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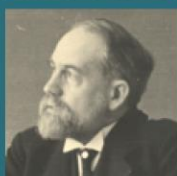
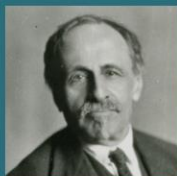
A Pragmatic Approach to Global Law

Benoît Frydman



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Par Benoît Frydman²

1. A provocative question

How should one think about global law? This is a provocative question because it presupposes an answer to another question, no lesser than the first one : does global law even exist? Nothing is less certain. One may certainly speak about a globalization movement, which is not always all that global; one can deal with global finance and global economy and bring up global issues, such as the struggle against global warming. But may one truly speak of a “global law”, when law remains, at least on the surface and in official addresses, the prerogative of the State or, in the case of international law, of the States? Wouldn't it be wiser to talk about “the effects of globalization on the law” rather than to invoke a “global law”?

A provocative question also in the sense that it catalyses thought, reflection, inasmuch as by presupposing its object it allows one not only to consider – which is a prerequisite – the destructive effects of globalization on existing legal structures, both national and international, but also to discern and to conceptualise the new legal objects, often still unidentified or not properly identified, which emerge from transnational relations and the global society under construction.

These multiple and heterogeneous devices, that proliferate, often in anarchical ways, in the most globalized fields, challenge the understanding of lawyers by the extraordinary diversity of their origins, their shape or their effects and by the apparent randomness of their arrangement and their combinations. However, they account for the necessary horizon of the legal philosopher and of the legal theorist of the 21st century. We are compelled, and this is not the first time in our history, to rethink law at the scale of the whole world.

We are urged by the changes in the world, and in legal relations and regulations, to re-evaluate the principles, concepts and tools of modern law, which have been established for several centuries - firmly entrenched it was thought – but which reveal more and more clearly the limits of their relevance and their effectiveness to capture their objects and to put them across. We are forced to reconsider the classifications and categories in which the new objects that emerge every day, akin to platypuses of the normative bestiary, stubbornly refuse to be encapsulated. To tell the truth, these categories are so undermined that it might be necessary to rethink the legal norms anew, not to say law itself, and probably to resolve to invent a new logic of norms. It just so happens that these are the tasks of the legal philosopher and of the legal theorist, towards which – as always in periods of paradigm crisis - the law professors and often the practitioners themselves turn to, but also the philosophers and the whole of society in demand of law, and above all our students, particularly the most advanced ones.

On top of this practical necessity, there is also another, both more epistemological and more personal, that irresistibly stirs those who take an interest in philosophy and theory of law and therefore seek to understand what law is, to penetrate the secret of the enigma and – to accomplish this – to pit their strength against the most difficult problems in the understanding of legal phenomena that reality offers us.

As Claude Lévi-Strauss wrote, in a short commentary of 1968: “*The essential task of the person who devotes his life to human sciences is to tackle that which seems the most arbitrary, the most anarchic, the most incoherent, and to attempt to discover an underlying order or at least to try to see whether such an order exists*”³.

¹ This text was first drafted in French and published in J. Y. Cherot et B. Frydman (dir.), *La science du droit dans la globalisation*, Bruylant (col. ‘Penser le droit’), 2011, 17-48. I am very grateful to M. Julian McLachlan, who helped me in translating this paper and sometimes in adapting it into English. I am also grateful to Caroline Lequesne who suggested important corrections and to David Restrepo for his comments.

² Professor at the Université Libre de Bruxelles (ULB) and at Sciences Po (Paris), President of the Perelman Centre for Legal Philosophy.

³ Cf. Lévi-Strauss, « L’ethnologue est un bricoleur » (commentaries given in January 1968 for a program of the research service of the ORTF devoted to the great adventure of ethnology), in « Lévi-Strauss par Lévi-Strauss », *Le Nouvel Observateur*, numéro spécial, nov.-déc. 2009, p. 22.

Let us therefore follow the invitation of this great ethnologist, who received an education in both philosophy and law (even though he did not think much of the latter) and whose first major work was about a legal problem - the rules of marriage - tackled at a global scale⁴.

Like ethnologists, we should be aware of the evolution of social interactions and we have to analyse those unidentified legal objects, that make up the substrate, or should I say the *bric-a-brac*, from which global law “*se bricole*”, to use another concept of Lévi-Strauss⁵.

But how should one take up this challenge and get down to this arduous and long-drawn-out job? How should one deal with this enormous mass of raw data? How should one organise and conceptualise this global law? So many questions with which those – increasingly numerous - who take up a research program in global law are necessarily confronted.

This article aims at providing some insights on these questions. It is based on research that has been carried out at the Perelman Centre for Legal Philosophy, which is the centre of the Brussels School of jurisprudence. The first part is devoted to the discussion of some methodological issues. In the second part, I summarize some of our theses, based on data collected on several fields explored in previous studies. Both steps are for that matter necessarily linked in the constructive approach of the object. Let us add immediately, and not just as a precaution, that this course of action is only one of the possible approaches to the issue of the Law & Globalization – we do not claim to exclude or invalidate other approaches. It seems to us that the validity of a theory, in this field as well, must be measured pragmatically, primarily using the results and insights it provides.

I. Methodological issues

2. Field Studies and UNOs

The “Global Law” program is the central research program of the Perelman Centre for Legal Philosophy. The Centre was named after one of its founders, Chaïm Perelman, leader of the Brussels School of Jurisprudence⁶, and has developed and applied his pragmatic approach to the current transformations of law induced by globalization. The Global Law Program started some fifteen years ago with the study of the consequences of globalization on law and governance, and progressively focused on the emergence of new forms of regulation in different sectors. Our pragmatic approach of legal phenomena has led us to study the consequences of globalization on law, not grounded in an existing theory, but rather by starting empirically from case studies and field observations. We conducted several field studies in areas particularly affected by globalization, such as the regulation of the Internet and of virtual worlds⁷, the fight against climate change⁸, but also corporate social responsibility⁹, human rights transnational litigation¹⁰, financial and accounting regulation, technical standards and indicators¹¹, as well as the European Union as a laboratory of global law¹². In order to do that, we often started from specific cases (such as the Yahoo! case about the Internet, the Nike case about CSR, the Unocal-Total case about HR transnational litigation), which we studied in great depth, without limiting ourselves to a strict approach of positive law, but on the contrary by providing a 360-degree view on the case, and by taking into account data that are still too often considered irrelevant

⁴ Cl. Lévi-Strauss, *Les structures élémentaires de la parenté*, Paris, Mouton, 2nd edition, 1967.

⁵ Cl. Lévi-Strauss, *La pensée sauvage*, Paris, Plon, 1962, col. Agora, ch. 1 La science du concret, p. 30 et seq.

⁶ B. Frydman and M. Meyer (ed.), *Chaïm Perelman 1912-2012 : De la nouvelle rhétorique à la logique juridique*, Presses Universitaires de France, 2012, esp. B. Frydman, « Perelman et les juristes de l’Ecole de Bruxelles », pp. 229-246.

⁷ B. Frydman and I. Rorive, « Regulating Internet Content Through Intermediaries in Europe and in the U.S.A. », *Zeitschrift für Rechtssoziologie* 23 (2002), Heft 1, pp. 41-59. – B. Frydman, L. Hennebel and G. Lewkowicz, “Coregulation and the Rule of Law”, in E. Brousseau, M. Marzouki, C. Meadel, (ed.), *Governance, Regulation and Powers on the Internet*, Cambridge University Press, 2012.

⁸ B. Frydman, « Coregulation : a Possible Model for Global Governance », in B. De Schutter and J. Pas eds., *About Globalisation, Views on the Trajectory of Mondialisation*, Brussels, VUB Brussels University Press, 2004, pp. 227-242.

⁹ Th. Berns, P.F. Docquir, B. Frydman, L. Hennebel and G. Lewkowicz, *Responsabilités des entreprises et corégulation*, Bruylant, col. ‘Penser le droit’, 2007.

¹⁰ B. Frydman and L. Hennebel, “Le contentieux transnational des droits de l’homme”, *Revue Trimestrielle des droits de l’homme*, 2009, pp. 73-136.

¹¹ B. Frydman and A. Van Waeyenberge (ed.), *Gouverner par les normes : de Hume aux rankings et aux indicateurs*, Bruylant, col. ‘Penser le droit’, 2013 (forthcoming).

¹² D. Dogot and A. Van Waeyenberge, “L’Union européenne, laboratoire du droit global” in J.-Y. Cherot et B. Frydman, *La science du droit dans la globalisation*, Bruylant, 2011, pp. 251-273. – A. Van Waeyenberge, *Les nouveaux instruments juridiques de la gouvernance communautaire*, 2013 (forthcoming).

from a legal perspective: media reactions, strategies of actors, technical constraints, economical consequences, etc.

These case studies often put us on the track of what we call “UNOs” - which stands for Unidentified Normative Objects – whose legal character is uncertain or challenged, but which produce or aim to produce regulation effects. In these fields and in the case studies, perhaps unconsciously following Lévi-Strauss' invitation, we have often favoured quirky, strange, new and puzzling objects, betting that their strangeness itself was a sign of the value of what they could teach us. And we set off on the tracks of these strange creatures through the jungle of global relations, rather like the zoologist sets off to find new species, while comparing them to known animals and attempting to classify them into families. That is how, in each successfully explored area (naturally, we have also been confronted to deadlocks), we have been able to highlight some specific regulatory “dispositifs”, apparatus or normative devices¹³. Then, still moving in the direction that leads from practice to theory, we compared these different sectorial apparatus and, on the basis of isomorphisms that we were able to observe, we developed a few general hypotheses and designed a few conceptual tools.

3. Conceptualising law without legal system – the micro-legal approach.

This pragmatic approach to global law implies some methodological choices. These choices must be explained for they have important consequences. Firstly, our study of global law is not a global study of law, at least not *a priori*. Economists usefully distinguish between two branches of their discipline, which also determine two points of view: macroeconomics and microeconomics. Such a distinction of level and of method also exists in other social sciences such as history and sociology. By analogy, we could also distinguish between a macro-legal and a micro-legal approach. The macro-legal approach gives priority to the study of the legal system of norms. The micro-legal approach determines how to decide cases and allocate rights. The concept of legal system, on the one hand, and the case method, on the other, are the two frames that history has given us to think about law. The case method was handed down to us by the Ancients, through Antiquity and the Middle Ages, while the concept of legal system was imposed by the Moderns, especially on the continent¹⁴. In continental Europe, the “legal system” was imposed in such a way that when we study law, we almost always give priority to the macro-legal approach, as if there were no other, at least no other scientifically valid approach. It is of course through this form that we consider national legal systems. Moreover, we have extrapolated this concept by applying it to supra-State levels. As soon as 1963, the Court of Justice of the European Union asserted that “the Community constitutes a new legal order of international law”^{15,16}.

Legal theory therefore tackles the question of global law by looking for a global system and noticing that such a system does not exist, which is indeed the case. It follows, for a large number of law professors, that the concept of “global law” does not make any sense and does not deserve any further consideration. In the absence of a legal system on a world scale, there is not such thing as “global law”. At the most one can bemoan or denounce the disorder – or the chaos – that prevails at a world level in the area of law. A way of escaping this deadlock is to resort to the solution of pluralism, developed notably by Santi Romano¹⁷. Romano contested monism (the approach centred exclusively on the state legal order) by showing that there are in our societies not one, but several legal orders, that coexist and have various relationships between themselves. Pluralism can therefore be called upon to think about global law, no longer as a unique order – that cannot be found in reality – but rather as an interrelated constellation of legal systems.

This option is favoured by numerous important studies on globalization, notably in France, by Mireille

¹³ The concept of “dispositif” or “apparatus” was originally proposed by M. Foucault in his studies of norms and “disciplines”. It was later developed by some commentators and followers such as G. Deleuze and G. Agamden, who gives this definition : “I shall call an apparatus literally anything that has in some way the capacity to capture, orient, determine, intercept, model, control, or secure the gestures, behaviors, opinions, or discourses of living beings (...)” (“What is an Apparatus?” in *What is an Apparatus? And Other Essays*. Stanford University Press, 2009, p. 14.

¹⁴ Concerning this question, I refer the reader to B. Frydman, *Le sens des lois. Histoire de l'interprétation et de la raison juridique*, Paris-Bruxelles, LGDJ-Bruylant, 3rd edition, 2011.

¹⁵ CJEC 5 feb. 1963, van Gend & Loos (case 26/62).

¹⁶ See the classical and already critical paper of J. Combacau, « Le droit international : bric-à-brac ou système ? », in *Le système juridique*, *Archives de Philosophie du Droit*, t. 31 (1986), pp. 85-105.

¹⁷ S. Romano, *L'ordinamento giuridico*, Pisa, Spoerri, 1918.

Delmas-Marty in her theory of the “pluralisme ordonné”¹⁸. Our position is not about replacing monism by pluralism, replacing the legal order with a plurality of legal orders, but rather about simply doing without the concept of legal order to immediately consider norms and legal interactions between actors as such, independently of any legal order(s) into which they would fit. I understand that this choice will raise fundamental objections from the perspective of legal theory and that it will be considered by many as absurd. Indeed, it is generally taught that a norm cannot exist by itself, but that it only takes on meaning and takes effect within a set or system of norms, to which the norm necessarily belongs¹⁹.

Why then give priority to this radical option? For a reason that is both simple and decisive in the eyes of a pragmatist: because the phenomena and objects that we observe in practice force us to do so. Most often the cases and normative devices that we examine on our various global field studies either cross the borders of established legal systems, or are located outside of these. Some even borrow their material from several legal systems. In sum, Occam's razor leads us to abstain from assuming the existence of a system where it is clear to everyone that there is none. In other words, the concept of the legal system, as it was created in the 17th century and that used to be so important, appeared to us as an obstacle, a screen, rather than a help or a tool to comprehend and understand the emergence of global norms. Accordingly, it seemed appropriate and urgent to break loose from it. This does not divert us from the objective mentioned by Lévi-Strauss to discover the “underlying order” in the infinitely diverse and quirky phenomena. Reality brings about this riddle but gives us doubts about finding the secret of the new order in the old one.

4. “Methodological nationalism”

All the more so that the concept of legal system (or legal order) does not only have a logical aspect (an ordered and complete set of consistent rules), but also an important political aspect, whose relevance must be reassessed in a global perspective. The legal order is indeed very often understood and used as an instituted order established by an authority, better yet by a sovereign authority, typically a State. In this respect, the notion of “order” refers not only to a system, but also to a command imposed by the authority to its subjects under the threat of sanctions. Historically, the construction of a legal system and the assertion of a sovereign political order have been the two sides (knowledge and power) of the same royal coin.

The logical and political aspects of the legal order merge to form a simple and rather rigid equation: law = legal order = State. Thus for many philosophers, conceptualising global law (or “cosmopolitical law” to use another term) does not only imply thinking about a new world order, but also implies almost necessarily, even if aporetically, asking the question of the existence of a world State. Some, such as Hans Kelsen, regard the law and the State as synonyms and consider that there is no other law than the law created by the States, i.e. national legal orders and an international legal order, made up of the law that States create together²⁰. We believe, for our part, that we must break off from this expression of what the German sociologist Ulrich Beck calls (well beyond law and legal thinking) the “methodological nationalism”²¹, while others speak of “statocentrism”²².

To conceive law as a State order would only be accurate from the perspective of sovereignty. It just so happens that if the world in which we live is certainly not a world without States (the UN tallies almost 200), it is, today as in the past, a world without a Sovereign. Indeed, the world State is not likely to happen soon. This is probably a good thing according to Immanuel Kant, who taught that a world State would necessarily take the shape of a dictatorship²³. In a world without a Sovereign, the States are forced to behave as actors among others. The State, sovereign (up until a certain point) within its own territory, loses all sovereignty (despite what international public law says) as soon as it crosses frontiers and must compromise with other forces. These forces are those of other States of course, but also those of other kinds of actors of the world society, such as international organisations and non-governmental organisations, or transnational firms and their networks.

¹⁸ M. Delmas-Marty, *Le pluralisme ordonné (les forces imaginantes du droit, t. 2)*, Paris, Seuil, 2006.

¹⁹ We use the terms of Pierre Livet in his book *Les normes*, Paris, Armand Colin, 2006, notably p. 3 and p. 74, who gives them a completely general scope, which includes a lot more than only legal norms. In legal theory, this idea was promoted mainly by normativists, like Kelsen and Hart.

²⁰ H Kelsen, *Pure Theory of Law*, Berkeley, 1967.

²¹ U. Beck, *Power in the Global Age*, Cambridge: Polity Press, 2005.

²² G. Timsit, *Thèmes et systèmes de droit*, Paris, P.U.F., 1986, p. 34. - W.J. ACEVES, "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation", 41 *Harv. Int'L.J.*, 129 (2000).

²³ I. Kant, *Perpetual Peace. A Philosophical Essay (1795)*.

Realists are well aware that we live in a multi-polar world on a long term basis. Most of them divert their attention from the concept of a “world State” to the issue of “global governance”. This notion of « governance », borrowed from political scientists and managers, is worthwhile and could, in the fuzziness that is inherent to it, be useful to describe some co-regulatory devices²⁴. However « global governance » overly emphasizes the organs, institutional structures and decision-making procedures, to the detriment of norms, objects and devices themselves. Empirical observation teaches us that norms are not necessarily produced by the structures of inter-state or para-state governance that are most often pointed out (international organisations, G8, G20, etc.) so that we prefer to refrain from reducing *a priori* global normativities to by-products of more or less official institutions of global governance.

In other – more theoretical – words, it is necessary, after having ousted the concept of « legal system », to distance oneself from the other major methodological tool of continental modern law, the concept of « legal source ». The main function and effect of that concept is to link the rule, its meaning, its scope, its binding effect and its legitimacy to the authority or the institution that enacts it²⁵. We mustn't deny that link, but we must put it into perspective. In the anarchical or polyarchical context of globalization, very talkative and creative with respect to legal and normative texts, it does not seem necessarily appropriate in our eyes to determine the value of a norm exclusively as a function of its origin or its author. For pragmatists, the value of a norm depends less on its “pedigree”²⁶ than on the effects that it produces²⁷. Several examples, taken from technical standards, codes of conduct, rankings and other labels, show that the normative force of these norms has little or sometimes nothing to do with the power, the official quality or the legitimacy of those who first designed and spread them. For that reason, the analysis of the current transformations of law in terms of an adjustment of the theory of sources (for instance by including various kind of « soft law ») although quite logical for lawyers, does not seem to us to be in this case the most promising nor the most appropriate. We are convinced that a theory of global law cannot be reduced to an exhaustive inventory of these sources, even if it would be possible to take ²⁸.

One might criticize us for concealing or even denying the link between law and power by separating the rule from its source and the system to which it belongs. We would thus be carrying out, either naively or intentionally, an insidious decoupling between law and politics. In reality, it is quite the opposite. It seems to us that by limiting, at a global level, the study of norms to texts enacted by official authorities, one sinks into a kind of formalism, to which lawyers are accustomed and which has been criticized by both Marx and the realists for concealing or being blind to the reality of power struggles. Moreover it is far from certain that these decision-making bodies of governance actually have the power of decision. A less punctilious analysis, that would extend to « soft law » as well as other kinds of norms might actually give us a better idea not only of political powers, but also of economic powers and technical forces that effectively prevail.

5. *Ubi societas ibi ius. – The Law of the Global Civil Society*

We have thus got rid, quite expeditiously I am afraid, of the legal system and of legal sources in order to understand global law. But what should we replace them with? How should we characterise the global environment if not as a super-State nor as a legal system? If we refer to the prevailing tradition of modern political philosophy, we would be left to think of the global environment as a “state of nature”. Here we are, back to Hobbes, who once described the international society of his times as a state of nature inhabited by Leviathans actually or potentially at war with one another²⁹. No social contract links those Leviathans with one another. Hobbes thinks of the state of nature – to say it very briefly – as a lawless state where the right of each person knows no other limit than his power or the limit imposed by another's power. In Hobbes' state of nature, individuals are completely on their own and there is almost no society at all. However, some of his successors, especially in the jusnaturalist or liberal tradition, believed, as Locke did, that some kind of society might actually exist in the state of nature, in which individuals may claim and even enjoy natural

²⁴ B. Frydman, « Coregulation : a Possible Model for Global Governance », in B. De Schutter and J. Pas eds., *About Globalisation, Views on the Trajectory of Mondialisation*, Brussels, VUB Brussels University Press, 2004, pp. 227-242.

²⁵ On the concept of source and its functions, *Le sens des lois*, op. cit., ch. 6, esp. § 175 et seq.

²⁶ The expression « pedigree test » belongs to R. Dworkin (*Law's Empire*, Harvard U.P., 1986).

²⁷ R.S. Summers, « Pragmatic Instrumentalism in American Twentieth Century Legal Thought – A Synthesis and Critique of our Dominant General Theory About Law and its Use », *66 Cornell Law Review* (1981), 861-948.

²⁸ On this question, reference may be made to our contribution with G. Lewkowicz, “Les codes de conduite, source du droit global?”, in *Les sources du droit*, Bruxelles, Publications des Facultés Universitaires St Louis, to be published in 2013.

²⁹ Th. Hobbes, *Leviathan or The Matter, Form and Power of a Common Wealth Ecclesiastical and Civil* (1651).

rights, particularly the recognition of their property³⁰. As the Romans said long ago : *ubi societas ibi ius*. There is no human society without law (but there are human societies without a State). Moreover the great Hegel, who was neither liberal nor jusnaturalist and who thought of the State as the ultimate form of government, taught that a private law grounded in persons, ownership and contracts, necessarily precedes State's Law, logically if not chronologically³¹. And one may observe the emergence of pre-political institutions, such as corporations and guilds, within this sphere of private law (civil and commercial law), before the emergence of public law.

The position of the Scottish empiricists (like Hume, Smith and Ferguson), that Hegel had read and pondered, is of peculiar interest. They rejected, before Hegel, the hypothesis of a social contract and the artificial discontinuity that it implies between the state of nature and the civil state. Hume and his successors reformulated the problem and thus the program of philosophy of law. The problem is no longer, as in the social contract tradition: "what are the necessary clauses of a fair social compact?", but rather: « how do legal rules and political institutions progressively emerge in the history of societies? ». With Locke, Hume, Smith and Hegel, we can therefore conceive of a law logically or historically prior to the State, a law of the world civil society. Better yet, we can tell its story. We are able to observe, as a matter of fact, the transformations operating in different fields with regard to the norms and regulations that are produced by the strategical interactions between actors in the global environment. In the second part of this article, we report a few provisional results that we think we can draw from these observations.

II. The dynamics of global law

6. Creative destruction and broadening the field of norms – Is global law really law ?

Globalization produces two kinds of effects. First, it affects, threatens and weakens classical rules and institutions, in particular national legal systems, but also European law and international law. A notable example is the henceforth often described phenomenon of the "race to the bottom". However, the fascination that stems from this spectacular and worrying deconstruction often tends to eclipse or to conceal other quieter phenomena, that develop at the same time. For social nature seems to loathe legal voids and the weakening of Leviathans and other dinosaurs of modern law appear to open an ecological niche favourable to the proliferation of other normative organisms, which take on various shapes and which invest in the rubble and the interstices between national laws and international law. These new creatures of the normative bestiary (sometimes resulting from older stems, already identified in the legal taxonomy) also deserve a careful study as embryos of new potential normative apparatus.

This gives rise to a serious doubt on the legal qualification of these emerging sets of norms and as a result on the competence of lawyers to deal with them. Modern law does not include the whole field of normativity, even if it claims to rule it. Law is only a form of social regulation among others, with precise characteristics, for example the articulation between primary and secondary rules in Hart's concept of law³². The norms that are dealt with here do not usually fit into such a frame. Thus, the legal theorist can quite rightly claim that those norms are not of legal nature and reject also the concept of "global law" for that reason. But what should be concluded from that? If we deduce that those norms do not concern lawyers or legal theoreticians who would not be cut out to deal with them because those norms are not part of the definition of law, such a conclusion would not satisfy the pragmatist, nor would it satisfy anyone relatively curious. From a pragmatic perspective, lawyers can – and even must – take an interest in those norms because they produce or attempt to produce regulation effects, to such an extent that they compete with, or even tend to replace classical legal rules. To take up a concept useful to comparatists, some of those norms potentially operate as "functional equivalents" of legal rules³³. They cannot be left exclusively to other social sciences. The legal philosopher must take an interest in them, even if it implies an expansion of the province of jurisprudence and of law's empire. This large conception of the philosophy of norms is, as it happens, not new, but remained commonplace at least until the 18th century. The work of Jeremy Bentham, for example, shows the fertility of such an approach for philosophy and for law³⁴.

³⁰ J. Locke, *Second Treatise of Government* (1690).

³¹ G.W.F. Hegel, *Elements of the Philosophy of Right* (1820).

³² H.L.A. Hart, *The Concept of Law* (1961).

³³ K. Zweigert. "Methodological Problems in Comparative Law", *Israel Law Review*, 1972/4, pp. 466–467.

³⁴ W. Twining also advocates for "normative pluralism" and a jurisprudence that would take into account those various competing normativities (W. Twining, "Legal Pluralism and Normative Pluralism : A Global Perspective", *20 Duke Journal of Comparative and International Law* (2009), 472-516).

7. *The race to the bottom and the global market of national laws*

Roughly summarized, globalization is a new phase in the evolution of capitalism and more largely of the world society, in which some actors, that are no longer named “multinational” but rather “transnational”, which notably include some large firms, but not only firms, directly determine and coordinate their action strategies on a global scale, and no longer by reference to one or several given countries or regions. The concept of “globalization” is a concept first developed in microeconomics, that refers to the perspective of an actor on his environment. In legal matters, globalization should also be studied from a micro-legal perspective. Globalization places transnational actors in a new situation. They are no longer subjects of a predetermined legal system, subjected to the constraints and if need be the sanctions of this system. Rather, they are placed before a fragmented landscape, a mosaic of legal systems, that roughly corresponds to the political map of the world, divided into States. This landscape itself is not new, since it was drawn first by Modernity and then by decolonisation. What is relatively new for many is the perspective and the opportunity of taking advantage of it. Indeed, transnational actors are, regarding this mosaic of legal systems, in a quasi-permanent situation of “forum shopping”, a term created by lawyers specialised in private international law, i.e. in a situation where they do their shopping between the different national legal systems.

From such a micro-legal perspective, globalization certainly does not give rise to the creation of a global law, but rather results in a global market of national laws by the competition that it establishes between these legal systems. This thesis of regulatory competition and of the race to the bottom that it causes is not new. Indeed, it has been developed, in the domestic context of the US, since the first decade of the 20th century, notably by Berle and Means, followed by Supreme Court Judge Louis Brandeis³⁵. Today, it can be adequately transposed to the world level, with the aggravating circumstance that, at this level, there is no federal State that could possibly temper its effects or regulate significant transfers of resources between States³⁶. States are very much concerned about attracting funds, activities and operations on their territory to generate economic growth and as a consequence revenue, income, employment and development. Therefore they are very willing to offer an attractive “normative package” to economic actors, especially to firms³⁷. Those firms tend to give priority, up to a certain point, to the State that has the lowest requirements. The legal duties, in the largest sense and obviously including social security, fiscal obligations and environmental constraints, are perceived as costs that are to be minimised in the unrelenting pursuit of profit maximisation. We know this situation very well through the issue of “outsourcing”. This competitive situation leads to a normative “price war”, a war which is all the fiercer as the difference between the regulatory levels of legal systems competing on the planet is huge and as some States (the so-called tax, financial or numerical safe havens) do not hesitate to resort to regulatory dumping practices to enjoy significant competitive advantages. We know that States that complain about that situation are for a large part those that have caused it. Indeed, financial markets as much as commercial barriers have been subjected to a deliberate policy of “deregulation”. That policy is itself grounded in a radical free-market ideology, whose effects are increased again by the economic and technical transformations, notably the unprecedented development of the world transportation and communication networks.

8. *The natural law of the global market*

Should we conclude from that “race to the bottom”, whose finish line is yet unknown, that there is a decline of law in favour of a regulation of the world exclusively by means of mechanisms of the market

³⁵ These notions were suggested by Berle and Means in their classic work *The Modern Corporation and Private Property* (New-York, McMillan, 1932) before gaining official recognition, in the very next year, by judge Brandeis in his opinion in the US Supreme Court case *Liggett Co v. Lee* (288 U.S. 517, 558–559).

³⁶ This issue of regulatory competition has also become relevant within the European Union and Europe single market. About the European Union as a laboratory for global law, see the works of A. Van Waeyenberge, researcher at the Perelman Centre, notably D. Dogot and A. Van Waeyenberge, “L’Union européenne, laboratoire du droit global” in J.-Y. Cherot et B. Frydman, *La science du droit dans la globalisation*, Bruylant, 2011, pp. 251-273.

³⁷ We can get a general idea of this type of « normative package » by consulting books or information websites of the type *Doing Business in ...*, that show firms the advantages and drawbacks, the costs and benefits of the installations or operations carried out in different States of the world. See in particular the *Doing Business* site of the World Bank. According to the experts of the Bank, the comparison between indicators over a period of five years between 2006 and 2011 shows that changes in terms of regulation have taken place in 85 % of the 174 economies (and therefore legal orders) studied, changes that « simplify » business life and improve the legal situation of investors (site <http://www.doingbusiness.org/reforms/five-years>, consulted on 6th September 2011).

economy? Some did not hesitate to predict that or wish for it, in particular the most radical supporters of liberal deregulation. From the perspective of legal theory, the ideas of those people fit into a frame that we have named elsewhere “natural economic law”³⁸. That law rests notably upon the general equilibrium theory of neoclassical economics, which claims that, in a “perfect market” situation, optimal regulation of all operations is achieved through the price determination model of supply and demand. There is nothing very surprising here to the historian of ideas, if we care to remind ourselves that economics historically derives from legal science, when philosophers such as Adam Smith (who not only taught moral philosophy but also legal theory) sought to establish the natural laws that govern society and thus discovered the law of the market and the famous « invisible hand ». The State and its iron hand, on the one side, the market and its invisible hand, on the other side, are the two models of social regulation that have been handed down to us by Modernity³⁹.

This doctrine, according to which the State and more generally rules and regulations are not a solution but rather a problem⁴⁰ and markets function better when left free from any public interference, did not stay purely theoretical, as we know, but have fed and legitimated massive deregulation policies at national, regional and world levels. Most leaders of regulatory organisations and agencies are subjected to or strongly convinced by the ideology of the natural economic law and the standard economic theory. Not only does that ideology contribute to the dismantling of national regulations, but it also obstructs the settling of new rules or institutions at the regional and world levels. Even in the classical cases of market failures, when the intervention of public authorities is deemed unavoidable, those authorities put hybrid mechanisms in place (interesting UNO's) that aim at establishing “artificial markets” such as, for example, in the field of the fight against climate change, the tradable pollution permits⁴¹.

Yet, and despite all the power of that ideology and the interests that support it, the empirical observation of the changes occurring in the different sectors of the global society does not confirm but in fact contradicts the theoretical hypothesis of the regulation of trade exclusively by the natural law of the market. Several reasons enable us to explain that fact. Firstly, and this is well known, the regulation by means of the market paradoxically requires a very large preliminary work of institutionalisation but also the establishment and the effective implementation of numerous rules and procedures to guarantee its smooth functioning. That is not only true for artificial markets, such as carbon markets, set up within the framework of neoliberal policies⁴², but also for classic markets in goods, securities and services, as the analysis of the causes of the bank crisis of 2008 convincingly shows⁴³. Indeed, one mustn't confuse the state of nature with the market: the market is not nature or rather, it is a “second nature”, as philosophers say, but which need to be instituted by the law.

9. The struggle for law

Secondly, and most importantly, field observation of the behaviour of actors, whoever they are (public and private, traders or not), teaches us that those actors seem far from being satisfied exclusively with the providential action of the invisible hand. Rather, they develop a sustained and sometimes intense activity, formulate claims and take numerous initiatives with regard to either the demand or the supply of norms. On our field studies, we noticed that “global players” are quite clearly in demand of norms and that norms are indeed produced in the course of interactions. This is due to multiple and varied reasons, that are not necessarily new: to standardise the features, quality and interoperability of products and services ; to encourage the division of labour and the globalization of production and trade; to stabilise expectations and to guarantee operations ; to reduce the uncertainty and risks associated to them; to coordinate the action plans of actors ; to structure networks and interest groups; but also to spread interests, values, behaviour patterns and make them prevail; to acquire, maintain, reinforce or fight for positions of power; to legitimate

³⁸ B. Frydman et G. Haarscher, *Philosophie du droit*, Paris, Dalloz, 3rd updated edition, 2010, p. 44 *et seq.*

³⁹ Concerning this question, see the fine book of P. Rosenvall, *Le capitalisme utopique. Histoire de l'idée de marché*, Paris, Seuil, 1979.

⁴⁰ According to Ronald Reagan's famous catchphrase : « State is not the solution, State is the problem ».

⁴¹ Regarding this question, reference may be made to our lecture series “*Les nouveaux instruments juridiques et financiers de la lutte contre le réchauffement climatique*”, février-avril 2011, www.philodroit.be (podcasts section). A summary of these lectures is also published on the website in the working papers series, 2011/1.

⁴² On this question, see the now classical analysis of Michel Foucault in his lectures to the *Collège de France* on neoliberalism : *Naissance de la biopolitique*, Paris, Gallimard-Seuil, 2004.

⁴³ Several recent works have stigmatised the deregulation of financial markets and the passive attitude of supervisor authorities as the main cause of the financial crisis which started in 2008 : J. Stieglitz, *Freefall*, Norton & Company, 2010 ; P. Jorion, *Le capitalisme à l'agonie*, Paris, Fayard, 2011 ; J. Sapir, *La démondialisation*, Paris, Seuil, 2011 ; etc.

some aspirations as “fair” by universalizing them; etc.

By way of answer, multiple undertakings aimed at producing norms have been emerging and prospering within the global environment. Their various means and techniques range from the improvised do-it-yourself to the most sophisticated normative engineering. A number of those techniques mobilise existing legal rules, procedures or institutions. Let us not forget that the global society was not born from nothing, but is the product of history, itself loaded with legal materials. Admittedly, those materials are ill-adapted to the global context. But they nevertheless remain available and recyclable for new constructions even though those have a radically different logic, aim and scope from the sets from which they are extracted. Aside from the mobilisation of classic legal tools such as contracts, torts, corporate law or arbitration, a few novel methods are worth mentioning: the new expansion or new recipients to international texts⁴⁴ or the multiple attempts to give extended extraterritorial effect to national or regional rules⁴⁵; diverse phenomena of “diffusion of law”⁴⁶, like so-called “transplants”⁴⁷ or “downloads” of norms⁴⁸; the regulation effects produced by the – sometimes accidentally – combined action of rules from different orders⁴⁹. Another phenomenon, highlighted by Saskia Saasen, is the “capture” of some state regulation agencies, such as monetary and financial regulation authorities, in the service of a global agenda⁵⁰, including, in some cases, national judges⁵¹.

Other apparatus are hybrids of legal rules and other normative fields: the aforementioned economic regulation through artificial markets or the incentives that Bentham calls “indirect legislation”⁵²; the technological “constraints”, standards and codes, notably in the IT area of communication networks⁵³ and virtual worlds; the management standards, notably the indicators used for evaluation and governance⁵⁴; the technical standards, including the extending scope of ISO standards and more generally the colonisation by technical standards of fields recently covered by classic legal rules (health, security, environment⁵⁵, etc.).

Observing those phenomena teaches us that global society is not a lawless environment, a place without norms. Nor is it a large market regulated exclusively by the law of supply and demand. It is a complex, fragmented, risky and uncertain environment in which various actors pursue their own goal and thus aim to establish norms that are favourable to their interests, so as to consolidate or strengthen their positions. The global environment may be compared to the state of nature. However, this state of nature is the arena not only of a struggle for life (as Hobbes told us) or of a competition for scarce resources (as in economic theory), it is also an arena where a “struggle for law” is taking place, to use the expression created

⁴⁴ For example, non-legally binding “soft law” texts, that are used as references for new instruments such as the UN's *Global Compact* or are applied to private agents rather than signatory States, such as in the *Global Compact* or in the ISO 26000 norm on the social responsibility of organisations.

⁴⁵ Such as, for example, in the case of the « *long arm statutes* » or, at the court level, the rules of universal jurisdiction.

⁴⁶ W. Twining, *Globalisation & Legal Theory*, Cambridge U. P., 2000. This idea was developed by the same author in “Diffusion of Law : a Global Perspective”, *Journal of Legal Pluralism* 49 (2004), 1 and « Social Science and Diffusion of Law », *Journal of Law & Society* 32 (2005), 203-240.

⁴⁷ The notion was developed by A. Watson in *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974.

⁴⁸ Metaphor used notably by Harold Koh and the school of New Haven who mention the « uploading » and « downloading » of legal rules between domestic and international law in particular (*Transnational Litigation in United States Courts*, West, 2008).

⁴⁹ Concerning this, we highlighted the phenomenon of combined action of provisions in the field of the responsibility of American and European Internet service providers, in particular the US « good Samaritan provision » in the CDA and the European e-commerce directive in the area of Internet content regulation (B. Frydman et I. Rorive, « Regulating Internet content Through Intermediaries in Europe and in the U.S.A. », *Zeitschrift für Rechtssoziologie* 23 (2002), Heft 1, pp. 41-59).

⁵⁰ S. Saasen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton U.P., 2006. For a more constructive approach of the same phenomenon : A.-M. Slaughter, *A New World Order: Government Networks and the Disaggregated State*. Princeton U. P., 2004.

⁵¹ See *infra* § 14 on the transnational litigation concerning human rights.

⁵² *Principes du Code pénal*, 4^{ème} partie.

⁵³ Among others, see Lany Lessig's book, which bears an evocative name: *Code and Other Laws of Cyberspace*, Basic Books, 2000.

⁵⁴ Concerning the application of such norms in courts, as well as their consequences, efficiency and legitimacy: B. Frydman et E. Jeuland dir., *Le nouveau management de la justice et l'indépendance des juges*, Paris, Dalloz, 2011 (sous presse).

⁵⁵ See below § 16.

by the German juriconsult Rudolph von Jhering⁵⁶. Even if we conceded that legal rules are but a means to an end, an element of the superstructure that can ultimately be reduced to the economic infrastructure⁵⁷, they are valuable assets, sources of power that are sought for their own sake⁵⁸. Thus the aim is to study whether or not, and if so how, in the absence of a supreme arbitrator (Jhering's sovereign state), the interplay of competing interests and the struggle for law that it causes can lead to the emergence and stabilisation of normative apparatus.

10. "Pannomie"

In the state of relative anarchy in which global society develops, the ability to propose and lay down rules is no longer limited to national parliaments and government institutions, nor even to international organisations. There is no such thing as a proper global legal system. Indeed, there is no monopoly on the power to enact rules and to impose them on others, nor are there any rules or procedures for deciding between competing rules. It follows that all the actors involved attempt to produce, endorse and to enforce by themselves the rules that best suit them. Let us take the typical example of codes of conduct: there are codes established by States, by international organisations (e.g. the UN's global compact), and also by firms, by NGOs or even by private experts⁵⁹. Thus global society is not characterised by a state of anomie. On the contrary it is characterized by a state of what we could call "pannomie", where norms spring up from everywhere, enacted by improvised legislators, public or private.

That situation obviously impacts interactions on the global scene, where some players attempt to define, modify or stabilise the "rules of the game" in the course of their relationships. It bears some resemblance to the very particular chess game described by Wittgenstein in his *Philosophical Investigations*, in which each player can choose, with each turn, either to move a chess piece or to change a rule⁶⁰. Of course, this extreme proliferation of rules is harmful to their effectiveness. As Wittgenstein rightly observes, following a rule means following the *same* rule⁶¹. If each and everyone follows their own rule, it is as if there were no rules at all.

In the absence of procedure or rules for deciding between competing rules, how will certain rules succeed prevail over others? How, in the struggle for law, is the selection of the fittest one made? There is no single answer to this question. However, on several occasions, we were able to find that the emergence and crystallisation of new norms only occurs in a later phase. Indeed, those processes presuppose the identification of a "fixed point" around which the sedimentation eventually takes place.

11. New points of control

In global law, anybody can proclaim oneself a legislator. But there is more to it: some can establish themselves as "policemen", provided that they have effective means of control over the behaviour of others. Or rather – since this is how it usually happens – the agent in control can be invested by others (often unwillingly) with the duty to keep actors under surveillance and to intervene when it is necessary. Those agents are invested by the public or by private groups and are urged or put under pressure to take responsibility and act as controllers.

In the various fields that we have studied, the search and identification of "points of control"⁶² or

⁵⁶ R. von Jhering, *Der Kampf ums Recht*, Vienna, 1872.

⁵⁷ On this notion of reduction "*en dernière instance*" (ultimately, in last instance) and the relative autonomy that justifies the attention paid to legal phenomena, refer to the classical study of L. Althusser, « Idéologie et appareils idéologiques d'Etat », Paris, Editions sociales, 1976, pp. 67-125.

⁵⁸ Reference may be made to the interesting debate which has been running since 2002 in political sciences on the concept of "normative power", which is used in particular to characterize the European Union. This debates has lead to numerous publications, including recently: R. Whitman dir., *Normative Power Europe*, Palgrave Macmillan, 2011.

⁵⁹ Please refer to the aforementioned paper of B. Frydman and G. Lewkowicz on « Les codes de conduite, source du droit global ? ».

⁶⁰ L. Wittgenstein, *Philosophical Investigations*, Blackwell Publishing, 1953.

⁶¹ *Philosophical Investigations*. See at § 225: "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")".

⁶² 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.

“gatekeepers”⁶³ often preceded the enactment of the rule. In other words, the policeman and the judge somewhat emerged before the legislator, which probably comes as no surprise to legal historians. In several sectors, one can observe the emergence and development of new points and procedures of control which perform a “quasi-regulatory”⁶⁴ function of “global monitoring”⁶⁵. Most dramatic is the case of rating agencies in financial markets⁶⁶. But this is also the case of rankings that measure and compare everything from Universities around the world⁶⁷ to the compliance by States with human rights standards and the rule of law⁶⁸.

In addition to those benchmarking tasks performed by professionals, there are actors in other sectors who are completely unrelated to those information and surveillance functions yet who are invested with a mission of regulation and control, because of their specific position in the organisation of production and trade. Those actors also came under broad pressure to bear, often unwillingly, a regulatory function for which they had not been destined and for which they had little means and legitimacy to perform. This is notably the case of Internet service providers (access providers, hosting providers, search engines...), but also of powerful brand companies (like Nike or Apple) which are *de facto* controlling the entire supply chain of their products. Those two examples, which were thoroughly investigated at the Perelman Centre, are further explored below.

12. Internet content regulation⁶⁹

In the 1990's, the Internet was considered, above all, as a lawless place for several reasons. First, it was deemed impossible to regulate and specifically designed for that purpose. Moreover the Internet culture has been driven by the capital goal to ensure the free flow of information : the main players would try to overcome all obstacles of any kind, whether technical, political or legal, limiting the exchange of data. That culture even led to the publication of a “*Declaration of the Independence of Cyberspace*” which denied any legitimacy to the intervention of States, and even challenged them to regulate the Internet. Furthermore, while the Internet was largely ruled by the United States, any public interference aimed at banning or controlling some kinds of questionable content was deemed to violate the 1st Amendment of the US Constitution. Several legislations by US Congress, like the Communication Decency Act (CDA) and the Child Online Protection Act (COPA), were actually struck down by federal courts and the Supreme Court of the United States. Finally, before the internet bubble, the faith showed by governments in the economic potential of the new information society and the net economy, prevented them to interfere too much with the Internet, so as avoid hindering its development. For all those reasons, States had, after a couple of vague attempts and several failures, more or less given up trying to regulate the new media and had decided to “*laissez-faire*”.

What happened? Interest groups made every effort to fight against certain content, either on grounds of a private interest (such as owners of intellectual property rights that are victims of counterfeiting), or on grounds of public interest (such as NGOs that fight paedophilia, racism or hate speech). Those private interest groups identified a point of control of the Internet: internet service providers (ISPs) and especially hosting providers, who host websites and other data on their servers. They then managed to exert significant pressure on ISPs by means of multiple legal proceedings. For example, in the famous French-American *Yahoo!* case, a French historian of the Shoah was alerted in the late nineties by an American “pin's” collector of the auctioning of a huge range of various Nazi paraphernalia on the auction site of Yahoo!.

⁶³ On the importance of this « gatekeeping » position, see, in addition to Zittrain, the more general book by J. Rifkin, *The Age of Access: The New Culture of Hypercapitalism, Where All of Life is a Paid-For Experience*, Putnam Publishing Group, 2000.

⁶⁴ I borrow the expression from the excellent article of T. Sinclair, « The Infrastructure of Global Governance: Quasi-Regulatory Mechanisms and the New global Finance. » *GLOBAL GOVERNANCE*, 7 (2001), pp. 441-451.

⁶⁵ T. Sinclair, « Global Monitor. Bond Rating Agencies » *NEW POLITICAL ECONOMY*, 8(2003), pp. 147-161.

⁶⁶ See notably the aforementioned articles of T. Sinclair and his book : *THE NEW MASTERS OF CAPITAL. AMERICAN BOND RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS*. Cornell University Press, 2005.

⁶⁷ For example, the famous Shanghai ranking (Academic Ranking of World Universities) : www.shanghairanking.com (accessed 9 September 2011).

⁶⁸ See for example the World Bank's ranking with regard to governance and the fight against corruption, which proposes a heterogeneous ranking by indicator, among which the respect of the rule of law by States, as well as the regulatory quality: http://info.worldbank.org/governance/wgi/mc_countries.asp (accessed: 12 september 2011).

⁶⁹ For a more complete discussion of the questions summarized in this paragraph and the precise references it contains, reference may be made to our following publications : B. Frydman and I. Rorive, « Regulating Internet Content Through Intermediaries in Europe and in the U.S.A. », *Zeitschrift für Rechtssoziologie* 23 (2002), Heft 1, pp. 41-59 and B. Frydman, L. Hennebel and G. Lewkowicz, “Public strategies for Internet co-regulation in the United States, Europe and China”, in E. Brousseau, M. Marzouki., C. Meadel, (dir.), *Governance, Regulations and Powers on the Internet*, Cambridge, Cambridge University Press, 2011 (in press).

French associations fighting against anti-Semitism and racism decided to target Yahoo! (who was far from being the only ISP involved, but who was, at the time, one of the most prominent ones) and to file a lawsuit against it in France. The aim was to force it to block access “on French territory” to such objects and more generally to any racist content. That not only led to a great transatlantic legal battle – which the American giant did not manage to win – but more importantly to a major change of policy. Indeed, Yahoo! decided to ban hate speech and the sale of hate groups paraphernalia from its sites, not only in France, but also in the United States (although they are protected by the 1st Amendment) and in the whole world. Under pressure, the other large auctioneers, like eBay, reacted in the same way. A “notice and take down” procedure conceived in the US for copyrights owners, then generalised in Europe and Japan, was put into place, turning hosting providers into unwilling and even reluctant censors of the Internet, censors that are nevertheless quite effective, sometimes too effective.

Of course, the effectiveness of such controls depends on the structure of data flows and when those flows change, the pressure shifts. For instance, the development of “peer-to-peer” networks for illegal downloads, where each person is his own host, shifts the pressure from the host provider to the access provider, as is notably the case in France with the Hadopi statute. Search engines, having become essential intermediaries between users and content editors, have also come under increasing pressure. Finally, there is the recent WikiLeaks case. Governments – notably the American government whose legal power was weak if not non-existent with regard to domestic law – moved and spread the pressure from host providers and access providers to Internet financial services providers: bank accounts, PayPal and other visa which supplied WikiLeaks were brutally blocked by those new appointed gatekeepers of the internet⁷⁰.

13. Corporate social responsibility⁷¹

A rather similar mechanism can be found in the area of global reorganisation of production and labour towards countries with a cheap workforce and low level of social protection. That question was brought to the international agenda by the United States and France during the negotiations that led to the establishment of the World Trade Organisation (WTO). Those two countries had suggested to introduce the possibility of excluding the countries that did not comply with minimal social standards from the benefits of free trade agreements. This so-called “social clause” was rejected by the WTO. The issue was transferred to the International Labour Organisation (ILO) which enacted a three-part Declaration, a solemn statement that was not, however, legally binding in international law. It promulgated four fundamental rights at work, that were later taken up in the UN Global Compact. That Global Compact, called for by the General Secretary of the United Nations in the year 2000, has been widely undertaken by major companies around the world and has become part of the growing corporate social responsibility movement.

According to our analysis, this CSR movement is not completely spontaneous, but largely corresponds to the identification of large firms as possible “points of control” in the global environment. For the past several years, some transnational firms, in particular those that sell branded products to the public while outsourcing the manufacture to subcontractors in low-cost countries, have been identified as points of control first by NGOs and other civil society activists, then by some States and international organisations which once more followed suit. Indeed, those firms, taking the place of failing or passive States, were targeted as both responsible and able to effectively contend exploitation of child labour, hellish working hours, dangerous or unhealthy working conditions, trade union banning, etc. Corporations such as Nike, for example, came under intense pressure from the media and public opinion and thus from their clients. Nike, like others, responded to that pressure by enacting a code of conduct, for obvious commercial reasons and to escape the void or vagueness of local law. The provisions of this code was then imposed through a chain of contracts to its subcontractors in India, China, Indonesia, Vietnam, the Philippines, etc. Nike even subjected those subcontractors to monitoring by Nike's inspection services or by external auditors. Nike's Code of Conduct provided sanctions – at worst the breaking of business relationships – in case of breach of its provisions. But this monitoring was carried out in a lax manner, and several investigations showed that working conditions remained appalling. Nike then suffered the backlash of its policy. Mr Kasky, a Californian activist in the area of consumerism assuming the function of “private prosecutor”, filed a legal

⁷⁰ See notably on this affair 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*, draft accessed on the website : http://benkler.org/Benkler_Wikileaks_current.pdf (28 June 2011).

⁷¹ For a more complete discussion of the questions summarized in this paragraph and the precise references it contains, reference may be made to our collective work : Th. Berns, P.-F. Docquir, B. Frydman, L. Hennebel, G. Lewkowicz, *Responsabilités des entreprises et corégulation*, Bruylant, 2007.

proceeding for false advertising. That led to a long and troublesome proceedings that Nike (not any more than Yahoo!) never managed to win, even by going right up to the Supreme Court of the United States. This affair forced Nike to change its social policy, to side-line its historical founder Phil Knight, whose reputation had been dented, and to put its acts of control in line with its code of conduct.

That affair and more generally the corporate social responsibility movement show us a transfer of the responsibility of control over working conditions in firms. Indeed, that responsibility was imperceptibly transferred from the local State – who is classically responsible according to international private law – and the international organisation (ILO) – who is in principle competent but without any direct means of intervention “on the field” –, to a private actor, the sponsor. That actor is not even the employer, but has been identified and put under pressure (by threat of damage to its reputation and thus to the value of its brand) as the one who *de facto* is able to, thanks to his economic position, exercise some control on working conditions, even though to start with he had no will, competence, and probably no legitimacy to take on such a role.

14. *Transnational human rights litigation*⁷²

Cases such as Yahoo! and Nike show that forum shopping is not only used by private actors – especially firms – to escape duties, taking advantage of the favourable conditions created by globalisation. Indeed, the same technique is used by other players, notably NGOs, to subject those same firms to rules from which, it seemed, it was possible to escape, under the traditional rules of international private and in particular the territoriality of police laws.

This opportunistic use of forum shopping for the purpose of implementing international standards of justice or to penalize the violation of fundamental rights is a very distinct hallmark of transnational human rights litigation. This type of litigation was highlighted in Europe with the Pinochet case. Pinochet was blocked in England at the request of Spanish and Belgian investigating judges, who were acting on the appeal of Chilean victims of the dictator, even though an amnesty law protected him in that country. That type of legal action is more and more frequently used to take proceedings against firms that are allegedly guilty of violations of human rights or of humanitarian law. For example, two large petrol companies – the French “Total” and the American “Unocal” – were successively confronted with proceedings in the US, in France and in Belgium. Those firms were charged for aiding and abetting crimes allegedly committed by the Burmese army (which was, on the other hand, immunised from proceedings on account of the absolute immunity of jurisdiction of States), as part of the exploitation of a gigantic gas field in Burma⁷³. In that case, the NGOs representing the victims used every procedural means available, notably active and passive personal jurisdiction, but also awaking an old law of 1789 in the US (the Alien Tort Claim Act), or even the universal jurisdiction statute enacted in Belgium (who for a while thought it good to offer in this global context “judicial hospitality”⁷⁴ to the whole world, before having to back down, under the pressure of the US). The case was in part political. It aimed to denounce to the tribunal of public opinion the crimes of the Burmese regime and to blame the western gas companies for their shameful complicity. At the same time, the case aimed to get a court declaring Unocal or Total legally responsible for their behaviour to the victims. Although the case collapsed in Belgium after an epic battle that pitted the two highest courts of the country against each other, it resulted, in the US and in France, in a compromise allocating significant compensation to the victims.

Thus, some national judges become the disputed agents of a de-localised global justice. Indeed, victims (or the organisations representing them), deprived of the possibility to lodge an appeal before the internal judge and often also before the international judge, use all procedural means to make those agents the oracles of a budding global justice.

15. *The standards wars*

Once the point of control is identified, the process of rule-making has found an anchoring point upon

⁷² For a more complete discussion of the questions summarized in this paragraph and the precise references it contains, reference may be made to our article : B. Frydman et L. Hennebel, « Le contentieux transnational des droits de l’homme : une perspective stratégique », *Revue trimestrielle des droits de l’homme*, 2009, pp. 73-136.

⁷³ B. Frydman, « L’affaire Total et ses enjeux », in *Liber amicorum Paul Martens. L’humanisme dans la résolution des conflits. Utopie ou réalité ?*, Larcier, 2007, pp. 301-321.

⁷⁴ B. Frydman, « L’hospitalité judiciaire » in *Justice et cosmopolitisme*, proceedings of the international conference of the Institut des Hautes Etudes sur la Justice, published on the website of the Institut des Hautes Etudes sur la Justice (www.ihej.org/ressources).

which it can be built in a more or less elaborate and effective manner. A rule is adopted by the improvised controller. This rule is often imposed by those who managed to put the pressure or negotiated among the main stakeholders, possibly with the intervention of States or specialised international organisations, whether intergovernmental or private, performing a function of standard setting.

Those standards are obviously not unique and “standards wars” quite often occur in this global state of nature, where each and everyone can proclaim himself legislator and attempt, with variable success, to impose his standard on others. Those conflicts of norms somewhat remind us of the technical standards wars that periodically occur in the technical and commercial areas, for example in the area of video formats (VHS vs. Betamax) or more recently of the high definition DVD (Blue ray vs. HD DVD), which also end up being arbitrated by the choice of their users⁷⁵.

China, for example, reacted to the development of the corporate social responsibility movement, to the declaration of the ILO on the fundamental rights at work, and to the various devices such as the SA 8000 standard or more recently the ISO 26000 standard, by proposing to firms in the textile industry or in the sport accessory sector, a competing quality norm, the SCS9000T, grounded in less demanding standards. In an entirely different area, that of accounting standards – strategic for finance and world economy –, Europeans decided to endorse the IFRS norms, enacted by a private actor, the International Accounting Standards Board (IASB), and convinced other world powers to do so, in order to counter the dominance of American norms, seemingly with some success⁷⁶.

16. Technical standards vs. legal rules⁷⁷

Beyond standards wars, norms bear much more resemblance to technical standards than to the legal rules, which they compete with and sometimes replace. First, with regards to drafting, those norms are not made by a parliament according to the classic law making process. Rather, they emerge from practical experience as a desirable average observed by experts, upon which stakeholders agree by consensus. Then, in contrast with classic legal sources, those norms are not imposed upon subjects under the threat of sanctions. On the contrary, they are norms to which actors subscribe voluntarily, although neither spontaneously nor selflessly, as we have seen. Regarding publicity, those norms are not rendered visible by a publication in an official journal, which would be necessary to make them enforceable. Instead, this is done by the granting of a “label”, which signals to others that an actor has committed himself to respecting such or such a norm. Maintaining this label requires the implementation of internal and external audit mechanisms, which take up the role played by administrative inspection services in domestic law. If the violation of those rules can result in legal proceedings (as we have seen with the Yahoo! and Nike examples) and sometimes in sanctions, those often give way to gradual improvement processes or, in irremediable cases, to the exclusion from the label and thus from the “club”, which functions according to a certain standard.

This comparison between global norms and technical standards should obviously be examined more thoroughly. However the few elements that we pointed out too rapidly show, in any case, that it would be of particular interest for lawyers to look into those technical norms. Indeed, those were considered for too long as “*infra-droit*” while they should qualify as “*contre-droit*”, as Foucault wrote⁷⁸, and they appear in the current context as a credible and sometimes effective alternative to traditional legal mechanisms.

17. Conclusion

The norms and surveillance apparatus that arise resemble legal instruments by the regulatory function they are assigned to and which they perform more or less effectively, but radically differ from those instruments by the forms and means used. Those norms and devices are still very little known and very poorly understood. There is no doubt that the work and research that I have attempted to summarise here are still in their early stages. For a long time, we will stay confined to feeling our way along the various field studies of global law before being able to understand its meaning and to control its mechanisms.

⁷⁵ This theme of « standards wars » sparked off a vast literature in particular in studies in economics and management, and, to a lesser extent, in sociology and history. However, too little attention has been given to this theme by legal professionals.

⁷⁶ On this matter, reference may be made notably to the many articles of Nicolas Véron and to his book *L'information financière en crise. Comptabilité et capitalisme*, Paris, Odile Jacob, 2004.

⁷⁷ For a deeper exploration of this subject, in the same collection : B. Frydman et A. Van Waeyenberge dir., *Gouverner par les normes : de Hume aux rankings*, Bruylant, 2012 (currently being published).

⁷⁸ *Surveiller et punir*, Paris, Gallimard, 1975, col. Tel. spéc. pp. 200-227 and *Histoire de la sexualité, t. Ier. La volonté de savoir*, Paris, Gallimard, 1976, spéc. p. 109 et s.

Nevertheless, these prolegomena are encouraging. Indeed, in this paper we have only managed to give a slight idea of the apparatus emerging in areas of all sorts. Yet their similarity allows some hope to find the common pattern to which those various instruments belong. One may start to discern the still vague prospect of an elementary theory of global law. That theory will not rest upon an exhaustive inventory of its sources, nor on the construction of a coherent and complete system of rules. Rather, it will rest on the description of a finite number of simple elements, the combination of which would enable us to account for the large number of seemingly anarchic, incoherent and arbitrary arrangements that reality confronts us with.