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'Change in the juridical order: destruction or metamorphosis?' The wording can seem a little provocative. And yet, is it not true that we have come to the point where any impingement on the law in a single place in the world is experienced by everyone? Kant's prophecy has become a reality, it seems to me, but it took over 200 years. And this shared emotion that he alludes to (any impingement on the law in a single place is 'experienced by everyone') has not been sufficient, and is still not sufficient, to guarantee permanent peace nor to promote the cosmopolitan rights that he dreamed of. So, one may ask the question – will we have to wait another 200 years to get there? At the moment, globalisation seems, effectively, to be more of a threat the juridical order.

This is why, in the guise of an introduction, I will distance myself from this conclusion that the current process of globalisation could endanger the juridical order, for at least three reasons.

First of all, the universalisation of values – the process inscribed in international instruments seems to express a desire to delimit the choices made on a national level, and thus to diminish the autonomy of national legislators, whether with regard to the protection of human rights, the protection of international public goods or the fight against serious international crimes (particularly crimes against humanity).

There is a second phenomenon, a second reason, namely, the globalisation of exchange, which is causing states to lose control of their borders, at least in part. Economic and financial flux, like the flux of digital information alluded to earlier during this conference, crosses boundaries blithely. Risks, in particular sanitary, environmental or nuclear risks, are no longer contained within national borders, as is the case for certain organised crimes such as terrorism, corruption and all sorts of trafficking.

Finally, the third reason, the increasing number of participants, which is also connected to the current process of globalisation. Participants who exercise power or an influence on an international level are no longer only states and public international organisations. We are seeing many private participants taking action such as transnational companies, NGOs and, sometimes, experts. In the issue of climate change, for example, it is often the work of experts that sets the agenda.

What are the consequences of such a conclusion? We will anticipate two responses.

**The pessimistic response would emphasise the destructive effects**, for two reasons. Firstly because the national juridical order, which is identified with the state in the sovereignist tradition that we know very well, would be threatened with regard to its axiological validity (legitimacy) and empirical legitimacy. Territoriality, encroached upon by globalisation, is causing the national law to lose some of its efficacy. Finally, responsibility, diluted by the increased number of participants, is losing its effectiveness.

It is not only the national juridical order that is being challenged but also, and this is more serious, the international juridical order, which is being obscured by a kind of superimposition of models. The traditional sovereignist model, connected to the autonomy of national law, has not disappeared, far from it. It is based on a process of the separation of juridical orders and sets limits on the scope of relations between states.

However, new models are appearing – universalism, characterised by the subordination of national law to international law, which is becoming common law, according to a process of unification that tends toward a supranational order. We are seeing a little bit of the cosmopolitanism imagined by Kant. This idea of a supra-state is very well known in Europe, whether within the European Union or the Council of Europe, and particularly in the European Convention on Human Rights. There is a similar idea at work on a global level but in a more fragmented way, limited to certain domains such as the law of the World Trade Organisation or the international criminal law that is the jurisdiction of the International Criminal Court.

I would like to add that although unification is taking place at the expense of the juridical order of a country that, in theory, is the most powerful in the world, which would spread to all other countries, another model of the imperialist

type would result. This is the reproach that is often made against American law, whether rightly or wrongly. In any case, it is an aspect that must not be neglected.

Finally, there is a model that could be described as 'liberal', in the economic sense of the term, which involves, if not total deregulation, at least the privatisation of norms on a basis of 'soft law'. 'Soft' is difficult to translate into French because the term can have three meanings – vagueness (*flou*), softness (*doux*) and weakness (*mou*). Vagueness signifies imprecise norms, weakness signifies optional norms and softness signifies unsanctioned norms. Sometimes, the three co-exist together. Sometimes, they are separate, as demonstrated by the diversity of forms that the notion of 'corporate social responsibility' can take.

In addition, we are observing another process, that of self-regulation, which is heralding an order that could be called 'transnational'.

Although I talked about a kind of 'blurring' taking place, what is actually happening is these different models are being superimposed on top of one another. Thus, in the case of the International Criminal Court, created in August 2002 according to a universalist model, practices vary. A recent application of universalist intentions occurred, for example, when the Security Council agreed to refer the situation in Libya to the Criminal Court. However, when the same Security Council, within which certain countries were threatening to exercise their right of veto, refused to refer the case of Syria, there was a return to the sovereignist model. Similarly, sovereignism and liberalism are sometimes combined. I am thinking of the tragic Rana Plaza incident, the fire at a textile factory in Bangladesh that led to the death of over a thousand workers. The facts came to light in April 2013 but since then no sanction has been pronounced, nor fines, nor compensation. Did sovereignism fail in this case? At the same time, a transnational agreement, concluded on 15 May 2013 by a certain number of clothing brands, implemented a programme to renovate and inspect buildings. So was this a success for liberalism?

And yet, liberalism is sometimes combined with imperialism, particularly with regard to international accounting standards, because these are issued by a private international organisation, the International Accounting Standards Board, founded in America. How should this be analysed? The question remains open.

These intricacies lead me to another theory, which I personally prefer. As opposed to a theory of destruction, this would be ***the optimistic theory of a process of metamorphosis***.

Basically, the idea is that we are in a period of transition, and that what is being constructed is a new, more complex model which, instead of opposing the different scenarios I mentioned previously, would combine them according to a previously unknown model that I have suggested can be called 'ordered pluralism', which is intended to refer simultaneously to a coordinated sovereignism, a flexible universalism or a regulated liberalism.

'*Coordinated sovereignism*' means that the separation of national orders would be gradually broken down by the circulation of norms and dialogue between judges, which would replace separation with coordination. Everyone knows about the debate between the judges of the Supreme Court of the United States concerning the question of whether or not it is correct to cite the jurisprudence of other courts, particularly courts that do not belong to a common law jurisdiction. It provides us with a powerful means of coordination that enables national norms to become closer in a spontaneous way. This concept does not, of course, permit submission to international law to be imposed. This was apparent in the *Medellin* case in the United States – even after the sentence issued by the International Court of Justice, the Supreme Court rejected any effort to grant enforceability to the decision of this Court, without taking into account the dissenting opinion of Justice Breyer. On the other hand, national judges can intervene when the international norm is directly applicable. We may perhaps talk about this later on with Lord Mance.

In any case, apart from coordinated sovereignism, there is another concept that, in my view, is able to initiate a process of metamorphosis. I will call it 'flexible universalism'. It is 'flexible' because instead of striving for the unification of all national norms, which seems both unfeasible and dangerous, reconciliation and harmonisation are preferred instead of unification. This process occurs on the basis of common principles together with techniques to minimise differences between the laws of states. This mechanism is well known in Europe. It is the subsidiarity of international norms, whether they originate from the legal apparatus of the European Union or the European Convention on Human Rights. It also constitutes – I like the concept very much because it can be transposed to a global level – a recognition of a 'national margin of appreciation', or in other words, a technique that enables international norms to be 'contextualised', to be situated in a given national context (economic, political, cultural, etc.).

In addition to this contextualisation in space, there is another form that takes place in time. We have, within the European Union, the notion of space at different speeds. The European norm can be integrated at different speeds. Examples are the European Schengen zone, the euro zone and the opt-out clause. It is true that on a global scale these techniques are more rare but there are some examples. For example, in the application of the OECD convention in the fight against international corruption, there appeared the notion of 'functional equivalence', which allows the same goal to be attained, namely, to fight against corruption, but by different means. And in the Statute of the International Criminal Court is inscribed what is known as the 'principle of complementarity', which in practice functions as a principle of subsidiarity – the Court is only competent if the States do not want to act themselves or are unable to do so.

Another technique should be mentioned which is often criticised. I think that it is criticised because it is not used properly but in and of itself it seems to be very useful. It is the notion of 'common but differentiated responsibilities'. It involves a sort of national margin that enables international norms to be contextualised within a particular space and time. This is what is practiced by the World Trade Organisation, which differentiates between three different speeds at which a market is opened up, depending on whether the given country is rich, an emerging economy or a poor country. This is also the procedure followed by the Kyoto Protocol for climate change, which introduces two speeds. Two speeds are undoubtedly insufficient on a global scale, where the world would thus be reduced to a binary opposition between industrialised countries and all the others. It would be necessary to introduce more nuances in order to account for diverse national contexts for at the present time there is still resistance because these first efforts to tone down the supranational nature of international norms are not adequate.

Flexibility is called for all the more because even in Europe, and within the highly respected domain of human rights, a certain number of countries have felt compelled to refer to the principle of subsidiarity as in the case of the Brighton Declaration of 2012 on the future of the European Convention.

It is *a fortiori* the same on an international level. Thus, the International Criminal Court was contested, not only by the countries that did not ratify the Convention, but also by African countries that had actually ratified it. There is also resistance to the World Trade Organisation – negotiations were recently concluded in Bali at the end of 2013, a simple *a minima* agreement, i.e. it does not concern industry, services, social rights, the environment or the manipulation of currency rates. In reality, all the Marrakesh agreements would have to be renegotiated, and we know how difficult that is. It is the same with climate change – several conferences attempted redistribute obligations between the various industrialised countries and the non-industrialised ones for the so-called 'post-Kyoto' period. However, in reality, the Warsaw Summit of 2013 has only postponed the issue to the Paris Summit in 2015. It may not take 200 years but there still remains a long way left to go.

This results in the interesting third concept – 'regulated liberalism' – which involves the introduction of shared responsibility among all global participants. It is undoubtedly necessary to accept a sort of combination between soft law and hard law, in the sense that one can give rise to the other. In the same way, self-regulation can give rise to regulation. In Bangladesh, after the Rana Plaza catastrophe, the agreement signed in May was followed by a proposed European directive and a proposed French law. Thus, there was a step from a 'vague' and 'weak' law to a 'hard' law. That said, it is not enough to enact precise and obligatory norms. The main problem remains that of effectiveness, particularly the effectiveness of sanctions, which requires a competent judge. In the case of transnational companies, there is no competent international jurisdiction as I mentioned previously. Even the International Criminal Court is not competent in matters concerning juridical persons. Thus, traditional territorial competence is not very effective because domestically countries generally have few means with which to pursue corporate misconduct. Apart from the national competence of the country of origin, the solution could be to foster extraterritorial competence as can be observed in the efforts of Europe as well as the United States. This is the well-known renaissance, if I may call it that, of the Alien Tort Act or Alien Tort Statute. I use the term 'renaissance' because this text dates back to 1789, it is not a recent invention. Rediscovered in the 1980s, this is an extraordinary text because it grants competence to American federal jurisdictions to pronounce civil sanctions, namely, punitive and dissuasive damages, in cases of violation of international law, or the law of nations, which is an extremely broad reference and specifically targets violations committed abroad by foreigners. In fact, it concerns the most serious violations of international law and human rights, including forced labour and the right to environment.

However, a serious stumbling block was recently erected in April 2013 by the Supreme Court of the United States in the *Kiobel* case. This case is highly significant because it concerns oil companies in Nigeria that were complicit in



serious violations of human rights, including rape and murder, perpetrated by military armed forces whose objective was to suppress the resistance of the local population to the polluting effects of the exploitation of oil in their territory. Thus, the Supreme Court gave reason to the court of appeal, which judged that the Alien Tort Statute was not applicable to juridical persons. What is also interesting is that the argument of the Supreme Court is different from that of the court of appeal. The Supreme Court examined the question from the angle of the extraterritoriality of the law. When one reads the judgement, one sees that all the judges agreed to approve the court of appeal's decision, but with a different motivation, from the angle of the question of territoriality. One thus sees, in my view, a clash between two views of sovereignty. The majority opinion upholds that 'There exists in American law presumptions that are unfavourable to extraterritoriality because legal conflicts must be avoided, discord must be avoided.' It returns to its position with this expression – 'United States law does not rule the world'. I will call this 'lone sovereignty'. On the other hand, Justice Breyer's separate opinion, supported by three other judges, approves the court of appeal's decision as does the majority but rejects the unfavourable presumption of extraterritoriality. On the contrary, this separate opinion allows extraterritoriality in certain cases, notably when the objective is to avoid the United States becoming a refuge for criminals. And I would like to say, a notion of shared sovereignty can be opposed to the notion of lone sovereignty. Because basically, in 1789, the Alien Tort Statute instituted a sort of solidarity between the United States and the rest of the world in the fight against pirates, who were described at the time as 'enemies of the human race'. This is why the question that I would like to ask Justice Breyer is, 'Who are the pirates of the 21st century?'

All in all, in my preliminary remarks, I have tried to show that the response to our question – destruction or metamorphosis – is undoubtedly complex. There is no destruction or true metamorphosis occurring. In order for this to be the case, there would have to be shared responsibility among all those participating in globalisation. There would have to be a geometrically variable kind of territoriality and there would have to be a shared sovereignty. Thus, are we perhaps witnessing a process of metamorphosis that is incomplete?

In any case, at the present time, in the absence of any world supreme court and in the absence of any integrated world juridical order, the main role lies with judges, and most particularly, with the judges of the national supreme courts. I would like to see them apply, in an echo of Kant's words, a very beautiful phrase by the Caribbean poet Edouard Glissant, who has recently passed away and who loved to say, 'Take action where you are, but think as if it is the whole world'.

We have the opportunity to welcome three supreme court judges who have demonstrated that it is possible to take action where you are and to think as if it is the whole world. It is time for me to give them the floor, starting with Stephen Breyer, associate justice, which does not mean an 'associate judge' but very simply a judge of the Supreme Court of the United States. He is known for having opinions that are open to dialogue. And he has shown what makes him different in the *Kiobel* case that I previously referred to. And I must thank him especially for agreeing to give a presentation this very afternoon although he only arrived about two hours ago from Washington after a difficult week devoted each day to difficult sessions in the Supreme Court. And since he likes challenges, he not only agreed to give a presentation two hours after his arrival, he also chose to speak in French. I shall now hand over to him.