - In English: « E. Dupréel's Attempt to Revise the Traditional Approach to Ancient Philosophy », *Annales Universitatis Mariae Curie-Sklodowska*, 1976, vol. I, 20, 223-246. - Dupréel also published in 1955 a book entitled *Pragmatologie* (éd. du Parthénon, 1955).

<sup>17</sup> In English, the book was first published in 1969 by University of Notre Dame press, translation by J. Wilkinson and P. Weaver.

<sup>18</sup> P. Forières, “Le juriste et le droit naturel. Esquisse d'un droit naturel positif” in *La pensée juridique de Paul Forières*, Bruylant, 1982, 2 vol., vol. 1, 411-428.

<sup>19</sup> Ganshof van der Meersch, member of the Law Faculty at ULB and attorney general at the *Cour de cassation* played a decisive role in implementing those changes in the Courts.

<sup>20</sup> Henri Rolin and Ganshof van der Meersch.

shift from CLT to the social model and then to the argumentative paradigm, followed during the 1970s by the interpretative turn<sup>21</sup>, profoundly transformed legal consciousness and the vision of the law from a monist rule-based activity to a pluralist right-oriented approach. In 1971, the Belgian *Cour de cassation*, overruling its own precedents, also acknowledged, still under the influence of BSJ members, that Belgian judges would have the duty to set aside national law if it entered into conflict with international or European law<sup>22</sup>. This ruling opened the way for a legal consciousness and practice of law more internationally oriented. However, this vision was still based on “methodological nationalism” and “state-centrism”. It was only after the 1990s when BSJ scholars started challenging the classic concept of international law by an alternative and competing model of “global law”.

## II. Global legal thinking beyond the traditional borders of the province of jurisprudence

For more than fifteen years, research has been carried out in Brussels on Law & Globalization by a new generation of scholars based at the Perelman Centre for Philosophy of Law. As discussed in the first part of this paper, BSJ has always been concerned with the study of law in practice and the evolution of law as a living organism (le “*droit vivant*”). In the 1990s, it seemed natural enough to focus on the social transformations on progress triggered by “globalization” (whether they were actually global or not) and the effects of these transformations on law and governance. At the time, “globalization” was already a major topic in most social sciences and it wouldn’t have been right for legal scholarship to stay behind or apart from this movement.

In accordance with the BSJ spirit, we didn’t want to start with a comprehensive theory of global law, another “new paradigm” or the mere transposition of an old one at the scale of the world. We were more interested in doing case studies and learning by observing what was going on. We focused on several fields, which were considered more globalized than others or more exposed to the consequences of globalization. We started with the issue of Internet regulation and worked with the Oxford University Program in Comparative Media Law & Policy (PCMLP)<sup>23</sup> at the time of the famous French Yahoo! case. Later on, we moved to the broader issue of the global reorganization of production, distribution and labor. Here too, we started with case studies related to transnational corporate litigation, like the Unocal-Total case for

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<sup>21</sup> M. Van Hoecke, *De interpretatievrijheid van de rechter*, Kluwer, 1979. – F. Ost et M. van de Kerchove, *Entre la lettre et l’esprit. Les directives d’interprétation en droit*, Bruylant, 1989. – See also B. Frydman, *Le sens des lois*, op. cit. n. 6.

<sup>22</sup> Arrêt Le Ski, Cass., 27 mai 1971, Pas., 1971, p. 886 and the “conclusions conformes” of Ganshof van der Meersch.

<sup>23</sup> At this time, it was an Anglo-American joint-venture led by Pr. Monroe Price. It was and still makes part of the Centre for Socio-Legal Studies. With my colleague Isabelle Rorive, we worked there during one year as visiting fellows.

instance. At the same time, we gain a special interest in the dynamics of corporate social responsibility (CSR) and the prolific tools and devices that had been developed in this framework. We also studied the transformations of financial market regulations in the context of globalization: the increasing and controversial influence of credit rating agencies as well as some peculiarly interesting byproducts of legal-financial engineering, like carbon emission trading in the issue of climate change. We have also undertaken research in other fields such as innovative tools in European and global governance, global constitutional standards and the rule of law, global human rights and anti-discrimination law, the transformations of the law of war, etc.

By applying this “microlegal” approach to several cases in various fields (as opposed to a “macrolegal” approach that would concentrate on a comprehensive theory of global regulation), we collected quite a lot of data from which we drew a certain number of theses to which I’ll come to in a moment. However, we soon realize that our traditional case study method would need considerable adjustments in order to fit the peculiar form and nature of the objects that we encountered and tried to grasp. Right from the start, it became obvious that the argumentative and the interpretative tools, inherited from our predecessors, would not be sufficient to understand what was really at stake in these global cases. Most of the time, judges themselves were not fully aware of the global scope or impact of the case at hand, which would often end without a final ruling. Several proceedings might be instituted simultaneously in different parts of the world and judicial proceedings often appeared to be only one side of the many aspects of a more complex strategy. We realized that we would have to depart from the method that focuses almost exclusively on judicial opinions and rulings as the “vanishing point” of legal reasoning<sup>24</sup>. It would be wiser to shift from the judge perspective to those of the parties and to consider what the case might teach us about their opposing strategies. We also learnt we should be cautious before discarding some aspects of the narrative of the case as being irrelevant from a legal point of view, as lawyers often do when they “translate” a story into a case. Indeed, what might not be relevant in order to solve legally a dispute, may well be of tremendous interest to understand what is really at stake. In other words, the interdisciplinary approach was to be taken more seriously and carried out more thoroughly than ever. What we would need from now was a 360° view of each case supplementing the legal aspects with the sociology of actors, the economics of the competing interests, matters of policy and technical constraints, communication strategies and so on.

Even more fundamentally, we became conscious that by focusing on judicial cases, like Yahoo!, Nike, Unocal, etc., we were narrowing our perspective to a limited area of the global regulations we were trying to disclose \_ which turned out to be not the most promising one. To study CSR through the Nike case, for instance, offers undoubtedly an insight, through the lawyers’ lenses, about the legal duties that might arise from the violation of the provisions of a corporate code of conduct. However, the study of the case in itself would not give us even the smallest idea about the range of normative devices and institutions that are engineered within the CSR movement,

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<sup>24</sup> See J. Habermas, *Between Facts and Norms*.

like quality labels, technical CSR standards, the global reporting initiative, CSR ratings and rankings, etc. Consequently, as we went on with our research, we revised our own notion of what a “case” was and we decided to extend the scope of our study to “objects” that didn’t fit in the standard range of legal sources. We were increasingly attracted to these platypuses of the normative bestiary. We favored those quirky and puzzling creatures, betting that their strangeness itself was a sign of the value of what they could teach us. We called them at first “ULOs”, standing for Unidentified Legal Objects, then perhaps more cautiously, “UNOs” for Unidentified Normative Objects. Rather like zoologists or botanists, we collected those objects in our field trips inside the global normative jungle. Then we have tried to classify them into families and compare their anatomy and the functions they perform with well-known legal rules and institutions. Undoubtedly, this is a long-term endeavor and it is far from being completed. Yet the similarities between what we found in different fields gave us hope we would find a common pattern. It led us to lay down a provisional hypothesis of what we might call an elementary theory of global norms, which nonetheless still needs further research to be confirmed. In the following paragraphs, I will summarize our findings on the nature, form and evolution of regulatory devices in a global environment. I will also discuss how this global perspective challenges contemporary legal consciousness and stimulates innovations in jurisprudence and the philosophy of law.

Our main thesis would be that the globalization of law encompasses not only a change in the scale of regulation, that would extend progressively from national and states jurisdiction to regional organizations and finally global governance; but that it induces a fundamental shift in the shape and the functioning of regulatory devices and institutions.

International law, classically defined by Jeremy Bentham as “a collection of rules governing relations between States”, is a model of global law that became dominant during the 19<sup>th</sup> century. It is indeed a typical product of Classical Legal Thought (CLT)<sup>25</sup>. It is today commonplace to observe that globalization has seriously challenged this model by establishing a situation of universal regulatory competition, which produces destructive effects on state law without providing an alternative set of effective worldwide regulations. After the end of the cold war, neo-classical economists, echoed by international financial institutions, advocated global deregulation as the most efficient way to achieve wealth and liberty for everyone on the planet. They suggested an alternative model of global (de)regulation that we have called elsewhere “natural economic law”, a.k.a. the law of the (global) market. Building on the famous British historian Arnold Toynbee’s analysis of the industrial revolution, one might summarize their thesis as follows: the essence of the global revolution is the substitution of competition for the national regulations that

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<sup>25</sup> D. Kennedy, “Toward an Understanding of Legal Consciousness : the Case of Classical Legal Thought in America : 1850-1940, *Research in Law and Sociology*, 3, 3-24. – Compare with a European view : B. Frydman, *Le sens des lois, op. cit.*, ch. 6, 324-430.

previously controlled the production and distribution of wealth<sup>26</sup>. This is hardly surprising since modern philosophy supplies only two alternative concepts of regulation: the iron hand of the State and the invisible hand of the market.

However, the evidence we gathered in the field does not confirm such a clear-cut analysis. What we observe looks more like a process of “creative destruction”<sup>27</sup>. The fascination with which we contemplate the decline of the old order tends to eclipse the proliferation of other forms of norms that deserve more of our attention. A complex society abhors a normative vacuum. The weakening of the Leviathans and other dinosaurs of modern law opens an ecological niche to humbler normative creatures previously confined to accessory tasks, like the specification of goods and the control of the quality of products, but ready to seize this opportunity to play in the big league and to compete with the good old legal rules. Again, we need to adjust our method if we want to seize these emerging, rapidly evolving, uncertain and unsettled norms and institutions. Lawyers, especially continental lawyers, are badly equipped to deal with these elusive objects. They are more at ease with well-established institutions and organized systems such as States and international organizations and primary and secondary rules respectively. This evidence pushed us to look for help elsewhere. From my point of view, Scottish empiricists provide us with a most meaningful insight. In the 18<sup>th</sup> they rejected, as unrealistic, the then dominant hypothesis of the “social contract”. They refuted the artificial dichotomy between the state of nature and civil society. They preferred a dynamic and historical approach, trying to understand how political institutions and legal rules progressively emerge and consolidate. This question, already pointed out by David Hume<sup>28</sup>, was dealt with by Adam Ferguson in his *Essay on the History of Civil Society* and of course by Adam Smith in his *Theory of Moral Sentiments*. In this book, Smith explained how the scandal created by injustice might have accounted for the emergence of the judiciary and the State itself. More recently, John Dewey’s remarkable book on *The Public and its Problems* went further on this path and brought new insights. He explained how the identification of a common interest and the mobilization of a group against a common threat might have led to the appointment of an agent that eventually became a public authority. Without necessarily agreeing with all their conclusions, we can learn from their way of reasoning to ask ourselves a similar question: how do global regulations and institutions possibly emerge and consolidate within a global civil society?

In sticking with our microlegal approach, we shouldn’t tie our hands with a rigid definition of “global society” as a whole. “Global” primarily refers to the strategic perspective of an actor who sees the world as its potential operating range or,

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<sup>26</sup> A. Toynbee, *Lectures on the Industrial Revolution in England*, 1884 : « The essence of the Industrial Revolution is the substitution of competition for the medieval regulations which had previously controlled the production and distribution of wealth ».

<sup>27</sup> See K. Marx and J. Shumpeter.

<sup>28</sup> See *The Treatise on Human Nature* and the famous rowers’ paradigm.

in other terms, who does not confine its actions within national or regional borders<sup>29</sup>. Pragmatically, it means that global or transnational interactions operate beyond the scope of the so-called “State sovereignty”. Such interactions are not anymore restricted to a handful of exclusive “global players”. Today, a much larger range of actors may play global, such as when ordering a medicine on the Internet, using an offshore vehicle for a financial investment, or even when traveling abroad to pay fewer taxes, adopt a child or marry a person of the same sex. As a matter of fact, everyone can play global without leaving one’s chair. In other words, interactions bypassing states power and national regulations are becoming mainstream. In this sense, “global society” means no more than a social environment that operates actually or potentially beyond the scope of sovereignty. How, if at all, may such a non-sovereign environment be regulated? This is the main issue urging a legal answer in today’s world. “Globalization” is not a mere catchword or a fashionable topic for a conference or a research center, but a critical issue that affects the very core of the law.

Law and governance does not operate in the same way inside than outside the scope of sovereignty. Business lawyers, legal anthropologists and sociologists, even international lawyers (at least part of them) are already well aware of that. A non-sovereign concept of law is insidiously making its way within contemporary legal consciousness and slowly eroding the long time dominant paradigm of sovereign law. But jurisprudence still needs to draw all the consequences of this change. Let us restart from the “struggle for law”, the concept laid down by Jhering at the end of the 19<sup>th</sup> century, which, at the time, set the grounds for the social model of legal theory. According to Jhering, conflicting groups and individuals are competing to see their own interests and values protected by the law. The struggle for law is arbitrated by the centralized institutions of the State: the legislator, the administration and the judiciary. In a non-sovereign environment, like the global society, the struggle for law is in full swing, but there are no central institutions whatsoever in charge of regulating conflicts and allocating rights. In such a context, global players as well as their contenders are deemed to adjust their behaviors and their strategies accordingly. Like in the Wild West, they may be tempted take the law into their own hands. Take the Nike case for instance, or any other similar case. The court of public opinion<sup>30</sup> was blaming Nike for the appalling working conditions in the offshore factories where Nike shoes are produced. Hence, Nike couldn’t argue that governments whereby the factories are located were responsible to regulate and enforce the labor conditions. Instead, it decided, as hundreds of corporations have done since then, to issue its own code of conduct. Subsequently, it included its provisions in the contracts signed with manufacturers of the supply chain. When there are public rules, private actors are entitled to maximize their benefits as long as they abide by these rules. But where no rules apply or are taken seriously, it doesn’t mean that every private party can do

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<sup>29</sup> This global perspective, as here defined, creates the conditions of the global regulatory competition above mentioned.

<sup>30</sup> According to J. Bentham, the court of public opinion is a fiction that makes part of “indirect legislation”.

whatever it pleases. Some are under heavy pressure to persuade their clients and the public that they play a fair game, that they are among the good guys, that they act for a just cause or, at the very least, that they are not the authors, the abettors or the beneficiaries of crime, malpractices or moral wrongdoings. This might prove very difficult, especially when the company is highly exposed to public scrutiny and when nobody knows precisely what the rules of fair play are. At this moment, private actors come to realize how useful rules are and how much the lack of them is costly. This may partly account for the spectacular success of the CSR movement and the extraordinary proliferation of codes of conduct and other norms of the kind.

Of course, this proliferation of norms and standards, that we call “pannomie”, produces at first no satisfactory result. Like Wittgenstein rightly observed in his *Philosophical Investigations*, the expression “to follow a rule” actually means to follow the *same* rule. He added: “the use of the word ‘rule’ and the use of the word ‘same’ are interwoven (as are the use of ‘proposition’ and the use of ‘true’)”<sup>31</sup>. In my opinion, this remark is more important than all the theorems of deontic logic put together. It helps us to discern why, despite the extraordinary growth of normative instruments and the numerous disputes among them, truly global standards eventually emerge out of this mess. Regarding CSR, the negotiation and the adoption in 2010 of the ISO 26000 standard on social responsibility of organizations offers a remarkable example of such a trend, even if this is only a step forward and by no way the end of the story.

To issue standards is an easy thing to do, maybe one of the easiest things to do in the world. A tougher task it to make sure the standard is actually enforced and obeyed, which is of course a matter of the utmost importance and a crucial stake in the struggle for law. In order to do that, we observed that the actors put all their efforts to identify global “gatekeepers” or “points of control”<sup>32</sup>. A point of control is an agent or a structure that has effective means to pressure, control or constraint global interactions or actors involved in such interactions. This theory was first tested in the sector of Internet content regulation. Private parties seeking to block certain sort of data circulating on the Internet, for instance copyright owners chasing down infringing material or NGOs contending hate speech, realized at their own expenses that they were hardly successful in their actions against content providers. Instead, they put pressure on ISPs, mainly hosting providers at first. They sued them in the US, then in Europe and around the world, sometimes successfully, like in the French Yahoo! case for instance. New intermediaries, like hotlines and watchdogs, entered the game. New procedures of complaint, like notice & take down, were designed, creating strong incentives for hosting providers to suppress controversial data when urged to do so by complainants. Public authorities followed the path, increasing the

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<sup>31</sup> L. Wittgenstein, *Philosophical Investigations*, Blackwell Publishing, 1953, § 225.

<sup>32</sup> J. Zittrain, “Internet Points of Control”, *Boston College Law Review* 44 (2003), pp. 653-688. See also : J. Zittrain, “A History of Online Gatekeeping”, *Harvard Journal of Law and Technology* 19 (2006), pp. 253-298.

pressure on ISPs around the world, such as in China for instance<sup>33</sup>. In the meantime, other players were inventing new ways to bypass this point of control, by modifying the communication channels in the network. For instance, peer-to-peer suppresses the need for hosting providers. Consequently, the interested parties looked for and identified new points of control, like access providers and more often search engines. They pressured them once more to play the role censors such as in cases involving Google in the US, Europe and much more dramatically and quite successfully in China. Online financial services have also been identified as gatekeepers, as it became obvious from the recent WikiLeaks case. Y. Benkler convincingly shows how the US administration and some of its allies pressured Pay-Pal, certain banks, Visa, Mastercard and American Express to cut off WikiLeaks fundings. WikiLeaks website was even shut down for some time, until Assange and his partners found new financial channels<sup>34</sup>. Internet points of control are still unstable, uncertain and relatively ineffective. They are deemed to evolve along with the structures of the global network. Nevertheless it shows how fast an emerging society, which is not regulated by a centralized power, manages to identify or create agents, to which it entrusts regulatory functions that they often don't have the willingness, the skills, nor the legitimacy to perform.

The theory of the points of control is by no way limited to the Internet. It also applies to well-known transnational companies, like Nike, Apple, Ikea or Wal-Mart, whose trademarks are sensitive to public opinion. They have similarly been put under pressure to regulate and monitor working conditions, human rights and environmental issues throughout the supply or value chain they control from an economic point of view. Another stimulating example is provided by the regulatory function assigned to credit rating agencies in global financial markets. Global finance provides one of the best cases against the natural economic law theory or the idea of market regulation as self-sufficient. Financial disintermediation and the dismantling of financial regulations and national barriers have led to the identification and the empowerment of new points of control. Investors and creditors entrusted them with the task of assessing the risks of financial products. Their judgments were granted normative force, both by private and public authorities, nationally and internationally, like the US SEC and the Basel Committee. Since the subprime crisis and the crisis of sovereign debtors in Europe, rating agencies have been put under tremendous pressure by lawsuits and judicial prosecutions launched in the US, Europe and all around the world. They are urged to clarify their methods, their procedures and their management so as to endorse, even reluctantly, their function and responsibilities as global regulators, despite their apparent lack of ability and legitimacy to fulfill such tasks.

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<sup>33</sup> B. Frydman, L. Hennebel and G. Lewkowicz, "Coregulation and the Rule of Law", in E. Brousseau, M. Marzouki., C. Meadel, (dir.), *Governance, Regulation and Powers on the Internet*, Cambridge University Press, 2012.

<sup>34</sup> Z Y. Benkler, "A Free Irresponsible Press : WikiLeaks and the Battle Over the Soul of the Networked Fourth Estate", forthcoming *Harvard Civil Rights-Civil Liberties Law Review*. See : [http://benkler.org/Benkler\\_Wikileaks\\_current.pdf](http://benkler.org/Benkler_Wikileaks_current.pdf).

Points of control play a key-role in the emergence and consolidation of global regulatory processes. They might even be transformed in the long run into regulatory institutions<sup>35</sup>. But we need to keep in mind that such a process is neither planned nor peaceful in the global environment. It is an uncertain outcome of the ongoing struggle for law. In the course of this struggle, numerous players, including public institutions as well as private bodies, produce conflicting standards, regulatory procedures and devices that serve their own purposes, interests and values. Take for instance the SA8000, CSC9000T and ISO26000, which compete among others as CSR global standards. Accounting standards provide another good example. The competition between the US and Europe in order to impose globally their own standards led the European Union to delegate almost all its regulatory power to a private accounting body, the IASB, which is now fully in charge of IFRS norms. However, the strong urge for convergence, “the norm of norms” as stated by George Canguilhem<sup>36</sup>, makes this struggle fiercer. At the very end, it allows only the “survival of the fittest”.

What does “fittest” mean in this context? Most of the time, if not all the time, it means the most powerful interest will prevail and impose its rule. According to our observations, first movers and innovators could also obtain a provisional advantage even if they don’t achieve a complete victory. A good example is the Shanghai ranking of universities, which performs a quasi-regulatory function in the field of education. As a pioneer and despite its well-known shortcomings, it remains a highly praised indicator assessing the quality of universities worldwide. We have also observed that the various components of a regulatory device are generally conceived and launched separately in the global environment. It is only subsequently that they may be connected and become part of one coherent and comprehensive regulatory institution. This may happen for instance with a code of conduct, a reporting framework, an auditing procedure and the granting of a label, which are progressively integrated within a unique and coherent quality control scheme.

Whatever they are, the normative devices that will eventually emerge from this struggle are unlikely to resemble the legal rules and institutions of the classic catalogue of sources of law. They often appear in the shape of technical standards (like ISO or IFRS) or of management devices (like indicators, benchmarks, rankings etc.). Moreover, technical standards and management tools complement each other very well and are often found working together. They make part of the same model of regulation and governance originated at the time of the industrial revolution. These norms and techniques, which were confined to the industry and the business world for a long period, have continuously evolved along with the transformations of our economy. They have matured, proved their utility and their efficiency and by now feel confident enough to pervade every sector of our “societies of control” to which they seem to fit perfectly<sup>37</sup>. New Public Management and the use of its techniques by

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<sup>35</sup> Michel Barnier, the French European Commissioner, mentioned in a official document the “quasi-institutional role” of credit agencies.

<sup>36</sup> *Le normal et le pathologique*.

<sup>37</sup> See G. Deleuze on M. Foucault : G. Deleuze, « Qu’est-ce qu’un dispositif ? », in Association pour le Centre Michel Foucault, *Michel Foucault philosophe, rencontre internationale*, Seuil, 1989, pp. 185-

OECD, the World Bank (Doing Business and Rule of Law indexes for instance)<sup>38</sup> and the EU (notably the Open Method of Coordination) give us a good idea of the tools of global and regional governance<sup>39</sup>. National regulations regarding the protection of safety, environment and health are progressively replaced by global standards as a consequence of the implementation of the agreement on Technical Barriers to Trade (TBC) of the World Trade Organization. For decades, the UN has failed to reach a political agreement on a legal status for multinational corporations; but ISO has been able to reach a large consensus of its ISO 26000 standard on CSO in a period of only five years. While international legal institutions seem paralyzed by the principles of sovereignty and unanimity in a multipolar world with almost 200 “sovereign” states, standards and indicators provide a much more flexible yet effective alternative solution to fill in the need for global regulation, coordination and governance.

These norms seem harmless because they appear to be only “technical”, meaning non-political (which is of course a fraud) and to be “voluntary”, meaning non-compulsory, which would not last for long. This may explain why they have until recently attracted little attention. Lawyers in particular seemed even lesser interested than others in such modest creatures, devoid of any attribute of power, force and sovereignty. Time has now come for a change. Lawyers cannot anymore indulge in such an attitude of superb ignorance. Law’s empire is under siege. Standards and indicators are gaining ground rapidly. They are not afraid anymore to compete with legal rules and they are often in a position to beat them. Standards and indicators are here to stay and to rule. So we better start to study them now.

In conclusion, I would advice lawyers to extend their expertise to other kinds of norms than legal rules. I would argue that the province of jurisprudence should be revised so as to include them in its scope. This is not an easy task. We have been dealing with them for some years now and almost each time I give a talk on global law, I have to face critics expressing more or less this: “Why are you talking about global law? There is no such thing as ‘global law’ or what you are talking about is not law, it is something else”. This does not always come from lawyers but also from philosophers, economists or laymen, who are not less attached to the good old reassuring picture of the law. Then the discussion would easily slip to a fascinating and complex metaphysical debate about what the law is and should be. Pragmatically, it comes to ask ourselves whether or not we should include these objects within our scope of expertise and our theories. In my opinion, the answer is undoubtedly positive. Even if such norms do not look like legal rules, not even from far away, and although they do not share the same “pedigree”, they are producing or at least have

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195. - G. Deleuze, « Post-scriptum sur les sociétés de contrôle », *Pourparlers*, Ed. de Minuit, 1990, pp. 240-247.

<sup>38</sup> D. Restrepo, “La mesure du droit : L’indicateur *Rule of Law* dans la politique de développement de la Banque Mondiale”, in B. Frydman et A. Van Waeyenberge eds., *Gouverner par les standards et les indicateurs*, Bruylant, 2014 (*forthcoming*).

<sup>39</sup> K. Davis, B. Kingsbury & S. E. Merry, “Indicators as a Technology of Global Governance”, *Law & Society Review*, Volume 46, Number 1 (2012), 71-104.

the potential to produce regulatory effects. They are “functional equivalents” of legal rules<sup>40</sup>. What the law actually is or is not is an open question to which the answer evolves from time to time. The history of legal ideas and successive models of legal consciousness has taught us this lesson so far. So it is time to work on a model that would allow us to observe and hopefully understand the kinds of norms that are proliferating in our global environment. While the outcome of the struggle for global law is still uncertain, as is the shape and content of global governance and global regulations, there is a favorable ground and a growing market for normative engineering. More important than all this, it seems to me worthwhile and urgent to take part in the ongoing battles.

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<sup>40</sup> K. Zweigert. “Methodological Problems in Comparative Law”, *Israel Law Review*, 1972/4, pp. 466–467.