GOVERNANCE BY NUMBERS
THE MAKING OF A LEGAL MODEL OF ALLEGIANCE

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‘That which is lacking cannot be counted.’

(Ecclesiastes I:15)

Introduction

LIKE EVERY WORK of human hand, our institutions bear the imprint of the ideas which helped bring them into being. Law is an institution in this sense, a cultural fact like technology, religion or the arts, which contain and preserve an era's dominant representations of the world. Of course, every body of representations—technology, law, the arts, and so forth—has its own internal system of reference. Although an airplane may be the incarnation of the human being's dream of soaring into the sky, as a technological object it depends on the *truth* of the scientific knowledge which enabled its construction. This necessary reliance on the value of scientific truth is what distinguishes modern from older technological objects, the latter being simply 'traps set at the points where nature can be grasped',[1] as Jean-Pierre Vernant puts it, that is, recipes deduced from what works or fails to work. Art, by contrast, has no such obligation towards truth, and can free itself entirely from the weightiness of the world as it is. However, a work of art needs to have an *aesthetic* value, at least in principle, and this is the yardstick by which it will be judged.

Law occupies a position halfway between art and technology. Its referent is neither truth, nor the aesthetic, but *justice*. However, just as a zeppelin may be dangerous, and a painting, botched, so a legal rule can be unjust. Yet even saying this implies a reference to what a legal rule *should* be. In common with art, law inhabits a world of fiction—for example a republic in which freedom, equality and fraternity reign. But in common with technology, law aims to act on the real world and must consequently take it into account. These two aspects interact, each being part of what Cornelius Castoriadis has called the imaginary institution of society.[2] 'Imaginary' does not imply that our institutions are creations of pure fantasy, born out of the magma of representations inhabiting us from cradle to grave. On the contrary: instituting individuals in society means removing them from that magma so that they may 'gain access to society and the world of signification as a world belonging to all and to no one'.[3] This world of shared meaning, which is imposed through the instituting of the psyche, is itself produced by

[1] J-P Vernant, *Myth and Thought among the Greeks*, tr J Lloyd with J Fort (New York City, Zone Books, 2006).

[2] C Castoriadis, *The Imaginary Institution of Society*, tr K Blamey (Cambridge, Massachusetts, MIT Press, 1987).

[3] ibid.

a social imaginary which, for society to survive, must be compatible with the prevailing physical and biological conditions of existence.

The legal order is also part of this imaginary institution of society. It cannot be divorced from a society's material conditions, but neither can it be deduced from these. The law is always one of the possible responses to the challenges which material conditions pose to humankind.[4] This is why it is as futile to seek to ground law transcendentally as it is to explain it away in terms of its material base, or analyse it as a technological object devoid of meaning. What natural law theory, materialist theory of law (based on biologism, sociologism, and economism) and Kelsenian positivism have in common is that they are all based on a subject–object dichotomy, which is a specifically Western way of conceiving relations to the world. Although we owe much to this way of thinking—on which, for instance, the natural sciences have thrived—it can blind us to the irreducible singularity of the human being. Our denatured animal may well project onto the world the images which inhabit him, using words and tools, but he can only survive if he is also aware of the realities of his ecumene,[5] his living environment.[6]

The *industrial* imaginary,[7] dominated by the laws of classical physics, gave us electrification, the film *Metropolis*, and labour law. The world was conceived as a huge clock advancing through the implacable interaction of weights and forces, which could be harnessed by human beings, but to which they were also subjected. The social state itself was designed as a machine, to correct the imbalances caused by industrial progress. It never aimed to eradicate the new forms of dehumanisation which appeared in the workplace, but instead to compensate for their effects and make them humanly bearable. It is at odds with today's *cybernetic* imaginary which champions governance by numbers. This new, and dominant, representation of how people and societies should function not only saps the social state but, more critically, it undermines our very conception of the state as it has been handed down to us from the Gregorian Reform of the eleventh to twelfth century, as a transcendent and immortal being.[8] The hypothesis on which this book rests is that the 'crisis of the welfare state' is a sign of a much deeper institutional break, which affects the specifically Western way in which the 'government of men' has been conceived. This is why we will not be treating the state, the law or democracy as parameters for a legal

[4] *cf* J-L Gardies, *L'erreur de Hume* (Paris, PUF, 1987).

[5] *cf* A Berque, *Écoumène. Introduction à l'étude des milieux humains* (Paris, Belin, 2000).

[6] *cf* S Weil, *The Need for Roots. Prelude to a Declaration of Duties towards Mankind* [1943], tr A Wills, pref TS Eliot (London, Routledge & Kegan Paul, 1952). From a similar perspective, M Horkheimer and T Adorno, *Dialectic of Enlightenment. Philosophical Fragments* [1947], tr E Jephcott, ed G Schmid Noerr (Redwood City, Stanford University Press, 2002).

[7] For this concept, see P Musso, *L'Imaginaire industriel* (Paris, Manucius, 2014).

[8] *cf* H Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass., Harvard University Press, 1983).

analysis, but as categories which must themselves be re-examined in order to understand the far-reaching institutional changes taking place under the name of 'globalisation'.

In order to approach this crisis of institutions, a much broader concept will be introduced: that of 'government', and its contemporary form, 'governance'. There is nothing new about broaching issues of law and institutions in terms of the 'government of men'. In Locke's *Two Treatises of Government* (1st edn, 1690), the notion of state appears only in 'State of Nature' and 'State of War', which are forms of power outside the realm of the law. To designate a system under the authority of the law, Locke uses the term 'Commonwealth' (Republic) and not 'State'. He thus marks his difference from Hobbes, who *equates* 'State' with 'Res Publica' or 'Commonwealth'. So we have only to cross the Channel for the general validity and self-evidence of the concept of state to evaporate. Much more recently, Michel Foucault has used the notion of government, or more precisely, 'governmentality', to designate all forms of exercise of power.[9] In addition to the authority of these authors, there is a further, and much more decisive argument for our focus on 'government': today, within the institutional configurations taking shape, it is transnational companies that occupy a role comparable to that of states. The methods of government employed by states and by businesses for governing people have always interacted, as from the industrial age. By employing the concept of 'government' it will be possible to track these mutual influences and address today's institutional transformations as a coherent whole.

The critical distance taken from the concept of the state is necessary but not sufficient for analysing the legal dimension of 'globalisation'. Other associated legal notions must also be re-examined because they too are products of the West, as is the notion of 'State'—and that of 'government'. We take for granted, for example, that governing and exercising power are one and the same thing. But this assimilation—even in the form of Foucault's 'biopower'—is by no means self-evident. It is symptomatic of a culture and an epoch (Western culture and our present times), which it would be childish to try and escape, since this is our world, but which we must try to situate in relation to other ways of conceiving the legal organisation of human societies.

The purpose of critically examining our categories of thought is not to dismiss them, but rather to circumscribe them, and understand how deeply they are embedded in the history of Western legal thought. In other words,

[9] M Foucault, *Security, Territory, Population. Lectures at the College De France*, Vol 4, 1977–78, tr Graham Burchell (London / New York City, Palgrave Macmillan, 2009) and *Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, tr Graham Burchel, (London / New York City, Palgrave Macmillan, 2007).

these notions should be used knowingly, rather than letting them do the thinking for us. The reference to 'the West' here is to be understood in a particular sense, connected with the long history of our institutions and more specifically with our culture's grounding in Roman law. When Rome split into Western and Eastern Empires, this was not only a political and religious schism, it was also a crucial moment in the history of law. The fall of the Western Empire in 476 produced an institutional void which the Catholic Church was called upon to fill, leading to the medieval period's solutions of Roman and Canon law, from which our modern concept of the state emerged. Meanwhile, the Eastern Roman Empire survived until 1453, roughly 1,000 years later. There, a symbiosis developed between the priesthood (*hiérôsinè*) and the Empire (*basileia*), from which emerged the figure of a monarch who is also a priest.[10] Western leaders' staggering ignorance of the specific heritage of the post-Byzantine world has caused centuries of incomprehension; for example, the vision of Greece as the direct descendant of Athenian democracy (which affected the conditions placed on Greece's entry into the EU) or the difficulties encountered by Europe in establishing pacified relations with Russia.

Within Western legal culture, two branches have developed—continental law and common law. They harbour a common, if rivalrous, wish to westernise the world, but in our post-colonial era, it is their conflicting institutional forms which take centre stage.[11] The acritical catchword 'globalisation' refers to the expansion of a certain Western culture over the whole globe. The French language enables us to analyse this process more precisely, and to envisage another perspective, through the crucial distinction between *la globalisation*, and *la mondialisation*. *La mondialisation*—'worldisation'—is derived from the Latin 'mundus', which is the opposite of 'immundus' in much the same way that the Greek 'cosmos' is the opposite of 'chaos'. *La mondialisation* evokes the diversity of civilisations; that is, the different ways of inhabiting the planet and of making it humanly viable. An uninhabitable world resembles, precisely, a reversion of the cosmos to chaos.[12] *La mondialisation* does not imply the advent of a standardised world based on Western ways, but instead, the West's encounter with other ways of conceiving how society may be instituted; ways which are, in turn, challenged by Western modernity. This dynamic should force us to abandon both the illusions produced by an essentialist reading of legal cultures *qua* invariants persisting in their being, and the idea that history is coming to an end, with the victory of Western civilisation over all others.

[10] *cf* G Dagron, *Emperor and Priest. The Imperial Office in Byzantium*, tr J Birrell (Cambridge, Cambridge University Press, 2003).

[11] *cf* below, ch 3, p 52ff.

[12] *cf* A Berque, 'La mondialisation a-t-elle une base?' in G Mercier, *Les territoires et la mondialisation* (Quebec, Presses universitaires de Laval, 2004) 73–92.

The interaction of these reciprocal challenges can be felt with particular force in the history of social legislation. In nineteenth-century Europe, the forces of capitalism crushed traditional systems of solidarity. These were based on family, religious, geographical and occupational bonds, which were destroyed to varying degrees by Europe's first industrial revolution, and then no less brutally with colonisation and the slave trade. Today, it is state systems of solidarity, designed for nationwide coverage, and invented precisely to palliate the weakening of traditional solidarities, which are under threat. From the perspective of the total market, which globalisation aspires to, society is simply a swarm of contracting particles whose relations to each other are based purely on calculated self-interest. Calculation—and hence the contract—thus comes to occupy the place previously assigned to the law as the normative reference.

This new utopia is no more likely to succeed than those which preceded it in the twentieth century, when the founding reference for the political order was the laws of biology or of history. As soon as Nazism and Real Communism were obliged to confront the limits imposed by reality, this proved catastrophic for their unbounded ambitions. Today, the pressure of globalisation on all cultures has triggered a powerful backlash of religious, ethnic, regionalist and nationalist identifications. Their common hallmark is to look for new solidarities grounded neither in tradition nor in the state, but rather in solidarities of combat based on the binary opposition—dear to Carl Schmitt[13]—of friend and enemy, which try to find justification in fundamentalist re-readings of dogmatic corpuses.

So how, and under what conditions, can a legal analysis help shed light on these transformations? Law occupies a strange position as a field of knowledge. Due to the medieval origins of modern law, Western jurists tend to see it as a self-enclosed system which can have no fruitful interactions with other domains.

However, law can best be understood as the secular equivalent of the systems of mandatory rules which, in other times and cultures, originated—or still originate—in shared belief and religious ritual. Every legal system rests on what the American Declaration of Independence calls 'self-evident truths', that is, on a dogmatic basis which makes the system meaningful and authorises interpretation:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to

[13] See below, ch 11, p 295ff.

> institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

This founding text presents a series of logical deductions. It starts by supposing the existence of individual rights, in a clearly dogmatic gesture: just like the creator, rights are 'self-evident', a truth which thus requires no demonstration, but should instead be proclaimed and celebrated. This dogmatic core grounds the power of government, while simultaneously limiting it in two ways: the government must have the consent of those governed; and its power should be used to defend the people's rights. If the government fails in this, the people have the right—a collective right this time—to put power into the hands of another group which can better guarantee security and happiness. The word 'happiness' appears twice in the Declaration: first, as the object of an individual quest which each citizen must be allowed to pursue freely; and again as the happiness of the people as a whole when it is ruled by a good government.

So law has a dogmatic basis, but it is also a technique of government, which people may use as they see fit. This duality explains the abyss existing between the supporters of legal positivism, who exclude any axiological considerations from their approach to the 'science of law'; and those who swear by a natural foundation to legal systems, an immanent or transcendant order considered universally valid, against which positive law can be measured, and which it should simply serve.

However, in reality, no serious legal analysis can opt for *either* the technical *or* the axiological dimension of law. A legal analysis should certainly not dissolve the text in its context, as sociologising and economistic approaches do. But neither should it divorce the text entirely from its historical, anthropological and socio-economic contexts. If these two conditions are not met, a legal analysis will be unable to contribute to our understanding of phenomena which anyway no single knowledge area can explain. Unlike biological or economic norms, legal rules are not derived from the observation of fact. They are not the imprint of the world as it is, but rather what a society thinks the world should be. It is thus a representation which can help bring about change.

The specific task of a legal analysis is thus to apprehend what *ought to be*, not directly what *is*. This definition is not intended to exclude the dynamic relation between *is* and *ought* (and additionally the realm of the purely imaginary), which exists in every human action. But we would insist that it cannot be grasped unless the systems of representation which leave their imprint on the law in a given society are first identified. There is much at stake in the gap between these formal representations and the real state of the world. If the gap is too large, or if it widens, then the legal order will be disqualified by reality, and its credibility will be undermined. This is what

happens when the law—which should be equally binding on all—simply masks a system ruled by privilege and personal allegiances. On the collapse of Real Communism, for example, the state lost all credibility, and what replaced it were negotiated 'arrangements' based on calculations of individual interest alone. But a system of law can also implement, at least partially, the vision of the world it advocates. Tocqueville's analyses, for example, testify to the strength of the principle of equality once it had gained constitutional value. And although it is clear that, for example, there are still today many inequalities between men and women, and thus a gap between the law and the facts on the ground, the normative force of the principle of equality has just as clearly narrowed that gap.

For a legal analysis to be productive, it must thus take into account the historical and geographical *relativity* of the law, which is not a universal and atemporal feature of human societies. But it must also take into account the *centrality* of legal rules, which are the only form of normativity to be the object of deliberation, and conscious of its own status, as well as binding on everyone.[14] With this relativity and centrality in mind, legal analysis can help detect the normativity at work in scientific disciplines, which often unknowingly mobilise legal categories while attributing to them a universal heuristic value. These categories, which frequently originate in Roman law—'civilisation', 'contract', 'law' and 'religion', for instance—are extensively used in economics and sociology. Many others—such as 'heritage' and 'heredity'—have influenced biology.

This treatment of law as a cultural fact attracts two types of criticism. The first, voiced by social scientists, accuses this type of analysis of relying on ideological constructs rather than confining itself to the facts. The second, from legal positivists, at the other extreme, accuses it of betraying the integrity of the law by attending to the law's contexts. On this basis, neither Montesquieu, nor Portalis and Carbonnier can have contributed anything at all to the science of law! But it is precisely when the study of law draws on this intellectual tradition that it can help us understand the upheavals of today's world.

A legal analysis as we define it here poses major methodological problems. The complex links between text and context cannot be identified and understood without studying historical and comparative works. As a result, the quality of a legal analysis begins to depend on readings from other fields, which in turn exposes jurists, despite themselves, to getting drawn into the controversies of other disciplines.

In addition to this first set of methodological difficulties, which relate to setting the text in context, there is a second group, which is internal to law. The extraordinary inflation of the law since the beginning of modern times,

[14] *cf* F Brunet, *La normativité en droit* (Paris, Mare & Martin, 2012).

and even more so today, has led to increasing specialisation on the part of jurists, both practitioners and researchers. At the same time, one cannot address fundamental questions affecting the development of law as a whole without leaving behind the comforts of a particular branch of law. What is required is a kind of 'intra-disciplinarity', despite the obstacles posed by the exponential increase in legal sources and the fragmentation of research across increasingly narrow specialisations.

The division of law into branches is a relatively recent product of the analytical study of law, or legal dogmatics, and dates from the jurists of Renaissance humanism and the legal theorists of the Reform. So it was only in the sixteenth century that law began to be conceived as having branches and sub-branches corresponding to the subjects treated. This approach, called *usus modernus*, was part of a larger movement affecting both theology and philosophy.[15] Today, certain signs, and the return of certain techniques employed by medieval jurists, suggest that the *usus modernus* no longer holds. In medieval times, the legal order was not compartmentalised, and operations of qualification did not consist of slotting a case into a category of subject matter. Jurists could solve a case by appealing to general principles or to rules borrowed from different subject areas.

Over the last century, the branches of law have multiplied, for practical (the increased number of sources) rather than epistemological reasons. This ramification is of importance for the profession, but its heuristic power is weak and perhaps getting weaker. It is particularly weak in the case of labour and social security law, a historically recent branch, which straddles private and public law, and has greater or lesser scope depending on the particular country and its judicial and administrative systems. Any advanced research will almost inevitably transgress the field's constituted boundaries, and oblige the jurist to venture onto terrain less familiar than his or her original specialism, with all the risks this involves.

Despite all these difficulties, a legal analysis can help one get one's bearings within the many calamities, of varying intensity, precipitated by globalisation throughout the world: increasing ecological threats, a massive rise in inequalities, mass pauperisation and migration, the return of religious wars and cultural isolationism, the collapse of political credibility and of financial systems, and so forth. We are a far cry from the radiant future announced by the prophets of the end of history and of a harmoniously globalised world. All these upheavals interact and amplify each other like dif-

[15] See on this subject, H Berman, *Law and Revolution* Vol II: *The Impact of the Protestant Reformations on the Western Legal Tradition*, which gives a historical account of this systematisation within Protestant lands; or, from a German perspective, J Schröder, *Recht als Wissenschaft. Geschichte der Juristischen Methode vom Humanismus bis Historischen Schule* (Geneva, Beck, 2001); A Wijffels, 'Qu'est-ce que le *ius commune*?' in A Supiot (ed), *Tisser le lien social* (Paris, MSH, 2004) 131ff.

ferent centres of the same fire. They have one factor in common: the decay of national and international institutions. The institutional bases on which a new world order was set up at the end of the Second World War have been profoundly dislocated, affecting countries and international organisations alike. People today cast around for a figure capable of protecting the planet, the value of the currency or justice in the world. They settle on God and the market, sometimes together, since monotheism and faith in a total market are well matched in the minds of fundamentalists, whatever their religion. After all, is not the 'invisible hand' of the market simply a secular version of Divine Providence?[16]

Whether it is God or the market which is called to the rescue in the various upheavals we are undergoing, the result always seems to be that collective deliberation is muzzled. In other words, the ideal of a *res publica* governed by the laws a people gives itself seems to end up abandoned or betrayed. This ideal, which has come down to us from the Greeks, rests on fragile foundations, and its history has not been smooth. It was utterly discredited by the twentieth century's totalitarian regimes based on scientistic norms, but it was solemnly reaffirmed in 1948 by the Universal Declaration of Human Rights, whose Preamble states that 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. This ideal is officially still our own, and so in the first part of this book we shall give an historical account of the many forms it has taken, in order better to grasp the critical challenges it has faced over the last century. This chronological contextualisation is vital for understanding how the promise of an impersonal government, which was already part of this ideal, came to take the form today of a governance by numbers.[17]

Since the reign of the law is intimately bound up with state sovereignty, this regime has suffered from the latter's decline. Today, the state seems to be relegated once again to the instrumental role it had under totalitarian regimes, and criticised as an archaic and oppressive figure. Where previously it was the plaything of a single party supposedly embodying the movement of history, the state has become the instrument of a total market which enlists all individuals into a world of unending competition, in which all aspects of human life are measured in economic terms. In this context, laws themselves become the object of a calculation, treated as legislative products

[16] *cf* T Todorov, *Hope and memory: reflections on the twentieth century*, tr D Bellow (Princeton, Princeton University Press, 2003) (translation of *Le siècle des totalitarismes* (Paris, Laffont, 2010), 31.).

[17] This idea, which I first elaborated in *The Spirit of Philadelphia* [2010], tr S Brown (London, Verso, 2012), was inspired by the title of the second volume of Alain Desrosières's collected articles, *L'argument statistique*, Vol 2: *Gouverner par les nombres* (Paris, Presses de l'École des mines, 2008). My debt to this author goes beyond this title, since his whole work shows a particularly fine understanding of institutions.

competing on a global market of norms. This gearing of the law to calculations of utility already operated in Soviet central planning. Thereafter, thanks to the unholy union of communism and capitalism—as from 1979, when the Chinese leader Deng Xiaoping launched his economic reforms—this subjection took the form of a governance by numbers which penetrates every level of society, from the individual employment relationship to the structural adjustment plans promoted at European and international level.

The overthrow of the reign of the law by governance by numbers enacts the dream of an arithmetically attainable social harmony. The latest incarnation of this dream in its long history are the ICT and digital revolutions, to which we all seem enthralled. The latter are based on a cybernetic imaginary, which produces to an idea of normativity not as legislation but as programming.[18] People are no longer expected to act freely within the limits laid down by the law, but to react in real time to the multiple signals they receive, in order to meet the targets they are assigned. Ways of thinking about work have been particularly affected by this development, which is why the second half of this book is devoted to the new forms taken today by the imperative of 'total mobilisation', which first appeared as Taylorism at the time of the First World War. The fate of Taylorism, and of 'total mobilisation['s]' new avatar, governance by numbers, demonstrates the failure awaiting all normative systems founded on denying the specifically human capacities of thinking and acting independently. Today, with the withering-away of the state and the new forms of alienation this brings, a typically feudal legal structure is re-emerging, consisting of networks of allegiance within which each person seeks the protection of someone stronger than he is, or the support of someone weaker.

This book therefore follows a double movement. First, the quest for an impersonal model of power, epitomised by the 'machine of government', which has led to governance by numbers. Secondly, the return of personal allegiance as a reaction to the failures of governance.

[18] On the cybernetic imaginary, see L Sfez, *Critique de la communication* (Paris, Seuil, 1988); P Thuillier, *La grande implosion. Rapport sur l'effondrement de l'Occident 1999–2002* (Paris, Fayard, 1995) 363f; C Lafontaine, *L'empire cybernétique. Des machines à penser à la pensée machine* (Paris, Seuil, 2004); P Breton, *L'utopie de la communication. Le mythe du 'village planétaire'* (Paris, La Découverte, 2006).

1

In Search of a Machine of Government

'To treat a person as a thing or as a purely mechanical system is not less but more imaginary than claiming to see him as an owl.'

EUROPE'S PRESENT INSTITUTIONAL disarray can be attributed to a certain way of conceiving government, which emerged with the modern age and continues to dominate our normative representations. The premise is that governing, as simply a technique of power, operates likes a machine, in this case a machine based on scientific knowledge of the human being. Yet there is nothing self-evident about equating rule with power. Or rather, one could say that this reduction is fairly symptomatic of a civilisation and an epoch which it would be childish to think one could simply leave behind, since it is still ours, but which we should attempt to situate in relation to other ways of conceiving human government. By exploring the aesthetic and poetic dimensions of government, we shall be able to relativise our own imaginary of the machine of government, and understand today's shift from government to governance.

I. THE POETICS OF GOVERNMENT

'Government' draws etymologically on a nautical terminology (the Greek *kybernan* (*κυβερναω*), via the Latin *gubernō*). To govern is to be at the helm, directing both the movements of the boat and its crew. But not all civilisations have conceived the organisation of human communities on this model of commands and constraints imposed on both men and things. The ethnobotanist André Haudricourt considers this model to be typical of predominantly pastoral societies.[1] By contrast, in societies where agriculture is more important, the image of the shepherd or the helmsman, who leads men with a stick, acting on them directly, is replaced by that of the gardener, who acts indirectly by creating the conditions which will enable each plant to thrive.

[1] A Haudricourt, *La technologie, science humaine. Recherches d'histoire et d'ethnologie des techniques* (Paris, Maison des sciences de l'homme, 1987) 277ff.

In the Confucian tradition, for example, the government guarantees the harmony which enables subjects to fulfil their functions as best they can. The person who deserves to govern is one whose virtue shines forth: 'When a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed.'[2]

So, reducing governing to the exercise of power is a typically Western idea. It has its origin in what Kantorowicz, in his research into the medieval origins of modern institutions, calls the disintegration of the ideal of liturgical royalty, when the figure of power split off from that of authority.[3] We tend to forget that this combination was precisely what made a government stable, as Cicero insists much earlier, in his dialogue *De re publica*:

> If there is not an equitable balance in the State of rights and duties and responsibilities, so that there is enough power in the hands of the magistrates and enough authority in the judgment of the aristocrats and enough freedom in the people, then the condition of the commonwealth cannot be preserved unchanged.[4]

Quentin Skinner has shown, in a magnificent short text,[5] that this tradition was still active in the political thought of the medieval pre-Humanists, as expressed in the famous allegorical frescoes of *Buon Governo* and Tyranny painted by Ambrogio Lorenzetti around 1338 on the walls of the Council Room of the Palazzo Pubblico in Siena. These paintings show two opposing scenes within a single political theatre: the allegory of bad government is dominated by a single figure—the Tyrant—whereas good government shows a balance between the masculine figure of political Power and the feminine figure of Justice. The honest citizens, when guided by power and authority together, are united in Concord (symbolised by the rope which links them to the two figures), and can thus contribute to the City's prosperity, as shown on another wall of the room.

These frescoes are a particularly striking example of the moment of self-representation essential to every government, whether the entity is a city, a state, a political party or a company. Pierre Legendre has explored the crucial

[2] *The Chinese Classics: Analects of Confucius*, Book XIII: Tsze-Lu, 6, tr and notes James Legge, online Gutenberg Project, 2001.

[3] E Kantorowicz, 'Kingship under the Impact of Scientific Jurisprudence' first published in M Clagett, G Post and R Reynolds (eds), *Twelfth-century Europe and the Foundations of Modern Society* (Madison, University of Wisconsin Press, 1961).

[4] Cicero, *On the Commonwealth*, Book 2, 57 in J Zetzel (ed) *On the Commonwealth* and *On the Laws* (London, New York City, Cambridge University Press, 1999) 52. See also the description of the three powers which, for Polybius, are unique to the Roman Constitution: Polybius, *The Histories*, Book VI, Ch 5, Loeb Classical Library edition, 1922–1927.

[5] Q Skinner, 'Ambrogio Lorenzetti: the artist as political philosopher' (1986) *Proceedings of the British Academy*, 72, 1–56. For a different interpretation of these frescoes, see P Boucheron *Conjurer la peur. Sienne 1338. Essai sur la force politique des images* (Paris, Seuil, 2013).

role of this aesthetic dimension in all institutional constructs.[6] A *representative* government implies that those governed can *recognise themselves* in it. The same goes for the sphere of collective representation which labour law has built up between private and public law. If the governed can no longer recognise themselves in their government, they will be unable to trust it and identify with its decisions. Politics will appear to be nothing but a ridiculous posturing, which can at best elicit derision, while one bides one's time. The blistering humour which thrives under authoritarian regimes is a sign of this, as the population's way of expressing their defiance of those who govern, and as a way of creating invisible networks of solidarity. When a people has been denied the right to form a political community freely, their poets and musicians often represent a more powerful and long-standing focus of collective identification than do their political leaders (Liszt's music, for example, or Mahmoud Darwich's poetry).

One of the most remarkable features of collective representation, understood in this double legal and aesthetic sense, is that it institutes, or gives legal existence to, a community of those governed. This is why ancient Greek theatre was not a form of entertainment reserved for the wealthy, but a civic ceremony which was integral to the development of democracy and the primacy of the law. Louis Gernet has shown, in Jean-Pierre Vernant's words, that 'the true material of tragedy is the socio-political thought peculiar to the City-state, in particular the legal thought that was being elaborated at the time.'[7] Theatre, music and poetry reinforced the laws governing the *polis*, and brought the public together through their experience of the same imaginary representations. A similar process of bonding is achieved by the various forms of collective representation. Every representative body of employees creates a particular community, whether at the level of the company or the business unit, and whether it is a group of managers or of metallurgists. Unlike a mandate or power of attorney, by which those who are represented institute their representatives, in collective representation it is always the representatives who institute the represented body.[8] In other words, this type of representation provides a form and a collective identity for what was until then only an aggregate of individuals.

What knits together such communities are legal ties, that is, texts which at once define and organise the groupings. However, the ties take shape only

[6] See particularly P Legendre, *La 901e conclusion. Étude sur le théâtre de la Raison* (Paris, Fayard, 1998) 291f.

[7] *cf* J-P Vernant, 'La tragédie grecque selon Louis Gernet' in *Hommage à Louis Gernet* (Paris, Collège de France, 1966) 31–35.

[8] *cf* G Borenfreund, La représentation des salariés et l'idée de representation (1991) *Droit social* 685–95.

through other forms of social imaginary, which we can class as aesthetic. This point should not be overlooked in examining the specific role of the law in instituting solidarity between people. In general, the links between law and technoscience are easy to grasp, for example when social law gives legal force to groups 'objectively' constituted by technological factors (for instance, a group of employees exposed to ionising radiation),[9] or else groups defined 'objectively' by social scientists (for instance, 'young people aged between 16 and 26 who live in deprived urban areas').[10] But the law also plays a role in constituting 'subjective' solidarity between, say, those attending a rock concert or a concert of baroque music. When a young graduate joins a fast-track stream of the civil service, this is not simply an administrative act determined by an organisational rationale; it is also a moment of initiation into a certain ethos, a certain type of 'confraternity' which, although symbolic, can have powerful effects in the way the State functions in practice. Similarly, the legal qualification of a 'young person who lives in a deprived urban area' is not simply a neutral label which translates a supposed understanding of the causes of unemployment. It is also the sign of a certain social group, which is a form of stigmatisation and relegation to a sub-culture. 'Rational' administrative bodies register the symbolic effects of certain legal categories only unconsciously, and veil their subjective dimension behind a façade of purely instrumental goals: take, for example, some French acronyms for university courses and posts at the bottom of the scale—ATER (*Attaché Temporaire d'Enseignement et de Recherche*), which sounds like *à terre*: floored, on the ground); or equally the incomprehension which has greeted the poor take-up of the State benefit 'Income from Active Solidarity' (*Revenu de Solidarité Active*), where those eligible explain that they are 'capable of coping alone' and do not want to 'be dependent on assitance from others'.[11]

The aesthetic dimension of the law extends to how legal statements themselves are formulated. The authority and stability of a rule will often depend on its literary elegance. The articles of the French Civil Code are a case in point, but the same goes for any work of legal doctrine,[12] since their force derives in part from their stylistic qualities. French jurists still deploy their arguments in two parts and sub-parts—a distant hangover from Scholasticism—which is deemed to reflect the balance and hence the fairness of their reasoning. We may hardly be aware nowadays of the normative force of

[9] French Labour Code, L.4451-1 and R.4451-1f.

[10] French Labour Code, art L.5134–54.

[11] *cf* P Domingo and M Pucci, 'Le non-recours au RSA et ses motifs' in *Rapport du Comité d'évaluation du RSA*, Annex 1, December 2011, 25–26.

[12] *cf* Archives de philosophie du droit (1995) *Droit et esthétique,* 40, 534.

aesthetic properties, but the reader of the famous opening sentence of the *Prooemium* of Justinian's *Institutes* senses this clearly: 'The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace'. Kantorowicz studied the singular fate of this couple *armis decorata-legibus armata* in the sixteenth century, when in some of its restatements Letters replaced Laws in order to stress that good government should be based on the arts as much as on force.[13] In the eighteenth century, despite the rationalism of the period, Vico methodically explored the links between laws and poetry. In his words, '[Scholars] agree that the first poets were also the first writers, but they have failed to recognise the related fact that poetic language was the first language of nations and that it founded their first religions and their first laws.'[14] To a modern mind, the affinity between law and poetry may seem incongruous, but it becomes clearer if we recall that the Ancient Greek term *ποίησις* (*poíêsis*) meant creative activity, bringing forth something new, and only secondarily poetry and poetics.[15] Through its aesthetic force, poetry reconciles contraries and is both creative and organisatory. It can therefore contribute to establishing or re-establishing harmony between human beings.

This mode of thought was familiar to Japan, the first country to assimilate Western legal culture without abandoning its own traditions, and thus a particularly interesting case. With the Meiji era a vast linguistic project was launched to incorporate Western legal concepts while also reviving strictly Japanese ones, which belonged to the imperial tradition. One of these concepts was 'government'.[16]

Under the shogunate, government by warriors (*bushis*) was referred to metonymically as *bakufu* 幕府. Originally, '*baku*', 幕, referred to a piece of material which surrounded the place ('*fu*', 府) where the 'shogun' (the general-in-chief) resided in the camp of campaigning armies, and so the first meaning of '*bakufu*' was the headquarters of the military command. But in the twelfth century it came to mean the power exercised by the Shogun over his vassals, the great feudal lords. Different terms were used to refer

[13] Kantorowicz, 'Kingship' (n 3). See the same author's study of praise of the sovereign in the medieval liturgy, *Laudes Regiæ. A Study in Liturgical Acclamations and Medieaval Ruler* [1946] (Berkeley, University of California Press, 1958).

[14] G Vico, 'The Origin of Heroic Language or Poetry' (Ch 12 §.2) in *Opere Di Giambattista Vico. De Constantia Jurisprudentis Liber Alter, Volume 1* (reprint of 1841 translation, Saraswati Press, 2012).

[15] P Chantraine, *Dictionnaire étymologique de la langue grecque* (Paris, Klincksieck, 1999); see *poiesis*, 922.

[16] Most of the following exposition draws on Professor Kado Kazumaza's detailed analysis of these foreign legal and linguistic imports into Japan. See particularly his article in French, 'Revisiter la notion de souveraineté' (2011) *Droits* 53, 215–39.

to the power of the *Tenno* 天皇 (the king of the heavens, the most high), whose function was different. By metonymy, again, rather than metaphor, the terms *Gosho* or *Chotei* designated the imperial headquarters, the seat of the *Tenno*. One could compare this with the papal government, called the Holy See or the Apostiolic See. According to Canon 361 of the Code of Canon Law in force today, 'the term Apostolic See or Holy See refers not only to the Roman Pontiff but also to the State Secretariat, the Council for the Public Affairs of the Church, and other institutes of the Roman Curia, unless it is otherwise apparent from the nature of the matter or the context of the words.' The Roman pontiff himself is the ultimate seat of government of the Church. This comparison should help us understand the terminology adopted by Japanese jurists after the Meiji Restoration. Until the 1870s, there was no consecrated translation of the word 'government': the *Tenno*, like the Pope, was infallible. His omnipotence did not rely on what the West, following Weber, calls the monopoly of the legitimate use of force, but on the influence he exercised over his subjects' minds. Like the Pope, he did not reign through soldiers but through souls, and while the Shogun dealt with the reality of power, the Emperor organised poetry competitions.

The instigators of the Meiji Revolution attempted to reactivate this political figure of the *Tenno*, while ensuring that the Emperor held real power. This was, understandably, no easy task, and the concepts they mobilised to achieve it can seem impenetrable to Western jurists. According to Article 1 of the Meiji Constitution, 'The Empire of Japan is reigned over by *Tôchi* power, from a line of Emperors unbroken since eternity.' One of the leading drafters of this Constitution, Inoue Kowashi (1844–1895), explained that the Chinese character '*Tôchi*' originally meant the capacity to reflect truth like a mirror. Due to his celestial position, the *Tenno* can know and ordain everything, bringing order to the world without violence despite his omnipotence. Another drafter of the Constitution criticised the Western idea of government in its original nautical sense, which in his view dehumanised the population by treating it like an inanimate object. Choosing the concept of '*tôchi*' to describe the role of the Emperor was also a response to this criticism.

Translations of the term for 'government' only stabilised in the 1880s, with the notions of 'sei-ji' and 'sei-fu'. 'Sei-ji', 政治, a term taken from ancient Chinese texts, refers to the action of governing, and means 'politics' in China and Japan. But in the pre-Meiji era in Japan, it also meant being in charge of the rites. 'Sei-fu', 政府, also a Chinese term, was used to translate *the organisation of government*, and was hardly used in Japan before modernisation. As we saw with *Baku-fu*, the word 'fu' was often used to refer both to the place of residence of the leader and his function. In the 1870s the word 'sei-fu' was adopted to translate 'government', in order to stress the fact that the emperor and his 'fu' were leaders of the 'sei'; that is, not only of the political realm, but also of state rites.

II. THE MAN-MACHINE

With some rare exceptions,[17] those who regard government as solely an instrument of domination of some groups over others tend not to perceive its aesthetic and poetic dimension. The latter seems to have no place in the rationalistic and mechanistic imaginary which has dominated political philosophy from the advent of modernity until today. When political institutions are regarded as machines, it is indeed difficult to understand the pivotal role of aesthetics in the art of governing, but since government's spectacular aspect cannot be denied either, it is reduced to techniques of manipulation and communication, and thus forced back into a mechanistic paradigm. This paradigm, which is supposedly 'objective', makes us view people as though they were things, 'like "particles" which are under the sway of forces of attraction, repulsion, etc, as in a magnetic field', in Bourdieu's words.[18] From this perspective, government is one huge machine controlled by a play of forces, cogs, weights and counter-weights.

Hobbes in the mid-seventeenth century is certainly the thinker who expressed this idea of government as a machine in its purest form, as from the opening of his classic work of European legal thought, *Leviathan*.[19] In the section which precedes and justifies the contents of the book, and indeed its very first word, we find the term 'nature': 'Nature (the art whereby God hath made and governs the world) is by the art of man, as in many other things, so in this also imitated, that it can make an artificial animal.' Hobbes is neither the first nor the last thinker to ground the law in nature, where nature is the expression of a technique which God has devised and which He oversees. Man, made in God's image, can and should copy this technique, and, in turn, use the mechanical arts to create artificial beings, more precisely 'artificial animals' or automata, which imitate a living being and are endowed with movement. From the late Middle Ages to the industrial era, automata were objects of such fascination that they attracted the best watchmakers of Europe and involved remarkable technical prowess, as in the group of three figures—the writer, the draughtsman and the woman playing an instrument—created by Pierre and Henri Jaquet-Droz in 1775 (today displayed in the Neuchâtel museum).

[17] On the post-colonial political practices of Central Africa, see J Tonda, *Le Souverain moderne. Le corps du pouvoir en Afrique centrale (Congo, Gabon)* (Paris, Karthala, 2005). On Western countries and multinationals, see P Legendre, *La Fabrique de l'homme occidental* (Paris, Mille et une nuits, 1996), and, by the same author, *Dominium Mundi. L'Empire du Management* (Paris, Fayard, 2007), texts complemented by two eponymous documentary films by Pierre Legendre and Gérald Caillat, produced by Pierre-Olivier Bardet.

[18] P Bourdieu, *Réponses* (Paris, Le Seuil, 1992).

[19] T Hobbes, N Malcolm (ed), *Leviathan*, 3 vols, English and Latin (Oxford, Oxford University Press, 2012).

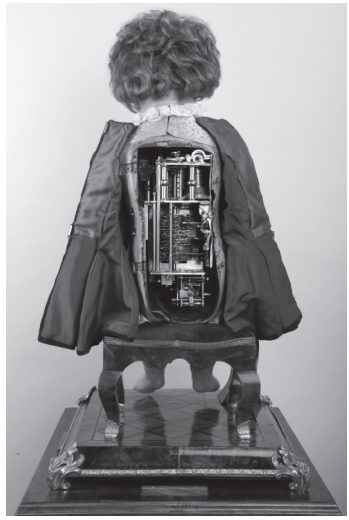

Figure 1.1: *The Draughtsman*, by Henri Louis Jaquet-Droz, 1774 (inv AA3). He draws by moving his hand over the paper, which is immobile. He blows on his drawing a few times to get rid of any dust left by the pencil © Musée d'art et d'histoire, Neuchâtel

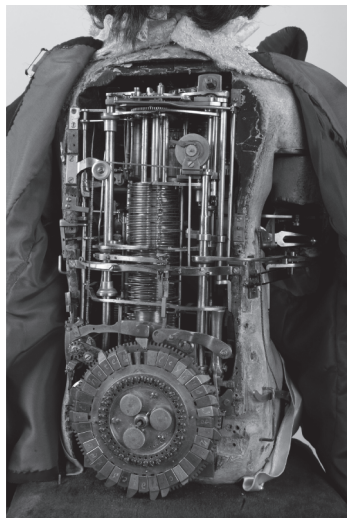

Figure 1.2: *The Writer*, by Henri Louis Jaquet-Droz, 1774 (inv AA2). This automaton has the most complex mechanism. It is programmable, and can write any text of 40 signs covering three lines © Musée d'art et d'histoire, Neuchâtel

Hobbes states:

> For seeing life is but a motion of limbs, the beginning whereof is in some principal part within, why may we not say that all automata (engines that move themselves by springs and wheels as doth a watch) have an artificial life?

'As doth a watch': this object—the automaton *par excellence*—captured the imagination of the West from the late Middle Ages to the industrial era because it reproduced on a human scale what God the watchmaker created.[20] Astronomical clocks could even be found hanging in cathedrals, for example in Strasbourg. The whole of creation was represented as a vast clockwork mechanism driven by a play of weights and energetics which classical physics would attempt to explain.

Hobbes's argument at this point takes a new direction. Man imitates God by creating automata, but that is because he is himself an automaton, created by the Great Watchmaker: 'For what is the heart, but a spring; and the nerves, but so many strings; and the joints, but so many wheels, giving motion to the whole body, such as was intended by the Artificer?' This reversal of agency resembles the logic of those who argue today that the human brain works like a computer because the computer is modelled on certain faculties of the brain. What underlies the famous Treatise on the *Matter, Forme, and Power of a Common-wealth Ecclesiastical and Civil* (the subtitle of *Leviathan*) is thus not simply a metaphor, but a real physical anthropology of the man-machine. This figure had precedents in the sixteenth century, for example in Ambroise Paré's medical works, and in the eighteenth century a more radical version emerged with de la Mettrie, who declared that 'we are like a watch which says, "What! Was I made by that stupid workman, I who can divide up time, who can indicate so precisely the sun's course, who can say out loud the hours which I indicate! No, that is impossible".'[21]

After establishing a continuum between man, animal and machine, Hobbes takes one last step, to arrive at his conception of the state as an automaton made by man in his own image:

> Art goes yet further, imitating that rational and most excellent work of Nature, man.
>
> For by art is created that great Leviathan called a Commonwealth, or State (in Latin, *Civitas*), which is but an artificial man, though of greater stature and strength than the natural, for whose protection and defence it was intended; and in which

[20] *cf* L Mumford, *Technics and Civilization* (New York City, Harcourt, Brace & Co, 1934).
[21] JO de La Mettrie, A Thomson (ed and tr), *Machine Man and Other Writings* (Cambridge, Cambridge University Press 1996).

— the sovereignty is an artificial soul, as giving life and motion to the whole body;
— the magistrates and other officers of judicature and execution, artificial joints;
— reward and punishment (by which fastened to the seat of the sovereignty, every joint and member is moved to perform his duty) are the nerves, that do the same in the body natural;
— the wealth and riches of all the particular members are the strength;
— *salus populi* (the people's safety) its business;
— counsellors, by whom all things needful for it to know are suggested unto it, are the memory;
— equity and laws, an artificial reason and will; concord, health; sedition, sickness; and civil war, death.

Lastly, the pacts and covenants, by which the parts of this body politic were at first made, set together, and united, resemble that *fiat*, or the *Let us make man*, pronounced by God in the Creation.

In this seminal text, religion, law, science and technology are all summoned to give form to a normative imaginary which is still largely ours today, namely that of government as a machine.

However, European societies went further than placing astronomical clocks in cathedrals, as images of God's creation. In the medieval period, they also put them on the outside, on belfries and church towers, introducing a new organisation of working time, which followed the clock's

Figure 1.3: Astronomical Clock, Strasbourg Cathedral. The original fourteenth-century clock was replaced in the sixteenth century, and renovated in the first half of the nineteenth century © David Iliff / WikiCommons

Figure 1.4: A detail of the mechanism for the perpetual calendar (or Gregorian *computus*), at the bottom left of the clock © Fryderyk / WikiCommons

mechanical movements and gradually diverged from natural rhythms.[22] The culmination of this new way of governing human beings is represented by Taylorism. The industrial worker of Chaplin's *Modern Times* is nothing but a set of physical forces enslaved to the cadence of the production line.[23] His body is utterly dominated by the model of the clock, dear to Hobbes and de La Mettrie.[24] 'Machine operators,' Simone Weil observed,

> do not reach the required cadence unless even their smallest gestures succeed one another in an uninterrupted sequence and almost like the tick-tock of a clock, without anything marking that one thing is finished and something else is beginning. Workers are obliged to reproduce with their bodies this tick-tock, which is so dreary and monotonous that one cannot bear to listen to it for long.[25]

[22] *cf* J Le Goff, *Pour un autre Moyen Âge. Temps, travail et culture en Occident* (Paris, Gallimard, 1977) 66ff.

[23] *Modern Times* by Charlie Chaplin [1936] is an inspired and cruel criticism of the theory of the man-machine. On the perception by artists of the mechanisation of the human being more generally, see V Adam, A Caiozzo (ed) *La Fabrique du corps humain: la machine modèle du vivant* (Grenoble, CNRS MSH-Alpes, 2010).

[24] de La Mettrie, *Machine Man* (n 21).

[25] S Weil, 'The experience of factory life' (1941) in D Tuck McFarland and W Van Ness (eds) *Formative Writings, 1929–1941* (Cambridge, Mass, Massachusetts University Press, 1987). On the distinction between cadence and rhythm in Simone Weil's thought, see A Supiot 'La pensée juridique de Simone Weil' in *Mélanges à la mémoire de Yota Kravaritou: a trilingual tribute* (Brussels, ETUI, 2010).

As an object of 'scientific organisation', work is reduced to a succession of simple and measurable gestures. Occupational qualifications and their mysteries must dissolve into the transparent functioning of the factory.[26] Work is here reduced to its most basic expression, not; that of a beast of burden. In the industrial-era factory, the worker was deprived of a truly human experience of work, which consists of realising something one has oneself conceived.[27]

After this physical model of the clock, which encouraged a vision of human beings as themselves machines, there appeared in the nineteenth century the biological model of natural selection, which inspired Social Darwinism and continues to take its toll in the form of neoliberalism and the competition of all against all. To these figures, which are cumulative rather than cancelling each other out, we can add 'programmable man', produced by cybernetics and the information revolution. Its model is not the clock, with its interplay of forces and cogs, but rather the computer, with its digital processing of signals. The computer responds to programmes, not laws. It embodies the externalisation of some of the faculties of the human brain, and represents a new era in our relation to machines, as well as in the content and organisation of work.[28]

This reified concept of work expresses a social imaginary typical of modern times. Its potentially delusional dimension has been magnificently described by Castoriadis:

> To treat a person as a thing or as a purely mechanical system is not less but *more* imaginary than claiming to see him as an owl; it represents an even deeper dive into the imaginary. For not only is the *real* kinship between a man and an owl incomparably greater than it is with a machine, but also no primitive society ever applied the consequences of its assimilations of people with other things as radically as modern industry does with its metaphor of the human automaton. Primitive societies always seem to preserve a certain duplicity in these assimilations, but modern society in its practice takes them literally, in the most brutal ways.[29]

Although this fascination for the technical rationalisation of work was criticised by the most clear-sighted thinkers,[30] it was the Left's ideological backbone for over a century, and had this in common with the neoliberal Right. Not only did the majority of the Left adhere to the imaginary representation of the man-automaton, and the supposed techno-scientific

[26] *cf* the etymology of the French *métiers* (trades), which were called *mystères* (mysteries) up to the eighteenth century, as Marx reminds us in *Capital*, Book I, Ch XV, para 9.

[27] See below, ch 12, p 229ff.

[28] *cf* P Breton, *Une histoire de l'informatique* (Paris, La Découverte, 1987; republished by Le Seuil, 1990).

[29] C Castoriadis, *The Imaginary Institution of Society*, tr K Blamey, (Cambridge, Mass, MIT Press, 1998) 99–100.

[30] *cf* S Weil (1937) 'La rationalisation' in *La Condition ouvrière* (Paris, Gallimard, 1964) 289ff; B Trentin, *La città del lavoro. Sinistra e crisi del fordismo* (Milan, Feltrinelli, 1997).

rationality of the organisation of work, but it also applauded the idea of extending this model of corporate governance to the whole of society. Lenin regarded Taylorism as 'an immense scientific progress',[31] and in his view one could consider the Bolshevik Revolution to have achieved its ends when 'the whole society [would] be nothing but a single office, a single workshop.'[32] Bruno Trentin describes the human being produced by this ideology shared by the Left and the Right as 'a new subject, conscious of the limits "technology" and the organisation of labour impose, and capable of assuming them voluntarily; capable also, for that very reason, of being in some sense more conscious and freer.'[33] One cannot help thinking here of Ernst Jünger's depiction of the worker after the First World War, who was heir to the industrial management of man tested out in the trenches, and whose only freedom was total self-sacrifice on the altar of the party or the market.[34] This shared imaginary helps explain the unholy union of communism and capitalism which we have witnessed in China and in post-enlargement Europe, and it can also make sense of the general approval given the idea of importing into the public sphere the management techniques used in the business world.

III. FROM GOVERNMENT TO GOVERNANCE

The desire to apply the supposedly scientific methods of the organisation of work beyond the factory to the whole of society has by no means disappeared today, but the reference has changed. The physico-mechanical model of the clock,[35] linked to the idea of the reign of the law, has been supplanted by the cybernetic model of the computer. The organisation of work is no longer conceived as a machine controlled by the play of weights and forces, in which workers are no more than cogs, but as a programmable system of interacting units adjusting automatically to signal inputs and feedback. This model was welcomed across the political spectrum, and imported into

[31] Cited by J Querzola 'Le chef d'orchestre à la main de fer. Léninisme et taylorisme' in (1978) *Recherches*, *Le Soldat du travail*, 32/33, 58.

[32] Lenin (1902) *What is to be done?*, cited by Querzola, 'Le chef d'orchestre' (n 31) 70.

[33] Trentin, *La città del lavoro* (n 30) 246.

[34] E Jünger (1932) *Der Arbeiter*. See, similarly, Marcel Gauchet's summary of the heritage of the First World War:

> 'an individual who consummates his existence by being unattached, finding all grounds within himself, shouldering the law which binds the whole, to the point of self-sacrifice […]. This is why the figure of sacrifice is a legacy made by war to peace which is much more dangerous, in reality, than is the issue of "brutalization", which has dominated recent research'. (M Gauchet (2000) 'L'Avènement de la démocratie' in *À l'épreuve des totalitarismes (1914–1974)* (Paris, Gallimard, 2010) vol 3, 47.

[35] On this point, see L Mumford, *Technics and Civilization* (New York City, Harcourt, Brace & Co, 1934).

state institutions at all levels under the name of New Public Management,[36] a doctrine which would certainly have been applauded by the brains behind the Gosplan.

It was one of the founding fathers of cybernetics, Norbert Wiener, who first had the idea of projecting this mode of functioning onto society as a whole. He described this in a work published in 1950 called *Cybernetics and Society*, whose sub-title, '*The human use of human beings*', already spoke volumes:

> *It is my thesis that the physical functioning of the living individual and the operation of some of the newer communication machines are precisely parallel in their analogous attempts to control entropy through feedback*. Both of them have sensory receptors as one stage in their cycle of operation: that is, in both of them there exists a special apparatus for collecting information from the outer world at low energy levels, and for making it available in the operation of the individual or of the machine. In both cases these external messages are not taken neat, but through the internal transforming powers of the apparatus, whether it be alive or dead. The information is then turned into a new form available for the further stages of performance.
>
> In both the animal and the machine this performance is made to be effective on the outer world. In both of them, *their performed action on the outer world, and not merely their intended action, is reported back to the central regulatory apparatus*.
>
> This complex of behavior is ignored by the average man, and in particular does not play the role that it should in our habitual analysis of society; for *just as individual physical responses may be seen from this point of view, so may the organic responses of society itself*.[37] (emphasis added)

This text is particularly useful for understanding the transition from government to governance (or rules to regulation) in the institutional vocabulary of the last 30 years. Contrary to 'government', which implies a law which must be obeyed, 'governance' rests on the capacity of human beings to adapt their behaviour to changes in their environment, in order to survive.

***

Historically, the French term *gouvernance* appeared in the thirteenth century to refer to the art of governing. It was subsequently transplanted into English, and then taken back into French charged with a new meaning.[38] In its modern sense, it was first used to challenge the power of senior managers, through what would become the doctrine of corporate governance. The famous economist Ronald Coase had already laid the theoretical bases

[36] See below, ch 8, p 153ff.

[37] N Wiener, *Cybernetics and society. The human use of human beings* [1950] (London, Free Association Books, 1989) 26–27.

[38] *cf* G Hermet, 'Un régime à pluralisme limité? À propos de la gouvernance démocratique' (2004) 54 *Revue française de science politique*, 1 159–78.

of this doctrine in a famous article of 1937 on the nature of the firm,[39] and its principles were expounded in the Cadbury Report of 1992,[40] by the OECD in 1998,[41] and then by the European Commission.[42] In France it was imported via the *Rapport Viénot* (1995), which was behind the French reforms of company law adopted at the end of the 1990s.[43] Corporate governance in practice made the firm's financial performance into *the* criterion for management decisions, and adjusted the forms of organisation of work to 'value creation' for shareholders, with the result that calculations of financial interest overrode all other rationales.

By linking top managers' pay to the company's financial performance, corporate governance called a halt to the autonomisation of the power of the 'techno-structure', as John Galbraith called it.[44] The Fordist organisation was a hierarchical, integrated structure, which obeyed a logic of technical rationality. It prevailed during the post-war boom years, and provided factory workers with economic security. Corporate governance, by contrast, thinks in terms of networked units of value creation,[45] which obey the logics of the information and communication technologies, and where a worker's motivation is supposed to spring from the maximisation of his or her financial interest.

Work has no place in this new conception of the company, for which only shareholders and stakeholders exist. Employees are stakeholders, not because they work or as workers (such terms are banished from the language of governance),[46] but because they possess a 'human resource' or a 'human capital'. To borrow an expression used by Augustin Berque in a different context, the 'foreclusion of work'[47] has replaced the industrial era's 'reification of work'. Under Taylorism, work was divided between a small number of people paid to think and the vast mass of workers who

[39] R Coase, 'The nature of the firm' (1937) 4, *Economica*, 16, 386–405.

[40] *The Financial Aspects of Corporate Governance* (London, Professional Publishing Ltd, 1992) www.ecgi.org/codes/documents/cadbury.pdf.

[41] See the updated version published by the OCDE, *Principles of Corporate Governance* (Paris, OECD, 2004) 66.

[42] 'Communication from the Commission to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward' COM(2003) 284 final.

[43] *cf* P Bissara, 'Les véritables enjeux du débat sur le gouvernement d'entreprise' (1998) *Revue des sociétés* 5; B Bruhnes, 'Réflexions sur la gouvernance' (2001) *Droit social,* 115–19; P Charléty, 'Le gouvernement d'entreprise: évolution en France depuis le rapport Viénot de 1995' (2001) *Revue d'économie financière,* 63, 25–34.

[44] The increasing power of this technostructure in industry was identified by J K Galbraith, *The New Industrial State* (Boston, Houghton Mifflin Company Boston, 1967).

[45] On this new conception and its impact on labour law, see E Peskine, *Réseaux d'entreprises et droit du travail* (Paris, LGDJ, 2008).

[46] On the place which these stakeholders ought to occupy in corporate 'governance', see S Deakin and A Hughes (eds) *Enterprise and Community: New Directions in Corporate Governance* (Oxford, Blackwell, 1997).

[47] A Berque, *Histoire de l'habitat idéal. De l'Orient vers l'Occident* (Paris, Éditions du Félin, 2010) 347ff.

were forbidden to do so, who were simply machines for obeying orders. This division of labour disappears in the cybernetic universe of governance, where all work is 'functioning',[48] more specifically the functioning of a communication machine programmed to always optimise performance. It is these real performances, measured quantitatively in terms of financial results, which have become the criterion of good governance, rather than respect for the law.

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The notion of governance in this sense was adopted at the end of the last century by international economic organisations (the World Bank[49] and the IMF),[50] who imposed this business model on 'developing' countries first through structural adjustment plans, and later through poverty reduction strategies. The 'good governance' championed by these organisations works out in practice as a drastic shrinkage of the state, particularly in the areas of culture and welfare, and the burgeoning of the private sector and 'civil society'. As Joseph Stiglitz, the former Vice-President and Chief Economist of the World Bank from 1997 to 2000 confessed, structural adjustment plans were never anything other than forcing developing countries to serve the financial interests of the industrialised countries.[51]

The notion of 'governance' also overrun the vocabulary of the EU at about the same time.[52] It cropped up in all sorts of contexts: the EU's legal system as a whole; its economic and taxation policies; its statistics; international institutions; relations with developing counties; aviation; new technologies; the environment; and more. The notion's crowning triumph, whereby it jumped to the top of the hierarchy of European legal instruments, was represented by the coming into force of the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, on 1 January 2013. This was the Treaty which the then candidate for the French Presidency, François Hollande, vowed never to ratify as it stood—which did not prevent him doing just that as soon as he came to power. But this makes perfect sense, because governance, implemented as programmes of self-adjustment to received signals in real time, is incompatible with keeping one's word.

[48] *cf* Wiener, *Cybernetics and Society* (n 37). See, for a similar argument, Amartya Sen's use of this notion in *Inequality Reexamined* (Cambridge, Mass., Harvard University Press, 1992).

[49] World Bank, 'From crisis to sustainable growth—sub-Saharan Africa: a long-term perspective study' (Washington, 1989); 'Governance and Development' (Washington, 1992).

[50] International Monetary Fund, 'Good Governance: The IMF's Role' (Washington, IMF Publications, 1997).

[51] JE Stiglitz, *Globalization and its Discontents* (New York City, Norton, 2002). Similarly, M Mahmoud Mohamed Salah, *L'Irruption des droits de l'homme dans l'ordre économique international. Mythe ou réalité?* (Paris, LGDJ, 2012) 21ff.

[52] The Eurolex database turns up 205 texts with 'governance' in the title, of which 27 are regulatory texts (consulted on 10 April 2013).

More generally, the terms of 'governance' tend to replace those of 'government',[53] as Table 1 below shows:

Table 1: The political vocabulary of government replaced by the terminology of management

Government	Governance
people	civil society
sovereignty	subsidiarity
territory	space
law	programme
freedom	flexibility
morals	ethics
justice	efficiency
judgment	evaluation
rule	objective
rulings	regulation
representation	transparency
worker	human capital
qualification	employability
trade unions	social partners
collective bargaining	social dialogue

Where 'government' relies on *subordinating* individuals, 'governance', in line with its cybernetic vision, relies on *programming* them. This shift was already visible in the text by Norbert Wiener cited above, in the opposition he drew between performed action and intended action. The subordinated worker obeys the rules he is given, whereas the programmed worker reacts to the information reaching him from his environment. This move from subordination to programme is absolutely central to our contemporary representation of human action. Unlike plans, which suppose the heteronomous intervention of a planner, programmes are homeostatic and auto-referential systems. This explains their success in biology, where genetic programmes have put a salutary end to divine plans, and in management, as a way of getting around the question of who governs. Today, the media do not explain a politician's or a political party's policies in terms of their ideology or their principles, but instead they talk about them being 'hard-wired' to do something, having it 'in their DNA'.

[53] *cf* C Gobin, 'Le discours programmatique de l'Union européenne. D'une privatisation de l'économie à une privatisation du politique' (2002) *Sciences de la société*, 55, 157–69; Hermet, 'Un régime à pluralisme limité?' (n 58) 167–68.

The myth of a being created by man in his own image to satisfy his needs and desires is nothing new. But it is only in the West and in modern times that this imaginary has inspired technology, from the construction of the first automata to the industrial universe represented by Fritz Lang or Charlie Chaplin, and more recently the world of information technology. In an illuminating book on these creatures made in the image of man, the historian of technology Philippe Breton has sketched the filiation from Pygmalion and Galatea in Greek mythology, or the Golem in the Talmudic tradition, through to contemporary computers and robots.[54] *Leviathan* is not mentioned, but it would rightfully have a place in this lineage alongside the first automata and androids of the Renaissance. With it, everything is already in place: legal rules are assimilated to the biological regulation of a 'political body', and this 'body' is itself reducible to a machine. The many offspring of this machine of government could also be added to the list: the Jacobin Republic, the monstrous machine of the totalitarian state, which massacres innocents, like Frankenstein's creature, and the nurturing figure of the welfare state, which should satisfy all man's needs. The youngest offspring would be the decidedly contemporary figure of the pre-programmed homeostatic machine, capable of self-regulation through feedback (in response to the 'nerves' of this machine-body, which are punishment and reward). The machine of government has abandoned the model of the clock and adopted that of the computer, an acephalous machine in which the locus of power is unidentifiable, in which regulation replaces rules, and governance replaces government. The digital revolution thus accompanies the revolution in law, in which an ideal of governance by numbers tends increasingly to supplant government by laws.

Hobbes's machine of government, modelled on the automaton, was ruled by inflexible laws similar to Galileo's laws of physics. Today, its cybernetic equivalent is ruled not by laws but by programmes which ensure homeostasis[55] according to a self-regulatory mechanism similar to that of a biological organism or a computer. The replacement of government by governance is an expression of this new, cybernetic imaginary, and marks both a break with the ideal of the law's supremacy, and a continuity. A break, because law loses its sovereign status and becomes simply an instrument for the realisation of programmes; but also a continuity, because governance comes closest to the ideal of a *res publica* protected from the arbitrariness of human will—including the will of the majority, that is, democracy. As such, the consecration of governance in the form of programming and programmes resonates with another dream pursued by the West, that of socio-political harmony as a calculable outcome. By focusing first on these two elements of continuity, we shall gain a better understanding of the dynamics and scope of governance by numbers, as well as the inevitable failure of its proposed solutions.

[54] P Breton, *À l'image de l'homme. Du Golem aux créatures virtuelles* (Paris, Le Seuil, 1998).

[55] On this concept, see G Simondon, *On the Mode of Existence of Technical Objects* [1958], tr C Malaspina (Minnesota UP, Univocal Publishing, 2016).

2

The Fortunes of an Ideal: Ruling by Law

> 'For wherever in a State the law is subservient and impotent, over that State I see ruin impending; but wherever the law is lord over the rulers, and the rulers are servants to the law, there I see salvation and all the blessings that the gods bestow on States.'
>
> Plato, *The Laws*

IT HAS OFTEN been argued that we need to consent to general and abstract laws in order to be freed from bonds of personal dependence. The most eloquent defendant of this ideal of rule by laws was Rousseau, who, on the eve of the French and American Revolutions, declared that: 'A free people obeys, but it does not serve, it has leaders, but no masters; it obeys the laws, but it obeys only the laws, and it is due to the strength of the laws that it is not forced to obey men. All the boundaries set on the power of Magistrates in a Republic are fixed only to protect from their attacks the sacred precinct of the law. A people is free, whatever form its government takes, when it sees in him who governs not a man but the organ of the law. In a word, liberty always follows the fate of the laws, it reigns or perishes with them. I know of nothing more certain.'[1] Scarcely two decades later, this desire to be governed not by men but by laws was a cornerstone of the first modern Constitutions. In the pioneering example of the State of Massachusetts (1780), the principle of the separation of powers was introduced 'to the end it may be a government of laws and not of men'. This end also inspired the Constitution of the French Republic, as informed by Article 6 of the Declaration of the Rights of Man and of the Citizen (1789): 'Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes.'

[1] J-J Rousseau, 'Eighth Letter' in *Letter to Beaumont, Letters Written from the Mountain, and Related Writings*, eds C Kelly and E Grace, tr C Kelly and JR Bush, *Collected Writings of Rousseau Series, Volume 9* (Lebanon, NH, University Press of New England, 2013).

The goal of ruling by laws was nothing new, and went back to the Greek ideal of a state in which, as Plato wrote some 2,000 years before Rousseau, those who govern are servants to the law:

> And those who are termed 'magistrates' I have now called 'ministers' of the laws, not for the sake of coining a new phrase, but in the belief that salvation, or ruin, for a State hangs upon nothing so much as this. For wherever in a State the law is subservient and impotent, over that State I see ruin impending; but wherever the law is lord over the rulers, and the rulers are servants to the law, there I see salvation and all the blessings that the gods bestow on States.'[2]

The machine of government is the outcome, over many centuries, of the sedimented interpretations of this Greek ideal. In order to understand our current situation, in which law no longer rules because it is once again a servant, this time serving the calculations of a machine, we must briefly review the main stages which have led us to this pass.

I. THE GREEK *NOMOS*

Some years ago, Marcel Détienne rightly drew attention to our tendency to mythologise our Greek roots,[3] but despite this justified criticism, Greece remains the place where a state first realised the ideal of freely endowing itself with laws.[4]

Writing brought with it the possibility of making laws out of the rules of coexistence which until then had circulated orally and were relatively unenforceable. The founding laws of the Greek city states, which the great lawgivers like Lycurgus and Solon had drawn up, were called *Rhetra* (ῥήτρα) in Sparta and *Thesmos* (θεσμός) in Athens. *Rhetra* is related to the verb for 'to say', and *Thesmos* to the verb 'to lay down', 'to institute'. *Nomos* (νόμος) replaced *Thesmos* in the fifth and sixth century BC, when Athens became a democracy, and the laws imposed externally were replaced by laws with which the citizens endowed themselves. *Nomos* was therefore associated with the idea of the rule of law, which for the Greeks was synonymous with democracy.[5] This was the ideal later upheld by Plato, that of a government where 'Law became … supreme king over men instead of men being despots

[2] Plato, *Laws*, 715d–e, *Plato in Twelve Volumes*, Vols 10 & 11, tr RG Bury (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd, 1967 & 1968) [*tr mod*].

[3] *cf* M Détienne, *Comment être autochtone. Du pur Athénien au Français raciné* (Paris, Le Seuil, 2003).

[4] On the conditions in which law in this modern sense was 'discovered' in Ancient Greece, and on some of its faltering first steps, see J de Romilly, *La Loi dans la pensée grecque* (Paris, Les Belles Lettres, 1971).

[5] C Mossé, 'Comment s'élabore un mythe politique: Solon, "père fondateur" de la démocratie athénienne' (1979) *Annales ESC* 3, 425–37.

over the laws'.[6] *Nomos*, from the verb *nemô*, 'to share', had previously referred to a wide range of ritual and aesthetic rules. In its new guise, it contained a tension between what is prescribed (an ideal order) and what is described (customs observed in practice). This tension would appear to be inherent in the very idea of human law. It is found in every historical period, down to this very day.

Unlike the modern era, which ended up conceiving the political realm exclusively in terms of power, the Greeks first conceived it in terms of a just order. In the sixth century BC, Greek political thought centred on the concept of *nomos*, and the opposition between *Eunomia* (Εὐνομία), the ideal of a well-ordered state, and *Dysnomia* (Δυσνομία), the rule of injustice and excess. Each of these poles was embodied by a goddess, who presided over the state. Equality between citizens gradually became integral to the idea of a just order, and gave rise to the concept of *Isonomia* (ἰσονομία).[7] There emerged in the ensuing century the idea that a state's organisation is decided by whoever governs it, and with that the goddess *Eunomia* developed gradually into a concept. This was when 'cratistic' constitutional terms emerged, to differentiate states according to their form of power (*cratos*): monarchy; oligarchy; aristocracy; and democracy. In Christian Meier's analysis, this change in vocabulary implied a change in awareness: citizens discovered that a just order is not something preordained on which one has no purchase, but that they themselves can decide under what sort of rule they wish to live.[8] From then onwards, *Nomos* took on the meaning of law in the modern sense, that is, a law made by and for the citizens.

Since this was an entirely human law, the question of the source of its binding effect—that is, the authority on which it drew, which secured it obligatory character—was quick to emerge. Obviously, the question had not arisen as long as laws were deemed to have a supernatural origin, but as soon as they were recognised as a human invention, they lost their ultimate surety and became open to change and relativity. Legal thought soon seized upon the possibility—which was to haunt it throughout its history—that higher, unwritten laws might exist, to which everyone must bow even if they were contradicted by a human law-giver. This was the theme played out by Antigone in her struggle against Creon, when she claimed that every human being should receive due burial rites in the name of the 'unwritten, unwavering laws of the gods'.

Today we no longer invoke the gods, but instead the sacred rights of the human being, which underpin the right to resist oppression, and which,

[6] Plato *Letters*, Letter 8 [354c]. *Plato in Twelve Volumes*, Vol 7, tr RG Bury (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd, 1966).

[7] C Meier, 'Essais et conférences du Collège de France' in *Introduction à l'anthropologie politique de l'Antiquité classique* (Paris, PUF, 1984) 28ff.

[8] Meier 'Essais et conférences du Collège de France' (n 7) 30.

since they are without statutory limitations, can prevent someone hiding behind the laws in force in order to escape prosecution. This right was contained in the American Declaration of Independence (1776), and reappeared in Article 2 of the Declaration of the Rights of Man and the Citizen (1789), thus forming part of today's Constitutional laws in France.

We cannot help noticing, however, that the authors of the American Declaration had no qualms about racial legislation, and had no intention of conferring on their slaves the same rights of resistance as they did on themselves. In other words, they gave legitimacy to legal rules which Article 7 of the Rome Statute, which instituted the International Criminal Court, qualifies today as crimes against humanity. The regime of '*indigénat*' which the French Republic applied in its colonies, and the eugenicist legislation which remained in force in northern countries well after the Second World War, encounter the same problem: that however eternal and sacred the human laws laid down claim to be, they have no absolute authority. They may contradict each other, and change, and their legitimacy is thus only relative.

It is well known that Montesquieu devoted a large part of his work to the relativity of laws. But long before him, Herodotus, who can indisputably be called the founding father of comparative law, made similar observations. Throughout his wanderings, which provided him with the subject matter of his *Enquiry* (his *Histories*), he noted down and passed judgement on the different laws he encountered in the countries he travelled through. He came to a ground-breaking conclusion: the very same people who habitually eat their fathers' dead bodies are repelled by the idea of burning them. And vice versa.[9] Universally, the relativity of laws goes hand in hand, in human societies, with the law's anthropological function of inter-diction.[10]

The idea of the relativity of laws was taken up by the Sophists in their claim that the real laws, unlike these artificial ones, were the laws of nature. In their wake, generations of philosophers and jurists attempted to measure the legal order's legitimacy against the order of nature. Nature, indeed—but which nature? Aristotle wrote that natural justice, in contradistinction to justice in law, 'has the same validity in all places, and does not depend on whether public opinion favours or rejects this value'.[11] But what has the same validity everywhere, and does not depend on this or that opinion? An order of the world, that is, a cosmic order which is beyond human will and

[9] Herodotus, *The Histories*, tr AD Godley (Cambridge, Mass, Harvard University Press, 1920), Bk III, Ch 38, ss 3–4; Hérodote, *L'Enquête*, III, 38, in *Œuvres complètes* (Paris, Gallimard, coll 'Bibliothèque de la Pléiade', 1964) 235–36.

[10] The French term '*l'interdit*' has the primary sense of a 'prohibition' or 'interdiction', and carries the additional meaning of something 'said-between' (*inter-dit* from the verb '*dire*', to say). Law as 'inter-diction' thus both separates and mediates, making possible the space of shared meaning necessary for the creation of the social bond. See my *Homo Juridicus. On the Anthropological Function of the Law*, tr. S Brown (London, Verso Books, 2007).

[11] Aristotle, *Ethics*, tr JAK Thomson, revised by H Tredennick (London, Penguin, 1976) [*tr mod*].

controls it? Or the nature of man, driving him to impose his views and to seek to dominate his fellow men? Are cosmic and human nature simply one and the same, with the only really universal law being the law of the jungle?

All these questions, which preoccupied the Greeks, are still with us today. Those who believe in the existence of a 'spontaneous order of the market', and who condemn in its name the 'mirage of social justice', could repeat Callicles's criticism of laws in Plato's *Gorgias* without changing a word: 'The pity is that the makers of the laws are the weaker sort of men, and the more numerous.'[12] Human law, which is founded on equality, is thus the weapon of the weak and the least capable, a weapon by means of which they avoid being subjected to the stronger and more capable, and even manage to subjugate these. Against such artifice, Callicles appeals to nature, in a Darwinistic claim which was to have a notable legacy: 'but nature, in my opinion, herself proclaims the fact that this is what justice has been decided to be: that the superior rule the inferior and have a greater share than they'.[13]

We should be careful not to lump together the many later advocates of this idea that the law of the strongest is true to the order of nature: Sade, Nietzsche and Hitler cannot be conflated, no more so than Adam Smith, Darwin and Milton Friedman or Friedrich Hayek. However, this very range shows how powerfully seductive it has been to project onto the legal order what we think of as a 'natural' order.

Sade, whose relation to the law has been the subject of several recent books,[14] in a certain way took this projection to its limits in showing its deadly potential. Sade wrote:

> 'If it is true that we resemble all the other productions of nature, if we have no greater worth than they, why should we continue believing that we are driven by different laws? Are plants and animals acquainted with pity, social duties, brotherly love? And can we find in nature any supreme law other than that of egoism?'[15]

There is no simple transition from philosophising in the boudoir to mass butchery, yet this was a step the twentieth century took. Notably Hitler, for whom 'natural resources, by virtue of an imminent law, belong to he who conquers them […] This is in accordance with the laws of nature […] The law of selection justifies this unceasing struggle to enable the best to survive.'[16] What Hitler added to Sade was the reference to Darwin, that

[12] Plato, *Gorgias, Plato in Twelve Volumes*, tr WRM Lamb (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd 1967) Vol 3, 483 c [*tr mod*].

[13] Plato, *Gorgias* (n 12) 483 d.

[14] *cf* F Ost, *Sade et la Loi* (Paris, Odile Jacob, 2005); D-R Dufour, *La Cité perverse. Libéralisme et pornographie* (Paris, Denoël, 2009).

[15] DAF Marquis de Sade, *L'Histoire de Juliette ou les prospérités du vice*, Ve Partie, in *Œuvres complètes* (Paris, Tête de feuille, 1973) vol 9, 291.

[16] A Hitler, Libres propos sur la guerre et sur la paix, recueillis sur l'ordre de Martin Bormann (Paris, Flammarion, 1952) 51 and 69.

is, to a biological understanding of history. But Sade was not the first to describe the 'supreme law' of nature as egoism, and to have proclaimed that vices prosper and virtues suffer. This idea had already appeared in Bernard Mandeville's *Fable of the Bees*, a short philosophical tale published in 1714 with the candid sub-title of 'Private vices, public benefits'. Louis Dumont has stressed the importance of this text in the emergence and success of contemporary economic ideology,[17] and more recently, Dany-Robert Dufour has shown convincingly that Sade did no more than expose the normative truth behind the idea that Kant's categorical imperative could simply be put aside, and self-love and the instrumentalisation of others celebrated as the supreme law of a just order.[18]

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How did the Greeks attempt to resolve this crisis of legitimacy affecting democratic law? Now that the law was no longer ultimately guaranteed by the gods, how could it avoid being enslaved to human passions and appetites, and ultimately treated as a simple tool wielded by the strongest? The answers to this question varied from Socrates to Aristotle, but their common ground was that *they appealed to human reason as a substitute for divine reason*.

For Socrates, human reason understands law as a kind of pact. Not an arbitrary, but a necessary pact, guaranteeing the survival of the state. Contrary to Enlightenment philosophers and Rawls, Socrates did not postulate an originary social contract, a sort of normative Big Bang from which the law must have issued. He regarded respect for the law (even if it was unjust) to be an obligation to be shouldered daily, a debt contracted simply by virtue of living in a law-governed state. Without this respect, the state would go to rack and ruin. And since Socrates formulates this principle in the *Crito*, when he is deciding whether to submit to or flee the death sentence which had been passed upon him, one can suggest that Socrates valued this respect for the law above his own life. Having witnessed this injustice, Plato can no longer adhere unreservedly to the ideal of government by laws. For him, what reason dictates is that law is a necessary evil; an imperfect, but indispensable instrument. There would be no need for laws in an ideal world because it would be governed by a perfect science, a royal science which along can reconcile the world of facts and that of ideas. This ideal order is the subject matter of Plato's *The Statesman*, which is also

[17] L Dumont, *Homo æqualis, vol I, Genèse et épanouissement de l'idéologie économique* (Paris, Gallimard, 1977). See Ch 5, 'La Fable des abeilles de Mandeville: l'économique et la moralité' 83ff.

[18] Dufour, *La Cité perverse* (n 14).

a thorough-going critique of the imperfections of the law, in its inability to grasp the diversity of individual cases and changing situations. Yet Plato's last treatise, the *Laws*, defends the sovereignty of the law.[19] For laws to constitute a bridge between the world of ideas and the human world, he argues, they must pursue the public interest, and be informed by the divine model which is revealed to humans through the exercise of reason. The law in this sense is what must reign in the city, whose leaders are no more than its guardians, or even its slaves.

For Aristotle, by contrast, the authority of laws is based on the length of time they have been in use by the state, which is a sign of their soundness. Aristotle therefore refuses to assimilate the art of legislation to a technique of government. Whereas technical rules may change for greater efficiency, the efficiency of laws is measured by their stability. Aristotle wrote:

> The example from the case of the [mechanical] arts is a mistake as to change the practice of an art is a different thing from altering a law; for the law has no power to compel obedience beside the force of custom, and custom only grows up over a long lapse of time, so that lightly to change from the existing laws to other new laws is to weaken the power of the law.[20]

Aristotle would therefore condemn the idea of a 'machine of government', insofar as the law cannot be equated with a technique.

The idea that the authority of laws depends on their stability still has its advocates today; for example in a famous passage from the *Preliminary Address on the First Draft of the French Civil Code*, Jean-Marie-Etienne Portalis claimed (although at the time he was himself involved in recasting the whole of French law) that one must

> be abstemious in terms of novelty in matters of legislation because, while it is possible, in a new institution, to *calculate* the advantages which theory may offer us, it is not possible to know all the disadvantages that practice alone can uncover; […] that instead of changing laws, it is almost always more useful to present citizens with new reasons for liking them.[21] (emphasis added)

This warning against enslaving laws to calculations of interest shows a premonition of governance by numbers, at a time when, just after the French Revolution, calculations of probability were first being applied to social issues.[22] Like Plato, and also Ulpian,[23] Portalis regarded the art of

[19] See Leo Strauss's extremely detailed gloss on *The Laws* in his *The Argument and the Action of Plato's Laws* (Chicago, University of Chicago Press, 1975).

[20] Aristotle. *Politics*. Aristotle in 23 Volumes, Vol 21, 1269 a, tr H Rackham (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd, 1944).

[21] J-É-M Portalis, *Preliminary Address on the First Draft of the [French] Civil Code* (1801), tr R Singh, *Montesquieu Law Review*, University of Bordeaux, November 2016.

[22] See below, ch 5, p 89ff.

[23] *The Enactments of Justinian. The Digest or Pandects*, Book I, 1, 'Cujus merito quis nos sacerdotes appelet …': 'Anyone may properly call us [jurists] the priests of this art, for

law-making as a kind of sacred task mediating between the world of ideas and pure knowledge, on the one hand, and knowledge of the diversity of temperaments and the strength of habit on the other. The first realm prompts us to 'calculate the advantages which theory may offer us', whereas the second consideration prompts us to 'to touch laws only with trembling hands'.[24] The fear which should grip the legislator in the exercise of his function was a theme already in Greek times. Demosthenes held up as an example to the Athenians the Locrian custom in which 'if a man wishes to propose a new law, he legislates with a halter round his neck. If the law is accepted as good and beneficial, the proposer departs with his life, but, if not, the halter is drawn tight, and he is a dead man.'[25] What we see today is quite the inverse, with legislative hyperactivity and the imperative of 'publish or perish' dictated to leaders and scholars alike.

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Contemporary legal scholars tend to neglect what Greek thought contributes to our conception of the law. At best they note the few pages on 'particular justice' in Aristotle's *Nicomachean Ethics*, while abandoning all the rest as political philosophy, and thus as anathema to legal inquiry.[26] Yet even this extreme position cannot mask the extraordinary *legal* influence of the Greek ideal of the rule of law in the history of Western institutions. It is an ideal embodied in the very first Constitutions and Declarations of Rights drawn up in the late eighteenth century, which laid the basis for legal orders which are still essentially ours today. So we cannot exclude the heritage of Greek philosophy from the 'science of law' because, as Harold Berman rightly notes, legal positivism, natural law theory, the historical and sociological schools (and, one should add, the 'Law and Economics' doctrine) cannot themselves *explain* the legal order, since they are all part of it. 'The history of the Western legal tradition,' Berman writes, 'is in part the tale of the emergence of, and the friction between, these different schools of

we cultivate justice and profess to know what is good and equitable, dividing right from wrong, and distinguishing what is lawful from what is unlawful', ed and tr SP Scott, *The Civil Law*, II (Cincinnati, The Central Trust Company, 1932).

[24] Montesquieu uses this famous formula in Letter LXXIX of his *Persian Letters*, English translation, *The Persian Letters* (London, Athenaeum Publishing Company, 1897) [*tr mod*]. Its first sentence is also worth noting: 'Most legislators have been men of limited intellect, owing their elevated position to accident, and, in almost every case, guided by their prejudices and fancies.'

[25] Demosthenes, *Against Timocrates*, with an English translation by AT Murray (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd 1939), s 24, 139.

[26] In France, this was the position held by Michel Villey, *Philosophie du droit*, vol 1, *Définitions et fins du droit*, 3rd edn (Paris, Dalloz, 1982) 55f.

philosophy of Law. They do not explain history because it is history which explains them, why they appeared and why certain schools predominated in such-and-such a place and in such-and-such a time.'[27] Projecting back onto our Greek heritage a 'pure' conception of law, emptied of any political or philosophical dimension, is in fact a legacy of Roman Law.

II. *LEX* IN ROMAN LAW

Although the word *lex* has certainly come down to us from Rome, or through Latin, its etymology is the subject of much debate, and it has no equivalent in other Indo-European languages. We can suppose that *lex* comes from *legere*, which originally meant to pluck or gather, and later had the sense of reading (harvesting the writing's meaning). The great Roman Law specialist, André Magdelain, adopted this etymology, which has the additional advantage of clarifying the difference between *lex* and *ius*.[28] The primary meaning of the word *ius* in Latin is an authoritative formula. *Ius* comes from the verb *iurar* meaning to swear, and *ius dicere* was the formula used to declare what the law is, what one must comply with.[29] In Archaic Rome, *ius* was a body of secret knowledge which circulated only between the pontiffs, because they alone were guardians of *mos*, the customs of the ancestors. The Roman *civitas* originally had two colleges of priests (sacred experts), the six augurs responsible for interpreting the signs sent via birds by the gods to humans, and the five pontiffs (*pontifices*). The pontiffs were responsible for assembling and dismantling the bridges over the Tiber, and were thus in the first instance engineers, privy to the secrets of measurements and numbers. They had the associated duty of announcing the public calendar, and their legal expertise derived from their ability to tell *dies fasti* from *dies nefasti*. A third college, of the twenty *fetiales*, emerged later. Its members were the living memory of the treaties passed with neighbouring States, and they played a similar role regarding the *ius gentium* (international law) as did the pontiffs for the *ius civilis*. Despite their prestige (in their particular areas), the pontiffs, augurs and fetials were simply consultants, who only pronounced on what was asked of them, and had no *potestas*.[30] The pontiffs prescribed rites (particularly sacrificial rites) to be performed in order to keep peace with

[27] HJ Berman, *Law and Revolution, the Formation of the Western Legal Tradition* (Cambridge, Mass, Harvard University Press, 2009).

[28] A Magdelain, *La Loi à Rome. Histoire d'un concept* (Paris, Les Belles Lettres, 1978).

[29] *cf* E Benveniste, *Vocabulaire des institutions indo-européennes* [1969] vol 2, 111ff, translated as *Dictionary of Indo-European Concepts and Society* (Chicago, Chicago University Press, 2016); A Magdelain, 'Le ius archaïque' in *Ius, Imperium, Auctoritas. Études de droit romain* (Rome, École française de Rome, 1990) 3ff.

[30] T Mommsen, *The History of Rome*, 5 vols, tr W Purdie Dickson (Cambridge, Cambridge University Press, 2010) vol 1 [1861], Bk I, Ch12.

the gods and between men. The precepts delivered consequently covered both the sacred (*fas*) and the legal (*ius*) domains, which were intertwined.[31] The *pater familias* who wished to know what *ius* to follow in a particular circumstance, for example, what attitude and ritual words to observe in carrying out a particular act (claiming or disposing of a good, making a formal commitment, for instance), turned to the pontiffs, whose *responsa* took oracular form, were never justified by reasons, and were always formulated in the imperative. The *responsa* were only valid for the case under consideration, but the pontiffs kept a record, and in their case-based reasoning, certain precedents, which they alone knew of, were endowed with authority.

Like the *responsa*, the *leges* were formulated in the imperative and likewise belonged to the wider category of *ius*. But this *ius* was made public, promulgated or displayed, or both at once. The ritual of reading the *lex* was a condition of its validity, for royal edicts (*lex dicta*), the consecration of temples (*lex templi*), the publication of treaties (the *lex* of *foedus*), or other legal acts. Only gradually did *lex* come to take on the meaning not of reading a text, but of the text itself. And only after the founding of the Republic was *lex* used to import the Greek *nomos* into Rome, together with its model of a state ruled by laws and by the principle of *isonomia*. This legal and democratic turning point was marked by the Law of the Twelve Tables, which was composed in 450 BC, inscribed in bronze, and erected on the *Forum Romanum*.

However, as Aldo Schiavone has shown,[32] grafting the Greek model onto the Roman system never really worked because the rule of law had to contend with the legal expertise of the pontiffs. The pontiffs became the guardians of laws which they had not themselves proposed, but which they scrutinised closely with their acknowledged hermeneutic powers. This power passed into the hands of the (non-priestly) jurisconsults, after a freed scribe, Gnaeus Flavius, divulged the pontiffs' secret knowledge in the mid-fifth century BC, consisting of the law to be applied (statute law and case law), the formulae to be used and the calendar to be respected to bring an action before the judge.[33]

This is how *ius* incorporated *lex*, and could emerge as a technique stripped of its religious origins, and capable of being used in the most varied political organisations. One could suggest that this technique had a digestive function. It enabled the *corpus iuris* to digest a law's content, whatever it was. It was a technique wielded by experts who claimed to be neutral regarding

[31] P Noailles, *Fas et Jus. Études de droit romain* (Paris, Les Belles Lettres, 1948).

[32] A Schiavone, *Ius. L'invenzione del diritto in Occidente* (Turin, Einaudi, 2005); *The Invention of Law in the West*, tr J Carden and A Shugaar (Cambridge, Mass, Harvard University Press, 2012).

[33] This famous episode is described by Marie Theres Fögen in *Römische Rechtgeschichten. Über Ursprung und Evolution eines sozialen Systems* (Göttingen, Vandenhoeck & Ruprecht, 2002).

its content and to apply it under rigorously codified conditions. The law could give rise to an individual right only if the plaintiff was granted an action, and this was done by complying with certain formulae approved by the judge.[34]

The formulae, which originated in a typology of cases abstracted from their factual contexts, were a kind of social algebra, and the real keys to the law. Girard observed that your average Roman would have felt just as much at a loss attempting to apply the Twelve Tables to a concrete situation as we feel today when faced with a set of log tables.[35] However, despite its relevance, we should not be tempted to project back onto the past our contemporary distinction between form and content. Not only did the Romans have no algebra, but above all Roman law did not make the same clear-cut distinction which modern legal systems make between substantive law and procedural rules. *Ius* still conflated them: it endowed the subject with a *right to bring an action* in a particular case. Respecting the forms accompanying each type of case was necessary for the performance of this ritual, even if this process also laid the groundwork for a technical conception of law as a pure form capable of adapting to any content whatsoever.

The formulae obeyed strict compositional principles. Their structure could be divided into essential parts (which were specific to the type of action) and ancillary parts (dependent on the concrete characteristics of each case). The principle elements were the judge's *nominatio*, the *demonstratio* (a clause stating the facts from which the claim arose), the *intentio* (the plaintiff's statement of the claim or cause of action), the *adjudicatio* (which gave the judge the power to transfer property, in actions for division of common property) and the *condemnatio* (the instruction to the judge to make a decision). A very simple example of a formula, comprising only the three essential clauses of an action, looked like this:[36]

> [NOMINATIO] So-and-so must be judge. [INTENTIO] If it is proven that A (the plaintiff) entrusted for safekeeping a silver table to B, and through the perfidy of B the table was not returned, [CONDEMNATIO] you, judge, must condemn B to pay to A the sum which the object is worth. If it is not proven, you must acquit him.

Litigants were obliged to use the set formulae, but the praetor could change these to extend their scope and include situations which had not been foreseen originally. This he did by adding a parameter which separated the precedents from the case under consideration. For example, he could invoke the notion of good faith (*bona fides*) if the custodian had a good reason for not

[34] On the development of procedure, see PF Girard, *Manuel de droit romain*, 5th edn (Paris, Rousseau, 1911) 971ff.

[35] Girard, *Manuel de droit romain* (n 34) 44.

[36] Quoted by Fögen (who takes this example from the *Digest*) (n 33) 175.

returning the table. Or he could change the person, in order to grant the ususfructuary (U) the *actio civilis legis Aquiliæ* which was initially granted the owner (O) of something damaged by a third party. Thus U became admissible instead of O, giving rise to a new formula. Another method was to introduce a fictional element by behaving *as though* one of the formula's conditions had been fulfilled. This gave rise to an *actio fictitiæ* of the following sort:

> So and so should be appointed judge. The theme of the trial is that A (the plaintiff) entrusted a silver table to S, the slave of B. You, judge, must say what S—were he free—must give to A or perform for him on the basis of good faith, and sentence B in favour of A.

In this type of system, an individual right was a right to an action in the procedural sense of the term: without a formula corresponding to the matter under dispute, no right could be claimed. To use a concept coined in a completely different context by Louis Dumont,[37] that of 'the encompassing of the contrary', Roman law came into being when *ius* encompassed *lex*, and produced an extraordinarily successful paradigm, namely a legal order which was at once binding on those who governed and a tool in their hands. It was binding because it gave autonomy to the legal form and endowed those governed with enforceable individual rights; and it was a tool the powerful could wield because, unlike religious or scientific law, human law gives normative force to the human will and can be shaped and transformed by it.

This paradigm certainly belongs to rule by laws, but unlike the Greek original, it cannot be identified with any particular political regime. Once the law becomes a technique of government, it can function indifferently in a monarchy, an oligarchy or a democracy. Thus Pope Gregory VII, in the late eleventh century, could seize on this technique drawn from historical Roman Law when—as *vicarius Christi* (and not simply vicar of Saint Peter)—he claimed to be the living source of laws which were binding throughout Christendom.

III. THE GREGORIAN REVOLUTION

Contrary to received ideas, modern law did not emerge in the Renaissance, but at the height of the Middle Ages. Ernst Kantorowicz,[38]

[37] L Dumont, *Essays on Individualism: Modern Ideology in Anthropological Perspective* [1983] (Chicago, University of Chicago Press, 1986) 227.

[38] E Kantorowicz, 'La royauté médiévale sous l'impact d'une conception scientifique du droit' (ch 2, n 3). See also his *Kaiser Friedrich der Zweite* (Berlin, Georg Bondi, 1927); tr ang. *Frederick the Second, 1194–1250*, tr EO Lorimer (New York City, Frederick Ungar Publishing Company, 1931).

Pierre Legendre[39] and Harold Berman[40] have all highlighted its medieval origins and its debt to the rediscovery of Roman law hybridised with canon law. What Berman has called the Gregorian Revolution occurred in the twelfth to thirteenth centuries, with its first moment in 1075, when Pope Gregory VII proclaimed in his *Dictatus papae*: a) the divine source of the authority of the Church and the Pope; b) Papal supremacy over the whole Church; c) the Pope's power to make new laws; d) the Pope's supreme judicial authority; e) his independence from all temporal power; and f) his superior authority.[41] The papacy had been 'the abstract continuation of Roman government in the West' since the fall of the Empire, as Elie Faure puts it.[42] Since the Western Church was the bridge between Roman imperial institutions and feudal ones,[43] it could assert itself as an autonomous transnational entity with a separate legal personality, independent of any imperial, royal or feudal power.

A new conception of legal systems emerged with this revolution, influenced by the distinction between temporal power and spiritual authority. Gregory VII's claim to sovereignty over the government of the Church and the spiritual life of Christians uncoupled the previous intertwining of spiritual and temporal, and paved the way for recognition of temporal power, and for the rise of the modern state. Yet it would be inexact to think of the Holy See as itself the first modern state. Unlike state power, its authority had no territorial limits, and was restricted to the salvation of the children of God (and hence, originally at least, to the personal status of individuals). In other words, it reigned over only a certain part of human life, the rest being in the hands of secular powers. These powers themselves adopted the model of government forged by Pope Gregory: a sovereign judge and legislator whom all must obey, and whose power transcends the generations.

In this new model of government, the law was not simply an instrument of sovereign power, but actually its constitutive element.[44] Bracton, in the thirteenth century, was already claiming that 'The king must not be under man but under God and under the law, because the law makes the king, for there is no *rex* wherever will rules rather than *lex*'.[45] This means that *it*

[39] P Legendre, *La Pénétration du droit romain dans le droit canonique classique, de Gratien à Innocent IV (1140–1254)* (Paris, Jouve, 1964) 144; and, by the same author, *Les Enfants du Texte. Essai sur la fonction parentale des États* (Paris, Fayard, 1992) 237ff.

[40] Berman, *Law and Revolution* (n 27).

[41] Berman, *Law and Revolution* (n 27).

[42] E Faure, *Découverte de l'archipel* [1932] (Paris, Seuil, 1995) 217.

[43] P Anderson, *Passages from Antiquity to feudalism* (London, NLB, 1974).

[44] *cf* T Berns, *Souveraineté, droit et gouvernementalité. Lectures du politique à partir de Bodin* (Brussels, Léo Scheer, 2005). On the particular importance of justice for medieval monarchies see R Colson, *La Fonction de juger. Étude historique et positive* (C-F, Presses universitaires de Clermont-Ferrand, 2006).

[45] Bracton (*c* 1210–68) *De Legibus et Consuetudinibus Angliae*.

is not because the will of the ruler is sovereign that it is the source of law. On the contrary, it is because it is the source of the law that this will is sovereign. The ruler cannot break the law without disqualifying his own sovereignty. Mozart put this theme to music in his opera *Il Seraglio*: although the Pasha Selim Bassa desires the beautiful Konstanze and has her at his mercy, he cannot use force against her without thereby destroying his own position as sovereign.[46]

The articulation between laws (*la loi*) and the objective order of the law (*le Droit*), which was already present in the Roman *lex*, was reworked after the Gregorian Revolution and gave rise to what since the nineteenth century has been called the Rule of Law (*l'État de droit*). Over the last 200 years, this institutional construct has spearheaded the West's 'civilising mission' abroad, in its successive guises of colonisation, development policies and globalisation. However, it was first exported much earlier, in the twelfth and thirteenth centuries, when jurists serving the temporal power of princes adopted the model of government invented for the spiritual order by Gregory VII. That is how the first modern states emerged, beginning (in chronological order) with England and France. This history is well known, but one should not forget that the two major legal cultures of the West—common law (in England and then America), and continental law, or Romano-canonic law on Continental Europe—have this origin in common.

IV. COMMON LAW AND CONTINENTAL LAW

Again, contrary to certain received ideas, the legal culture of common law comes closest to that of Ancient Rome. It took shape following the Norman invasion of 1066, when William the Conqueror preserved the customary law of the Anglo-Saxon inhabitants (using a legal strategy shared by many colonising forces), but also imported the Norman laws in force at the time for use by the new masters of the kingdom. The *Curia regis* used the original language of this legislation ('Law French'). William's successors, and particularly Henry II (1133–89), set up legal institutions in England which were heavily influenced by Gregorian innovations. For example, in the work of the great jurist Bracton (*c* 1210–68), the King of England is explicitly assimilated to the Pope, subject to no one but God, and called '*vicarius Christi*.' 'For as long as he metes out justice', said Bracton, 'he is the vicar of the eternal King'.[47] Unlike what occurred in France, the monarch's

[46] *cf* C Pornschlegel, 'La question du pouvoir dans les opéras de Mozart' in A Supiot (ed) *Tisser le lien social* (Paris, FMSH, 2005) 149–62.

[47] *cf* F Oakley, *The Mortgage of the Past. Reshaping the Ancient Political Inheritance (1050–1300)* (New Haven, Yale University Press, 2012), esp 161ff.

normative power was thus initially rooted in his role as a judge.[48] The much sought-after access to the royal court was limited by a system of specific actions comparable in all respects to the Roman *actiones*. One's case could be heard there only if one obtained an ordinance from the King's Chancellor (the Royal *writ* or *bref*, a short written order, from the Latin *breve*), or—in a later version—if one obtained an authorisation from the judge himself (actions *on the case* or *super casum*). Each type of action corresponded to a particular type of case and had to comply with forms—the 'forms of action'—which determined the procedure to be followed (the words to be used; the modes of proof and of court appearance; the modes of judgment, etc). As the adage 'Remedies precede rights' shows, a right was only recognised if there existed a specific action (a remedy) which corresponded to the case in hand. The progress of law thus depended, as it did in the Roman period, on the recognition of new cases which could give rise to an action, like new shoots grafted onto the old stock of cases accepted in the past. The rule that there is only one 'form of action' for each cause of action remained in force until 1854.

The law was thus identified with the authority of precedents. The grounds for judgement—the *ratio decidendi*—were binding on judges when confronted with similar cases in the future (but any other *considerations*, or *obiter dictum*, which were not essential to the decision, were not binding). The judge, just like the Roman praetor, could innovate by admitting new *distinctions*, from which a new case and a new rule could emerge. The law was thus first and foremost *case law* (in French, *la juris-prudence*), expressing the prudence and the immemorial wisdom of the judge. But the sovereign—the monarch, or equally the people represented by Parliament—could also make the law. This statute law was binding on judges, but since in their decision-making they filtered it through the common law, or rather incorporated and absorbed it into the latter, Parliament had to practise a certain casuistry in order to foresee how its intentions might be distorted or bypassed. This is why common law jurists have such difficulty accepting that the succinctly polished statements of principle which constitute the very backbone of continental law have legal force. Tocqueville summarised the difference in mentality between the common law and the Continental jurist in a few incisive traits 'The English and American lawmen [*légistes*] investigate what has been done; the French lawmen inquire into what one must have intended to do; the former looks for rulings, the latter, for reasons.'[49]

[48] For an overview of this legal history, see SFC Milson, *Historical Foundations of the common law*, 2nd edn (Oxford, Oxford University Press, 1981); JH Baker, *An Introduction to English Legal History*, 4th edn (Oxford, Oxford University Press, 2007).

[49] A de Tocqueville, *Democracy in America*, ed JP Mayer, tr G Lawrence (New York City, Harper & Row, 1969) Vol I, Ch 8, 'What Tempers the Tyranny of the Majority in the United States.

The common law's embedding in casuistry explains why it resembles a network rather than a pyramid. Its structural traits emerge inductively, through the actions of individuals, and not deductively, from the general interest incarnated by the State. There is thus not really any place in common law systems for what continental law calls the Law [*le Droit*], in the sense of a national legal system identified with a state and a territory. In Continental languages, the distinction between *ius* and *lex* in Roman law is still operative in the difference between *Droit* and *loi* in French, and *Recht* and *Gesetz* in German, but with certain shifts in meaning. French *Droit* was coined in the medieval period from the Latin *directum*. It differs in two respects from Roman *ius*: first, there is the additional idea of rectitude and direction, of that which orientates human life in time, and prescribes a path to be followed. Secondly, this path is not simply the procedural route by which one gains access to the law—that is, to recognition of an individual subjective right (*un droit*)—but it is also the direction which a whole society decides to take (*le Droit*, capital 'D'). These two sides of the notion of *droit—le droit* and *le Droit*—are, of course, intimately linked. It is because the individual is within a shared normative framework that he or she can be a legal subject (*un sujet de droit*) and have recourse to the law. This particular interconnection between the individual and society is not only lexicalised in French but in all Continental European languages: *Recht, diritto, derecho,* etc. It implies that the individual cannot be considered independently of the society in which he or she is a subject, in the sense both of sub-jected, 'thrown under' (*sub-jectum*), and of a speaking subject, a bearer of rights and freedoms. This sub-jection of individual identity in a shared whole is also implied in the French term *état*. An individual's *état civil*—which could be translated as 'personal status'—communicates with the notion of *État* (capital 'É'), the state, which guarantees this status; and also with the *Etat social*, the social state, which extends guarantees to the individual's working life.

These interconnected meanings (around '*droit* and '*état*') do not exist in the English language. Admittedly, 'right' comes from *Ius*, from the same root as *Recht* or *droit*, but it has the meaning of an individual subjective right; there is no equivalent of *Droit* with a capital 'D', the order which underpins and on which depend *les droits* with a small 'd' ('rights'). The term 'law', which is derived from the Old Norse *lag* meaning what is placed, fixed[50]—similar in this to the German *Gesetz* and Latin *lex*—combines the senses

The Temper of the American Legal Profession and How It Serves to Counterbalance Democracy'. On the persistence of this attitude, which dictates that the judge may not go beyond the text of the law to inquire into what the lawmakers may have had in mind, see RA Katzmann, *Judging Statutes* (Oxford, Oxford University Press, 2014).

[50] See the *Oxford English Dictionary* (Oxford, OUP, 2016) '**Law** *n.1* Etymology: Late Old English (c1000) *lagu* strong feminine (plural *laga*), < prehistoric Old Norse **lagu*

of the French *la loi* and *le Droit*, which are thus inadequately rendered in English by 'law' (although this is its standard translation). If we take Hegel's *Rechtsphilosophie*, for example, the English translations show the extent of this dilemma: variously, the *Philosophy of Law* or, most obscurely for an English reader, the *Philosophy of Right*.[51]

Beyond these translation problems lies the issue of the law of language.[52] The system of common law has been adopted by many countries, and it is not attached to any particular one because it retains something of the universalising ambition and the imperial pretensions of *ius civilis*, from which our term *civilisation* comes. By contrast, in the system of continental law, the law as *Droit* (capital 'D') is linked to the idea of the state and of territorial limits: one expects the term to be accompanied by an adjective such as 'German', 'Belgian', 'Italian', etc. 'The Rule of Law' stands alone, requiring no further qualification, whereas its German equivalent, *Rechtsstaat*, supposes the figure of the state.[53]

The aspiration to universality which is contained in the very expression 'rule of law' determined its translation into French in the Preamble to the Universal Declaration of Human Rights (1948) as *régime de droit* (an expression otherwise unfamiliar to the French ear): 'it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law [*par un régime de droit*].' Where the English has a definite article, *the* rule of law, implying the dream of a law embracing all the peoples of the earth, the French has the indefinite article, un *régime de droit*, and hence the suggestion of a multiplicity of legal orders. This example alone shows the weighty political stakes involved in the issue of working languages in university research and in the drafting of laws at international level. Working in a single language inevitably means thinking along the lines of the legal culture it transports. This is particularly true of European law, where the gradual adoption of English as the only working language has gone together with abandoning the idea of a territorially defined political entity.

However real these differences may be, they should not be over-emphasised. Were comparative law to broaden its scope, these two sides of the same

(< Old Icelandic *lǫg*), plural of *lag* neuter; in singular the word meant in Old Icelandic 'something laid or fixed' (specific senses being, eg 'layer, stratum', 'share in an undertaking', 'partnership', 'fixed or market price', 'set tune', etc); the plural had the collective sense 'law', and in Old Norwegian its form became (as in Old English) a feminine singular'.

[51] *cf* P Raynaud, see *Law/Right* in B Cassin (ed) *Vocabulaire européen des philosophies* (Paris, Seuil—Le Robert, 2004) 695; *Dictionary of Untranslatables: A Philosophical Lexicon*, ed B Cassin, translation eds E Apter, J Lezra and M Wood (Princeton, Princeton University Press, 2014).

[52] *cf* S Kakarala and A Supiot (eds), *La Loi de la langue* (Zurich, Schulthess, 2017).

[53] *cf* O Jouanjan (ed) *Figures de l'État de droit. Le Rechtsstaat dans l'histoire intellectuelle de l'Allemagne* (Strasbourg, Presses univ Strasbourg, 2001); L Heuschling, *Etat de droit—Rechtsstaat—Rule of Law* (Paris, LGDJ, 2002).

Western legal tradition might in fact prove closer and more unified than they appear today, in comparison with the normative systems of other cultures. And indeed, a closer look shows us that although the architecture of common law may be very different from that of continental law, functionally they are very close. The difference between common law (in the narrow sense) and equity—one of the pillars of this architecture—is of about the same importance for English jurists as that between private and public law for Continental ones. Equity echoes *aequum*, which was used by Roman praetors to temper the inflexibility of the formulae of *ius*, and to prevent their mechanical observance from generating injustice,[54] as embodied in the proverb *summum ius, summa iniuria*.[55] Equity had a similar function in countering the rigidity of the Westminster Courts, and the injustices this gave rise to. The victims of these injustices appealed to the sense of *equity* of the King, who delegated the investigation of their claims to his Chancellor, who was also his confessor and the 'guardian of the King's conscience'. The development of this new branch of law within the Court of Chancery as from the fifteenth century could have led the British legal system towards the Continental model, with sovereignty vested in the king rather than in the authority of parliament. But history did not take that path, and indeed equity finally absorbed common law in the seventeenth century, as an antidote to its own deficiencies. The Introduction to Hobbes's *Leviathan* states that 'Equity and laws are an artificial reason and will,' thus establishing both their difference and their complementarity. Equity played a similar role in the common law system as general legal principles do in continental law, allowing a judge to interpret a technical rule, which may be a source of injustice, in the light of a principle which transcends and corrects its unjust effects. This complementarity between common law and equity, as between the articles of Continental Codes and the principles by which one can interpret them, shows that in neither system can the law be lastingly divorced from considerations of justice. One could even claim that law's effectiveness as a technique depends on its fulfilling the criteria of justice of a particular society at a particular time. Those who claim the contrary revert to a dogmatic definition of the law, which may well correspond to the mechanistic imaginary of the West, but has never secured itself historically for any length of time.

Continental law and common law are thus two branches of a single Western legal tradition, as Harold Berman has described.[56] Its principal characteristic is to have established law as an autonomous sphere, separate both

[54] *cf* Schiavone, *The Invention of Law in the West* (n 32).

[55] Mentioned by Cicero, *De officiis*, I, 10, 33, tr W Miller (Cambridge, Mass, Harvard University Press, 1913).

[56] HJ Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass, Harvard University Press, 1983).

from politics and from religion. In the other civilisations of the book, legal interpretation necessarily defers to Revealed Scripture, that is, to a text which is the foundation of the legal order and of its legitimacy. By contrast, the Gregorian Revolution separated law from theology, and the secular states which were founded in its wake reaffirmed this autonomy of the legal sphere. Thereafter, the law developed as a technique, and was entrusted to experts who had no need to inquire into the reason of the law.

V. THE WESTERN LEGAL TRADITION

Accursius (*c* 1182–1260), who pioneered the teaching of law at university, was already defending what is today the widely held purely technicist and self-referential conception of the law when he dismissed the question of whether the jurist should study theology with the reply 'Everything can be found in the corpus of the Law'.[57] Today, jurists still tend to dismiss the question of the *ratio legis*, and to see themselves as plain and simple technicians who supervise the complicated system of conduits in which claims and counter-claims circulate. The rationale and legitimacy of the laws they study can be left to others.

But the issue would not go away. In the modern period, before the natural sciences became the paradigm for the science of law, it was theologians and philosophers who examined this question spurned by jurists. In Catholic lands, the key actors were the School of Salamanca and the work of Francisco Suarez. In the wake of the Counter-Reformation, Suarez developed a general theory of laws in his *Treatise On Laws and God the Lawgiver*. In Protestant lands, Hobbes's *Leviathan* attempted to 'establish the art of government as knowledge of nature'.[58] This direction was pursued further by the Enlightenment philosophers, especially Locke in England, and Montesquieu and Rousseau in France. As from the nineteenth century, biology and the nascent social sciences became the fields in which scholars hoped to find the natural foundations of government.[59] Today it is economics, and so pervasively that the *Law and Economics* doctrine has become the standard paradigm for the science of law in the United States.[60]

By separating law from theology, the Gregorian Revolution created a space for political theologies, or secular religions, to develop. Their common feature was that they subjected the legal order to the normative force of certain ideas. They thus laid the groundwork for modernity in the West,

[57] Quoted by Legendre, *La 901e Conclusion* (Ch 1 fn 6) 409.
[58] P Legendre, *De la société comme Texte. Linéaments d'une anthropologie dogmatique* (Paris, Fayard, 2001) 230.
[59] See below, ch 5, p 90ff.
[60] See below, ch 7, p 121ff.

with its idolisation of ideas,[61] and attempts to fashion society in their image. One might think of tracing this omnipotence of ideas back to Plato, and it is true that Platonism has always haunted the sciences, not least mathematics. But whereas Plato's reflections on the cosmic order aimed at finding a place for the human being within it, modernity aimed at quite the reverse, at fashioning a human order in the image of its own theories. Robert Lenoble has described the break between the Greek representation of Nature and our own in the following terms:

> For a Christian, Nature is not eternal: God cast it into being when He wanted to, and He will spirit it away at the Last Judgment as though it were simply a huge stage-set. It is not all there is, but simply something in the hands of God. When humankind thus thinks of itself not as in Nature, but as facing nature, it will apprehend its destiny as independent of the history of the world. And a day will come when humankind will dare to declare that Nature, a machine in the hands of God, is itself only a machine, whose levers may be handled also by man.[62]

So it is our belief in the Biblical narrative of the Creation—secularised as the 'Big Bang theory'—that separates our vision of nature from that of the Greeks. In common with many non-Western cultures, the Greeks viewed nature as eternal, subject to a cyclical and not a linear time. It was the object of religious contemplation, not of active exploitation. For the Moderns, by contrast, knowledge of nature was primarily a means to access its resources. The Judeo-Christian belief that nature, or the physical world, was an emanation of God's mind and corresponded to His designs, brought with it the subject/object dichotomy which has so powerfully shaped our scientific representation of the world.[63] It led to the Cartesian ambition of becoming 'master and possessor of nature', and fashioning the world in our image, by appropriating for our own use the God-given laws inscribed there.

This shift in the role of knowledge of the world, from contemplation to transformation, brought with it a change in the status of technology. In Ancient Greece, technology never got further than 'a system of traditional recipes and practical skills',[64] whereas from the seventeenth century

[61] The two words have the same etymology, from the Indo-European *weird* (to see, to perceive by vision). On the passage from idol to idea, see M Horkheimer and T Adorno, *Dialectic of Enlightenment. Philosophical Fragments* [1947], tr E Jephcott, ed G Schmid Noerr (Redwood City, Stanford University Press, 2002).

[62] R Lenoble, *Histoire de l'idée de nature* (Paris, Albin Michel, 1969) 227.

[63] This is what Augustin Berque calls 'TOM' (as in 'lobo*tom*y'), an acronym for 'Modern Western Topos' (*Topos Occidental Moderne*). See *Poétique de la Terre. Histoire naturelle et histoire humaine, essai de mésologie* (Paris, Belin, 2014) 35ff. The critique of the subject–object dichotomy has been a minor, but longstanding and tenacious, theme in the human sciences, from Vico to Dilthey and Gadamer. It is essential for understanding the symbolism specific to human beings.

[64] J-P Vernant, 'Remarques sur les formes et les limites de la pensée technique chez les Grecs' in *Revue d'histoire des sciences* (Paris, PUF, 1957) 205–25, reprinted in *Mythe et pensée chez les Grecs*, vol II (Paris, Maspero, 1971) 44ff.

onwards it became both the means of putting knowledge into practice, and the primary justification for pursuit of knowledge. A similar change took place at the same time in the realm of law, as in Hobbes's conception of the law as a vast machine in which jurists are one of the 'artificial joints' (or rather, in today's vocabulary, the technicians or maintenance team). Legal technique embodied, and also challenged, the ideas which supposedly governed the world at the time. These ideas were treated as idols, images to which were attributed powers similar to the gods they represented. The King, the nation, the fatherland, race, class, genes, the market and globalisation are some such fetish words, and are meant to disclose a natural order and allow us to press it into our service. According to this logic, the laws in force should be the reflection of the revealed truth of these ideas.

But we should not ourselves succumb to the idolatry of ideas, by treating them as equivalent and interchangeable expressions of an 'idea of ideas' which would be called 'political theology' or 'dogmatics'. All these notions serve to link the human order to the natural order, but they are so wide-ranging that 'nature' seems to cover almost anything. The laws of nature according to Aristotle, Cicero, or Rousseau are not the same as those for Callicles or Sade.

When examining how these different ideas situate law, we shall be asking whether or not they allow for an autonomous legal order. One of the characteristics of twentieth-century totalitarianisms is precisely that they obliterated an autonomous realm for the law, under the sway of scientism. The conviction that science can answer the question of the meaning and orientation of human life reduces the law to the role of a simple technique of power, which can thus lay no claim to an independent realm. Our twentieth-century historical experience should remind us that the autonomy of the legal form, and government by laws, cannot be taken for granted as timeless and universal achievements, and that they have already come under heavy fire within the Western world itself.

3

Other Perspectives on Law

> A wise sovereign changes the laws according to the demands of the times, and adapts the rites to the development of morals. Clothes and utensils must be adapted to the use to which they are put, just as legislation must be appropriate to the society.[1]

EVERY CIVILISATION UNTHINKINGLY endows its own categories of thought with a universality they never have. Westerners are particularly prone to this tendency because they have enjoyed three centuries of dominating others thanks to their techno-scientific prowess. This period is coming to a close, and they must now contend with other ways of conceiving how human societies should be organised. This is no easy task for some, as the return of the most primitive biologism attests and, relatedly, the eclipse of comparative cultural studies among the research priorities of the human sciences. As though exploring the 'neurological bases of religious belief' could substitute for an understanding of other systems of thought (if only with a view to understanding the specificity of our own)! This kind of escapism, which is intimately entwined with the founding dogmas of the West, makes any real universalism unattainable. Universalism does not mean filtering the whole world through our own concepts, but rather filtering our concepts through those of other civilisations.[2] It would be judicious, to say the least, to pay some attention to how the emerging continents, which have assimilated Western culture without abandoning their own, view the world and conceive its organisation. We could learn from this how to identify the real bonds and discrepancies between the different legal traditions facing globalisation today.

For there is nothing universal about conceiving a natural or social order in terms of laws. To show this, rather than undertaking a world tour of different civilisations, this chapter will simply consider two very different but complementary cases: sub-Saharan Africa and China. The example from

[1] *Wen-Tzu (Wenzi): Understanding the Mysteries. Further teachings of Lao-Tzu*, tr T Cleary (Boston/London, Shambhala Publications, 1991). (French-Chinese bilingual edition, *Les Écrits de Maître Wen. Livre de la pénétration du mystère,* tr and annotated by J Lévi, Paris, Les Belles Lettres, 2012).

[2] See P Legendre (ed), *Tour du monde des concepts* (Paris, Fayard-Institut d'Études avancées de Nantes, coll 'Poids et mesure du monde', 2014).

Africa is particularly revealing, because laws arrived there only with colonisation, and remained alien to African thought systems. We shall spend longer, however, on the case of China because the idea of governing through laws actually emerged there at roughly the same time as it did in Ancient Rome, but in a different form. In both cases, governing by laws interrupted a social order regulated by rites. We shall therefore start with a brief reminder of what a ritual order is, and how it differs from a legal one.

I. RITUALISM

Ritualism is undoubtedly the oldest way of organising social relations, and it was for a long time the most widespread. The role of rites in African societies has been extensively studied by anthropologists, who have shown how they enable the visible world to be harmonised with invisible forces. However, these thought systems are difficult to characterise in general terms because of their variety (also linguistically) and their oral mode of transmission. Since Chinese ritualism is more unified, and has been codified in writing,[3] it is an easier corpus to summarise, especially since it shares some common ground with European-style legal systems.[4]

Ritualism prescribes the ways of behaving appropriate to the full range of inter-personal relations in a society, starting with the essential ones—father–son, sovereign–subject, husband–wife, older–younger, colleague–companion. From these are derived the rites to be observed in all other types of relation, from the most local bonds (neighbourhood, school) to the most distant (the nation, humanity as a whole). According to *The Book of Rites*:

> He who sets great store by rites and who observes them is called an orderly person; he who, on the contrary, ignores them and does not observe them is called a man without rules. [Rites] are the consequence of respect and modesty; when observed in the temple of one's ancestors, it is respect; when observed at court, the higher-ranking people and those who are more lowly have their respective places; if observed in the home, there is love between father and son, and harmony between older and younger; if observed in one's village, there is a distinction between the elders and those who are younger.[5]

As the life of this 'orderly person' shows, rules do not have the same sense in a ritual and in a legal order. In a society governed by laws, rules have an objective, external existence with respect to the individual. In ritualism,

[3] On the place of rites in Confucian thought and its tradition, see A Cheng, *Histoire de la pensée chinoise* (Paris, Le Seuil, 1997).

[4] See L Vandermeersch 'Ritualisme et juridisme' in *Études sinologiques* (Paris, PUF, 1994) 209–20.

[5] *The Book of Rites (Li Ji): English-Chinese Version*, tr J Legge (CreateSpace Independent Publishing Platform, 2013).

they are internalised ways of behaving. The Confucian tradition on which ritualism is based depends on individuals' work of ascesis in 'overcoming their ego'.[6] Each person must internalise the primacy of society over the individual in his handling of human relations; and harmony results from the principle of allotted positions, to which the individual's behaviour must correspond.[7] This primacy of form over content and of society over individuals explains why ritualism is based on duties and not on individual rights. On this issue, Léon Vandermeersch notes that the single French term '*droit*' refers both to 'subjective' rights and to the 'objective' system of laws (*le Droit*), and its equivalent Chinese term, '*yi*', refers both to the duty to show respect and to the ritual form.[8] He quotes the *Book of Rites*, which states that 'What results from disciplining attitudes by applying rites is respect. It is from respect that prestige results.'[9] In other words, being respectful is motivated by a duty and expressed in the form of rituals, and only he who conducts himself respectfully will in turn elicit respect. What the different rituals have in common is this imperative of respect for the other, which plays the same role as what we call dignity.

In the case of both China and Europe, the issue is imposing rules on social relations. However, the nature of the rules is quite different: in a law-bound order, violation of the rule is sanctioned by cancelling the act or, where this is impracticable, by repairing the damage caused. This principle of liability gained constitutional status in France, on the basis of article 4 of the Declaration of the Rights of Man and of the Citizen: 'Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the enjoyment of these same rights. These borders can be determined only by the law.'[10] In a ritual order, however, liability cannot be defined in this way. Rituals are not concerned with the outcome of actions, but the way they are carried out. Someone who has behaved badly can neither annul his or her bad conduct nor compensate for any losses, because this behaviour cannot be calculated in financial terms. The punishment is of a different order: it is shame, or what in the East is called 'losing face'.[11]

[6] *cf* Cheng, *Histoire de la pensée chinoise* (n 3) 73.

[7] Cheng (n 3) 224–25.

[8] Vandermeersch 'Ritualisme et juridisme' *art. cit.* (n 4) 213.

[9] *The Book of Rites (Li Ji)* (n 5) Ch 21.

[10] *Conseil constitutionnel* (the French Constitutional Council), Decision no 99–419 DC of 9 November 1999, *Loi relative au pacte civil de solidarité*. Prior to this, *Conseil constitutionnel*, Decision no 82–144 DC of 22 October 1982, *Loi relative au développement des institutions représentatives du personnel*. On this approval, see P Deumier and O Gout (2011) 'La constitutionnalisation de la responsabilité civile', *Cahiers du Conseil constitutionnel* 31; B Girard, *Responsabilité civile extracontractuelle et droits fondamentaux* (Paris, LGDJ, 2015).

[11] According to Confucius, 'when the people live in harmony through rites, it is the feeling of face (*chi*) which makes the rule prevail' (Lunyu, Ch 2, Weizheng, quoted by Vandermeersch 'Ritualisme et juridisme' (n 4) 218).

But before we make the culturalist move of saying that we have found a properly Eastern characteristic, unknown in the West, we should recall that infringements of codified good behaviour are punished in exactly this way in the West. If a dinner guest gets abusive after drinking too much, offering to pay compensation the next day will not rectify the situation, and since good behaviour is constitutive of a person's place in society, disrespect for such rules will lead to the person's downfall. And even if we look only at legal rules, we find that there is no unbridgeable gap between them and ritual ones. Even Roman law stems from consultations given by experts in ritual forms,[12] and legal formalism still retains something of that origin.[13] As for rights and duties, they are inseparable: 'subjective' rights imply the duty to be respected by others, just as the duty to respect others is paired with the right to be respected. These are two inseparable sides of the relations between human beings. But it is symptomatic that in our societies the 'struggle for recognition', by which some authors characterise the second period of social justice,[14] takes the form of claimed *rights*. Respect is then claimed as an individual right rather than as a duty inherent to life in society. Similar tendencies can be found in societies in which ritualism is dominant: it is not that the law is ignored, but that it is coloured by other factors.

II. AFRICA, THE OTHERNESS OF THE LAW

African cultures do not conceive of society in terms of law. This is why the colonising powers had such difficulty translating the notion into the vernaculars. A recent study by Danouta Liberski-Bagnoud has shown how these difficulties were overcome, in the case of the Gur (or Voltaic) languages.[15] This family of languages includes the most widely spoken of the 61 languages of Burkina Faso, Mossi (six million speakers), a language which distinguishes three types of norms: prohibitions linked to ritual observances, which are beyond human will (Mossi: *kigsu*); edicts (Mossi: *noorè*, whose primary meaning is 'mouth'), which are issued by human authorities such as the king or the elder of a lineage; and the intermediate category of prescriptions attributed to recent ancestors whose alteration of a ritual later became authoritative. The colonising powers, wishing to leave intact the rules governing marriage, inheritance and land transfers, grouped these together under the

[12] On the importance of this type of consultation in the practice of African rituals, see M Cartry (2011) 'Le chemin du rite', *Incidence* 6, 37–44.

[13] See above, ch 2, pp 39–40. See also P Legendre, 'Légalité du rite' in *Sur la question dogmatique en Occident* (Paris, Fayard, 1999) 259–72.

[14] A Honneth, *Kampf um Anerkennung: Zur moralischen Grammatik sozialer Konflikte*, 2nd edn [1992] (Suhrkamp, 2003); translated as *The struggle for recognition. The moral grammar of social conflicts*, tr J Anderson (Cambridge Mass, MIT, 1996).

[15] D Liberski-Bagnoud, '"Langues du Burkina Faso", *v* "Loi", in Legendre (ed), *Tour du monde des concepts* (n 2) 92–97.

name of 'customary law'. Other terms were therefore needed to translate the European idea of statutory law. The solution was to take two terms used by the Mossi themselves in their subjection of the local populations before they were colonised: *tilaï* (obligation) and *panga* (force / strength), both of which imply illegitimate coercion using force. This was why, after Independence, it proved difficult to convey the idea of a law to be observed by the whole population because it was formulated by those to whom it applied. As for the notion of a constitution, the Mossi term *tengkugri* was used by journalists keen to protect this structure from their leaders' ongoing habit of amending it as they pleased in order to hang on to power indefinitely. *Tengkugri* refers to a much-feared figure of the Earth, sacred (inviolable), and fenced off by prohibitions.[16] The choice of this term was criticised as anti-democratic insofar as it placed the number of presidential terms of office beyond human will.

Thus sub-Saharan Africa had such a different vision of an orderly society from the Western ideal of government by laws that even today few people appreciate how much Africa has to offer Western legal thought under globalisation.[17] For instance, 'speech assemblies' [*assemblées de parole*], that is, open deliberative practices leading to the adoption of shared norms—which are, after all, what we call 'law' in democracies—were already used long before colonisation.[18] Yet the message addressed to African states over the last 30 years has insistently been that they should import the European democratic model, despite their own traditions, and despite the utter discredit it suffered under colonisation. What most African elites retained from colonialism was that this legal system (an import frequently also written by Western jurists) was basically no different from the law of the jungle (Mossi: *panga*), and likewise for the concept of the state. Given that the 'civilising mission' of the colonial state seemed primarily concerned with exploiting local populations and resources, this arrogant and predatory state could hardly be regarded as serving the local populations' interests and meeting their needs. After Independence, the new leaders simply stepped into the shoes of the former colonial administrators, and the state continued its predations.[19] In a note on colonisation written in 1943 for the French government in exile in London, Simone Weil observed that

> 'the poison of scepticism is much more virulent where previously there was none. Unfortunately we do not believe in much. And when we come into contact with

[16] Liberski-Bagnoud, '"Langues du Burkina Faso", *v* "Loi"' (n 15) 95.

[17] On land ownership, A Supiot, 'L'inscription territoriale des lois' (2008) *Esprit*, November, 151–70.

[18] *cf* M Détienne, *Comparing the Incomparable*, tr J Lloyd (Stanford, Stanford University Press, 2008); J-G Bidima, *La Palabre. Une juridiction de la parole* (Paris, Michalon, 1997).

[19] *cf* P-O de Sardan, 'Gouvernance despotique, gouvernance chefferiale et gouvernance postcoloniale' in *Entre tradition et modernité: quelle gouvernance pour l'Afrique?*, Actes du Colloque de Bamako, 23–25 January 2007, IRG 2007, 109–31, www.institut-gouvernance.org/fr/analyse/fiche-analyse-263.html.

> others, we seem to manufacture a species of man who believes in nothing at all. If that continues, one day we will experience the backlash with a brutality of which Japan (in 1943) gives us a foretaste.'[20]

We will continue to be flummoxed by the difficulties many African countries have in constructing a workable state unless we recall that the model inherited from colonialism is a predatory state. Many of the ruling elites after Independence simply adopted this model, producing the figure of what Joseph Tonda has called the 'modern Sovereign'.[21] And what is true of institutions is also true of colonised individuals, who internalised something of the identity of the coloniser, their 'intimate enemy'.[22]

So there is nothing essential to Black Africa which makes it incapable of achieving the rule of law. The state, far from being bloated, is sorely lacking in its role of ensuring peace internally and guaranteeing people's fundamental rights.[23] This lack cannot be remedied by imposing 'models of governance' from the outside, dreamt up in Europe or the US. On the contrary, these countries must be enabled to draw on what is best in their own traditions, so that they may invent their own models of government. In Africa as elsewhere, the choice is not between being dissolved into a 'global' culture and adopting the position of a victim, in an ossified and essentialised 'local' one. Tradition is everywhere a resource for renewal, and not an obstacle to be overcome, nor a place to retreat into.

On this issue, we should remember that law and ritual are not binary opposites, and that in practice they operate together in every culture.[24] We tend to overlook this because we understand ritualism as an archaic and outdated form, and thus unthinkingly place the relations between law and ritual within a linear history in which the former replaces the latter. The narrative of this historical 'progress' corresponds, in legal terms, to a reduction in formalism and an increase in consensualism, which many regard as supremely embodied by the history of Roman law: the pontiffs prescribed, in oracular fashion, the rituals to be observed, and only later did they become the guardians of laws. Although the idea of the law's inviolability, which marks the beginnings of government by laws in the West, still

[20] S Weil, 'À propos de la question coloniale dans ses rapports avec le destin du peuple français' [1943] in *Œuvres* (ch 2, fn 9) 429. From a similar perspective, see Tzvetan Todorov's remarks on the 'sombre victory of colonialism and its ideology over their enemies', whenever the latter simply invert racism and oppression rather than eradicate it (T Todorov, *The Morals of History*, tr. Alyson Waters (Minneapolis, Minnesota University Press, 1995).

[21] Tonda, *Le Souverain modern* (ch 1, fn 17) 297.

[22] A Nandy, *The Intimate Enemy. Loss and Recovery of Self Under Colonialism* (Oxford, Oxford University Press, 1984).

[23] *cf* OO Sidibé, 'La déliquescence de l'État: un accélérateur de la crise malienne?' in D Konaté (ed), *Le Mali entre doutes et espoirs* (Bamako, Editions Tombouctou, 2013.) 171–91.

[24] On the harmful effects of these oppositions, see A Cheng (ed), *La Pensée en Chine aujourd'hui* (Paris, Le Seuil, 1997) 7ff.

represents an ideal for all lawgivers,[25] it is also a way of preserving something of the stability of rituals. For, once written down, the law unleashes what Marie Theres Fögen rightly calls an 'explosive force',[26] like a kind of atomic core generating mushrooming glosses by chain reaction. When the free play of interpretations is no longer controlled by the strict limits of the text, the reaction spirals out of control. So when laws and constitutions are reduced to the status of 'legislative products', and tools for governance, the very idea of law is under threat. Instead of constituting a stable framework within which human activities can take on sense for everyone, this debasement of the law draws everything towards senselessness, a bit like a house whose foundations become rubbery and whose walls keep moving. All the great law-givers, from Solon (who, after drawing up the Athenian laws, left the city for 10 years to avoid the temptation of changing them) to Portalis, were acutely aware of the danger of a legislative *hybris*, which ultimately destroys the very purpose of the law. It was in order to counter precisely such a *hybris* that the Burkinabé decided to use the term *tengkugri* to refer to their constitution, since it implies a prohibition which transcends human will.

It is unlikely that a society can survive for long without stable rules and without rituals. In twentieth-century totalitarian states, the contempt for the law went hand in hand with an exaggerated use of rituals, invented for the occasion to glorify a mythical past or a radiant future. Big business is also fond of rituals, some of which are drawn from tradition, such as the rites performed by Japanese firms when they inaugurate a new site,[27] but most are standardised packages produced by event management specialists. You want to see Bill Gates dance on stage? Just come along to Microsoft's annual celebration of its financial results.[28] And even societies as devoid of rituals as our own have not yet abandoned funeral rites, however basic they may have become.

III. CHINA, THE LEGALIST SCHOOL

No one would dream of suggesting to the Chinese government today that it should divest itself of its ancient culture and embrace the modern world. Like Japan half a century before it, China had adopted Western-style laws in its First Chinese Republic (1911), which it harmonised with

[25] See above, ch 2, p 37–38.

[26] MT Fögen, *Histoires du droit romain* (ch 2, fn 33) 86.

[27] *cf* J-N Robert, 'Les religions du Japon' in *Orientalisme* (1982) *Courrier du CNRS,* 48, supp.

[28] This scene is filmed in the documentary with Pierre Legendre, *Dominium Mundi. L'Empire du Management* (dir G Caillat, 2007).

its own traditions.[29] This process was interrupted under Mao, who dissolved the legal form, but was resumed after 1978,[30] connecting back to the synthesis of legalism and ritualism which had characterised its beginnings.[31] It is erroneous to believe that the art of government in China can be reduced to Confucianism, with its particular model of 'government by men'. For there is another tradition in China, that of 'government by laws', which played a major role in the foundation of the country's imperial institutions, and continues to shed light on issues today. The singular position of China within the globalised world is arguably incomprehensible without an understanding of what has been called the Legalist School (Fa-jia: 法家), which still informs Chinese practices in government and big business.

The Legalist School developed in China during the Warring States period (sixth to third centuries BC), a time of unrest and feudal struggles. Legalist doctrine underpinned the first empire, founded by Qin Shi Huang (221–10) (the dynasty of Qin). This emperor did not leave fond memories among the Confucian learned elite, whom he apparently burnt at the stake in large numbers along with their books. But he was the first emperor to set up a centralised bureaucracy ruled by stable laws, which provided a more or less exemplary model of government right up to the contemporary period. The principal theoreticians of Legalism—Shang Yang, Shen Dao and above all Han Fei[32]—are as famous in China as Confucius or Lao Tseu. Their works became known in France thanks to scholarly research,[33] first and foremost Léon Vandermeersch's research into the formation of the Legalist School.[34] The conception of law current in that school derived from Taoism, for which nature, the Tao,[35] is the only law. In Taoism, the universe is perceived

[29] J Escarra, *Le Droit chinois. Conception et évolution. Institutions législatives et judiciaires. Science et enseignement* (Paris, Sirey, 1936) XII-562.

[30] M Delmas-Marty and P-É Will (ed), *La Chine et la Démocratie* (Paris, Fayard, 2007); X-Y. Li-Kotovtchikine (ed), *Les Sources du droit et la réforme juridique en Chine* (Paris, Litec, 2003), bilingual, French and English, 271 and 257; PB Potter (ed) *Domestic Law Reforms in Post-Mao China* (London, East Gate Book, 1994); SB Lubman (ed), *China's Legal Reforms* (Oxford, Oxford University Press, 1994); and by the same author, *Bird in a Cage. Legal Reform in China after Mao* (Stanford, Stanford University Press, 1999).

[31] *cf* Cheng, *Histoire de la pensée chinoise* (n 3) 614ff.

[32] *Basic Writings of Han Fei Tzu,* tr B Watson (New York City, Columbia University Press, 1964).

[33] H Maspero, *La Chine antique* [1927] (Paris, PUF, 1965) 426ff; Escarra, *Le Droit chinois* (n 29) 3–84; J Bourgon, 'Principes de légalité et règle de droit dans la tradition juridique chinoise' in Delmas-Marty and Will, *La Chine et la Démocratie* (n 30) 157–74; X Li, 'L'esprit du droit chinois. Perspectives comparatives' (1997) *Revue internationale de droit comparé,* 49, 1, 7–35; and by the same author, 'La civilisation chinoise et son droit' (1999) *Revue internationale de droit comparé,* 51, 3, 505–41; Cheng, *Histoire de la pensée chinoise,* (n 3) 235–49.

[34] L Vandermeersch, *La Formation du légisme. Recherche sur la constitution d'une philosophie politique caractéristique de la Chine ancienne* (Paris, École française d'Extrême-Orient, 1987).

[35] K Schipper, '"Chinois", *v* "Loi"' in Legendre (ed), *Tour du monde des concepts* (n 15) 166–71. On Taoism, see the classic work by H Maspero, *Le Taoïsme et les religions chinoises*

as a self-regulating system governed by interacting forces of creation and destruction; neither rites nor royal ordinances have any moral basis. The doctrine of the Legalists was developed in opposition to Confucianism and its ideal of government by men, for which ritualism and the cultivation of virtue were central.[36] However, the exceptionally long-lived institutions of the Chinese Empire—from the second century BC to the beginning of the twentieth century—were based on a mixture of this legalism and Confucian ritualism. Many Chinese classics on the art of government reflect this synthesis, in their attempt to temper the totalitarian dimension of legalism with ritualism.[37] Even today, legalism continues to show beneath the veneer of Confucianism applied by the People's Republic of China to the Socialist market economy.

The Legalists thought it was useless to bank on human virtue because only egoism exists. In their view, the Confucians were simply wrong to believe that social harmony could be produced by instilling the Prince's virtue into the hearts of his subjects through the practice of rites. In opposition to Mencius, who considered that 'human nature, like water, flows from high to low', the Legalists claimed that 'the people pursues its interest like water flows down a slope'.[38] The question of government was therefore, rather, how to make egoism work for the Prince. A good example of this problem can be found on the battlefield. The individual soldier's personal interest is to take to his heels as soon as he can. To prevent this, the soldier must be made to displace his fear onto something other than the enemy, which can be done by punishing desertion with spectacular cruelty; and at the same time he must be roused to battle by having his exploits in the field rewarded, which also inspires courage in the cowardly. Hence, for the Legalists, laws were regarded as a technique for influencing people's self-interest. Rejecting rites as the means of ensuring order and unity, the Legalists highlighted what was only a secondary measure for the Confucians, and considered worthy only of those incapable of governing themselves, namely the criminal law, and punishment, *xing* 形. The word *xing* in Chinese means both 'punishment' and 'form'. Punishment is understood as re-form, which could be physical (physical marks: castration, amputation, cutting off the nose, etc), or symbolic (wearing red clothing, etc). The word *fà* 法, by contrast, from which the Legalists' name derived, meant 'Law of the Heavens' in

(Paris, Gallimard, 1971), preface by M Kaltenmark. (a collection of articles authored by this great specialist on China who was deported and died at Buchenwald).

[36] *cf* A Cheng, *Étude sur le confucianisme han: l'élaboration d'une tradition exégétique sur les Classiques* (Paris, Collège de France and Institut des Hautes Études chinoises, 1985); and, by the same author, *Histoire de la pensée chinois* (n 3).

[37] See especially Wen-Tzu (Wenzi), *Understanding the Mysteries. Further teachings of Lao-Tzu* (n 1).

[38] Vandermeersch, *La Formation du légisme* (n 34) 219.

ancient texts, and was the model which the sacred king was supposed to imitate, that is, the universal law. In its archaic written form, the character *fà* was composed of three elements, which represented:

— water (perfectly flat, symbolising the idea of rectitude and justice)
— an element meaning 'to expel' (everything crooked)
— a pictogramme representing a unicorn, reputedly able to detect those who have not behaved with rectitude.

The Legalist doctrine was the result of bringing together *xing* and *fà*, and of adding to the regime of punishments that of rewards. The art of government consisted of using these 'two handles'—punishments and rewards. In Han Fei Tzu's words:

> The Prince controls his ministers by means of two handles alone. The two handles are punishment and favor. What do I mean by punishment and favor? To inflict mutilation and death on men is called punishment; to bestow honor and reward is called favor. Those who act as ministers fear the penalties and hope to profit by the rewards. Hence, if the ruler wields his punishments and favors, the ministers will fear his sternness and flock to receive his benefits.[39]

For the Legalists, law was thus a machine which the sovereign could use to ensure social order, by manipulating the two sole motives for human behaviour: greed and fear. To achieve this, the sovereign does not need to be crafty or intelligent, nor to make a show of his power; on the contrary, he should conceal it in order to become one with this impersonal and abstract law. He must be able to count on the eyes and ears of his subjects, who are made transparent to him because they all spy on each other, while he himself remains invisible.[40] The Sovereign-Legalist is less a prince than a principle: the principle of a law which transforms egoism into a force for order. The comparison which inevitably springs to mind here is today's faith in the invisible hand of the market. In both cases, the order derived from the manipulation of self-interest is linked to concealment of the loci of power, or more precisely the immersion of power into a general system for conditioning behaviour. One could say of our self-regulating market what Jean Levi says of the Sovereign-Legalist: what the other sees is only ever the polished mirror of nothingness.[41] But the Legalists did not believe that order could emerge spontaneously from unbridled self-interest. The Prince quelled his subjects only by implacably applying the criminal law, which

[39] 'The two handles' in *Basic Writings of Han Fei Tzu* (n 2) s VII, 30–34. There is nothing specifically 'oriental' about singling out these two tools: along similar lines, see Richelieu, *The Political Testament of Cardinal Richelieu* [1688]: *the Significant Chapters and Supporting Selections,* tr HB Hill (Madison, Wisconsin University Press, 1961).

[40] 'The two handles' in *Basic Writings of Han Fei Tzu* (n 2), s XIV.

[41] J Levi, Introduction to *Han-Fei-tse ou le Tao du Prince*, *Han-Fei-tse ou le Tao du Prince*, presented and translated from the Chinese by J Lévi (Paris, Le Seuil, 1999).

itself was successful in conditioning people's self-interested behaviour only if it was both objective and general.

This objectivity was predicated on publication of the laws. The first Chinese legal codes, carved onto tripod vessels, date from the sixth century BC, and replaced the Annals, which only legal officials could consult. Publication was meant to prevent purely subjective interpretations of the law. A comparable shift towards codification took place a century later in Rome, when the Law of the Twelve Tables was promulgated. There was one essential difference, however. The Legalists published laws not to satisfy the demands of the people, but to restore the state's authority. Concomitantly, codification did not lead to a legal system in the Western sense; that is, one which also guarantees the rights of individual subjects. Classical Chinese has no term for these rights. It was translated by *quán* 权, which refers to the power—the 'two handles' described by Han Fei Tzu—exercised by the Prince through the law, namely to punish and to reward. The Legalists confiscated these instruments from the learned bureaucratic class, and handed them over to the sovereign.

Another important difference was that promulgating laws did not go hand in hand with the idea of the law's inviolability. Since laws were simply an instrument of power at the sovereign's disposal, they had to be efficient, not just. Also, their value was not in their relation to moral principles—which are simply masks for the private interests of those who profess them—nor of course in their reflection of the will of the people. Rather, laws conveyed an understanding of things. As such, they needed to evolve with time, in order to respond to the changing context and to the lessons learnt from their application. A famous treatise on government advises the sovereign to change the laws according to the demands of the moment: 'Clothing and utensils must be adapted to the use which is made of them, just as legislation must be appropriate to the society. This is why it is not always a bad thing to change ancient rules, nor always judicious to preserve them.'[42] In the West, not until very recently has the law been so totally assimilated to an instrument of power, to a tool no different from a saw or a hammer. And since the law was founded on efficiency, there was no place for contradiction: a more efficient law naturally excludes one that is less efficient (a notion which resurfaced with Condorcet, and with the contemporary Law and Economics school).[43] The law's efficacy depends not only on being known, but also on being understood by everyone, which is why the Legalists designed their system for the least educated, and did not assume any perspicacity on the part of the people: 'The people are easy to

[42] Wen-Tzu (Wenzi), *Understanding the Mysteries. Further teachings of Lao-Tzu* (n 1).
[43] See below, ch 7, p 121ff.

govern because they are stupid. The law can do this. If it is clear and easy to understand, it will work necessarily.'[44]

As a technique for conditioning subjects through punishments and rewards, the law was applied to every individual and every area of life in society. In opposition to the Confucian tradition, which exempted the nobility from punishments involving physical mutilation because the performance of rites was what disciplined them and, just as 'rites do not extend down to the common people', so the criminal law 'does not rise as far as the nobles',[45] Legalist doctrine made the law absolutely universal. As Han Fei Tzu states, 'When faults are to be punished, the highest minister cannot escape; when good is to be rewarded, the lowest peasant must not be passed over. To suppress disorder, muzzle lies, check excess, expose error and unify the conduct of the people, nothing can compare with the law.'[46]

The Legalists additionally subjected all aspects of life in society to the law, including areas which in the West would be classed under a different type of normativity, such as moral principles or technical standards. As the etymology of the Chinese character *fà* shows, the law is related to the sign for water. Like water, with its level surface symbolising equality, the law indicates the right path with impartiality, and marks out the dividing line between the true and the false, the just and the unjust. But it is also placed under the sign of water as that which flows through the whole social body. The Legalists borrowed from Taoism, which regards water in its formlessness as a primordial element close to Tao, the idea that Tao produces the law, *dao sheng fà*, or 'the Way engenders the Law'.[47] The law is not based on a contract between free and equal subjects, but is created by the interacting forces of Tao at work throughout the society. Jean Lévi comments that 'what makes it possible for the law to impregnate and irrigate the social whole is a political organisation in which the population is divided up into interlocking territorial units, where behaviour is fashioned through collective responsibility and mutual surveillance from the lowest level—the brigade—upwards.'[48]

As such, when laws are diffused throughout the social body and supplemented by a system of generalised surveillance, they produce order and efficiency. These two aspects are combined in the organisation of work, which is entirely governed by criminal law, and where no separation may exist between moral, disciplinary and technical norms and standards. Léon Vandermeersch gives a particularly striking example of this, dating from the

[44] *S Jun shu*, Ch 26, 43, cited by Vandermeersch, *La Formation du légisme*, (n 34) 195 and 200.
[45] *The Book of Rites* (n 5) Ch 1.
[46] *Basic Writings of Han Fei Tzu* (n 2) Ch VI.
[47] *cf* J Levi, Introduction to the *Écrits de Maître Wen* (Paris, Les Belles Lettres, 2012), CXIII.
[48] ibid.

first century BC, concerning the introduction of new agricultural techniques for increasing the yields of the land in the Kingdom of Wei:

> In Wei, in the 3rd month, during celebration of the rites, the agricultural officials read out the law to the peasants. The law said 'If you plough without driving the ploughshare deep into the earth, your labour will not break up the soil. In the fields in Spring, flatten the earth like a sheet before planting. In the fields in Summer, flock together to work, in as large numbers as the ducks. In the fields in Autumn, keep a constant watchful eye, for the unforeseen arrives like a thief. In the fields in Winter, spy on one another, as the people of Wu and of Yu observe each other [*that is, as enemies*]: if your harvest is of the last of the lowest quality on fields of the highest first quality, you will be punished; if your harvest is of the highest first quality on fields of the last lowest quality, you will be rewarded.'[49]

One can hazard a guess that something of this tradition persists today in the way China's large industrial companies are governed, and in the total control which they seek to exercise over their workers. More generally, this rapid incursion into the writings of the Chinese Legalists already gives us some idea of how their conception of the law resembles, and also differs from, the dominant paradigm in the West. Both models aspire to objectivity, equality and generality, but the Chinese version has three distinguishing features: enforceable individual rights are inexistent (the *lex* is not combined here with a *ius* which is a source of individual prerogatives); what in the West would pertain to theology, morals or technology is here encompassed within the sphere of law; and, lastly, the law is judged by its efficiency and not by its justice. These three markers can help us measure the extent to which globalisation has brought these Western and the Chinese ideas of law closer together.

The Legalist doctrine was supported by merchants and tradesmen exasperated by the arrogance and hypocrisy of the nobles, and by the anarchic political situation which undermined economic prosperity. So it is hardly surprising that their idea of the human being had much in common with the West's characterisation of the *homo economicus* and with utilitarian philosophy. Some twenty centuries after the Legalists, the utilitarians likewise regarded the pursuit of individual interests as the only real motivating force behind human behaviour. But in utilitarianism, this pursuit was understood as the best way to produce social harmony. It is private vices that engender public benefits, Bernard Mandeville remarked at the very beginning of the eighteenth century. This founding credo of the liberal economic order is illustrated in a famous passage from Adam Smith's *The Wealth of Nations*: 'It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to

[49] H Tan, *Xinlùn*, cited in Vandermeersch, *La Formation du légisme* (n 34) 103.

their own interest. We address ourselves, not to their humanity but to their self-love.'[50] Dany-Robert Dufour has shown in a recent book that this idea of the automatic conversion of private vices into public benefits has religious origins.[51] It derives from a belief in the capacity of divine providence to redeem human imperfections in order to lead humankind to salvation. In its secular form of the invisible hand of the market, this faith in divine providence has made individual economic freedoms into the cornerstone of the legal order. By contrast, such a faith in the miraculous virtues of egoism was completely foreign to Chinese Legalism, whose purely rationalistic conception of the world stemmed from Taoism. Although the Legalists' disenchanted view of humankind as motivated exclusively by greed and fear has a certain resonance with liberal ideology, they never envisaged that unleashing desires and passions could produce anything other than chaos. Giving free reign to individual egoism cannot produce harmony because egoism imprisons people in a short-term vision of calculated personal interests, and blinds them to any long-term interests, be it their own or those of the group. As the Legalists put it, egoism encourages people to behave like the child who refuses to let his head be shaved, although it is to prevent him getting lice. The legal system can in consequence be based only on seeking rewards and fearing punishments. It is a unified and impersonal system, which aspires to produce a self-regulated society in which the laws apply equally to everyone, and where there is no distinction between what we would call legal, moral and technical norms.

Further research into Legalism by specialists on Ancient China would not only enrich comparative law, but it would also give depth to our understanding of the specificity of the modes of government demonstrated by the Chinese state and Chinese businesses in the international arena today. This project is itself predicated on building strong bridges between research on ancient civilisations and research on the contemporary world, in order to avoid clichés and hasty judgements (instead of which there is a tendency to draw fiercely defended frontiers between the two). It is a risky venture, since the appropriation of scholarly work can always lead to approximations and simplifications, but such work is vital for any well-grounded legal analysis of globalisation, for which the Western tradition, whether in the form of economic liberalism or of Marxism, is too limiting a framework. Contemporary China, with its constitutional 'democratic dictatorship' and its 'socialist market economy',[52] does not fit neatly into either of these forms, and requires us to reflect differently upon its mode of government and its relation

[50] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed E Cannan (London, Methuen & Co, 1904), Book I, Ch II, 1.2.2: 'Of the Principle which gives Occasion to the Division of Labour' 50.

[51] D-R Dufour, *La Cité perversem* (ch 2, fn 14) 51ff.

[52] *Constitution of the People's Republic of China* [1982], Arts 1 and 15.

to the rule of law. Kristofer Schipper has argued that Legalism remains a dominant influence in China to this day, with a veneer of Confucianism to give an appearance of humanity to what is overwhelmingly state control and bureaucratic power.[53] If we accept Schipper's analysis, we can make two further claims to end this chapter.

The first point is that a more profound comparative analysis of Western and Chinese traditions of government by laws can help us understand their different perceptions of globalisation. For Western governments—and especially for Europeans—globalisation means that the spontaneous order of the market henceforth rules the whole world, and that far from impeding this dominion, states should be its willing vehicle, ensuring only the universal recognition of economic freedoms and respect for first-generation (civil and political) human rights. For the Chinese government, on the other hand, an order founded purely on the pursuit of individual interest is another name for chaos. This might be tolerated abroad, but not in China, where this pursuit must be harnessed to the national interest by a strong state which encourages wealth creation while strictly policing its population and meting out harsh punishment for any infringement of the political order as it stands.

Our second claim, which we expand on below,[54] is that the new world order which emerged after the collapse of real communism should not be interpreted as a victory of the West over the East, or the rule of law over totalitarianism, but rather as a hybrid form of communism and liberalism; in other words a form of what the Chinese Constitution precisely calls a 'socialist market economy', partaking of both systems.

[53] Kristofer Schipper, '"Chinois", *v.* "Loi"' in Legendre (ed), *Tour du monde des concepts* (n 35) 170–71.

[54] See below, ch 6, p 112ff.

4

The Dream of Social Harmony by Numbers

'Everything is ordered according to number.'

Pythagoras

THE SPECTACULAR SUCCESS of the model of governance by numbers is no historical accident. Nature's ultimate principles had long been represented by a mixture of numbers and rules (through physics and mathematics), and the social order, by a mixture of quantitative economics and law. The religious sphere likewise admitted a composite of submission to divinely given laws and mystical contemplation of absolute truths, as two different ways of attaining the godhead.[1] Governance by numbers does not in fact abolish laws, but it submits their contents to a calculation of utility designed to serve the 'economic harmonies' which reputedly ensure the smooth functioning of human societies.[2] But can the law be reduced to numbers? Does law do something other than express the perfect harmonies formulated by mathematics? Does it not have a purpose of its own, to overcome the strife inherent in life in society? Our leaders confront these questions daily, torn between quantitative representations of the economy and society, and whatever remains of democratic representations of the social body. In order to understand both the ancient origins of governance by numbers and its foreseeable failures in the future, we shall again adopt a historical perspective.

I. THE PERFECT HARMONIES OF NUMBERS

The fascination with numbers and their systematising powers is age-old, and not confined to the Western world. Chinese thought is pervaded by the

[1] For Islam, see I Khaldûn, *La Voie et la Loi, ou le Maître et le Juriste* (Paris, Sindbad, 1995), presentation and notes by René Pérez, 308. Christianity also addressed this dichotomy, for example in the controversy over Quietism in the seventeenth century.

[2] The notion of calculated harmony comes from Pierre Legendre (*La fabrique de l'homme occidental* (Paris, Mille et une nuits, 1996) 26), who was himself inspired by the work of the liberal economist Frédéric Bastiat (*Harmonies économiques* (Paris, Guillaumin, 1851, reprint BookSurge Publishing, 2001) 582, online: http://bastiat.org/fr/harmonies.html).

symbolic value of numbers,[3] and the Indian, Arab and Persian worlds have contributed enormously to mathematics. But the West was where numbers were vested with the most potential: as objects of contemplation, then as tools of knowledge and prognostication, and today as tools of governance, after being endowed with legal force. One might be tempted to find an origin in a Biblical source, the Book of Wisdom, in which it is stated that God has 'arranged all things by measure and number and weight' (Wis 11:20). But we would have to add that this book was (apparently) written directly in Greek in the second century BC by a Hellenistic Jew who was probably influenced by the Pythagorean revival. And it is apparently Pythagoras (-580/-500 BC) who claimed that 'Everything is ordered according to number', an idea developed further by the philosopher and mathematician Nicomachus of Gerasa (first century AD) in the following terms:

> Everything that has been arranged systematically by nature in the Universe appears in its parts as in the whole to have been determined by and harmonised with Numbers, through the foresight and thought of he who created all things; for its model was fixed, like a preliminary sketch, by the preeminence of numbers preexisting in the mind of God the creator of the world, number-ideas which are purely immaterial in every respect, but at the same time the true and eternal essence, such that in harmony with numbers, as though following an artistic design, were created all these things, and Time, movement, the heavens, the stars and all the cycles of all things.[4]

The idea that numbers were thus the key to the divine order has had an extraordinary legacy, from Pythagoras to this day, in particular through the works of Plato and the Renaissance Neo-Platonists.[5] Nicolas de Cues, for instance, maintained that 'since no path gives access to godly matters except through symbols, we can use mathematical signs because their indisputable certainty makes them best suited to this'.[6] And in Galileo's words, 'this vast book which is constantly open before us, by which I mean the Universe […], is written in mathematical language, and its letters are triangles, circles and other geometrical figures, without which it is humanly impossible to

[3] *cf* Marcel Granet, who devotes a chapter to numbers in his *La Pensée chinoise* [1934] (Paris, Albin Michel, 1968) 127ff.

[4] Nicomachus of Gerasa, *Theology of Arithmetic*, quoted by M Ghyka, *Philosophie et mystique du nombre* (Paris, Payot, 1952) 11.

[5] *cf* E Cassirer, *The Individual and the Cosmos in Renaissance Philosophy* [1963], tr M Domandi (Chicago, Chicago University Press, 2010), F Patras, *La Possibilité des nombres* (Paris, PUF, 2014) 13–42.

[6] N de Cues, *On Learned Ignorance* [1514], tr J Hopkins (Minneapolis, MN, Banning, 1985).

understand a single word.'[7] This belief in a world entirely ruled by numbers continues to fuel our imagination today. 'The world is mathematical' was the title of a book series headed by Cédric Villani, a 2010 Fields Medalist and the Director of the *Institut Henri-Poincaré*, for the newspaper *Le Monde*, in 2013. Mathematics—today as in the past—is deemed to be the key to understanding—and hence mastering—the world, a claim echoed not only in numerous philosophical, scientific and mystical works, but also in the conviction that a numerical 'legality' exists, as expressed in cosmology, theology, music, ethics and law.[8]

Within this numerical symbolism, the scholarly and mystical Confraternity of Pythagoreans placed particular emphasis on the number 10. The group's emblem was the esoteric symbol of the Tetractys, a triangle of 10 points, on which its members swore an oath never to divulge their secrets, especially not those pertaining to mathematics. It was the geometrical figure of the number 10, represented as an equilateral triangle whose tip is one, and whose sides are three times four.

Figure 4.1: The esoteric symbol of the Tetractys

Michael Stolleis's research on the metaphor of 'the eye of the Law' has shown that the Tetractys is present throughout Western history. Masons and kabbalists used it, and although it was rejected by Christianity as a pagan element, it was recycled as a figure of the Trinity,[9] and then of the eye of

[7] Galileo, *The Assayer* [*Il Saggiatore*, 1623], selections translated by S Drake, *Discoveries and Opinions of Galileo* (New York City, Doubleday & Co, 1957). On this 'mathematical alphabet of the world', see O Rey, *Itinéraire de l'égarement* (Paris, Le Seuil, 2004) 46ff.

[8] For the mystical influence, see, for example, S Weil 'The Pythagorean Doctrine' [1941], in *Intimations of Christianity Among the Ancient Greeks*, ed and tr GE Chase (London: Routledge, 1957).

[9] *cf* D-R Dufour, *Les Mystères de la trinité* (Paris, Gallimard, 1990) 354ff.

God. Thereafter it continued its course, and was secularised as the eye of the Law.[10] This is the symbol we find, still laden with its religious, legal and mathematical symbolism, when we look at the reverse side of a one dollar note today. Represented are the two sides of the Great Seal of the United States of America, including a pyramid, dated 1776 at its base, and at its tip, the eye of divine Providence, which watches over the newly formed State.

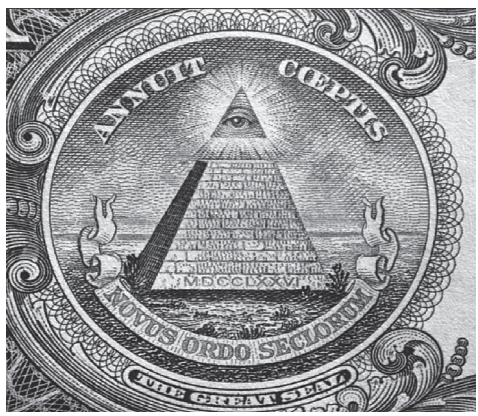

Figure 4.2: At the pyramid's tip: the eye of God and the mention *Annuit Cœptis* ('He has favoured our undertakings'). On the ribbon: *Novus Ordo Seclorum* ('A new order of the ages [which is beginning]')

The Tetractys was a symbol of the cosmos (of a universe saved from chaos), and also represented harmony.[11] Harmony, the daughter of Ares, the god of war, and of Aphrodite, the goddess of love, has represented the uniting of opposites and the resolving of discord and disagreement ever since the Ancient Greeks. In European Union law, 'harmonisation' means either materialising in law the economic freedoms guaranteed by the Treaty on the Functioning of the European Union (TFEU), or a spontaneously produced outcome of using these freedoms. In the terms of the Treaty's Article 151, the 'functioning of the internal market'—the freedom given economic operators to act on the basis of their calculated interest alone—should result in the 'harmonisation of social systems'. The convergence of national legislations has only a subsidiary role, to accompany this spontaneous operation. Somewhat like the *Decretum Gratiani* eight centuries earlier, the

[10] M Stolleis, *Das Auge des Gesetzes. Geschichte einer Metapher* (Munich, Beck, 2004); Eng tr *The Eye of the Law: Two Essays on Legal History* (London, Birkbeck Law Press, 2008).
[11] Ghyka, *Philosophie et mystique du nombre* (n 4) 50–51.

European Treaty thus hoped to establish a 'reconciliation of contradictory canons' (*Concordia discordantium canonum*), and a 'harmonisation while [the] improvement is being maintained',[12] by overcoming the diversity of national legislations and the imperative of competition. Unlike in Gratian, however, this reconciliation was not to be achieved by the law (since the alignment of national legislations is conceived simply as a facilitator), but rather was to emerge as the by-product of the economic calculations of an 'internal market'. The redactors of the Treaty of Rome instituted and delimited this market under EU law, but they certainly did not have in mind a global market where all obstacles to the free circulation of goods and capital would be abolished. This utopia of a total market engendering social harmony spontaneously across the whole planet only emerged a few decades later, with the triumph of neoliberalism.

The Pythagorean mysticism of numbers understood harmony to be conceived either as a result of an immediately achieved perfect eurythmy, or from the consonance of opposing principles, on the model of musical harmonies which transcend dissonance. The Greeks measured musical frequencies in terms of the ratios between string lengths (length and frequency are inversely proportional: the longer the string, the lower the frequency). The ideal order of numbers contained in the Pythagorean Tetractys was immediately linked with the laws of musical harmony because the Tetractys contained the main ratios of the diatonic scale:

— the ratio 4:2 or 2:1, the octave
— 3:2, a fifth
— 4:3, a fourth.

However, to accommodate further ratios, another number was required, the number 12, which is divisible by all the numbers of the Tetractys: 1, 2, 3 and 4. For example, the consonance of two strings of length 12 and 6 corresponds to the interval of an octave (12:6), that of two strings of length 12 and 8 to a fifth (3:2), and that of two strings of length 12 and 9 to a fourth (12:9). These consonances of an octave (12:6), a fifth (3:2) and a fourth (12:9) correspond to the arithmetical ratios 2/1, 3/2, and 4/3. These are not only arithmetical but also geometrical ratios because 9 is a square number (3 squared), 6 is the number of faces of a cube, 8 the number of points of a cube, and 12 the number of its edges.[13] This perfect correspondence

[12] TFEU, Art 136.

[13] This way of defining sounds in terms of harmonic proportions was highly influential right up to the nineteenth century, when the physicist and acoustician Hermann von Helmholtz 'objectively' defined the frequency of each sound in absolute terms. *cf* M Rieger, *Helmholtz Musicus. Die Objektivierung der Musik im 19 Jahrhundert durch Helmholtz' Lehre von den Tonempfindungen* (Darmstadt, Wissenschaftliche Buchgesellschaft, 2006) esp 49ff.

between mathematical proportions and musical harmonies was interpreted as the sign of a cosmic harmony to which one may have access through the contemplation of numbers.[14] One of the most powerful motives behind scientific endeavours in the West was the desire to penetrate the secrets of this universal harmony.

Not only should this harmony resonate in all works of human hand—from the most modest manufactured object to the work of art—but it should also operate *between* people, by establishing 'concord', a perfect harmony which transcends differences. As shown by these terms' etymology, harmony and concord (and their antonyms of dis-harmony and dis-cord) have at once an auditory sense (the consonance of sounds) and an emotional one, with the union, or dis-union, of affections.[15] Bringing humans together in harmony requires both that hearts should beat in unison and that strong bonds should be forged between them. Harmony in this sense achieves a universal dimension through its mathematical expression. This is abundantly conveyed by its representations, for instance, on the walls of Chartres Cathedral, in Renaissance painting, and even in certain twentieth-century literary works depicting an ideal world of erudition.[16]

One of the treatises on the art of government to have profoundly influenced the Renaissance Neo-Platonists was Cicero's *De re publica*, in which the law is central. It ends on the account of a fictional dream in which Scipio is visited by his ancestor Africanus, who reveals to him that 'nothing on earth is more agreeable to the foremost of the gods, the governor of the universe, than the assemblies and societies of men united together by laws, which are called States'.[17] Africanus then transports him to the nine heavenly spheres which compose the universe, and asks him to listen to the music they produce, while explaining that what he hears is the result of 'their motion and impulse; and being formed by unequal intervals, but such as are divided according to the most just proportion, it produces, by duly tempering acute with grave sounds, various concerts of harmony'.[18] Mathematics, physics and music are here as one, and together they create the celestial harmony which the law must materialise in the state. It is somewhat disconcerting,

[14] On the role of quantification in the mediaeval invention of polyphony, see AW Crosby, *The Measure of Reality. Quantification and Western Society 1250–1600* (Cambridge, Cambridge University Press, 1997) 139ff. And more generally, on the 'Golden Number' or 'divine proportion', see M Neveux and HE Huntley, *Le Nombre d'or. Radiographie d'un mythe* followed by *La Divine Proportion* (Paris, Le Seuil, 1995) 328.

[15] 'Concord' and its cognates stem from the Latin *concordia* ('agreement, union') derived from *cor*, *cordis* (the heart), and *concors* ('of the same mind'), literally 'hearts together'.

[16] *cf* H Hesse, *The Glass Bead Game. A tentative sketch of the life of Magister Ludi Joseph Knecht together with Knecht's posthumous writings* [1943], tr R Winston and C Winston, Foreword by T Ziolkowski (London, Picador, 2002).

[17] Cicero, *De re publica*, para 13, ed OJ Thatcher, *The Library of Original Sources, Vol III: The Roman World* (Milwaukee, University Research Extension Co, 1907) 216–41.

[18] ibid, para 18.

given today's legal positivism, to find in a treatise on the institutions of the *res publica* this kind of dream story, with its aesthetic and mathematical considerations. But the contemporary doctrine of *Law and Economics* does something very similar in its claim to found social harmony on mathematical operations—although it should be noted that Scipio's humanity is missing from today's *homo economicus*, who could neither dream nor even imagine that the Invisible Hand could be that of a musician.

This ongoing mathematical influence on legal thought, from the Renaissance to the present, is shown particularly well in an incisive commentary by Marie Theres Fögen on Raphael's famous fresco *The School of Athens* (although I have some reservations about her conclusion).[19] She uses this fresco (situated in the Room of the Signatura in the Vatican) as an illustration of Livy's narrative of the establishment of the Law of the Twelve Tables. The question she is trying to answer is why, at the origin of Roman Law, should there be 12 and not 10 tables (the number sacred to Pythagoreans, and also the number of the Commandments).

II. THE FOUNDATIONAL FUNCTION OF DISCORD

In Livy's account, the Tables were created by an appointed assembly of 10 sages, the decemvirate, in 457 BC. Its membership was identical to that of the Tetractys: one consul from the preceding year; two consuls from the current year; three envoys who had returned from Greece; and four elders appointed, in Livy's words, 'to make up the number';[20] in other words, the sacred number 10. The laws drawn up by these 10 sages were transcribed onto ten tables, which were presented to the Roman citizens for discussion, and then adopted by the *comitia*, or citizens' legislative assembly. A rumour then spread that there were two tables missing 'which, if added to the others […], would have formed a complete corpus of Roman law'.[21] Another decemvirate was therefore appointed, among them Appius Claudius, who had already worked on drawing up the first set. But this new assembly behaved tyrannically. Appius Claudius infringed the laws he himself had drafted, and he also abused his role of judge in a case in which he gave a young and beautiful plebeian, called Virginia, to be the slave of one of his henchmen. In order to spare her the enslavement and dishonour awaiting her, Virginia's father had no choice but to stab her to death. Appalled by such injustice, the people rebelled, and Claudius ended up committing

[19] MT Fögen, *Römische Rechtsgeschichte. Über Ursprung und Funktion eines sozialen Systems* (Göttingen, Vandenhoeck und Ruprecht Verlag, 2002).

[20] Livy, *History of Rome*, tr and notes D Spillan (Covent Garden, London, Henry G Bohn, 1857) III, 33.

[21] ibid, III, 34.

suicide in captivity. When peace returned to a city governed thereafter by the Twelve Tables of the Law, these were displayed in the Roman Forum, in 449 BC.

This narrative of the origins of Roman law is worth dwelling on, because it concerns at once numbers (10, then 12), and law. In Marie Theres Fögen's interpretation, the Romans had to experience a lack of law before a legal system, and the resulting society harmony, could prevail. We take issue with this interpretation, however, because it is both anachronistic and misleading: where there is no law, it cannot be broken, and Claudius Appius's crime was precisely to have broken the laws in place, which he himself had drafted. The conclusion we can draw from this narrative of the origins of the law is, rather, that no legal system can hold if founded on a calculating rationality alone.

Yet if this ideal of a calculated social harmony has so tenaciously haunted Western legal thought, it is perhaps because of the West's inability to grasp the unity, at a deeper level, of law and its violation, of order and disorder. We shall address this possibility by looking briefly to how other civilisations view the relation between order and disorder. Heinrich Zimmer has noted an interesting detail in Hindu cosmogony.[22] At the very moment when the god Vishnu conceives the advent of a perfect world, and despite his beauty, he has dirt in his ears! It is out of this dirt that Madhu and Kaitabha, the demons of passion and stupidity, are born, and it is they who will sow the first seeds of disorder in the cosmos. In the Western tradition, by contrast, the godhead is purely positive, with no demonic dimension. Zimmer reminds us that human beings achieve selfhood only by confronting the shadowy, negative side of their being: 'How else,' he writes, 'could men enter into contact with external and internal reality, except through guilt? How could one be rooted in reality without some failing? It is only through failings that one learns who one is; before that, one is simply floating in the realm of appearances.'[23] Returning to our analysis, rather than postulate an improbable passage via 'lawlessness', we would suggest thinking together at once the democratic process of deliberation (which led to the first ten tables being adopted) and the collective revolt against injustice (which led to the adoption of the last two tables). The rule of law cannot be established by mathematical calculation, but only through the experience of injustice and the passions. The narrative of the foundation of Roman Law thus shows not only the *hubris* of human passions which trample the law underfoot, but also the *hubris* of a perfect law determined by numbers. It enables us

[22] H Zimmer, *Maya. Der indische Mythos* [1936] (Insel Verlag, 1988); French tr, *Maya ou le Rêve cosmique dans la mythologie hindoue*, Preface by M Biardeau (Paris, Fayard, 1987).

[23] ibid. This remark applies to a very concrete problem which the courts are confronted with today: young delinquents who have not integrated a sense of limits, that is, with whom instituting has failed, are impervious to the sense of guilt.

to understand the logic of the passage from 10, the perfect number, to 12, the key to harmony. The Twelve Tables are the result both of rational deliberation and of a revolt or struggle inspired by a sense of injustice. And even of *two* struggles: first the plebeians, who fought for Rome to adopt a law which was equal for everyone, on the model of Greece; and then all the citizens of Rome, to oblige the leaders themselves to submit to the law. The primal scene of Roman law thus exposes at once the fruitlessness of pursuing an ideal order founded on numbers, and the need for a system, however imperfect it may be, founded on experience.

Machiavelli referred to this founding Roman narrative to prove that good laws are those which are born of the experience of conflict:

> In every republic there are two conflicting factions, that of the people and that of the nobles; it is in this conflict that all laws favourable to freedom have their origin […]. We cannot truly declare … the republic [the Roman Republic] to have been disorderly … wherein we find so many instances of virtue; for virtuous actions have their origin in right training, right training in wise laws, and wise laws in these very tumults which many would thoughtlessly condemn.[24]

Machiavelli's discovery is nothing short of scandalous, as Claude Lefort has pointed out: in a free republic, the law is not the outcome of level-headed reasoning but of the clash of two equally limitless desires, that of the nobles to possess ever more; and that of the people not to be oppressed. This is also why the law is never laid down once and for all, but is always open to the conflicts through which it is reformed.[25]

The Greeks themselves were aware, in their reflections on law, of the impossibility of giving justice a purely mathematical basis. In *Nicomachean Ethics*, Aristotle attempted to express in mathematical terms the different types of justice he identified. But contrary to what all the textbooks on the philosophy of law say,[26] he discovered three, not two, forms of justice. The first two are represented in the allegory of *Buon Governo*, in the Palazzo Pubblico in Siena.[27] We can identify distributive justice, which distributes 'honour or money or such other assets as are divisible among the members of the community,[28] and which is proportional to the person's merit, as Aristotle describes: 'This kind of proportion is called geometrical by mathematicians […]. For justice that is distributive is always in accordance with the proportion [to merit] because if the distribution is made from common

[24] N Machiavelli, *Discourses upon the First Ten (Books) of Titus Livy* [1517], tr N Hill Thomson (London, Kegan Paul, Trench & Co, 1883) I, 4.

[25] C Lefort, *Le Travail de l'œuvre: Machiavel* [1972] (Paris, Galli-mard, coll 'Tel', 1986) 472ff.

[26] See, for example, M Villey, *Philosophie du droit*, t. 1 *Définitions et fins du droit* (Paris, Dalloz, 1982), 43, 76ff.

[27] See above, ch 1, p 14.

[28] Aristotle, *Nicomachean Ethics*, tr J. Thompson, rev H Tredennick (London, Penguin Books, 1976) V, 2, 176–77.

funds it will be in the same ratio as the corresponding contributions [to the community] bear to one another'.[29] And there is also rectificatory justice, which consists of repairing the harm unjustly inflicted on one person by another. This second type of justice obeys an arithmetical, and not a geometrical, principle of equality: 'What the judge does is restore equality. It is as if a line were divided into two unequal parts; the judge takes away that by which the greater segment exceeds the half of the line, and adds it to the lesser segment'.[30]

However, the typology does not end there. As François Ewald, and later Clarisse Herrenschmidt, have noted,[31] Aristotle completes the picture with a third type of justice: a justice of proportional reciprocity, which he introduces as follows:

> The idea of reciprocity does not square with either distributive or rectificatory justice […]. Nevertheless, in associations for exchange, what sustains the community is this type of justice, but it is reciprocity based on proportion, not on strict equality. […] It is because one returns the equivalent of what one has received that the state holds together.[32]

This type of justice—which prefigures our social justice—is, according to Aristotle, indispensable to exchange, which alone holds humans together. And it requires agreement on a standard which all citizens will respect when they exchange the fruits of their labour.

> Proportional exchange or requital involves an equation between diametrically opposed terms: for example, a builder [A], a shoemaker [B], a house [C], and a shoe [D]: the builder receives from the shoemaker part of what he produces, and the shoemaker part of the builder's production. There can be no exchange or association between them if the transaction is not in some way equal: there must, therefore, be one standard by which all commodities are measured. This standard is in fact demand, which holds everthing together. … Demand has come by convention to be represented by money. It is called money [*nomisma*], Aristotle continues, because it does not exist naturally but by law [*nomos*], and it is hence in our power to change it or withdraw it from circulation.[33]

This passage is vital for understanding how Aristotle links law and numbers in his reflections on justice. Unlike Plato, he does not regard law as simply a stand-in required because of our inability to grasp the mathematical truths which govern the universe. Figures and numbers are indeed useful—they can illustrate the definitions of distributive and rectificatory justice, as Aristotle shows—but they cannot determine social bonds. The need to

[29] ibid, V, 3–4, 178–79.
[30] ibid, V, 4, 181.
[31] *cf* F Ewald, *L'État providence* (Paris, Grasset, 1986) 552ff; C Herrenschmidt, *Les Trois Écritures. Langue, nombre, code* (Paris, Gallimard, 2007) 289ff.
[32] Aristotle, *Nicomachean Ethics*, (n 31) V, 5, 182–83 [*tr* mod].
[33] ibid, V, 5, 183–84.

bring together similar needs but different activities is what produces the social bond, and Aristotle provides no mathematical formulation for this third type of justice. Likewise, money is not conceived as the spontaneous expression of the fair price of the products of human labour, but as a 'substitute for demand', which serves as a common measure for the goods to be exchanged; it is based on law and not number, as the derivation of *numisma* from *nomos* illustrates. The justice of transactions is therefore neither a question of mathematics nor of morals: if I wish to measure the value of the work of a trader on the financial markets or a nurse in a hospital, I require neither calculations, nor ethics, but law. And more specifically, today, social law.

Clarisse Herrenschmidt has shown, in her *Les Trois Écritures*, that the awareness of the limits of mathematical rationality for the organisation of human affairs was influenced by the discovery of irrational numbers such as √2—the length of the hypotenuse of the simplest right-angled triangle—which cannot be represented as a ratio of integers. In her view, this sort of incommensurable length led, during the fourth century BC, to the replacement of geometrical figures on coins by political symbols: 'If there exist magnitudes without a common measure, then everything is not proportional to everything else. Consequently, the arithmetical-geometric quality of monetary writing had no basis other than human beings and their squabbles'.[34] With these discoveries, the dream of having human communities governed by a mathematically deducible harmony, in tune with the music of the spheres, disappeared. Yet it is a dream which has continued to haunt the West in different guises up to our own times—and sometimes in the form of a nightmare.

[34] Herrenschmidt, *Les Trois Écritures* (n 34) 299.

5

The Development of Normative Uses of Quantification

> The notion of government has been simplified: numbers alone make laws and the law. Politics has been reduced to a question of arithmetic.
>
> Alexis de Tocqueville, *The Old Regime and the Revolution*[1]

SOME REMARKABLE HISTORICAL scholarship has been carried out over the last 30 years on the quantification of economic and social facts in the modern era,[2] showing the state's concern with perfecting instruments to measure its wealth and population. The most important of these instruments is *statistics*, a term derived from the German *Staatistik*, a 'science of the state' (*Staatswissenschaft),* but whose contents actually corresponded more to what in England was called 'political arithmetic'. The difference was that *Staatistik* sought to give an overall picture of the state without using quantification, whereas 'political arithmetic', or statistics, was entirely based on quantitative surveys.[3] Although, in both cases, the normative uses of quantification seem to have the state as their central protagonist, in fact they were first developed in the private sphere, to assist in business management. We shall therefore start with this corporate sphere, before examining the much better known history of the rise of public statistics and calculations of probability. From the different uses of quantification, both private and public, we shall be able to tease out its four normative functions, as they developed historically: accounting; managing; judging; and legislating.

[1] A de Tocqueville, *The Old Regime and the Revolution*, Vol II, *Notes on the French Revolution and Napoleon* [1856], tr AS Kahan, ed and intr F Furet and F Mélonio (Chicago, University of Chicago Press, 1998) Ch 5, 57 [*tr mod*].

[2] *cf* F Bédarida, J Bouvier, F Caron, I Cloulas, Marec, Briand, Desrosières, et al, *Pour une histoire de la statistique*, Vol 1 (Paris, INSEE/Economica, 1987); P Cline Cohen, *A Calculating People: The Spread of Numeracy in Early America* [1982] (London, Routledge, 1999); L Daston, *Classical Probability in the Enlightenment*, 2nd edn [1988] (Princeton, Princeton University Press, 1995); A Desrosières, *La Politique des grands nombres. Histoire de la raison statistique* (Paris, La Découverte, 1993, 2000 (2nd ed)); TM Porter, *Trust in Numbers. The Pursuit of Objectivity in Science and Public Life* (Princeton, Princeton University Press, 1995).

[3] On these differences, *cf* A Desrosières, La Politique des grands nombres (ibid) 28ff.

I. ACCOUNTING

Accounting ledgers are doubtless the first modern expression of the link made between numbers and law, quantification and legal obligation. In its *Commercial Code*, French law defines the 'financial obligations applicable to all traders' in the following terms:

> *Article L 123-12*—All natural or legal persons with the status of trader shall enter in their accounts the movements affecting the value of their company. These movements shall be recorded chronologically.
>
> These persons must check the existence and value of the assets and liabilities of the company by means of an inventory at least once every twelve months.
>
> They must prepare annual accounts at the end of the financial year in view of the entries made in the accounts and the inventory. These annual accounts shall consist of the balance sheet,[4] the profit and loss account[5] and an annex, all of which shall form an inseparable whole.
>
> *Article L 123-14*—The annual accounts shall be honest and truthful and shall ensure a fair representation of the assets, financial situation and results of the company.
>
> Where the application of an accounting requirement is not sufficient to ensure the fair representation indicated in this article, additional information must be provided in the annex.
>
> If, in an exceptional case, the application of an accounting requirement proves to be unsuitable in order to ensure a fair representation of the assets, financial situation or results, an exception must be made to this. This exception shall be indicated in the annex and duly reasoned, with an indication of its effect on the assets, financial situation and results of the company.

In this definition, accounting operates within four legal parameters. First, *the obligation to prepare accounts*. Merchants must be able to account for their activities before third parties, and preparing accounts is part of this commercial liability, which is not solely to contracting parties but beyond this to the state and the public in general.[6] The term 'accountability' precisely contains an idea of financial liability, requiring an *accountor* (who must render account), an *accountee* (to whom the accounts are submitted) and an *accountant* (who prepares the accounts). Today, accounting obligations are enshrined in law, but in the medieval period, when modern accounting was

[4] The balance sheet shows the company's assets at a particular moment, namely at the end of the accounting year.

[5] This account shows the profit and losses for the accounting period, and justifies the overall result.

[6] The concept of 'commercial liability' does not seem to have been studied for itself in recent doctrine. See the nomenclature of the tradesman's responsibilities in Jacques Mestre, Isabelle Arnaud-Grossi, Laure Merland, Marie-Eve Pancrazi, Nancy Tagliarimo-Vignal, *Droit commercial*, 29th edn (Paris, LGDJ, 2012) 249ff, 236ff.

first invented, they were stipulated by the guilds, or what Berthold Goldman has called the *lex mercatoria*.[7] Later, the Italian city states made book-keeping obligatory for merchants, as a system of proof and a way of preventing bankruptcy. Etymologically, 'bankruptcy' is the destruction of the bench; that is, the counter the bankrupt merchant had occupied in the marketplace. From the outset, then, keeping accounts was one of the merchant's responsibilities.

Secondly, accounting is a way of *accrediting a truth through an image*. The notion of 'fair view' (in French, '*image fidèle*'; a faithful image), which recurs in Article L 123-14 of the French Commercial Code (introduced via the European Directive no 78/660/CEE of 25 July 1978) is an abbreviation of the English formula, 'true and fair view'. The accounting image thus has the status of an icon: religious icons unite a community of the faithful around a religious truth, just as accounting images federate a community of merchants around a legally backed truth. With this shared faith in a divine guarantor for pledges made, merchants could obtain credit from one end of Europe to the other.[8] As late as the nineteenth century, many industrialists placed their accounting books under the protection of God. And inversely, when the accounting image proves deceptive, such that it can no longer inspire collective belief, the whole community falls apart. This is what happened with the American company *Enron*. Having risen to stratospheric heights on the stock exchange, it crashed over a couple of weeks at the end of 2001, when the accounting ploys on which its apparent wealth had been based became known.[9] The Sarbanes-Oxley Law passed by the American Congress in 2002 showed the lessons learnt: the law strengthened accounting regulations and attempted to break the collusion between companies and audit firms, but more importantly it reactivated the old religious principle on which the veracity of accounts is based, by obliging the heads and financial directors of quoted companies to certify their books under oath. Foreign companies trading on the US markets were under the same obligation, with stiff penalties for non-compliance.[10] The accounts must be a true and a fair image because they are a vital pillar of the market system, a point of articulation of the true and the just. As such, accounting standards necessarily

[7] B Goldman, 'Frontières du droit et lex mercatoria' in *Archives de philosophie du droit*, (Paris, Dalloz, 1964) 177; and, by the same author: 'La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives', *Clunet*, 1979, 475. P Lagarde, 'Approche critique de la lex mercato-ria ' in *Le Droit des relations économiques internationales. Études offertes à Bertold Goldman* (Paris, Litec, 1987) 125–50.

[8] *cf* A Supiot, *Homo juridicus. On the Anthropological Function of the Law*, tr S Brown (London, Verso, 2007) 153ff. (With this shared faith in a divine guarantor for pledges made, merchants could obtain credit from one end of Europe to the other.)

[9] See M-A Frison-Roche (ed), *Les Leçons d'Enron. Capitalisme, la déchirure* (Paris, Autrement, 2002).

[10] See P Lanois, *L'Effet extraterritorial de la loi Sarbanes-Oxley* (Paris, Éditions Revue Banque, 2008).

refer to a certain representation of justice, and are not simply politically neutral technical norms. Only ignorance, or the wish to mask this political dimension, can have led the EU to entrust accounting standardisation to a private agency, the International Accounting Standards Board (IASB).[11]

Thirdly, accounting is also the first modern system to have *conferred on numbers the value of a legally backed truth*. As the French Commercial Code states, the figures acquire probative force: 'Article L 123-23—Duly kept accounts may be accepted by the courts in order to act as proof between traders in respect of commercial instruments'.[12] The way these figures were arrived at, and the many qualitative decisions taken to get there, simply fall away, unlike what occurs when a law has been passed or a contract has been signed. For whereas laws or contracts are expressed in a natural language and so remain open to interpretation, numbers are not accessible in this way. The dogmatic value assigned to numbers in certified accounts is not absolute, however. An Annex which 'shall supplement and comment on the information given in the balance sheet and the profit and loss account' confirms that the accounting presentation is true and fair, when this cannot be perceived from the figures alone.

Lastly, accounting is *the first technique to have made money into a universal standard of value*. Money makes different things commensurable.[13] Its function as a unit of measurement is different from its function as a means of payment, and there is no reason why the two should be conflated, as we do today.[14] In a barter economy, one should be able to exchange a consultation with a doctor for a certain number of bottles of wine, by referring each to the same unit of account. This unit would simply serve as a reference for both parties, and not as a means to dissolve the obligation, which is only done by handing over the bottles. The idea of separating these two functions of money recurs periodically. Keynes, for instance, tried to do this after the Second World War when he proposed an accounting currency which he called the 'bancor' as an international monetary reference, to protect the economy from national currency manipulation (and from the hegemony of the dollar—which is why Keynes's proposal failed). More recently, the French statesman Jean-Pierre Chevènement proposed a similar uncoupling, in order to compensate for the evident design faults of the single European currency.[15]

[11] Regulation (EC) No 1606/2002 of 19 July 2002.

[12] French Commercial Code, Art L 123-23.

[13] *cf* above, ch 4, pp 76–77.

[14] Money has yet another distinct function, as a reserve currency, which raises other problems. On the legal analysis of these different functions, see R Libchaber, *Recherches sur la monnaie en droit privé* (Paris, LGDJ, 1992).

[15] J-P Chevènement, *1914–2014. L'Europe sortie de l'histoire?* (Paris, Fayard, 2013) 295ff. And on this defect, F Lordon, *La Malfaçon. Monnaie européenne et souveraineté démocratique* (Paris, Les Liens qui libèrent, 2014).

The euro could indeed cease to be the means of payment in France, without even having to change the provisions of the Commercial Code, which states that 'The accounting documents shall be expressed in Euros and drafted in the French language' (Article L 123-22)'.[16] Ever since the Bretton Woods agreement was abandoned in 1971, money has been treated as a commodity like any other, but this can only be sustained if its function as a measure of value is concealed. On any market worthy of the name, the weights and measures which are the common reference enabling exchange to take place cannot themselves be treated as things to be exchanged. The refusal to consider this foundational function of money inevitably ruins any market economy.[17] Be that as it may, accounting exploits money's function as a standard of value, to measure not only the value of existing goods of all sorts, but also credit-worthiness, or, more generally, future values. In other words, the word 'accounting' is deceptive: it precisely does not count (in the sense of enumerating things of the same nature); rather it evaluates; and it evaluates not only what is, but also what may be, using money as a way of taming the future.

This first form of government by numbers was not introduced by states, but by businesses. Although accounting techniques already existed in antiquity, especially in Ancient Rome,[18] it was in the medieval era that modern accountancy emerged, with the keeping of personal accounts and later the invention of the *partita doppia*, the double-entry system, by the merchants of large Italian towns.[19] This system solved the problems raised by the expansion of credit. Books in which the inflow and outflow of goods and money were entered as they arose were not suitable for credit arrangements with suppliers or clients. If I have granted a credit of 1,000 florins to a client, I can never be absolutely certain that I will recover the sum, so I cannot enter it as an available asset. By the same token, if I have a debt of 1,000 florins with a supplier, it must figure on the books, even if these 1,000 florins are still in my account. To give a faithful representation of these operations, merchants therefore opened specific accounts: 'client' and 'supplier' accounts for the operations of credit; and 'sales' and 'purchases' for the corresponding transfers of goods. They then opened more specific

[16] French Commercial Code, Art L 123-22.

[17] *cf* L Fantacci, La *moneta. Storia di un' istituzione mancata* (Venice, Marsilio, 2005) 276; S Jubé, *Droit social et normalisation comptable* (Paris, LGDJ, 2011) 63ff.

[18] For the case of Rome, see G Minaud, *La Comptabilité à Rome. Essai d'histoire économique sur la pensée comptable commerciale et privée dans le monde antique romain* (Lausanne, Presses polytechniques et universitaires romandes, 2005).

[19] On this history, see J-H Vlaemminck, *Histoires et doctrines de la comptabilité* (Bruxelles, Treurenberg, 1956); (Brussels, Treurenberg Press, 1956; rpt. Vesoul, Pragnos Press, 1979); Y Lemarchand, *Du dépérissement à l'amortissement. Enquête sur l'histoire d'un concept et de sa traduction comptable* (Rennes, Ouest Éditions 1993) 719; S Jubé, *Droit social et normalisation comptable* (Paris, LGDJ, 2011) 673.

accounts corresponding to the elements of their wealth which could be identified as a source of expenditure or income. All these books were kept in the same accounting currency, which could be different from the currency used for payment. When a sale occurred on credit, the same sum was entered in the 'sales' and in the 'clients' account. When this debt was settled, the sum was entered in the 'clients' and the 'cash' accounts. Thus any economic operation gave rise to at least two accounting entries. This is why historians regard keeping separate accounts for credit operations as the origin of double-entry book-keeping.

In the words of the great German historian and sociologist Werner Sombart—to whom we owe the word 'capitalism'—'capitalism and double-entry book-keeping are absolutely inseparable; their relation to one another is as form to content'.[20] The invention of the double-entry system went hand in hand with other legal techniques which were also highly successful—bills of exchange, discounts, endorsements and trusts. When analysed closely, all of these credit transactions reveal the dogmatic basis on which the market economy rests: they are all implicitly backed up by a third, who acts as a guarantor. The normative force invested in numbers through these key innovations was closely linked to the introduction of algebra in Europe.[21] The arithmetical and geometric figures of equality used by Aristotle to illustrate his theory of justice only allowed known magnitudes to be compared. With algebraic equations, *equality became a question*, and algebra could help arrive at the numerical value of a certain number of unknowns.[22] Double-entry book-keeping exploited these new techniques. It brought within the sphere of calculation elements which had previously been excluded: not only the money one has, but all the resources mobilised for one's trade; not only the value of one's present goods, but also an estimation of future values. Additionally, double-entry book-keeping gave the legal principle of equality a new systematising power, since charts of numbers were organised according to a rigorous principle of equal rights and obligations.

[20] W Sombart, *Der moderne Kapitalismus. Historisch-systematische Darstellung des gesamteuropäischen Wirtschaftslebens von seinen Anfängen bis zur Gegenwart* [final edition, 1928] (Berlin, Duncker & Humblot, 1986); passage translated into French by M Nikitin in *Cahiers de l'histoire de la comptabilité*, 2, 19ff., quoted by B Colasse, *Les Fondements de la comptabilité* (Paris, La Découverte, 2007) 10. See also W Sombart, *Der Bourgeois. Zur Geistesgeschichte des modernen Wirtschaftsmenschen* [1913], English tr as *The Quintessence of Capitalism: A Study of the History and Psychology of the Modern Business Man*, tr and ed M Epstein (New York City, EP Dutton, 1915).

[21] The first systematic exposition of double-entry book-keeping was in the work of a mathematician and monk, Luca Pacioli, entitled *Summa de arithmetica, geometria, proporzioni et proporzionalita* (Venice, 1494). But it makes up only one chapter of this work, which remained famous for introducing algebra into the West, from Arab scholars. Pacioli also elaborated the notion of 'divine proportion' (see above, ch 4, p 72), which he took as the title of a later work illustrated by Leonardo da Vinci (*De Divina Proportione* [1509], French tr G Duschesne and M Giraud (Librairie du Compagnonnage, 1980)).

[22] I owe this insight to Pierre-Yves Narvor, philosopher-scholar and mathematician.

This new form can be discussed alongside the contemporary invention of the laws of perspective, which conferred a comparable objectivity on depictions of reality.[23] Tables of figures (or, later, statistical tables) can be regarded as a sort of portrait, an objective *figuration* of reality. The French language already points to this meaning, through its designation of the chart of accounts as a *tableau chiffré* (literally, a *figured table* or *figured painting*). Michel Foucault famously gives a foundational role to painting in his 'archaeology of the human sciences'.[24] However, painting is only one way of projecting an image onto a flat surface. It should be relativised by two others: the map and the mirror.[25] 'The merchant's mirror,' a metaphor often used to describe accounting, and found in the title of Richard Dafforne's 1636 treatise on book-keeping, published in London, *The Merchant's Mirrour, or Directions for the Perfect Ordering and Keeping of his Accounts*,[26] can be regarded as a precursor of our legal concept of 'faithful image' or fair view. What gives double-entry book-keeping its originality and power is that fundamentally heterogeneous things, people and operations are presented as a coherent and homogeneous whole, by the use of a unit of account which 'views' them all from the same perspective, showing the relative importance of each one's place in the financial life of the company. The laws of perspective result in exactly the same ordering effect, since the size of each object in a painting will be exactly proportional to its distance from the spectator's viewpoint, irrespective of any qualitative criteria.

Of course, this objectivity is as fabricated in the case of book-keeping as it is in painting, where the composition will vary according to the spectator being addressed, and the desired effect. Today's dominant accounting regulations, which are Anglo-American, have always privileged the viewpoint of investors; the financial reports accordingly seek to gain their trust, and to enable them to form an opinion on the accounts. In mainland Europe, by contrast, the accounting tradition has always addressed the state, particularly the tax authorities: it is for them that a company's accounts should appear transparent. And the books would look different again if the privileged viewpoint were that of the people whose work keeps the company going. At present, employees are regarded as a liability and an expense.[27] This is one of the reasons for share-price-induced redundancies, which

[23] *cf* S Jubé, 'De quelle entreprise les normes comptables internationales permettent-elles de rendre compte?' in A Supiot (ed), *L'Entreprise dans un monde sans frontières* (Paris, Dalloz, 2015) 147–63.

[24] M Foucault, *The Order of Things. An Archeology of the Human Sciences*, (London, Tavistock Publications, 1970).

[25] VI Stoichita, *L'Instauration du tableau* (Genève, Droz, 1999) 207ff.

[26] Quoted by Y Lemarchand, 'Le Miroir du marchand. Norme et construction de l'image comptable', in A Supiot (ed), Tisser le lien social (ch 2 fn 47) 213.

[27] *cf* on this point Jubé, Droit social et normalisation comptable (n 19).

automatically show up as 'value creation', whereas in reality they drain the lifeblood of a company, sometimes bleeding it to death like an over-greedy vampire. So, there is nothing mechanical about the recording of numerical data, not even according to the same accounting standards. The information is filtered through a range of possible presentations, highlighting or playing down this or that aspect, in a process of window dressing or, at the other extreme, of 'creative accounting' close to cooking the books. However, none of this will be visible in the final financial statements and, if well executed, they will have the persuasive self-evidence of a truth. Unlike scientific truths, which are always a modifiable approximation of the state of the world, legal truths fix a certain representation of the world and continue to produce their normative effects as long as people continue to believe in them. Their veracity does not depend on fluctuating empirical data but on the trust they are able to elicit, in this case, trust in the accounting image presented by a company regarding its economic situation. If that trust falters, either for good reasons (too wide a gap between the accounting image and reality) or for bad ones (a rumour, stock-market panic), then the company's credit will plummet, as occurred in the Enron scandal.

Double-entry book-keeping has a further crucial characteristic, which is its application of an unbending principle of balance to the represented system of rights and obligations. The term 'balance' comes via the Italian *bilancio* from the Latin *bilanx*, used to designate a pair of scales in which two (*bis*) pans (*lancis*) are in equilibrium. Everything on the *balance sheet* must, precisely, be balanced. The merchant can see at once the state of his company and the entries he can act on to ensure it does not go under. In other words, the books present the company as a *homeostatic whole* whose internal equilibrium must be respected. The company director must react to the numerical information given by the accounts, in order to avoid spiralling imbalances becoming so critical that the company collapses in entropy. Profit and loss, from this perspective, are simply indicators which need to be interpreted in the light of other figures. This is why the pressure from the financial markets to get fixated on 'the bottom line'—the company's net balance—can lead to suicidal strategies, if to increase profits one loses the skills (which themselves are excluded from the company's accounts) which ensured the company's market position in the first place. This is the slippery slope on which 'fabless' companies navigate, in their belief that they will be able to keep on amassing golden eggs while outsourcing the goose which lays them.

II. MANAGING

In the Roman Republic, the population census which was carried out every five years ended on a ritual of purification, the *lustrum*, to mark the

city's rebirth. The two specialist legal experts, or censors, who were entrusted with this task through a non-renewable mandate counted the citizens and the goods they possessed, appointed senators, and supervised public morality. 'Census' and 'censorship' in modern English retain a reference to this dual function, just as 'lustre' denotes a period of time (five years) as well as a literal and metaphorical radiance (the Latin *lūstrāre* means to purify ceremonially, to expiate or redeem). Thomas Berns has shown in a recent book how a long line of early modern jurists sought to have the Roman institution of the *censor* restored, among them Jean Bodin, Lipsius, and Montchrestien, and, on the Protestant side, Althusius.[28] Censors, like judges, were legal officers, but unlike judges, they did not apply the law. Instead, their task resembled what could be called—without fear of anachronism—*public management*, a knowledge-based activity.

The Roman censor's primary function was to provide the sovereign with *knowledge* of human and material resources, and thus to contribute to the country's political economy, dissolving the limit Aristotle had drawn between the *oikos* and the *polis*, and treating state administration on the one hand, and the management of a company or a family on the other in the same terms. The most important knowledge provided by the censors was that of the distribution of wealth within the population, this being, ever since the Middle Ages, construed as a 'mirror of the Prince' in the same way as accounting was a 'mirror of the merchant'. It allowed the monarch to gauge his own importance and that of his kingdom. The metaphor of the mirror was also used to refer to the first codifications of laws; for example, the famous *Sachsenspiegel*, the mirror of the Saxons, a code of laws in Middle Low German. Whereas the mirror of the laws composed the image of an ideal order for the sovereign and his subjects to contemplate, the mirror held up by the censors was supposed to present the kingdom as it really was. This 'mirror of the prince' became the 'mirror of the nation' a few centuries later, and continues today in the form of ONS in the UK or Eurostat at the European level.

Equipped with this knowledge, the sovereign could act on two fronts. First, he could *correct* over-large disparities in wealth. Political and legal thought at the time was particularly sensitive to the fact that such inequalities were a source of unrest and sedition, and thus a threat to law and order. Francis Bacon spared no one on this point, comparing money to muck that must not be allowed to accumulate if one wants it to fertilise the land and

[28] T Berns, *Gouverner sans gouverner. Une archéologie politique de la statistique* (Paris, PUF, 2009) 163. This book expands an analysis already present in Berns's *Souveraineté, droit et gouvernementalité. Lectures du politique moderne à partir de Bodin* (Brussels, Léo Scheer, 2005) 183ff. On this history, see Jean-Claude Perrot's earlier *Une histoire intellectuelle de l'économie politique* (Paris, EHESS, 1992) 143ff.

not pollute the atmosphere.[29] Secondly, the sovereign's knowledge was to allow the deserving poor to be *distinguished* from those whom Montchrétien called 'importunate beggars'[30] and, more generally enable 'banishment of the vagabonds, the idle, the thieves, the tricksters and the ruffians',[31] in Bodin's words. To banish is also to make public—one publishes marriage banns—a publicity which in this case is both a punishment and a way of making society transparent to itself. In Bodin's time, only individuals were targeted, but today whole nations are demoted by rating agencies and made to toe the line by the IMF or the European troika. And information technology helps realise the vision of a society laid bare for its leaders to observe, in a way Bodin and the Chinese Legalists could not have hoped for in their wildest dreams. But might this transparency, Bodin nonetheless asked, lead to tyranny? Certainly not, he replied, and for at least two reasons: the honest citizen has nothing to hide;[32] and besides, this transparency does not constrain people from the outside, as would a sentence handed down by a judge, but from within, by encouraging everyone to behave well. Unlike Justice, who is armed with a sword but who is also blindfold so as not to see particularities, the budding discipline of statistics has no power to coerce, but it wants to see absolutely everything.[33]

So once again we come upon the figure of the government of souls, dear to both the Pope and the *Tennô* of imperial Japan. The population censuses in the Bible likewise have a religious dimension, and are to be performed only under God's instructions, and within the limits He poses.[34] God alone keeps the register of souls, and King David even regrets that he complied with God's order[35]—but maybe it was Satan's[36]—to conduct a census of the populations of Israel and Juda. The institution of the *censor*, in encouraging spontaneous compliance with the rules of a society which had been made self-transparent, contains in embryonic form all the ingredients of participatory management. The only elements lacking were the 'objective' images which today statistics and indicators, after two centuries' development, can provide of everyone's activities.

Since the census's primary function was to assess the wealth of the kingdom, it is hardly surprising that the legislative field in which statistics developed most spectacularly was taxation. As the historian Jean-Claude Perrot

[29] F Bacon 'Of Seditions and Troubles' in *The Essays or Counsels, Civil and Moral* [3rd ed, 1625].
[30] A de Montchrétien, *Traité d'économie politique* [1615] (Genève, Droz, 1999) 237.
[31] J Bodin, *Six Books Of The Commonwealth*, tr MJ Tooley (Oxford, Blackwell, 1955), VI, 1 (quoted by T Berns, *Souveraineté, droit et gouvernementalité* (n 28) 194).
[32] Bodin, ibid.
[33] *cf* Berns, *Gouverner sans gouverner* (n 28) 134–35.
[34] *Numbers*, I, 49.
[35] *The Book of Samuel*, II, 24:10.
[36] *Chronicles*, Book One, 21:1–17.

has remarked, 'the overlap of the census and taxation was for many years the best and the worst motivations for book-keeping'.[37] The example he takes is from the early eighteenth century, and Vauban's research into the possibility of introducing a royal levy. To assess the potential yield of this policy, Vauban used two different methods. He isolated a 'proportional mean' of several measurements of the same object (for example, the surface area of the kingdom), and he calculated a 'mean value' arrived at by aggregating heterogeneous data into 'a sort of whole'.[38] For example, he calculated average agricultural yields using data from different parishes or years. Whereas quantities had previously been estimated purely pragmatically (with the idea of 'grosso modo', 'taking the good years and the bad', 'all things told'), taxation gave rise to new techniques of quantification, and new entities such as 'sorts of wholes,' which then became operative categories in law.

The normative force of these new categories increased considerably when the state acquired powerful tools for carrying out censuses, and for calculating and comparing quantified data on the country's population. The two types of mean identified by Vauban—an objective average, calculated from many imperfect observations of the same object, and a subjective average, derived from the aggregation of heterogeneous objects—could then be combined. Adolphe Quételet who, despite his profession as an astronomer, is regarded as one of the founding fathers of statistics and sociology, used these methods. When the exhaustive data he had gathered on the number of births, deaths, marriages, crimes, etc, was plotted on a graph, there appeared regularities which, for example for statistics of fertility, had the form of a bell (the 'Gaussian function'): the pinnacle of the bell corresponded to the age of greatest fertility. One hundred years earlier, Johann Peter Süßmilch, a Prussian pastor and almoner in the army of Frederick II, had seen in this type of regularity the expression of a 'divine order', which he described as follows:

> The most wise Creator and Governor of the world brings forth from the nothingness the hosts of humans by creating those He has commanded to live. The Lord has us all pass in the same way before his eyes, until such a time as each of us, having attained the goal decreed, deserts the world's stage. Our emergence, our passage before the Lord of Hosts, and our departure all occur in admirable order. Our appearance in the land of the living occurs progressively, without precipitation and according to certain numbers, which are always in a precise relation to the army of the living and the numbers of the departing. Just before we enter the land of the living, some of us are struck off the tally, these are the stillborn. But even this operation occurs in accordance with fixed proportions. Two facts are

[37] Perrot, Une histoire intellectuelle de l'économie politique (n 28) 147.
[38] ibid, 28–29.

> particularly worthy of our attention concerning our emergence from the void: 20 girls are always born for 21 boys, and the newly born are always a little more numerous than those who return to dust. This is how the human army continues to increase slightly, but always in a set proportion.[39]

Like all nineteenth-century scientists, Quételet abandoned the idea of a divine order, and used the numerical regularities discovered to construct the image of the 'average man' whose role in statistics is the same as that of 'the normally prudent and diligent man', or the 'reasonable person' in issues of civil liability, that is, a standard of normality by which the deviations of individual cases may be measured. Quételet called the regular effects revealed by numbers 'binomial law', but Pearson later renamed it 'normal law' ['*loi normale*'].[40] This shift signalled the emergence of a *normality* induced from the observation of facts, which displaced the *legality* of the legal system, and hence replaced the subject of law with an object of care, through the institution of what Foucault has called 'biopolitics'.[41]

The 'objective laws' brought to light by quantification inevitably had an impact on law. They were based on the supposition of constant causes which could explain the observed regularities. The inductive method used did not measure the effects of an identifiable cause, but inferred from the unchanging nature of certain measurements that constant causes existed. In biology, this idea of explaining phenomena through quantification was extraordinarily successful because it held out the promise of discovering laws which would be as rigorous and unquestionable as the laws of physics. Since legal systems attach normative effects to the laws of science,[42] they could certainly not ignore these 'normal laws', all the more so as Quételet and his successors did not restrict their quantifications to physical features alone, but also calculated what was called 'moral behaviour', and today would be called socio-cultural phenomena such as marriage, suicide or homicide. It becomes clear that no simple limit can be drawn between physical and socio-economic features. Studying the statistics of mortality, for example, shows differentials linked to wealth or working conditions, such that one must impute social causes to physical effects. Research of this kind, as carried out, for example, by the doctor Louis René Villermé in the first half of the nineteenth century, encouraged the

[39] JP Süßmilch, *Die göttliche Ordnung in den Veränderungen des menschlichen Geschlechts aus der Geburt, dem Tode und der Fortpflanzung desselben*, 2 Teile [1st ed 1741, 2nd ed 1761–1762], vol II, ch I, §14, 468. On these origins, see also H Le Bras, *Naissance de la mortalité. L'origine politique de la statistique et de la démographie* (Paris, Gallimard-Le Seuil, 2000).

[40] In 1897. *cf* TM Porter, *The Rise of Statistical Thinking* (Princeton, Princeton University Press, 1986).

[41] *cf* M Foucault, 'Society must be defended', *Lectures at the* Collège de France, *1975–1976*, tr D Macey (New York City, Picador, 2003).

[42] This point is developed in A Supiot, 'L'autorité de la science. Vérité scientifique et vérité légale' in P Rosanvallon (ed), *Science et Démocratie. Colloque de rentrée du Collège de France* (Paris, Odile Jacob, 2014) 81–109.

adoption of the first social laws, which were introduced to tackle the relative over-representation of death and disease among the working class.[43] The statistical measurement of the specific physical risks run by certain categories of the population was thus pivotal in the birth of social legislation, which was the first area to respond to the social differences revealed by quantification.

The use of the term 'social' here, to qualify a new branch of law, implied a new legal representation of society. 'Society', as conceived in the French 1789 Declaration, was an ideal homogeneous body composed of free and equal persons (even if this ideal was already compromised by the exclusion of women from universal suffrage and, later, when voting was linked to a tax threshold, the exclusion of the poor). The only political arithmetic to have legal validity was therefore elections—one person, one vote: in Tocqueville's words, 'the notion of government has been simplified. Numbers alone make laws and the law. Politics has been reduced to a question of arithmetic'.[44] The 'society' sketched by social law is quite different. It is not a homogeneous political body, but a 'sort of whole', to borrow Vauban's words, composed of heterogenous and also dysfunctional elements, as revealed by statistical studies and the new discipline of sociology. This 'whole' cannot survive without legal measures to support the most vulnerable, above all working-class women and children. This is why the jurist Louis Josserand gave the name of *class law* to what was otherwise known as 'workers' law' or 'industrial legislation',[45] implying that the physical and spiritual hardships of this new class were not regarded as facts of nature, but as the consequences of the industrial revolution. Social legislation was thus built on the conviction that material inequalities such as illness, accidents, or life expectancy, but also inequalities in ways of life, had socio-economic causes.

At the same time, but inversely, socio-biology and racial biology attributed physical causes to social phenomena. This was the direction taken by Francis Galton (1822–1911), a cousin and admirer of Darwin, and one of the inventors of biometrics and eugenics, who sought to relate the distribution of physical, intellectual and spiritual qualities revealed by statistics to natural selection. He advocated eugenicist legislation, to improve the human species by encouraging the reproduction of the fittest and the most capable, and the progressive elimination (through sterilisation) of those whom the 'normal law' categorised as deviants.[46] Nazi Germany was certainly not the only country to pass laws designed to eliminate the 'unfit'; this occurred

[43] L-R Villermé, *Tableau de l'état physique et moral des ouvriers employés dans les manufactures de coton, de laine et de soie* (Paris, Renouard, 1840); rpt, *Éditions d'histoire sociale* (1979), 2 vols, 458 and 451.

[44] de Tocqueville, *The Old Regime and the Revolution*, Vol II (n 1).

[45] L Josserand, 'Sur la reconstitution d'un droit de classe' (Dalloz, Recueil hebdomadaire, 1937) 1–4.

[46] *cf* A Pichot, *La Société pure. De Darwin à Hitler* (Paris, Flammarion, 2000); and, by the same author, *Aux origines des théories raciales. De la Bible à Darwin* (Paris, Flammarion, 2008).

in the United States and in almost all the Protestant countries of Northern Europe, with the remarkable exception of the United Kingdom. Many progressive thinkers viewed the successful opposition to these laws mounted in the Catholic countries of Southern Europe as a sign of a reactionary attitude going against the movement of history. In some Western countries this eugenicist and racial legislation remained in place long after the end of the Second World War. In the US, racial laws were abolished only in 1964, and the eugenicist legislation in Sweden remained in force until 1976. An estimated 63,000 mentally ill and 'socially maladjusted' people (90% of whom were women) were sterilised against their will in application of these eugenicist laws in Sweden as from 1934.[47]

Both these ways of articulating physical and socio-economic data, as revealed by statistics, supposed that society was a whole, a social body, whose laws of functioning can be elucidated by quantification, and whose malfunctions can be corrected through legal measures. The social sciences, beyond their diversity and their divisions, all defined themselves in relation to this new object called 'Society' with a capital S, a totality which could be contemplated from the outside using the same methods of quantification as the natural sciences. The social sciences also sought to found a legal order on the 'normal laws' which Society had been shown scientifically to obey. Legal qualification and statistical qualification were thus interwoven, since the law was grounded in 'truths' revealed by the quantification of economic and social facts. 'Qualification', in both cases, means relating facts to categories of thought, but there are important differences between this operation in law and in statistics.

All judicial decisions are based on prior operations of *legal qualification*. The judge who is called upon to decide, for example, whether the suicide of an employee in his home can be qualified as a work accident has to examine—and possibly broaden—the notion of 'industrial accident'. This is what the French Cour de cassation did when it ruled that 'an accident occurring at a moment when the employee is no longer in subordination to the employer constitutes a work accident if the employee proves that it occurred due to the work'.[48] The fact that the employer did not take the necessary steps to ensure that the working relationship responsible for the suicide did not deteriorate was qualified in the same decision as 'gross negligence', with the result that the widow and orphans gained rights to 'full redress'. The judge decides on the qualifications—here, 'work accident', 'gross negligence'—only after hearing an adversarial debate between the two parties [*audi alteram partem*]. This debate can be re-opened on appeal or in the Supreme Court. Only at the end of this process will a legal truth be fixed, as

[47] *cf* A Drouard, 'À propos de l'eugénisme scandinave. Bilan des recherches et travaux récents' (1998) *Population*, 53, 3, 633–42.

[48] Civ 2, 22 February 2007, No 05-13771, Bull civ (Bulletin des arrêts de la Cour de cassation: Chambres civiles) II, No 54.

case law. And even then, this truth can be challenged if a judge goes against precedent or if Parliament intervenes. In other words, legal qualification operates in the reflexive medium of language, and thus remains indefinitely open to reinterpretation.

Statistical qualification is less easy to grasp because it works behind the scenes and does not follow procedural rules in the way legal qualification does. Despite this, qualification is a necessary stage in the production of a statistical image of social facts because *one cannot quantify what has not been qualified*. Statisticians talk of 'conventions of equivalence' to refer to the aggregation of heterogeneous elements into a single whole.[49] This procedure is necessary because every enumeration must begin by defining *what* is being counted. To count apples, I must begin by distinguishing them from pears and plums. And if they are for immediate consumption, I shall have to separate the ripe from the unripe and the rotten apples. Since, not unlike us humans, apples do not change overnight from immaturity to maturity, and on to the disorders of old age, I shall have to decide like a judge how to qualify each of my apples in order to single out the edible ones. If I am an apple-seller, I will be tempted to qualify as edible an apple which a more demanding client would qualify as rotten. In other words, the qualification of the objects of a calculation implies a standard of judgment which is not itself an object of calculation, but which makes the calculation possible.

In some cases, statistics simply adopts pre-existing legal qualifications, as when it counts work accidents or the national population. In other cases, however, it uses its own categories, which may then carry over into law. This is precisely what happened with the category 'unemployed', which was a category invented by labour statisticians in the late nineteenth century.[50] However, the constant is always the construction of equivalences, so that heterogeneous elements may nonetheless be counted. Although these conventions of equivalence may be as hotly debated as any issue in the court room or before parliament, statistical qualification still differs in two essential respects from the work of a judge. Since statistics are supposedly the preserve of technical experts, the decisions are not the object of revisable open debate, and there is no standard procedure by which qualifications may be contested. Secondly, once the element has been qualified, it is used not to judge but to count, to fix the facts of the case in figures not letters. In other words, the pronouncements of statistics lie outside the reflexive medium of language, and this gives them a very particular dogmatic power.

This symbolic power of numbers was reinforced by the use of what are called Arabic numerals, transmitted by the Arab Enlightenment, although actually of Indian origin. Unlike Roman or Greek numerals, which retained

[49] A Derosières, 'Entre réalisme métrologique et conventions d'équivalence: les ambiguïtés de la sociologie quantitative' (2001/2) *Genèses* 43, 112–127.

[50] *cf* R Salais, N Baverez and B Reynaud-Cressent, *L'Invention du chômage*, 1st edn (Paris, PUF, 1986); 2nd edn (PUF, coll 'Quadrige', 1999) 288.

semantic traces of a particular alphabet, Hindu-Arabic numerals had the advantage of being potentially universal (as well as abolishing the distance between writing and calculation). They can be compared to sinogrammes, which are understood by Chinese people even if they speak different languages: they simply have to trace the strokes of the character on a slip of paper or on the palm of their hand. But the person they address still has to be able to read sinogrammes, whereas the hegemony of Hindu-Arabic numerals has universalised the normative force of numbers and realised the Babelian dream of a language shared by all humanity.[51]

III. JUDGING

Another dilemma central to law, which modern methods of quantifying social facts sought to address from the outset, was how to choose rationally when in a situation of uncertainty. Legal procedure deals with this, and if one were to teach only one area of law in all law faculties it should unquestionably be procedure. The aim of every trial is to prevent a conflict from degenerating into fisticuffs. Legal procedure converts conflict into litigation, that is, into a regulated exchange of arguments under the supervision of a third party who will hand down a judgement binding on all parties. The role of the judge is to weigh up the arguments in the scales of justice, establish the truth or falsehood of the facts produced, and take a decision which shall have the force of law.

The role of the judge is similar to that of a gambler, who also takes decisions in situations of uncertainty. Rabelais merged the two in his colourful Judge Bridlegoose, who explains to Pantagruel how he decides on cases by throwing the dice, 'as the custom of the judicatory requires, … and by the rule thereof to direct and regulate our actions and procedures'.[52] Throwing the dice is entrusting oneself to God's judgement, as Saint Augustine observed regarding drawing lots.[53] But ever since Canon law forbade bringing God into settling cases in this way, the search for rational proof took over.[54] Similarly, the experienced gambler does not simply rely on chance, but instead tries to calculate the chances of winning or losing before placing his bets. Pascal's famous wager was directed precisely at this calculating gambler. If he has not received faith through divine grace, then only he can decide

[51] European merchants banned the use of Hindu-Arabic numerals in bookkeeping until the end of the fifteenth century, when its use became standard, long after it had started to be used in mathematics (*cf* Vlaemminck, *Histoires et doctrines de la comptabilité* (n 19) 54).

[52] Rabelais, *Le Tiers Livre*, Édition de Pierre Michel. Préface de Lucien Febvre, (Paris, Gallimard, 1973) Ch 39.

[53] Saint Augustine, *De Doctrina Christiana*, L I, Ch XXVIII, 29, quoted by E Coumet, 'La théorie du hasard est-elle née par hasard?' (1970) *Annales ESC*, 3, 578.

[54] *cf* J-P Lévy, *La Hiérarchie des preuves dans le Droit savant du Moyen Âge depuis la renaissance du droit romain jusqu'à la fin du XVI^e siècle* (Paris, Sirey, 1939) 174; H Lévy-Bruhl, *La Preuve judiciaire. Étude de sociologie juridique* (Paris, Marcel Rivière et Cie, 1964).

whether or not he should believe in the existence of God. Since he has already 'embarked' on life's journey, he cannot escape this question, but his decision will be taken in a situation of uncertainty. Pascal shows that he can decide rationally to believe or not, using the same calculations as at the gaming table. The mathematical rigour of Pascal's demonstration and its sheer daring (basing faith on a calculation) is a precious resource for our understanding of the religious dimension of governance by numbers to this very day. Pascal begins by showing that certainty and uncertainty are not separated by an unbridgeable gulf, but are linked by the 'proportion of the chances'[55] of gain and loss. In the case of the existence of God, the chance is set at a one in two chance. All that remains after this step is to apply the amount of the stakes to this probability: a libertine but finite life on the one hand, and on the other, eternal salvation. The maths holds no secrets, and must lead to *rational belief*, a truth of which 'all men are capable'. One could argue that Pascal does not calculate everything rationally because he decides arbitrarily that there is a 1:2 chance of winning or losing. However, any other proportion would have given much the same result, given that the trump card of infinity has been introduced into the equation. At all events, this is a good example of the impossibility of an entirely self-enclosed calculation divorced from any reference to a value judgement, a qualitative moment underpinning the demonstration. Calculations of probability are at once descriptive and normative.

The problem Pascal was trying to solve in this exploration of probability was in fact a question of law: how should losses and gains be allotted in the case of breach of an aleatory contract?[56] As Alain Desrosières has shown, this question cannot be answered without appealing to an arbiter who stands outside the game and is able to construct 'spaces of equivalence between incompatible, heterogeneous future events which have not yet taken place'.[57] Although calculations of probability can replace the qualitative operations which a judge carries out in order to arrive at a position 'beyond reasonable doubt' (the judge's '*intime conviction*'), and although these calculations can thus replace legal procedure, the figure of the impartial third party does not disappear for all that. In making incommensurable facts commensurable, the third carries out exactly the same type of operations as those undertaken by jurists when they subsume different factual situations under the same legal qualification.

Like the judge, this third must first decide on the truth or falsehood of the facts alleged. In the courtroom, this question is ultimately a matter for 'the prudence of the judge', in the words of Domat, the most brilliant jurist of his time (and friend of Pascal).[58] Prudence, one of the four cardinal Christian

[55] B Pascal, *Les Pensées* in *Oeuvres Complètes* (Paris, Gallimard, 1954), pp 1214–1215.

[56] *cf* E Courmet, 'La théorie du hasard est-elle née par hasard?' in *Annales. Économies, Sociétés, Civilisations,* no. 3, 1970, pp 574–98.

[57] Desrosières, La Politique des grands nombres, (n 2) 65.

[58] J Domat, *Les Loix civiles dans leur ordre naturel* [1689–94] (Paris, M de Héricourt éditeur, 1777) 285.

virtues—the others being justice, fortitude and temperance—is the faculty of discernment thanks to which actions may be guided by an exact representation of the truth. The famous sculptures of the tomb of Francis II of Brittany portray Prudence as a twin-facing figure, representing from the front a young woman holding in her right hand a compass, the symbol of the measure appropriate to every action, and in her left hand, a mirror.[59] Due to this mirror, she does not simply face the future, but also looks into herself, for self-knowledge, and behind her to the past. No prudent action is indeed possible without self-knowledge and the benefits of experience, as this sculpture also shows, on its reverse side, through the depiction of a pensive old man facing away from us and towards the past.

Figure 5.1: The Allegory of Prudence, one of the four cardinal virtues which stand at the corners of the tomb of Francis II, Duke of Brittany, and his wife Marguerite de Foix, sculpted by Michel Colombe, Nantes Cathedral © Florian / WikiCommons

[59] On this tomb, *cf* Fulcanelli, 'Les gardes du corps de François II de Bretagne', in *Les Demeures philosophales et le symbolisme hermétique dans ses rapports avec l'art sacré et l'ésotérisme du grand œuvre*, 3rd edn (Paris, Jean-Jacques Pauvert, 1965) Vol 2, 181–238.

The good judge (whose jurisprudence is authoritative) is thus one who takes into account past experience, through self-examination, who is able to assess the reliability of the evidence presented concerning the alleged facts, and who can anticipate the effects of his decision. A key facilitator of these essentially qualitative evaluations is what in French procedure is called the *principe du contradictoire*, which means that the judge decides only on the basis of evidence which all the parties to the trial have been able to discuss. This is the rule laid down in Article 427 of the French Code of Criminal Procedure: 'The judge may only base his decision on evidence which was submitted in the course of the hearing and adversarially discussed before him'. The value attributed to a piece of evidence presented to the judge will depend on several factors: the conditions surrounding it (a testimony under oath carries greater weight than a simple declaration before a police officer), on the character of the person testifying (the words of an honest citizen are more trustworthy than those of a ruffian) and on the credibility of the facts attested (seeing the Virgin Mary appear is less credible than seeing a shepherdess).

The founding fathers of calculations of probability—Leibniz, Bernoulli, and Condorcet—attempted to quantify these types of factors, in order to give a numerical value to the possible truth of a reported fact. In her *Classical Probability in the Enlightenment*, Lorraine Daston cites many examples of these calculations, as applied in the field of law.[60] Condorcet, in one of his *Mémoires à l'Académie royale des sciences*, arrived at the following formula to calculate the probability of an extraordinary event reported by a witness:[61]

> Let us suppose that u and e represent the probability of the truth of an extraordinary event and of the falsity of the same event, and that at the same time u^1 and e^1 express that the probability of a testimony will or will not conform to the truth, and that a witness has testified to the truth of this event […], the probability that the extraordinary event declared true really did occur will be:
>
> $$\frac{uu^1}{uu^1 + ee^1}$$
>
> and that it is false:
>
> $$\frac{ee^1}{uu^1 + ee^1}$$

Some years later, Laplace arrived at a significantly more complicated formula in his calculations of the probability (P*i*) of the truthfulness of a

[60] Daston, Classical Probability in the Enlightenment (n 2) 306–69.

[61] M-J-A de Condorcet, *Mémoire sur le calcul des probabilités* [1786], in *Arithmétique politique: textes rares ou inédits* (1767–1789), critical edition with commentaries by Bernard Bru and Pierre Crépel (Paris, INED- PUF, 1985) 432.

testimony which claims that a number i was drawn from an urn containing n numbers.[62] There are four possibilities, he maintains: the witness does not lie and is right (P1 = pr/n); the witness does not lie but is wrong (P2 = $p[1 - n]/r$); the witness lies and is not wrong (P3 = $[1 - p][r]/n$); and the witness lies and is wrong (P4 = $[1 - p][1 - r]/n$: L). This gives the following mathematical formula:

$$\mathrm{P}i = \frac{\frac{pr}{n} + \frac{(1-p)(1-r)}{n(n-1)}}{\frac{pr}{n} + \frac{p(1-r)}{n} + \frac{(1-p)r}{n} + \frac{(1-p)(1-r)}{n}}$$

or:

$$\mathrm{P}i = pr + \frac{(1-p)(1-r)}{n-1}$$

Formulas of this sort already give substance to the dream of replacing the judge, who decides impartially on the truth of an alleged fact, with a calculating machine.[63] They prefigure the role of computers in regulating the financial markets through governance by numbers. Calculations of probability also embody a change in the hierarchy of values by privileging considerations of utility over knowledge in the face of uncertainty. Pascal's wager already demonstrates this inversion, insofar as his libertine has no interest in fathoming the mysteries of existence, all he wants is to maximise his winnings. Through calculation, he can evade both the abyss of a world devoid of sense, and the absoluteness of a world over-saturated with sense. Thus purged of any metaphysical qualms, he can live his life in the dimension of the gambling table, which knows neither heights nor depths. This shift in values separates Greek investigations—centred on the contemplation of the world—from our own, which have to prove their usefulness. Usefulness is indeed what gave statistics its momentum: society is constructed as an object of knowledge only in order to make it easier to manage. René Thom has argued that at the turn of the eighteenth and nineteenth centuries, the mathematics of control supplanted the mathematics of intelligibility, due to the professionalisation of the activity of the scholar or scientist: 'Armed with the certainties of science, the enlightened man gradually transformed into what today we would call a technocrat'.[64]

[62] P-S de Laplace, *Théorie analytique des probabilités* [1812], 3rd edn (Paris, Coursier, 1820) 457, quoted by Daston, *Classical Probability in the Enlightenment* (n 2) 335ff.

[63] Laplace even applied calculations of probability to judges' decisions in court, in *Essai philosophique sur les probabilités*, 5th edn [1825], preface by René Thom (Paris, Christian Bourgois, 1986) 136–42.

[64] Thom, Preface to Laplace, *Essai philosophique sur les probabilités* (n 2) 6–7.

IV. LEGISLATING

The first calculations of probability bear this tendency out, in that they did not confine themselves to establishing certains facts, but additionally sought to formulate the rules governing these facts. Calculations of probability thus overstepped the limits of stating what *is*, and concerned themselves with what *should be*. They did not simply describe, they prescribed.

The legitimacy of probability calculations as a basis for a legal decisions was first debated in the context of a public health issue: the question of whether inoculation against smallpox should be made obligatory, as a preventive measure.[65] It was clear that this would reduce the incidence of the illness as a whole, but the inoculation had also caused the death of a number of people vaccinated. On the basis of the patchy statistics existing at the time, the risk was evaluated at 1/300. When Daniel Bernouilli presented a paper to the Academy of Sciences on the subject in 1760, he recommended applying a formula similar to the one used for calculating one's chances of winning at the lottery. Since the results gave an increased life expectancy of about three years for those inoculated, he implicitly recommended inoculation for everyone. The case was hotly debated. Bernouilli's argument for inoculation was echoed by most of the enlightened minds of the time, especially Voltaire, and the issue was framed as a conflict between the forces of progress and of reaction, where progress meant adapting the government of men to the facts of science.[66] Among the *philosophes*, only d'Alembert came out against, arguing that one could not apply to a problem where human lives were at stake a calculation based on incomplete data.[67]

Since then, the questions raised by this famous controversy have not gone away. Public health policy is still obliged to take into account the two facets of illness, as a quantifiable social fact and as a singular event in a person's private life. In the nineteenth century, hygenicist doctors advocating a 'numerical method' which standardised care on the basis of medical statistics fought it out with doctors who set store by clinical experience and individualised discussion with the patient. Claude Bernard, who was critical of the numerical method, accused it of treating conditions 'on average,' instead of using in-depth knowledge of the particular determinations of the illness.[68] The fact that the primary factors of illness appeared to be physical

[65] On this debate, see Laplace (n 63 above) 145ff; J-P Benzécri, *L'Analyse des données* (Paris, Dunod, 1973); Daston, *Classical Probability in the Enlightenment* (n 2) 83ff; Le Bras, *Naissance de la mortalité* (n 3).

[66] A Rowbotham, 'The Philosophes and the propaganda for inoculation of smallpox in eitheenth-century France' (1935) *University of California Publications in Modern Philology*, 18, 265–90; AA Rusnock, *Quantifying Health and Population in Eigteenth-Century England and France* (Cambridge, Cambridge University Press, 2002) 249 esp 43–91.

[67] *cf* Daston, *Classical Probability in the Enlightenment* (n 2) 84ff.

[68] *cf* Desrosières, *La Politique des grands nombres* (n 2) 104ff.

doubtless helped justify the use of calculations of probability to decide on preventive or other treatments, since it seemed legitimate to accept statistical regularities which derived from the unchanging and universal laws of the physical world. This is why the first applications of probability calculations to legal issues all concerned physical phenomena, particularly mortality, which the development of statistics could represent in the form of quantified tables. The 'Galilean sciences', which are also based on measuring regularities observed in nature, are not so different. Techniques such as life insurance and life annuities, which were still assimilated to games of chance in the seventeenth century—and particularly blameworthy ones at that, because they played with an individual's life—tended to be considered, by the nineteenth century, as a sign of forethought, which the authorities would do well to foster in the venerable minds of the *pater familias*.

The legitimation of probability calculations started with a Gambling Act in the UK, passed in 1774, which made the interests of the person insured into the criterion by which to distinguish between insurance (legitimate) and a bet (legally void).[69] John Law, and the crash of his system insuring lottery losses, was fresh in people's minds. And in order to decide whether the insurance contract was 'in the interests of the person insured', the question posed was: does it imply the long time of foresight, or the short time of speculation? This same question could helpfully be applied today, if only there existed some genuine determination to regulate the financial markets. For everything points to the fact that insurance on the financial markets has become speculative in the way that led to its being banned until the eighteenth century. The lifting of this ban—a change which enabled the construction of the modern Social State—was not unconditional. The generalisation of social statistics seemed to transform uncertain events into calculable risks, but these calculations were still screened by a principle of prudence. This principle cannot itself be an object of calculation because it applies to the essential function of insurance and not just the extent of particular financial reserves. In other words, the principle of prudence should oblige one to set solvency ratios[70] and limit the activities of insurance to exclude speculative operations.

The importance of insurance in the construction of the social state is unquestionable, but its precise role merits closer analysis. François Ewald, in his book on the birth of the welfare state, examines the debates which led to the inclusion of insurable risk within legal liability.[71] This marked a legal turning-point, the beginning, he argues, of a society which had become

[69] *cf* Daston, Classical Probability in the Enlightenment (n 2) 175ff.

[70] This was the main lesson drawn by European law from the financial crash of 2008. See the 'Solvency II' Directive 2009/138/EC of 25 November 2009, on access to the business of Insurance and Reinsurance, and their practice.

[71] Ewald, *L'État providence*, (ch 4 n 31) 143ff.

totally objectifiable and transparent to itself, regulated by norms rather than governed by law. He calls it a 'society of insurance techniques' [*une société assurantielle*]. This reading leads him to deny any essential difference between social insurance and private insurance. There is no good reason, he argues, to oppose them 'because both use the same techniques of risk, and both proceed by pooling and sharing out the burden of these risks'. Thus one could say that within the vast field of 'social' security, that is, of security which is mutualised through insurance, what we usually call 'Social Security' is but one part.[72] The concept of a society of insurance techniques thus leads to the conclusion that social insurance and private insurance are functionally equivalent. Both types 'pool' risks and use the same actuarial techniques, such that private insurance would be perfectly capable of covering those risks today covered by social security. From there, it is a small step to maintaining that the choice between the two should depend ultimately on their relative cost, set by the market. This step was taken recently by the Court of Justice of the European Union, when it stated, in a decision of 15 July 2010, that 'preservation of [those] elements of solidarity is not inherently irreconcilable with the application of a procurement procedure' since 'the pooling of risks, upon which any insurance activity is based […] can be ensured by a body or [a] undertaking'.[73] The case involved the requirement that the social partners turn to the insurance market for the management of a pension fund established by a collective agreement. A draft European directive of 2012 on public procurement similarly included this requirement, regarding 'obligatory social security'. The political uproar this caused obliged the Commission to withdraw the provision.[74]

The notion of a society of insurance techniques cannot, however, do justice to the scope and complexity of the legal changes brought about by the quantification of social facts. As regards the scope: insurance is only one aspect of the shift from faith in persons, operative at the very heart of institutions, to faith in numbers.[75] It is a shift clearly visible today in insurance contracts, for which statistical risk assessments have progressively supplanted prudent examination of the situation of each candidate.[76] But already in the nineteenth century this movement was emerging in fields as diverse as medical practice and public administration. Quantifying social facts lends them an appearance of objectivity, and makes them commensurable on the scale of the planet. Belief in numbers can thus foster the hope

[72] *ibid*, 390.

[73] Court of Justice of the European Union (Grand Chamber), 15 July 2010, *Commission v/ Federal Republic of Germany*, Case C-271/08, *Droit social* 2010, 1233, observations Francis Kessler.

[74] *cf* Written Question No 02501 by Mme Marie-Noëlle Lienemann (Sénat, *Journal officiel*, 18 October 2012, 2262).

[75] *cf* Porter, Trust in Numbers (n 2).

[76] *cf* Daston, Classical Probability in the Enlightenment (n 2) 182ff.

that another type of rule of law may exist, founded not on dogma but on observed regularities valid for all humankind.

Advances in quantification thus went hand in hand with the idea of a uniform and universal law, such as Condorcet had advocated, in his sharp criticism of Montesquieu's legal relativism. His model for this law was that of weights and measures, a model 'which can only displease men of law who fear to see the number of trials diminish'. He justifies his ideas as follows:

> Since truth, reason, justice, the rights of men, and the interests of property, liberty and safety are the same everywhere, there is no good reason why all the provinces of a State, or even all States, should not have the same criminal laws, the same civil laws, the same laws on trade, etc. A good law should be good for all men, just as a true proposition is true for all. Where in different countries the laws would appear to need to be different, or have objects which should not be ruled by laws, like most of the rules of trade, or are based on prejudices and customs which should be eradicated; one of the best ways of destroying these is to cease to support them through laws.[77]

Condorcet goes on to say that Montesquieu is wrong to evoke the legal function of Tartar or Chinese ceremonies because just as mathematicians accustomed to calculations of probability are capable of explaining the rules of a particular game, so it should be possible to calculate the rules applicable to *all* humanity.[78] The vision of law sketched here prefigures the situation under globalisation: the deregulation of trade, and the eradication of regional and national legal cultures in the name of a uniform law. The only element missing is the natural selection of the fittest 'legislative products' through competition between national legal systems.

Applying probability calculations to social facts has, however, always met with opposition. The early eighteenth-century mathematician Pierre de Montmort identified the two reasons why one should beware of these calculations. The first was that human action does not obey the unchanging laws of nature (and one is fooling oneself if one thinks self-interest can be equated with this type of law). The second was the human mind's inability to grasp all the factors determining any given action.[79] In the following century, Comte added scathing criticism of 'the pretension of some geometers to render social investigations positive by subjecting them to a fanciful mathematical theory of chances',[80] in this explicitly targeting Condorcet

[77] Condorcet, 'Observations sur le vingt-neuvième livre de l'Esprit des lois' in ALC Destutt de Tracy, *Commentaire sur l'*Esprit des lois *de Montesquieu* (Liège, Desoert, 1817) 458.

[78] ibid, 461–62.

[79] PR de Montmort, *Essai d'analyse sur les jeux de hazard*, 2nd edn (Paris, Jacques Quillau, 1713) quoted by Daston, (n 2) 317.

[80] A Comte, 'Relation of Sociology to the other departments of positive philosophy' in *The Positive Philosophy*, tr H Martineau, intro F Harrison (London, George Bell and Son, 1896), Vol 2, Ch IV, 223.

and Laplace. He considered that the high degree of abstraction of mathematics disqualified it from being used at all rigorously for the close study of nature.

> Can one possibly imagine a more radically irrational conception than that which takes for its philosophical basis, or its principal method of conclusive explanation, for all the social sciences, a supposed mathematical theory, in which, as is normal for purely mathematical speculations, signs being taken for ideas, we attempt to subject to calculation the necessarily sophistical notion of numerical probability, which amounts to offering our own ignorance as the natural measure of the degree of probability of our various opinions?'[81]

More recently, this criticism was echoed by Karl Polanyi who attacked the 'immature dogmatism [which] stood guard at the gates of moral statistics, through which the reality of society had announced its entrance in the guise of mathematical precision'.[82] Quantification is legitimate in the social sciences only if it is limited to what can be precisely counted, and does not construct simulations which extrapolate general laws from incomplete measurements of sets of heterogeneous facts. Frédéric Le Play, an engineer by training, and his successors, observed this method scrupulously in their minutely detailed surveys of the living conditions of the peasantry and working-class populations in different European countries.[83] Le Play had been struck by the lack of scientific rigour in the existing statistical tables which, he said, 'take into account neither the specific nature of the individuals, nor the particular character of their living environments; the official data thus neglects the principal facts which science must consider in order to reach conclusions which concern individual existences or different social categories'.[84]

This ethno-accounting continues to be practised today by some researchers, despite the overwhelming dominance of standard econometrics. Instead of replacing the real with prefabricated statistical categories, this type of research attempts to understand in all their complexity the systems of values operative in a human group.[85] For instance, instead of projecting an a priori notion of value onto poor populations in the context of quantified anti-poverty programmes, these researchers regard the attribution of value as a social process which must be understood before one can really improve these people's lot.

[81] ibid, 224 [*tr mod*].

[82] K Polanyi, 'The Machine and the Discovery of Society' [1957] lecture: http://kpolanyi.scoolaid.net, 4.

[83] *cf* the excellent biography of Le Play by F Arnault, *Frédéric Le Play. De la métallurgie à la science sociale* (Nancy, Presses universitaires de Nancy, 1993).

[84] F Le Play, *Les Ouvriers européens* (Paris, Imprimerie impériale, 1855) 301.

[85] See, for example, A Cottereau and MM Mazok, *Une famille andalouse. Ethnocomptabilité d'une économie invisible* (Paris, Bouchêne, 2012).

6

The Law Geared to Numbers: From the Gosplan to the Total Market

'The State forbids by law any organisation or individual from disturbing the socio-economic order.'

The Constitution of the People's Republic of China, art. 15

ONE OF THE many convictions capitalism and communism have in common is that social harmony can be the outcome of a calculation. Where they differ is that, unlike the Soviet planned economy, 'classical' or 'old-style' economic liberalism considered the law and the state to be the condition, and not the means, for achieving social harmony through calculation. Communist regimes used the normative instrument of planned economic development in their attempts to produce harmony out of quantification, whereas the fathers of liberalism believed that an essential condition for a system of spontaneously self-adjusting calculations of individual interest was the rule of law (*un régime de droit*), under which the identity and freedom of persons were guaranteed, property rights were protected and contracts were enforced. Even as provocative a thinker as Mandeville never lost sight of the fact that the conversion of private vices into public wealth required the reign of the law because, as he concluded in his fable of the bees, 'So Vice is beneficial found, When it's by Justice lopt, and bound'. In other words, classical liberalism still placed itself under the authority of the law. In order to understand how greatly neoliberalism departed from this vision, and how greatly it resembles communist utopias, we must take another look at how the authority of the law was undermined by Soviet planning.

I. THE LAW DETHRONED

The founders of liberal thought knew full well that the rule of law is a *condition for economic activity*. They certainly did not think that a market was possible without a law to fix its limits and its rules, and they would never have dreamt of laws as 'products' competing on a market of norms. The two parties to a contract may calculate their interests only because a

third is there to guarantee fair exchange, and to settle everything which lies beyond calculation—not least the identity of the contracting parties. From this perspective, law is not an instrument serving the cause of calculation, but rather a prerequisite for its existence. In other words, classical liberalism still inhabited a three-dimensional universe, in which the dimension of market exchange had its reference point in the vertical dimension of the state. This third dimension is necessary not only for contract law, but also for property law and personhood.

After all, what would a contract look like if it were reduced to a bilateral bond between *Primus* and *Secundus*? It would be nothing but the expression of the power relation between the two. For there to be a contract, *Primus* and *Secundus* must at least both be equally subject to a heteronomous rule which they cannot modify, namely the value of the pledged word (*Pacta sunt servanda*). In other words, there is no contract without a law. This in itself tells us nothing about the nature of that law, which may have a religious or a customary or a codified basis, but at all events it represents a guarantor of the pledged word, whether this is called the gods, the community or the state. And the guarantor is not on the same plane as the contracting parties.[1]

So much for the contract. But what would a property right be if it were reduced to a bilateral relation between an individual and a thing? It would be nothing but a simple fact, the fact of possessing a thing, with the risk of being dispossessed of it at any moment at knifepoint, or by someone just a bit stronger. This is something we can easily forget if we have the good fortune to live in a country where we do not risk being mugged at every corner. In other words, in a country where the law prevails. But one has only to venture into 'no-go areas' ['*zones de non-droit*'] for the fiction of a bilateral and exclusive relation between myself and my property to be exploded, as we leave behind the rule of law and enter zones of lawlessness, a 'state of nature' in which people must be armed and live in gated enclosures if they are to come out of it alive and with all their possessions. The *praemium* of Justinian's *Institutes* expressed this as follows: one must be armed with laws for arms to be decorative objects or replaced by the arts and letters.[2]

And who would we be, after all, if our identity were not secured by a heteronomous order which assigns us personhood before the law, and ensures it is respected? Whole swathes of humanity had to be reduced to pack animals, numbered and led to the slaughter before their legal personhood was at last enshrined as a right, in Article 6 of the Universal Declaration of Human Rights: 'Everyone has the right to recognition everywhere as a person before the law'. This article implies a ternary structure: if I am

[1] I take the liberty of referring the reader to my *Homo Juridicus: On the Anthropological Function of the Law*, tr S Brown (London / New York City, Verso, 2007) Ch 3, 86ff.

[2] See above, pp 16–17.

to be 'recognised everywhere' by others, then my identity must be warranted by a third, whose authority is respected. The immediate reflex, on losing one's passport abroad, is to contact one's country's embassy, the sate which vouches for who one is, in order to prove one's identity to the foreign authorities, and thus regain one's freedom of movement and the protection of a legal personhood. One does not need to be schooled in law to have this reflex, because institutions are not simply things outside of us; as Durkheim states, 'Institutions bear down upon us, yet we nevertheless cling to them; they impose obligations upon us, and yet we love them; they place constraints upon us, and yet we find satisfaction in the way they function, and in that very constraint.'[3]

So, from a legal perspective, classical economic liberalism and communism had one essential difference: liberalism recognised that the rule of law was necessary for economic harmony, whereas communism used the law as a tool for implementing a harmony based on quantitative computations. The unholy union of capitalism and communism which Europe and China celebrated towards the end of the twentieth century[4] accelerated the process of gearing the law to numbers. Classical liberals were in no doubt that the unrestricted pursuit of individual interests could never lead to general prosperity unless the law set limits on individual greed. But neoliberals took the legal fictions which ground the market to be facts of nature. They mistook a construct for a given, and extended the paradigm of the market to all areas of human life, including the law, which is considered to be just another product competing on a market of diverse norms.

Neoliberalism is thus a utopia predicated on erasing the *fictional* nature of the legal constructs on which the market economy is based: identity is treated as though it were solely a solipsistic, self-defining individuality; property as the omnipotent hold of a subject over an object; and contracts as two-way communication between two subjects. Neoliberalism's world is composed of contracting particles calculating in real time their individual interests and exchanging the objects they have in their possession in the light of this calculation. This is indeed how the financial markets, which are at the epicentre of globalisation, operate today. They are largely controlled by computers performing high-frequency trading, which is itself the latest incarnation of the governing machine.[5]

[3] E Durkheim, *The Rules of Sociological Method*, 2nd edn, tr WD Halls (New York City, The Free Press, 1982) preface, 47.

[4] See my *The Spirit of Philadelphia*, (*op. cit*. Introduction), n 17, Ch 1, 17ff.

[5] On the practice of high-frequency trading, see the Report of the French Financial Markets Regulator, the *Autorité des marchés financiers:* A Oseredczuck, *Le trading haute fréquence vu de l'AMF* (Paris, AMF, 2010). On how it can be manipulated, see M Lewis, *Flash Boys. A Wall Street Revolt* (New York City, Norton & Cie, 2014); J-F Gayraud, *Le nouveau capitalisme criminel* (Paris, O Jacob, 2014). The European Union did not want to forbid these practices, but introduced stricter regulation: see Directive 2014/65/UE of 12 June 2014 concerning the market in financial instruments, and Regulation (EU) No 600/2014.

As often happens—with human imagination prefiguring human action—this 'flat world' divested of the vertical figure of the third which secures relations between individuals, was first represented in a novel, a philosophical tale called *Flatland*, published in 1884 by the mathematician Edwin Abbott.[6] Ota de Leonardis unearthed this forgotten work some years ago and showed its striking relevance for today, and its prophetic power.[7] As the title indicates, *Flatland* is a world reduced to two dimensions, characterised by a sort of caste system in which the Brahmin are polygons aspiring to the perfection of circles, the lower cast are represented by triangles, and the intermediary cast, by squares. Those outside the caste system, and obliged to serve all the others, are irregular geometrical figures. If we try to imagine living in this two-dimensional universe, in Flatland, we can begin to understand how tricky social relations must be. Since by definition figures in the same plane cannot meet face to face, the most insignificant encounter becomes an extremely complicated and perilous affair, in which mutual recognition requires prior measurement and calculation of angles in order to identify the other's caste. This world without verticality—without heteronomy—this Flatland without a horizon, has no visible limits. In a three-dimensional universe, the horizon (from the Greek *horizein*: to set a limit) is precisely a line which circumscribes our field of vision and in so doing also designates the existence of something beyond it.[8] Abolishing any such beyond has been the work of positivism, with its purely immanent approach. It attempts to free humankind from the fear of the unknown by 'identifying the animate with the inanimate, just as myth identifies the inanimate with the animate', leading to a new 'universal taboo', which Horkheimer and Adorno described: 'Nothing should remain outside because the very idea of an 'outside' is itself the source of terror'.[9]

The metaphor of a flat world reappeared around the year 2000, but used this time without any critical intent. It even became a best-seller, by the economist Thomas Friedman: *The World is Flat. A Brief History of the Twenty-first Century* (published in 2005).[10] In it Friedman rejoiced in the advent of a world flattened by globalisation and market forces, in which all the operators have the same chance of succeeding in a competitive environment unencumbered by any heteronomous rules. The neoliberal utopia

[6] EA Abbott, *Flatland, A Romance of Many Dimensions, with Illustrations by the Author, A SQUARE* (London, Seeley and Co, 1884). https://archive.org/details/flatlandromance00abbouoft (accessed 20 July 2017).

[7] 'Nuovi conflitti a Flatlandia' in G Grossi [a cura di] *Conflitti contemporanei* (Turin, Utet, 2008) 5ff.

[8] Unlike Cartesian space and the representations of classical physics, the universe described by Einstein is not without limits: it has a 'border', a horizon. See on this point the remarks of A Berque, *Écoumène. Introduction à l'étude des milieux humains* (Paris, Belin, 2000).

[9] Horkheimer and Adorno, *Dialectic of Enlightenment.* (ch 2 fn 62).

[10] TL Friedman *The World is Flat. A Brief History of the Twenty-first Century*, 1st ed (New York City, Farrar, Straus & Giroux, 2005).

is precisely this flat world wholly driven by the immanent laws of the market, and in this respect it is much closer to communist utopias than to 'classical' liberalism.

II. THE INSTRUMENTALISATION OF LAW IN THE PLANNED ECONOMY

The construction of a communist society was entrusted not to the law, but to plans; in other words to a two-dimensional universe in which law was reduced to an instrument for implementing a computed collective utility. Harold Berman has aptly described such a totalitarian regime in terms of a distinction between *rule by law* and *rule of law*:[11] Soviet-style planning illustrates *rule by law*, and a normative order in which economic life is ruled by numbers rather than law. This early historical experiment is largely neglected by researchers today, but its lessons are more than ever relevant to us. It sheds light on the contemporary hybridisation of communism and capitalism, for instance in the People's Republic of China and the Russian Federation, but also in Western countries, whose dependence on the financial markets has transformed them, in the felicitous terms of the First Article of the Chinese Constitution, into 'democratic dictatorship[s]'.[12]

So we should re-examine, if only in its broad outlines, the episode of the Soviet planned economy, which preceded—and in many respects paved the way for—China's conversion to capitalism under the presidency of Deng Xiaoping (1904–1997).[13] Article 15 of the Chinese Constitution assigns the state a threefold task: 'The State practises a socialist market economy. The State strengthens economic legislation, improves macro-regulation and control. The State prohibits by law any organisation or individual which disturbs the socio-economic order'. The exercise of rights is thus protected by the Constitution only to the extent that this does not disturb the 'socio-economic order'. We find this idea (which has some similarity with the rulings of the European Court of Justice) already in the Soviet Civil Code of 1922, whose first article provided that 'Civil rights are protected by law except when they are exercised in violation of their socio-economic destination'.[14] In order to know whether this destination is indeed violated, one has to

[11] H Berman, *Law and Revolution II. The impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, Mass., Harvard University Press, 2003) Vol II, 19.

[12] On this Constitution, see C Jianfu, 'La dernière révision de la Constitution chinoise. Grand bond en avant ou simple geste symbolique?' (2004) *Perspectives chinoises*, 82, 15–32.

[13] See the comparison between these two historical experiences by P Anderson and W Chaohua, *Deux révolutions. La Chine au miroir de la Russie* (Marseille, Agone, 2014).

[14] On the application of this idea to property rights, *cf* the thesis of Aurore Chaigneau, *Le droit de propriété en mutation. Essai à la lumière du droit russe* (Paris, Dalloz, 2008), preface by A Lyon-Caen.

calculate how useful exercising a particular right is to the Soviet people. A right's enforceability thus depends on a *calculation of its utility* which is external to, and imposed upon, the legal apparatus. If this calculation suggests a lack of 'utility', legal guarantees simply evaporate.

As a result, laws were simply tools—Chinese legalists would have said 'utensils'[15]—with which to construct socialism. 'Construction' was the USSR's preferred term for designating its political system, rather than political or constitutional 'regime'.[16] The word suggests a dynamic onward march, as illustrated by the Soviet art invented to glorify it. In the USSR, as in Nazi Germany, the single party was the driving force behind a society which was to be in perpetual motion.[17] Soviet jurists defined socialist legality not as a stable framework for society, but as a method: 'The method for actualising the dictatorship of the proletariat and the construction of socialism […] it is always the Socialist State's means of action, and cannot become an obstacle to the fulfilment of its historical tasks'.[18] The notion of 'construction' conveys at once a process, the extension of a system whose limits are not yet fixed, and a technical conception of normativity, pegged to efficiency and not to the law's authority. 'Construction' thus defies the legal order's aspiration to stability, as represented in the emblems of justice, which are always motionless Single Party if only to keep the scales straight! This new ideal of movement was embodied above all in Soviet and Fascist art, and particularly sculpture.[19] We should note that the term 'construction' has also been used Single Party and still is used Single Party to describe the European Community, and later the European Union. The 'construction of Europe' will, in similar fashion, be achieved through an institutional momentum inseparable from an economic programme. The images on euro banknotes show this clearly, with schematic doors (symbols of openness) and bridges (symbols of union) following a line of historical progress which is reflected in the value of the note (from five-euro notes in Roman style to 500-euro notes in contemporary style, via the Middle Ages, the Renaissance and industrial architecture). 'The construction of Europe' thus inscribes itself within an imaginary historical movement, but one in which

[15] See above, ch 3, p 52 and p 62.

[16] T Kondratieva, *Gouverner et nourrir. Du pouvoir en Russie* (Paris, Les Belles Lettres, 2002).

[17] The Nazi Party (the *Nationalsozialistische Deutsche Arbeiterpartei*, or NSDAP) was called the 'movement' (*cf* M Stolleis, 'Que signifiait la querelle autour de l'État de droit sous le Troisième Reich?' in O Jouanjan (ed) *Figures de l'État de droit* (Strasbourg, Presses univ Strasbourg, 2001) 374).

[18] SA Golunsky and MS Trogovitch *Theory of State and Law* (Moscow, 1940) quoted by P Lavigne 'La légalité socialiste et le développement de la préoccupation juridique en Union soviétique' (1980) 11 *Revue d'Etudes Comparatives Est-Ouest* 1980, 3, 11.

[19] One of the most spectacular incarnations of this ideal, and the highlight of the Soviet pavilion at the Universal Exhibition of 1937 in Paris, was the sculpture *The Worker and Kolkhoz Woman* by Vera Moukhina: 25m high and 80 tonnes of steel.

Single Party—unlike the society of plenty promised by Communism—seems to have no other goal than itself. In a similar development, with the increasing financialisation of the economy, the body representing French businesses, the MEDEF, decided to change its name from the familial and far too reassuring *Conseil national du patronat français* to one evoking the dynamic force of a Movement (*Le Mouvement des entreprises de France*).[20]

So we can see how the extremes of Soviet planning on the one hand, and neoliberalism on the other, converge in gearing laws to calculations of utility. Where they differ is in the means they employ to do so. Communism used the central plan, whereas neoliberalism uses the contract. The body responsible for central planning was called the State Planning Committee, better known by its Russian acronym *Gosplan*. The idea behind it was actually developed much earlier, well before the Bolshevik Revolution, by a German economist—of socialist and not communist sympathies—Karl Ballod. In 1898 he published a book called *Der Zukunftsstaat* (*The State of the Future*), with a preface by Karl Kautsky, which defined the role of state planning in a future socialist Germany.[21] The book went through many editions and translations, and it influenced Lenin, who lacked a clear idea of how a socialist economy should be organised concretely. At first the Gosplan, which was created in February 1921, brought together economists of different schools of thought.[22] As from 1925, it produced annual 'control figures', to monitor the activities of state enterprises.[23] It was only in 1927 that the first five-year plan was worked out (1928–1932). Unlike the *Goelro* plan, which had been adopted in 1921 to set up the USSR's electricity system, and which defined the broad lines of longer-term development (10–15 years), the five-year plan fixed precise targets for businesses, and assessed their attainment annually through 'control figures'. The Gosplan, the body responsible for economic planning, was considered to be one of 'the USSR's scientific and technical structures'. This is another point of convergence between communism and neoliberalism: the assertion that economic policy is not the outcome of political debate, but of scientific calculation. It led

[20] 'Le patronat' refers to employers as a group (or, in the context of labour negotiations, to 'management' in contrast to 'labour'). The notion comes from Roman law, and designates the reciprocal obligations between a freedman and his former master. The latter gives birth to the freedman's social existence, and transmits him his name, just like a father (*pater*). The former master, now a *patron* (in French, an employer), owes help and assistance to the freedman, who owes respect (*obsequium*) and certain services (*operae*) in return.

[21] K Ballod, *Der Zukunftsstaat* (Stuttgart, J.H.W. Dietz, 1920). I thank Martine Mespoulet for pointing out this filiation.

[22] On the economic debates in the early days of the Gosplan, see N Jasny, *Soviet Economists of the Twenties. Names to be remembered* (Cambridge, Cambridge University Press, 1972).

[23] *cf* H Bhérer, *Management soviétique* (Paris, Presses de la Fondation des sciences politiques, 1982); EH Carr, *An History of Soviet Russia. Socialism in one Country. 1924–1926* (New York City, MacMillan, 1958), esp 315f; F Seurot, *Le système économique de l'URSS*, 1st edn (Paris, PUF, 1989).

to the creation by the Bank of Sweden of the so-called 'Nobel Prize' for Economics, in 1969, a (successful) counterfeit of the Nobel Prizes in physics, chemistry and physiology.[24] Once the management of economic affairs is legitimated by science, it need no longer be exposed to the will of the people and the decisions of the ballot box.[25]

The Gosplan was a model for similar structures in other communist countries, including China.[26] Underpinned by an impressive data-collection and statistical system,[27] its task was to collect and analyse all the information from all the economic regions and enterprises, from which it drew up three types of plan: long-term prospective plans; five-year plans; and annual plans. The plans gave greater weight to geographical or to industry sector factors in different periods. The organisational diagram of the Gosplan reflected this complexity. Its central bodies were organised both by industry sector, working with the economic planning departments of the corresponding ministry; and also by specialised departments (investment, territorial planning, etc). The central, federal, apparatus had regional and local equivalents, with a whole hierarchy of different bodies at Soviet republic and local level. The plans were supposed to reflect the Gosplan's overall goals while taking into account territorial specificities, in order to achieve balanced development in all economic regions of the USSR. The procedures evolved over time, but in the last decades of the USSR, greater weight was given to data fed up from the local level.[28] 'Control figures', which were the backbone of the plan, were produced, comprising relative and absolute magnitudes.[29] These were then fed down through the different industry sectors, republics and economic regions. Once they had been further broken down and defined by the regional authorities, these figures were passed down to company level, where the businesses prepared their own plans on the basis of these figures and in accordance with the terms of the contracts they had already signed with their clients and suppliers. All these plans were then fed back up to the republic-level Gosplan bodies, which synthesised them and

[24] On the history of the creation in 1969 of this 'Bank of Sweden Prize in Economic Sciences in Memory of Alfred Nobel', see P Moynot, 'Nobel d'économie: coup de maître', *Le Monde,* 15 October 2008.

[25] The idea of limited democracy sketched here was vigorously defended by Friedrich Hayek, one of the first Laureates of this so-called 'Nobel Prize'.

[26] For China, see BM Richman *Industrial Society in Communist China* (New York City, Random House, 1969); MA Hong (ed) *Modern China's Economy and Management* (Beijing, Foreign Language Press, 1990); C Eyraud, *L'entreprise d'État chinoise. De l'institution totale vers l'entité économique* (Paris, L'Harmattan, 1999) 215ff.

[27] M Mespoulet, *Construire le socialisme par les chiffres: enquêtes et recensements en URSS de 1917 à 1991* (Paris, INED, 2008) 240.

[28] *cf* H Chambre, Espace économique et Union soviétique (1959) 1 *Cahiers du monde russe et soviétique* 1 (May 1959) 25–48.

[29] *cf* Carr (n 23) 315f.

arbitrated between the initial figures and those proposed by the lowest levels. The republic-level plans went back to the central Gosplan, which in turn synthesised them, and passed them on for approval to the government of the USSR. This final plan became legally binding, and was fed down, a second time, in the form of directives affecting the various occupations and regions, and right down to enterprise level. Each level had to follow the annual plan prepared for it, with the Gosplan piloting the whole exercise and ensuring co-ordination with the central planning bodies of the other socialist countries and of the Council for Mutual Economic Assistance (Comecon). The accounting system used was the 'method of material balancing', which calculated resources and needs in kind, in order to measure the real flow of products and not their equivalent in money.

In legal terms, all these plans governing the production of goods and services took the form of unilateral administrative acts binding on the economic operators, who were all public operators. Contracts were simply the tools used to implement the quantifiable objectives fixed by the plans.[30] However, Soviet legal doctrine distinguished two types of contract, depending on whether it had been imposed on the economic operator or not. The first were called planned contracts, and they were imposed by the plan; they prescribed, for example, that enterprise A should be supplied by enterprise B. The planned contract contained all the obligations that could not be fixed at the level of the overall plan. It also constituted a legal commitment by the parties, a voluntary pledge to carry out the plan. The second type of contract, called non-planned contracts, was not the result of any legal obligation to contract, but of the fact that it was economically necessary or beneficial to do so in order to fulfil the plan's objectives. In certain circumstances, enterprise A could take the initiative to enter into contract with enterprise B or C. This freedom to contract was very limited, because the obligations undertaken by the contracting parties had to correspond to the assignments given in the plan. This sort of contract prefigures what we have seen spreading through Western Europe over the last 20 years, and which goes by the name of the contractualisation of public action and public services.[31]

The shift from liberalism to neoliberalism was precipitated by the implosion of real communism. The rivalry between Eastern and Western blocks disappeared, and with it the pressure on Western leaders to introduce welfare reforms. This is clearly visible in the plummeting number of new international Conventions adopted since the mid-1990s by the International

[30] *cf* R David, *Les grands systèmes de droit contemporain*, 7th edn (Paris, Dalloz, 1978), n 254f and p 305ff.

[31] *cf Conseil d'État* [French Council of State], *Le contrat, mode d'action publique et de production de normes*, Rapport public 2008 (Paris, La Documentation française, 2008) Vol 2, 398; J Caillosse, *La constitution imaginaire de l'administration*. (Paris, PUF, 2008) 145f.

Labour Organisation (with the exception of the maritime transport sector).[32] And former Eastern bloc countries were already familiar with a system in which, in Tzvetan Todorov's words, 'the Constitution and the laws are held in low esteem by the Security Forces and the other powerful figures of the regime […] for whom the individual can always get round the law applicable to all […]. Here everything can be arranged, negotiated, bought: the exception replaces the rule'.[33] Real communism had primed its populations to treat the law not as the inviolable framework within which individual interests may mutually adjust, but as one of those very interests themselves.

III. THE HYBRIDISATION OF COMMUNISM AND CAPITALISM

In order to grasp the process of hybridisation at work here, we must understand how very different Soviet-style planning was from the legal universe of Western liberalism. First, the planned economy was predicated on the abolition of the private ownership of the means of production, and the introduction of Socialist property 'either in the form of State property (owned by the people as a whole), or in the form of cooperative and collective-farm property (property of a collective farm or property of a cooperative association)'.[34] Secondly, the whole society was mobilised to achieve quantified objectives imposed from above by a government which operated as a dictatorship. By contrast, the liberal system is based on the privatisation of the means of production. All individuals are mobilised, as under communism, but in a generalised competition for the maximisation of their individual interests. From this the greatest social utility should spontaneously emerge. Another major difference is that under liberalism, although governments are regularly exposed to the sanction of the ballot box, the management of the economy is removed from any political or democratic scrutiny. The state's role is simply to guarantee the security of the economic calculations on which the market is based, to protect private property and to ensure that contracts are honoured. To this was later added the role of the social state, which was responsible for the longer timeframe of human life and the succession of generations.

These differences are considerable, and they should not be minimised. But if we look no further, we shall never understand what the two regimes had in common from the very start. As products of the same civilisation,

[32] Between 1995 and 2012, eight conventions were signed concerning non-maritime labour and six concerning maritime labour, compared with the 108 conventions adopted between 1946 and 1994.

[33] T Todorov, *Le siècle des totalitarismes* (Paris, Laffont, 2010) 18–19.

[34] The Constitution of the USSR (1936) Arts 4 and 5.

communism and capitalism had the same faith in gaining mastery over, and possessing, nature. Both saw themselves as bearers of a messianic promise expressed in terms so similar that it caught the attention of the more lucid Soviet dissidents once they had settled in the West.[35] The 1936 Constitution of the USSR defined the goals of central planning as 'increasing the public wealth, [of] steadily improving the material conditions of the working people and raising their cultural level, [of] consolidating the independence of the USSR and strengthening its defensive capacity'.[36] We could compare these goals with the EU's Lisbon Strategy of 2000, which promised to bring about, by 2010, 'the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth, with more and better jobs and greater social cohesion'. The very same philosophy of history, whose genealogy Karl Löwith has traced, lies behind these grandiose pronouncements: history as an indomitable march forward towards a radiant future.[37]

The shared economistic vision of communism and liberalism was supplemented, with the advent of neoliberalism, by a shared belief that the law was merely an instrument in what the Chinese Constitution called 'the economic order of society'. This instrumental conception of *rule by law* had led the Communist regimes to reject the idea of the *rule of law*. Lenin dreamt aloud of the 'very happy time' when the power of politicians and administrators would give way to that of engineers and agronomists, that is, to an order founded on science and technology, and no longer on the law:

> We are witnessing a momentous change, one which in any case marks the beginning of important successes for the Soviets. Henceforth the rostrum at All-Russia Congresses will be mounted, not only by politicians and administrators but also by engineers and agronomists. This marks the beginning of that very happy time when politics will recede into the background, when it will be discussed less often and at shorter length, and when engineers and agronomists will do most of the talking.[38]

The founding fathers of Marxism already entertained this vision of a world purged of politics in favour of technology. For Engels, once the Proletarian revolution had been achieved, 'the government of persons is replaced by the administration of things, and by conducting the processes of production,'

[35] *cf* A Zinoviev, *L'Occidentisme. Essai sur le triomphe d'une idéologie* (Paris, Plon, 1995).
[36] The Constitution of the USSR (1936), Art 11.
[37] K Löwith, *Weltgeschichte und Heilsgeschehen. Die theologischen Voraussetzungen der Geschichtsphilosophie* (Stuttgart, Kohlhammer, 1953); English tr *Meaning in History: The Theological Implications of the Philosophy of History* (Chicago, University of Chicago Press, 1957).
[38] Lenin, *Report On The Work Of The Council Of People's Commissars*, Eighth All-Russia Congress of Soviets in *Collected Works*, 4th edn (Moscow, Progress Publishers, 1965) Vol 31, 461–534.

which should lead to the gradual extinction of the state.[39] And Saint-Simon is often read as promising to replace the government of persons with the administration of things—whereas Saint-Simonian religion taught, on the contrary, and in accordance with liberal doctrine, that 'it is not simply a question of administering things, but of governing persons, a difficult task, an immense, a saintly task'.[40] What characterises neoliberalism, and defines its radical distinction from classical liberalism and its affinity with Marxism, is that it likewise envisages laws and the legal order not as stable frameworks securing life in society, but as pure instruments and products. Hence the utopia of a flat world, where the law no longer occupies a dominant position, as 'queen', but is simply a utensil judged by its efficacy. And if law is a *product*, then legislation is a technical issue, not an object of political debate. This was the spirit in which M Trichet, towards the end of his mandate as the President of the European Central Bank, described at length and in detail to an interviewer how urgent it was to privatise public services and deregulate labour markets, while insisting all the while that these reforms were in no way a *political* programme, but simply *technical* measures for the good of the '17 governments and 332 million citizens, of all leanings' whose best interests he felt he spoke for.[41] Once one accepts that law is a technical tool, it must, like any other product, be exposed to competition on a global market of norms in order for those products best suited to the needs of the economy to be selected.[42] This is how forum shopping comes to replace the rule of law, especially in those areas crucial to the social state, such as labour law, tax law and social security law.

Of course, we should not confuse neoliberalism in the strict sense—as it was broadcast across the Anglo-American world by Ronald Reagan and Margaret Thatcher—with German-style ordoliberalism, which stresses the institutional conditions underpinning the 'spontaneous order' of the market.[43] The differences between these two contemporary forms of economic liberalism are significant, and should not be played down. Germany's legal and economic resistance to the neoliberal tendencies of the EU is partly due to ordoliberalism's influence. Cases in point are the tensions

[39] F Engels, *Anti-Dühring. Herr Eugen Dühring's Revolution in Science*, tr E Burns (Moscow, Progress Publishers, 1947), III 'Socialism', II 'Theoretical'.

[40] I thank Pierre Musso for bringing to my attention this phrase of Enfantin's, which first appeared in *Le Globe* in July 1831 (and was later published in *Religion saint-simonienne. Enseignement central* (Paris, Imprimerie D'Éverat, 1831)).

[41] *cf* Trichet's statements quoted by A Dumini and F Ruffin, 'La Banque centrale, actrice et arbitre de la débâcle financière. Enquête dans le temple de l'euro' *Le Monde diplomatique,* November 2011.

[42] See below, ch 10, p 197ff.

[43] On this distinction, see M Foucault, *Naissance de la biopolitique. Cours au Collège de France, 1978–1979* (Paris, Gallimard-Le Seuil, 2004). On the influence of ordoliberalism on the construction of Europe, see P Anderson, *The New Old World* (London, Verso, 2009).

which have emerged around how the European Central Bank's mandate is interpreted,[44] and around the Anglo-American versus Rhineland models of the company.[45] Ordoliberalism's influence has also spotlighted the particular type of governance by numbers which the eurozone has adopted, with its 'control figures' set in stone in the treaties on the single currency.[46] But on the world stage, Germany does not carry the same weight as the United States. And above all, since ordoliberalism is a contemporary form of German nationalism, it does not have the same imperialist and universalist pretentions outside of the eurozone as does neoliberal ideology. The latter claims to be the expression of universal economic laws which transcend the diversity of legal cultures. This is why it could so easily replace a communist eschatology whose *telos* was to see an identical economic order reign across the whole world.

So neoliberalism has in common with communism its desire to see the law geared to calculations of utility. The theoretical difference between these two utopian visions is that Soviet-style planning believed in a centralised calculation of social utility as a way of governing the behaviour of individual economic operators, whereas neoliberalism believes in these economic operators' calculations of individual utility as a way of maximising social utility. Neoliberal governance expunges all trace of heteronomy. In substituting governance for government, technical regulation (*la régulation*) for regulations (*la réglementation*), ethics for morals and norms for rules, it closes the gap between being and ought-to-be. This gap still existed in communist planning, which conceived itself as a *government* by numbers. The Soviet leaders saw themselves as the engineers of a new society, whose construction depended on the commitment of the working class labouring under their orders. The construction of socialism required unquestioning obedience, and permanent surveillance by the party hierarchy, similar to the managerial control of workers in a Taylorist factory. Soviet planning, understood as a tool for the construction of communism, can thus be situated somewhere between government by laws and governance by numbers. Although the plan's directives were legitimated by mathematical formulae rather than by the sovereignty of the law, they resembled laws and regulations in that they still addressed the citizen from a heteronomic position. Governance by numbers goes one step further in its dethroning of the law. As in economic planning, calculation replaces law as the basis of the norm's

[44] See Decision No 2 BvR 2728/13 of the *Bundesverfassungsgericht* of 14 January 2014 on the European Central Bank's programme of 'Outright Monetary Transactions' (OMT); S Dahan, O Fuchs and M-L Layus, Whatever it takes? A propos de la décision OMT de la Cour constitutionnelle fédérale allemande (2014) *Actualité juridique de droit administrative* 1311.

[45] *cf* R Hornung-Draus 'Le modèle allemand d'entreprise' in A Supiot (ed) *L'entreprise dans un monde sans frontières* (Paris, Dalloz, 2015).

[46] See ch 8, p 157ff.

legitimacy. But the norm is now akin to a biological norm or a computer programme, it results from the interaction of individual calculations and it operates *from within*. This interiorisation, or eradication of heteronomy, is precisely what governance means: whereas *government* implies a commanding position above those governed, and the obligation for individual freedoms to observe certain limits, *governance* starts out from individual freedoms, not to limit but rather to programme them.

Economists were not the only ones to seek to topple the law by gearing it to calculations of individual utility. Much of the sociological and philosophical critique we have seen over the last half century has branded the state and the legal apparatus—and more generally any form of heteronomy—as ruses of power and assaults on individual sovereignty. This position is shared by much of what has been called post-modern thought, and it can be found in authors of very different leanings, disciplines and specialisms.[47] Their common ground is that they all confirm Cioran's remark on the post-war French intelligentsia: 'They all claim to speak in the name of freedom yet none of them respect the form of government which defends and embodies it'.[48] Foucault, for example, discusses law as follows, in his lecture 'Society must be defended':

> The essential function of the technique and discourse of law is to dissolve domination in power and to replace that domination, which has to be reduced or masked, with two things: the legitimate rights of the sovereign on the one hand, and the legal obligation to obey, on the other. […]
>
> My general project has been, basically, to reverse the general direction of this analysis, which has, I think, been the entire discourse of law since the Middle Ages. I have been trying to do the opposite, in other words to stress the fact of domination in all its brutality and its secrecy, and then to show not only that law is an instrument of that domination—that is self-evident—but also how, to what extent, and in what form the law (and when I say the law [*le droit*], I am not thinking just of legislation [*la loi*], but of all the apparatuses, institutions, and rules that apply it) serves as a vehicle for and implements relations that are not relations of sovereignty, but relations of domination. […]
>
> The legal system and the judiciary are permanent vehicles for relations of domination, and for polymorphous techniques of subjugation. The law must, I think, be viewed not in terms of a legitimacy that has to be established, but in terms of the procedures of subjugation it implements.[49]

[47] The ambiguity of 'post-modern' critique in this respect was pin-pointed by Luc Boltansky and Ève Chiapello already in 1999 in their *The New Spirit of Capitalism*, tr Gregory Elliott (London/New York City, Verso Books, 2006).

[48] EM Cioran, *Histoire et utopie* (Paris, Gallimard, 1960) 21.

[49] M Foucault, 'Society Must Be Defended', Lectures at the Collège de France, 1975–1976, 14 January 1976, tr D Macey (New York City, Picador, 2003) 26–27 [*tr mod*].

Equating law with a machine which subjects individuals to power can also be found in Bourdieu, for whom even legal controversies, and the divide between legal academics and legal practitioners, should not mask the fact that they are all 'objectively complicit' in the same enterprise of symbolic domination:

> The hostility between the holders of different types of juridical capital, who are committed to very divergent interests and world-views in their particular work of interpretation, does not preclude the complementarity of their functions. In fact, such hostility serves as the basis for a subtle form of the division of the labor of symbolic domination in which adversaries, who are objectively complicit, fulfill mutual needs. The juridical canon is like a reserve of authority providing the guarantee for individual juridical acts in the same way a central bank guarantees currency.[50]

Clearly the assimilation of law to a financial product ('legal capital') found a welcome home in sociology long before any theory of 'forum shopping'. But we would not wish to reduce the important body of works produced by these authors to what they wrote on law. Nor should we forget that despite this general trend in their thinking, they nonetheless defended the state and individual rights from time to time. For example, in the name of a 'critical morality', Foucault condemned 'the inflationary criticism of the state' by those who tar with the same brush the totalitarian state and the welfare state, and he reminded 'all those who share in the great phobia of the state' that they are 'swimming with the tide'.[51] And Bourdieu, who had declared that 'the state is a quasi-metaphysical notion which must be blown to bits',[52] took a stance, towards the end of his life, in favour of the social state and the public services, going so far as to write that 'the struggle of intellectuals must be directed first and foremost against the shrinking of the state'.[53] But the respect owed to their works and their thought also obliges us to point out the extraordinarily impoverished vision they have of law, when we compare it with the profound and subtle understanding which their great predecessors—Durkheim, Mauss or Gurvitch—had. After all, who would deny that law is part of the machinery of power and an instrument

[50] P Bourdieu, 'Force of Law: Toward a Sociology of the Juridical Field', tr R Terdiman (1987) *Hastings Law Journal* 38, 805.

[51] In *Naissance de la biopolitique* (n 43) 196–97. This ambiguity did not escape Márcio Alves da Fonseca, who noted that although the theme of law is omnipresent in Foucault's writings, it is never clearly defined as a concept, nor elucidated theoretically. (*cf* M Alves da Fonseca, M Foucault et al in A Supiot (ed) *Tisser le lien social* (Paris, FMSH, 2005) 164; *Michel Foucault e o direito* (São Paulo, Max Limonad, 2002), trad fr *Michel Foucault et le droit* (Paris, L'Harmattan, 2014)).

[52] In *Réponses,* Paris, Seuil, 1992, p 86 [English translation: *An Invitation to Reflexive Sociology*, 1992].

[53] In *Contrefeux. Propos pour servir à la résistance contre l'invasion neo-libérale* (Paris, Raisons d'agir, 1998) 46.

of domination? This affirmation can hardly be considered to add to our sum of knowledge. But reducing law to this function most certainly represents a regression, and shows a lack of understanding of the law as a nodal point in the domestication of power. Law is most certainly a technique of power, but it is a technique which binds and limits power, making it a particularly difficult object to think adequately.

As Louis Dumont has shown on a broader canvas, this reduction of political theory to a theory of power can be traced back to modern economic ideology. 'As soon as hierarchies are abolished, subordination must be explained as the mechanical result of an interaction between individuals, and so authority deteriorates into 'power' […]. We forget that this occurs only on the basis of a particular ideology, namely individualism: thus political speculation has unknowingly walled itself up within the confines of a modern ideology. Yet recent history has powerfully shown how worthless this approach is, with the disastrous attempt by the Nazis to found power only on itself'.[54] Beyond the reduction of law to power or domination, it is every form of social heteronomy which is under attack. Significantly, the last writings of Foucault were devoted to the self-government of the individual, what he called 'the perfect sovereignty of self over self',[55] freed not only from any legal system but also from any moral code.

The dethroning of heteronomy in all its forms is expressed during the same period in a new normative ideal theorised by Deleuze and Guattari in *A Thousand Plateaus*[56] as an ideal of networks and mutual adjustment, of free-floating identities and evanescent frontiers. Centred systems, embodied in territorial states, are set against

> acentered systems, finite networks of automata in which communication runs from any neighbor to any other, the stems or channels do not preexist, and all individuals are interchangeable, defined only by their *state* at a given moment, such that the local operations are coordinated and the final, global result synchronized without a central agency.[57]

Since the Internet did not yet exist in 1980, this cybernetic utopia employs a botanical metaphor, the rhizome, which is acclaimed in the following terms:

> Unlike trees or their roots, the rhizome connects any point to any other point, and its traits are not necessarily linked to traits of the same nature; it brings into

[54] L Dumont, *Homo æqualis*, t I *Genèse et épanouissement de l'idéologie économique* (Paris, Gallimard, 1977) 19, English translation: *From Mandeville To Marx: The Genesis And Triumph Of Economic Ideology* (Chicago, Chicago University Press, 1977).

[55] M Foucault, *The History of Sexuality*, 3 vols, tr R Hurley (New York City, Pantheon, 1978–86) Vol 2, *The Use of Pleasure* (Pantheon, 1985).

[56] G Deleuze and F Guattari, *A thousand plateaus. Capitalism and schizophrenia*, tr B Massumi (Minneapolis, University of Minnesota Press, 1987).

[57] ibid, 17.

> play very different regimes of signs, and even non-sign states. The rhizome is reducible neither to the One nor the multiple. It is not the One that becomes Two or even directly three, four, five, etc. It is not a multiple derived from the One, or to which One is added (n + 1). It is composed not of units but of dimensions, or rather directions in motion. It has neither beginning nor end, but always a middle [*milieu*] from which it grows and which it overspills. It constitutes linear multiplicities with n dimensions having neither subject nor object, which can be laid out on a plane of consistency, and from which the One is always subtracted (n–1).[58]
>
> A rhizome has no beginning or end; it is always in the middle, between things, interbeing, intermezzo. The tree is filiation, but the rhizome is alliance, uniquely alliance. The tree imposes the verb 'to be' but the fabric of the rhizome is the conjunction, 'and … and … and …' This conjunction carries enough force to shake and uproot the verb 'to be'.[59]

This really is a flat world ('laid out on a plane'), and not even a planned one, as in the Soviet era. It is a world without limits (it has no beginning and no end), it has no central agency or stable identities (neither individual, the One, nor collective, the multiple); it is a world in which 'numbers become the subject',[60] bonds are binary (the rhizome is alliance: and … and … and), and its only law is movement (it grows out and overspills). Mafia networks have long been organised along these lines, yet Deleuze and Guattari believed that with this reticular model they had discovered something radically new and subversive of the established order, an order symbolised, in their view, by the verticality of the tree plunging its roots into the ground. This much-decried emblem was easily comparable with the worst forms of nazism, they maintained. We had been 'too eager' to criticise the reduction of human beings to deterritorialised numbers in the universe of the concentration camps because, 'horror for horror, the numerical organisation of men is certainly not more cruel than their organisation by lineages or States'.[61] They thought they were one step ahead of capitalism when in fact they were paving the way for its transformation into neoliberalism.[62] Championed by them as a model of radicality, the rhizome could in fact serve as the logo of globalised capital today. It has no territorial boundaries, and its economic networks are so powerful that they can indeed uproot the authority of states, reduce identities to interchangeable numbers, and make laws useless in the face of the contract—all laws, except that of permanent change.

[58] ibid, 21.
[59] ibid, 23.
[60] Deleuze et Guattari, *Capitalisme et schizophrénie 2: Mille plateaux* (Paris, Minuit, 1980) 484.
[61] ibid, 486.
[62] For a similar analysis, see D-R Dufour, *L'individu qui vient … après le libéralisme* (Paris, Denoël, 2011) 128f.

Such zealous uprooting of whatever is still standing was diagnosed by Simone Weil as 'the most dangerous malady to which human societies are exposed',[63] because it gradually extends the proletarianisation which had first been the lot of workers and colonised peoples to everyone. Weil was in no doubt that there was no revolutionary potential in destroying roots, because she understood, much earlier and much more profoundly than Deleuze and Guattari, that this process was in fact driven by capitalism. As she noted:

> Money destroys human roots wherever it is able to penetrate, by turning desire for gain into the sole motive. It easily manages to outweigh all other motives, because the effort it demands of the mind is so very much less. Nothing is so clear and so simple as a row of figures.[64]

One cannot metabolise what comes from the outside unless one is rooted somewhere. And one of the effects of the mass destruction of roots is to impair this capacity to metabolise situations, with the result that all that remains is a choice between two forms of stultification: bowing to the victory of the commodity, or accrediting fantastical identities, which are the breeding ground of fundamentalisms of all sorts.

So we can understand better, with hindsight, what this post-modern thought, which was welcomed into American universities under the name of French Theory, was really about. It operated as a theoretical hinge enabling part of the intelligentsia to switch from communism to neoliberalism. This turning-point—from one blind alley to another—was a period of great intellectual vitality for the greatest of these thinkers. However, when the dust settled, their disciples lapsed back into Stalinist sectarianism, rallying to the total market with the same fervour as they had previously expressed for the 'Great Helmsman' Chairman Mao or, earlier still, for the magnificent 'little father of the peoples' and the 'great mechanic of the engine of history'.[65] But let's not get things out of proportion: the French intellectual scene in all its greater or lesser brilliance should not receive all the glory—or opprobium—for providing neoliberalism with its theoretical basis. Some years earlier, the economists and jurists of the Chicago School had already got down to it, with infinitely more powerful effects globally on the making of law than this so-called French Theory.

[63] S Weil, *The Need for Roots. Prelude to a Declaration of Duties towards Mankind* [1943], tr A Wills, pref TS Eliot (London, Routledge & Kegan Paul, 1952) 44.

[64] ibid, 41. In this respect, Weil is a successor to Charles Péguy: on 1 August 1914 he wrote that 'for the first time in the history of the world, money is the master, without limit or measure. For the first time in the history of the world, money stands alone opposite spirit' (C Péguy, 'Note conjointe sur M Descartes et la philosophie cartésienne' in *Œuvres complètes*, *tome IX: Œuvres posthumes* (Paris, Éditions de la Nouvelle Revue française, 1924) p 57–331.

[65] *cf* J-M Goulemot. *Pour l'amour de Staline. La face oubliée du communisme français* (Paris, ECRS, 2009).

7

Calculating the Incalculable: The Law and Economics *Doctrine*

'If the stakes are high enough, torture is permissible'[1]

WITHIN THE FRAMEWORK of neoliberalism, laws figure merely as legislative products which compete on a global market of norms. Their isonomic function disappears; that is, their role as a shared reference valid for everyone. As a result, neoliberalism faces a dilemma previously confronted by communist states when they abandoned 'the fetishism of the legal form'[2] (as Marxists put it): with law transformed into simply a tool to implement calculations, what can serve as a common reference by which to harmonise human activity, define each person's place and judge his or her actions? Soviet central planning had provided an answer by enlisting the whole of society, through administrative directives supplemented by 'planned contracts', into the process of achieving quantified objectives. 'Control figures', defined at the very top and fed down to individual level, served to assign each person a task and to judge how well it was carried out. In short, Soviet planning was the first attempt to introduce what René Guénon has called 'the reign of quantity'.[3]

No analogous problem arose for classical liberalism, because the contractual order was subordinated to the sphere of the law. But neoliberalism, with its aim of creating a society ruled by economics, simply cannot dodge the issue. The calculation of private interests cannot be referred to the incalculable value of a categorical imperative, as represented by the law. Nor can these calculations be measured against 'control figures' handed down from above. This is why neoliberalism has set up a self-referential system in which calculations of utility ultimately determine how the law is applied. The *Law and Economics* doctrine sought to provide a theoretical basis for

[1] 'If the stakes are high enough, torture is permissible' RA Posner, The Best Offense, *The New Republic*, 2 September 2002.

[2] This is Michel Miaille's formulation, in *Une introduction critique au droit* (Paris, Maspéro, 1976) 388.

[3] R Guénon, *Le Règne de la Quantité et les signes des temps* (Paris, Gallimard, 1945) 272.

these self-referential mechanisms.[4] Over the last 30 years it has acquired paradigmatic status for Western law, influencing not only research but also case law and legislation.

Before analysing this doctrine from a legal perspective, we should make an important preliminary point. Fortunately, the contribution economics can make to law is not exhausted by the *Law and Economics* approach.[5] One could even say that this particular branch of economics provides us with the least insight into legal thought, because it does not understand law in all its anthropological, historical and cultural depth, but only as a means to implement an economic calculation. The *Law and Economics* doctrine should thus not be confused with the tradition of political economy, which aims at describing and understanding the institutional frameworks delimiting economic activity and not at subordinating these to a model of computational rationality. The approach of political economy, which is already present in Veblen's[6] work, was pursued in the United States by what has been called institutionalist economics. It was a highly dynamic field before the Second World War,[7] and still has a certain following, albeit very small.[8] It gave rise to a 'neo-institutionalist' school, whose best-known representative is Olivier E Williamson.[9] Unlike marginalist or utilitarian currents which are dominant today, institutionalist theory is not predicated on the harmonisation of private interests, but instead seeks to explore the frameworks and possibilities of collective action. It is worth mentioning that in France this theory was taken up predominantly by scholars with a background in engineering, who sought to anchor economic thinking in the realities of the productive process. It has given rise to the regulation school,[10] which

[4] These legal constructs should not be confused with those of Niklas Luhmann and Gunther Teubner, who were influenced by the biological theories of Francisco Varela. See in particular, N Luhmann, *Legitimation durch Verfahren* (Frankfurt am Main Suhrkamp, 1969); G Teubner, *Recht als autopoietisches System* (Frankfurt/Main, Surhkamp, 1989); by the same author, *Droit et réflexivité. L'auto-référence en droit et dans l'organisation* (Paris, LGDJ, 1994). On the concept of reference, see P Legendre, *Le Désir politique de Dieu. Essai sur les montages de l'État et du Droit*, 2nd edn (Paris, Fayard, 2005) 350ff.

[5] This is why we shall use the original American name here rather than the broader category of 'the economic analysis of law'. For an excellent overview of the different economic approaches to law, see T Kirat, *Économie du droit* (Paris, La Découverte, 2002).

[6] T Veblen, 'Why is Economics Not an Evolutionary Science' (1898) *The Quarterly Journal of Economics* 12; (1899) *Theory of the Leisure Class*.

[7] JR Commons, *Legal Foundations of Capitalism* (1924); With a new introduction by JE Biddle and WJ Samuels (New York City, Transaction Publisher, 1995).

[8] WJ Samuels, *Economics, Governance, and Law: Essays on Theory and Policy. Cheltenham* (UK, Edward Elgar, 2002); GM Hodgson, *Economics and Institutions: A Manifesto for a Modern Institutional Economics* (Cambridge, Polity Press, 1988); GM Hodgson, WJ Samuels and MR Tool, *The Elgar Companion to Institutional and Evolutionary Economics* (London, Edward Elgar, 1994).

[9] OE Williamson, *Economic Institutions of Capitalism* (New York City, Free Press, 1985).

[10] R Boyer, *Théorie de la régulation: L'Etat des savoirs* (Paris, La Découverte, 2002); M Aglietta (ed), *Ecole de la régulation et critique de la raison économique* (Paris, L'Harmattan, 1994).

emphasises macroeconomic institutional frameworks, and to the economics of conventions,[11] which is more interested in the strategies of coordination used by actors of supposed limited rationality in situations of uncertainty. More generally, many economists are attentive to the non-economic determinants at work in the creation and distribution of wealth.[12] Beyond their differences, all these authors agree that, first, an economy has no existence outside of the societies or institutions of which it forms a part; and secondly, that we can understand the economy only by looking at the real behaviour of economic agents and at the law as it stands. These fields of research are essential for a better understanding of the law because their work of contextualisation is a prerequisite for an insightful legal analysis.

The doctrine of *Law and Economics* is quite different. It was developed by Henry Simons and Friedrich Hayek at the Law School of the University of Chicago in the late 1940s, in close collaboration with economists at the same university, amongst them Milton Friedman. Its explicit ideological aim was to combat Keynesianism and state interventionism by defining the legal and institutional frameworks best suited to fostering a competitive environment. The economic analyses produced there were thus from the outset conceived as the theoretical basis for a political programme with global ambitions. The core of this programme was elaborated within the Mont Pelerin Society, the first international and economically liberal think tank, which was founded by Hayek in 1947 with funds provided by Swiss businesses. It is still going strong today. The Society's website describes its members—top economists, politicians and business leaders—as those who

> see danger in the expansion of government, not least in state welfare, in the power of trade unions and business monopolies, and in the continuing threat and reality of inflation. Without agreeing on everything, the members see the [Mont Pelerin] Society as an effort to interpret in modern terms the fundamental principles of economic society as expressed by those classical economists, political scientists, and philosophers who have inspired many in Europe, America and throughout the Western World.[13]

An important link is made here between a neoliberal political position and belief in the scientificity of economic analysis. In order to get public opinion and academic circles to accept this link, the economists in question managed to have a new Nobel Prize for the Economic Sciences created,

[11] J-P Dupuy, *L'Avenir de l'économie: Sortir de l'écomystification* (Paris, Flammarion, 2012); O Favereau, 'Note critique sur le droit, l'économie et le "marché"' (2012) *Revue de droit du travail* 9, 479–87. A Orléan, *L'empire de la valeur. Refonder l'économie* (Paris, Seuil, 2011); R Salais and M Storper, *Les mondes de productions* (Paris, EHESS, 1995).

[12] For France, see R Guesnerie, *L'économie de marché* (Paris, Le Pommier, 2006); A Masson, *Des liens et des transferts entre générations* (Paris, EHESS, 2009); T Piketty, *Capital in the Twenty-First Century*, tr A Goldhammer (Cambridge, Mass, Harvard University Press, 2014).

[13] See www.montpelerin.org.

in 1969, whose winners have included many Mont Pelerin Society members such as Milton Friedman, Ronald Coase and Gary Becker. Alfred Nobel's great-nephew condemned this sleight of hand in 2001, maintaining that in legitimating the positions held by the Chicago School economists, the Royal Bank of Sweden 'had laid its egg in another bird's nest'.[14] When we examine the *Law and Economics* doctrine from a legal perspective, we understand that it is underpinned by a dogma structurally no different from that of scientific socialism: in both cases, law is merely a tool for implementing underlying scientific laws, which occupy the position of a *Grundnorm*, a founding norm valid for all humanity. Those who first attacked the Social State in the name of 'the fundamental principles of economic society' were undoubtedly just as sincere as the founding fathers of communism. The latter genuinely believed that economics was a science equal to the natural sciences, and so they sought to adapt law and institutions to it. But the same cannot be said for the ensuing generations. As in Orwell's 'animal farm',[15] one can always find 'useful idiots' who continue to believe in neoliberalism (as previously in communism). But they do this out of class interests, not zealous faith. In reality, communism's utopianism produced a thuggish and unscrupulous *Nomenklatura*, and neoliberalism has put power into the hands of a no less cynical, grasping and corrupt plutocracy.[16] This is why the ruling classes—particularly in post-communist countries—have so effortlessly passed from one regime to the other. Soviet planning and neoliberal programming also share the belief that since the economy is based on rational calculation, it should not be exposed to the vagaries of democratic elections. Recently the outgoing President of the European Commission, José Manuel Barroso (himself a former Maoist activist), expressed the need for a restricted democracy, when one of his former colleagues, Mario Monti, was defeated in Italy's general elections. He reflected out loud that:

> The question we have to ask ourselves is the following: should we determine our policy, our economic policy, by short-term electoral considerations or by what has to be done to put Europe back on the path to sustainable growth? For me the answer is clear. We should be serious, and not give in to immediate political or party considerations.[17]

[14] 'The Swedish Riksbank has put an egg in another very decent bird's nest and thereby infringed on the trademarked name of Nobel. Two thirds of the Bank's prizes in economics have gone to US economists of the Chicago School who create mathematical models to speculate in stock markets and options—the very opposite of the purposes of Alfred Nobel to improve the human condition.' Peter Nobel, quoted by H Henderson, 'The "Nobel prize" that isn't', *Le Monde diplomatique*, English edn, February 2005.

[15] George Orwell, *Animal Farm* [1945].

[16] We gained some insight into the morals and mores of this ruling class from the US Congress's auditions of the bankers and traders involved in precipitating the financial crisis of 2008. See also the documentary *Inside Job* (2010) by Charles Ferguson, with Matt Damon, in which one can see and hear many of the protagonists of the crash.

[17] Declaration to Reuters News Agency, Brussels, 26 February 2013.

The alliance between capitalism and democracy was sealed by the social state and also by Western competition with communism. But capitalism in fact has no need of democracy. It has never had a problem with dictatorships, as long as they respect the market economy. On the contrary, neoliberal doctrine has always singled out democracy as a source of disturbance for the spontaneous order of the market.[18] We should not forget that the place where the Chicago School first tested its theories was in Chile under Pinochet's dictatorship.[19]

Unlike the first economic analyses of law, the *Law and Economics* doctrine claims to encompass the whole legal order, and not simply the legal rules governing trade and industry. This extended scope corresponds to the tendency of economists to define their discipline not by its object (the production and distribution of wealth), but by its method, which can supposedly reveal the profound motivations of human behaviour in every area of life, and produce a system of rules to account for this behaviour. A book by Gary Becker, who was awarded this so-called Nobel Prize for Economic Sciences in 1992, bore the unambiguous title of *The economic approach to human behaviour*,[20] and theorised this shift from object to method. The call on which it ended, to link economics to biology, was heard loud and clear, to judge by the success of neuro-economics, today's version of the recurrent attempts since Francis Galton to ground human behaviour ultimately in biology.[21] Economics thus defined itself as a total science, capable of analysing in terms of the market all aspects of human life, whether family life (the marriage market), politics (the electoral market), intellectual endeavour (the market for ideas)[22] or religious life (the market of religions).[23]

The *Law and Economics* doctrine is just one corner of this vast project. In its descriptive aspects it relies on some very old legal practices, which are nothing but plain common sense. Cost–benefit analysis, for instance, was introduced in the nineteenth century by the state corps of engineers, in the US as well as in France.[24] As for how judicial decisions may encourage diligence or discourage negligence, the idea is probably as

[18] *cf* W Streeck, *Buying Time: The Delayed Crisis of Democratic Capitalism* (London, Verso, 2014); W Brown, Neo-liberalism and the End of Liberal Democracy (2003) 7 *Theory & Event* 1.

[19] *cf* JG Valdés, *Pinochet's Economists: The Chicago School of Economics in Chile* (Cambridge, Cambridge University Press, 1995).

[20] GS Becker, *The Economic Approach to Human Behavior* (Chicago, University of Chicago Press, 1976).

[21] See above, ch 5, pp 90–91.

[22] R Coase 'The Economics of the First Amendment. The Market for Goods and the Market for Ideas' (1974) 64, *American Economic Review, Papers and Proceedings* 2, 384–91.

[23] *cf* L Mayali (ed) *Le façonnage juridique du marché des religions aux Etats-Unis* (Paris, Mille et une nuits, 2002).

[24] *cf* T Porter 'US Army Engineers and the Rise of Cost-Benefit Analysis' in *Trust in Numbers* (ch 5, fn 2) 148–89.

old as the judgement of Solomon. But what really characterises this doctrine is its aim to derive from such particular practices generally valid norms to which all legal systems must conform. These normative ambitions are perfectly explicit, and the doctrine's influence, initially relayed by international economic bodies, was and still is considerable at all levels of law-making. There one can find, intact, the faith in a numerically computed social harmony, and in the possibility of realising the Platonic dream of a city state ruled not by human laws in their inevitable arbitrariness and imperfection, but by a royal science capable of securing the government of men through knowledge of numbers.

From its origins in the United States, with the publication of Richard Posner's pioneering work, *Economic Analysis of Law*, in 1972,[25] this doctrine spread to France via the Canadian legal scholars Ejan Mackaay and Stéphane Rousseau.[26] It has met with extraordinary success,[27] generating such mountains of secondary literature that no exhaustive account of it is possible.[28] Its different advocates share a belief in a certain number of theories and principles, which we explicate below, all of which justify a normative order based entirely on calculation.

I. GAME THEORY

The idea that calculation can replace judgement has a long history, at least since Pascal's wager and probability theory.[29] Its popularity peaked in the late eighteenth and early nineteenth centuries, and then declined, under fire from the positivists who criticised it as, in Comte's words, 'offering our own ignorance as the natural measure of the degree of probability of our various opinions'.[30] Yet even enthusiasts such as Condorcet and Laplace applied it only to situations resembling games of chance, where players calculate their chances of winning or losing without any ethical stakes being involved. In other words, they certainly never considered that society as a whole, and the economy, could be a vast gaming hall or casino. Only when economics decided that game theory could be applied to every situation of

[25] R Posner, *Economic Analysis of Law*, 8th edn (Aspen, Wolters Kluwer, Aspen, 2010).

[26] E Mackaay and S Rousseau, *Analyse économique du droit* (Paris, Dalloz-Thémis, 2008).

[27] *cf* B Deffains and É Langlais (eds) *Analyse économique du droit: Principes, méthodes, résultats* (Paris, De Baeck, 2009) 407; and for a historical overview: B Deffains and S Ferey, *Agir et juger: Comment les économistes pensent le droit* (Paris, Université Panthéon-Assas, 2010.

[28] Among the most recent, see particularly R Cooter and T Ulen, *Law and Economics*, 6th edn (Harlow, UK, Prentice Hall, 2011). Also the excellent bibliographical appendices in the books by Thierry Kirat and Ejan Mackaay.

[29] See above, ch 5, p 93ff.

[30] A Comte, 'Relation of Sociology to the other departments of positive philosophy' in *The Positive Philosophy*, tr H Martineau, intro F Harrison (London, George Bell and Son, 1896), Vol 2, Ch IV, 223.

uncertainty was the idea of the *limited* legitimacy of probability calculations overturned.[31]

Game theory, and one of its best-known examples, the Prisoner's Dilemma, is familiar even to beginners in economics. In this dilemma, invented in 1950 by Tucker, two prisoners, charged with the same crime, are each encouraged separately to betray the other in return for the promise of the accuser's acquittal (sentence = 0) and a heavy sentence (= 20 years in jail) for the one accused. If both refuse to collaborate, each will receive a light sentence (= 1 year). If each betrays the other, each will receive a moderate sentence (= 5 years). This situation can be compared to a 'game' in which each prisoner must optimise his situation, but this optimisation depends on the decision taken by the other party. If each relies on calculation, each will betray the other, whereas the optimal solution would have been that each refuses to collaborate. This is meant to demonstrate that strategies of cooperation grounded in a contract are more efficient at producing collective utility than is non-cooperation between agents acting under a common law.

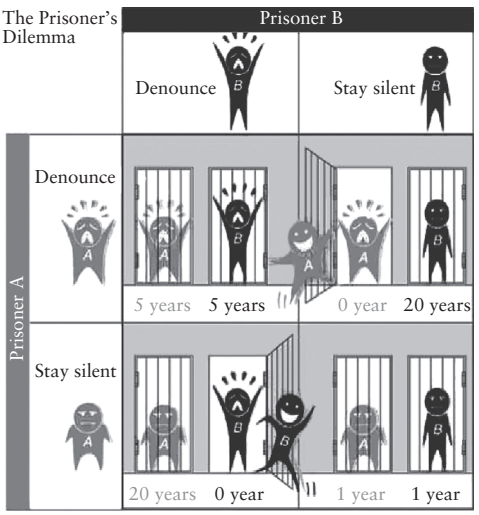

Figure 7.1: The Prisoner's Dilemma

We should note that this argument has eliminated any Kantian-style perspective, in which an incommensurable value is attached to actions

[31] Game theory was systematised by Oskar Morgenstern and John von Neumann in 1944 (in *Theory of Games and Economic Behavior* (Princeton University Press, 1944)). The so-called 'Nobel Prize' in economics is regularly awarded to authors who work within this theoretical framework, which has become something of a paradigm in the economic sciences today. For an overview, *cf* G Giraud, *La théorie des jeux*, 2nd edn (Paris, Flammarion, 2009). And for a legal approach, see M van de Kerchove and F Ost, *Le droit ou les paradoxes du jeu* (Paris, PUF, 1992).

performed out of a sense of justice, duty or honour. There is no place in this game theory for Jean Moulin's heroism, nor for all those who, for better or for worse, hold certain values in greater esteem than their own life. The marginalist or utilitarian economics on which this theory rests must pretend these values do not exist, and work with an incredibly impoverished notion of 'game-playing', understood as quantification of the stakes involved, and stripped of any anthropological depth.[32] From a legal standpoint, the extension of game theory to every situation of uncertainty implies a universe entirely governed by contract, in which individuals are driven by two forces dear to the Chinese legalists: fear and greed.[33]

In the terms of game theory, optimal outcomes, understood as the sum of individual utilities, are achieved only by the use of contracts, whereas non-cooperation between agents gives negative results; had the two prisoners made a pact of mutual non-denunciation, each would have come out of it better. This theory not only justifies off-the-record dealings, but more generally provides the basis for 'the contractualisation of society'. Since appealing to the law results in non-cooperation between individuals, one would do better to generalise use of the contract, which enables individuals to optimise their utility on a case by case basis, and thus to optimise collective utility.

II. AGENCY THEORY

One extension of game theory which directly affects the realm of law is agency theory. It focuses on situations in which the optimal result, which is supposed to be produced spontaneously by the contractual relation, is compromised by an asymmetrical distribution of information between the contracting parties. This occurs whenever a contract creates an 'agency relationship', that is, whenever there is 'a contract under which one person (the principal) engages another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent'.[34] An 'agency relationship' is a broad notion applicable indifferently to the employment contract, the relation between shareholders and company directors, or to situations of delegation. It goes without saying that each party in these relationships is presumed to be motivated exclusively by egotistical concerns. The risk is that agents may exploit the leeway they have in carrying out their tasks to serve their own rather than the principal's ends. Agency theory claims that such problems can be solved,

[32] See R Hamayon Jouer, *Etude anthropologique à partir d'exemples sibériens* (Paris, La Découverte, 2012).

[33] *cf* above, ch 3, p 60f.

[34] M Jensen and W Meckling, Theory of the firm: managerial behavior, agency cost, and ownership structure (1976) *Journal of Financial Economic*, Volume 3, Issue 4, October 1976, 305–360.

once again, by contractualisation, and notably by giving the agent a financial incentive to produce the most profitable results for the principal.[35] This theory provided the doctrinal basis for the trend in offering stock options to top business managers, and in fixing salaries individually. As is often the case with the economic analysis of law, it is tempting to see this doctrine simply as a slightly naive formalisation of what has long been common knowledge and practice. However, it also isolates the solutions proposed from their contexts and gives them a generalisable normative force. In other words, the theoretical innovations introduced by agency theory are as meager as their normative impact is huge.

For example, agency theory was central to the doctrine of corporate governance, understood as the generalisation throughout commercial law of a reductive idea of the business enterprise as the property of its shareholders.[36] Of course this idea has no serious legal grounding, because shareholders have never owned anything except their shares.[37] But it was used to contest the idea that a business enterprise is an economic entity whose freedom of action should be secured against shareholders and employees alike, while both should have the right to monitor together the directors' decisions. The application of agency theory has resulted in subjecting companies to the snapshot time of the financial markets, thus ruining precisely their entrepreneurial ability, which is predicated on the longer timescale of a collective project.[38]

Applying agency theory to the employment contract also has deleterious effects because it inverts the founding perspective of labour law. The law's function becomes the protection of employers from the power of employees rather than the protection of employees from the power of employers. We have seen a panoply of mechanisms developed over the last 30 years to destroy the individual and collective autonomy of employees. They have been applied up and down the salary scale, but obviously in different forms. At the top, salaried company directors are dissuaded from pursuing the business's long-term interests—which might conflict with short-term profitability—by pegging their final pay to shareholder profits through devices such as stock options. To keep employees lower down the scale from protesting, the national and industry-level safeguards provided by the Fordist compromise have been reduced. So-called 'atypical' [*atypique*] and insecure

[35] See the example of contracts with real estate agents, examined in EA Posner, *Agency Models in Law and Economics*, John M Olin Law & Economics Working Paper No 92 (2000) *The Chicago Working Paper Series*, 12, www.law.uchicago.edu/files/files/92.EAP_.Agency_0.pdf.

[36] See below, ch 8, p 148ff.

[37] *cf* J-P Robé, 'À qui appartiennent les entreprises?' (2009) *Le Débat*, 155, 32–36.

[38] See the collective volume edited by A Supiot, *L'entreprise dans un monde sans frontières* (Paris, Dalloz, 2015).

[*précaire*] contracts, outsourcing, individualised pay, and variable working time [*les accords emploi-compétitivité*] are all examples of this inversion of labour law's primary function, since they ultimately shift economic risk from employer to employee.

III. THE 'COASE THEOREM' AND THE THEORY OF PROPERTY RIGHTS

The American economist Ronald Coase wrote an important book published in 1937, *The Nature of the Firm*, on the economics of businesses. He demonstrated persuasively that firms will decide to carry out an economic operation within the firm, or else through the market, on the basis of the transaction costs—finding partners, invitations to tender, negotiation, and so forth—involved in the latter. Building on this work, he published an article in 1960 called 'The Problem of Social Cost', which is often considered to be the founding text of the new economic analysis of law.[39] It concerns the legal mechanisms required to mitigate what are called businesses' 'negative externalities', that is, the harm they cause their environment. Coase claims to show that if transaction costs are reduced to zero, it is always more efficient to settle this problem of externalities through private arrangements than by appealing to the law or regulations. To prove this, all one need do is frame the problem in terms of competing rights-bearers and not liability for damage.

> The failure to develop a theory adequate to handle the problem of harmful effects stems from a faulty concept of a factor of production. This is usually thought of as a physical entity which the businessman acquires and uses (an acre of land, a ton of fertiliser) instead of as a right to perform certain (physical) actions.
>
> If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production. Just as we may use a piece of land in such a way as to prevent someone else from crossing it, or parking his car,or building his house upon it, so we may use it in such a way as to deny him a view or quiet or unpolluted air. The cost of exercising a right (of using a factor of production) is always the loss which is suffered elsewhere in consequence of the exercise of that right—the inability to cross land, to park a car, to build a house, to enjoy aview, to have peace and quiet or to breathe clean air.
>
> It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost.[40]

[39] R Coase, 'The Problem of Social Cost' (1960) 3 *The Journal of Law & Economics*, 1–44 (available online at www.econ.ucsb.edu/~tedb/Courses/UCSBpf/readings/coase.pdf).

[40] ibid, 44.

If, for example, a company pollutes a river, the legal issue would not be regulating its activity but rather how to settle competing rights: the right to produce and the right of others to fish. The optimal solution proves to be a private arrangement between polluters and fishermen. If the gain for the business from its polluting activity is 1,000 and the loss for the fishermen is 200, this arrangement would take the form of the fishermen selling the business a 'right to pollute' in return for a sum set somewhere between these two figures. Failing an agreement, the case goes to court where the judge, after a 'cost–benefit' calculation, redistributes the rights between the two parties. Adjusting private utilities should thus result in a maximisation of public utility, independently of how the rights are distributed between the parties, which finally proves insignificant. In Coase's words:

> It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost.[41]

This idea was developed further by Richard Posner, who is generally acknowledged as the founder of the *Law and Economics* doctrine. Posner was a professor at the Chicago Law School as well as occupying a high-ranking position in the American legal system (he was a judge of the appeal court for the seventh circuit).[42] In his view, the judge's function is not to distribute goods justly but to allocate rights to their most productive use. Posner's view is that justice is the same as what is economically efficient. As Thierry Kirat summarises, 'the judicial process operates as a machine for allocating costs and profits, and for producing cost–benefit calculations'.[43] Unsurprisingly, when France imported this doctrine, it also imported this function of the judge. For example, in the presentation of the Economics of Law Research Unit of the University of Paris 2 (which describes itself on its English home page as having 'the top faculty of law in France'), the idea of 'justice' is distanced through quote marks, the judge is called a 'producer of rules' and the law, a product.

> The research carried out at the Economics of Law Research Unit of Paris 2 seeks to provide new ideas in legal reasoning, but also economic impact studies. Producers of rules must be made aware of the economic consequences of their decisions.

[41] 'It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises the value of production) is independent of the legal position if the pricing system is assumed to work without cost' (R Coase, 'The Problem of Social Coast', (n 39) 8).

[42] In US law, a 'circuit' is the area, covering several states, over which an appellate court has jurisdiction.

[43] Kirat, *Économie du droit* (n 5) 73.

> It is often assumed that the role of the courts is to identify 'just' solutions, and that the cases have no impact on individuals other than the parties in litigation. But in reality judgments produce effects for a whole category of similar cases.[44]

Rather than dwell on the dreadful platitude of this last sentence—as though the author were discovering the existence of case law ('juris-prudence')—we shall simply note that this necessary exercise of prudence by the judge is reduced to the consultation of 'economic impact studies'. This focus implies a method of reasoning which has long characterised American tort liability case law. It was formalised in 1947 by the judge Learned Hand in the *United States v Caroll Towing Co* case.[45] Judge Hand had to decide whether the owner of a barge left unattended was responsible for the damage caused when it struck another vessel after its moorings had come loose. He based his decision on a calculation with three parameters: the probability *P* that damage would occur; the expected sum *L* ('loss') corresponding to this damage; and the cost *B* (for 'burden') of preventing the damage. If the cost *B* was less than the amount of probable damage *PL*, then the person who could have prevented the damage occurring was guilty of negligence (*N*) and should be sentenced to indemnify the victim. This gave the following formula, known as the 'Hand Formula':

$$B \prec PL \supset N$$

The Coase Theorem generalises this extension of individual rights, and the corresponding restriction of the scope of legal prohibition. The overall result is supposedly to maximise wealth. It reflects a legal universe without a categorical imperative, peopled by contracting particles armed with rights by which to achieve maximum individual satisfaction. The judge is not the guardian of the law, but an accountant expected to tot up maximised individual utilities, case by case, the total being unquestioningly identified with *social* utility. As such, the judge is no longer a point of heteronomy, the expression of an authority placed at n+1 above the particular interests of the parties in dispute, but is simply there to ensure that maximum collective utility results from the parties' calculations of individual utility.[46] Instead of arriving at a judgment by applying the law, the judge fine-tunes figures on the basis of cost–benefit assessments. This explains today's trend for using alternative dispute resolution methods, and the generalisation of

[44] Homepage of the Economics of Law Research Unit of the University of Paris 2 at www.u-paris2.fr/1284364950996/0/fiche___laboratoire, consulted on 19 March 2013.

[45] 159 F 2d 169 (2d Cir 1947). See M Fabre-Magnan, *Droit des obligations*, 3rd edn, Vol 2, *Responsabilité civile et quasi-contrats* (Paris, PUF, Thémis, 2013) 58–59.

[46] The logical aporia of this reduction of the judge to a *homo oeconomicus* was already mentioned by Alexandre Kojève in 1943 in his *Outline of a Phenomenology of Right*, ed and tr B-P Frost (London, Rowman & Littlefield, 2000).

arbitration clauses in commercial agreements. When the law is thus atomised into a cloud of individual rights, disputes call for arbitration not judgment, guided by the arbiter's own desire to maximise his profits on the arbitration market.[47] And when the arbitration market gets a foothold in investment agreements between transnational corporations and countries, whole states are forced to obey the rationale of economic calculation. The inclusion of arbitration clauses, called Investor-State dispute settlement (ISDS) clauses, in international investment agreements gives businesses the right to go to arbitration for any employment, environmental or tax legislation liable to reduce the profitability of their investment.[48] If these sorts of clauses were inserted into the investment treaties currently being negotiated between the EU, and the USA and Canada, they would deal a death blow to national sovereignty in these areas and to the struggle against the total subjection of the law to economic calculation. This is why the negotiations have mobilised so many people, and also why they have been conducted with such stealth and speed.

In the *Law and Economics* doctrine, the replacement of mandatory rules by individual rights goes by the name of the 'theory of property rights'.[49] Based on Coase's ideas, this theory extends the reach of the market to encompass not only the exchange of goods and services but also the right to use these. The market thus conditions individual behaviour through the play of profit and loss resulting from exercising, or not exercising, these rights. The concept of property right is thus not simply about ownership, but it includes all the prerogatives, the 'bundle of rights', attached to the possession of a good. For example, if I take over a company I do not strictly have a property right in the skill and experience of its staff, but these are part of the 'bundle of rights' attached to the thing and transferable with it. What is really at stake here is the destruction of the separation between laws and products. On the one hand, legal rules are viewed as 'products' and the

[47] For this arbitration market and its practices, see P Eberhardt & C Olivet, *Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Brussels/Amsterdam, Corporate Europe Observatory and the Transnational Institute, 2012) 73 (available online at www.corporateeurope.org).

[48] See particularly SW Schill (ed), *International Investment Law and Comparative Public Law* (Oxford, Oxford University Press, 2010); F Gisel, *L'arbitrage international ou le droit contre l'ordre juridique: Application et création du droit en arbitrage international* (Fondation Varenne, thesis, 2011); M Audit, *Contrats publics et arbitrage international* (Brussels, Bruylant, 2011); AE Gildemeister, *L'arbitrage des différends fiscaux en droit international des investissements* (Paris, LDGJ, 2013); E Loquin and S Manciaux (eds) *L'ordre public et l'arbitrage* (Paris, Lexis Nexis, 2014); JE Viñuales, *L'Etat face a la protection internationale de l'entreprise*, in A Supiot (ed) *L'entreprise dans un monde sans frontières*, (Paris, Dalloz, 2015) 103–14.

[49] *cf* H Demsetz, 'Towards a Theory of Property Rights' (1967) *American Economic Review* 2, 347–59; Eirik G Furubotn and Svetozar Pejovich 'Property Rights and Economic Theory: a Survey of Recent Literature' (1972) X *Journal of Economic Literature* 4, 1137–62; S Pejovich, *Economic Analysis of Institutions and Systems* (Dordrecht-Boston, London, Kluwer, 1995).

judge or legislator as a 'producer of rules'; but, on the other hand, every product is conceived as a bearer of a bundle of rights. Everything is calculated in terms of individual rights, and more precisely of *property* rights, that is, they are exclusive and transferable.

The legal subject of the *Law and Economics* doctrine is thus a monad which cares only about (and for) itself, and which accepts no laws except the self-imposed bonds of its contractual relations with other similar monads. It fits neatly into our cybernetic imaginary, in which rhizomal networks, networks of nerves and networks of computers are all part of the same representation of the world. Law likewise becomes a network, with no vertical axis or identifiable frontiers. What gives stability and consistency to the whole is that all individuals are actively seeking to extend their territory. Legal bonds are just so many contractual threads joining legal subjects together, who would ideally be undifferentiated beings, without sex, age, forbears or interiority, and who would all be preprogrammed to maximise their individual utilities. The incalculable—because in-valuable—principles which ground the reign of the law have no place here. The values they represent have all been converted into quantities. We saw this above, in Coase's vision of environmental protection, where the judge balances the right to breathe pure air against a 'right to pollute'. The same logic can be applied regarding the value of the pledged word and of human dignity.

A cost–benefit analysis can be used to measure the value of keeping one's word. The theory of the efficient breach of contract does just that: on the basis of a calculation of utility, one of the parties can be authorised not to honour his or her word when it is more advantageous to pay damages to the other party than to perform the agreement. The efficient non-performance of a contract was first theorised by Richard Posner,[50] who attributes its origin, most probably wrongly, to Judge OW Holmes, in whose words

> the only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case, it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.[51]

The promisor's behaviour is to be judged not in terms of his obligation to honour his promise, but in terms of a calculation of the greatest social utility. When the dogmatic, and therefore priceless, value of a promise is replaced by a monetary value, and the rule of *Pacta sunt servanda*

[50] R Posner *Economic Analysis of Law*, 8th edn (Aspen, Wolter Kluwer, Casebook series, 2010); and by the same author, 'Let us never blame a contract breaker' (2008–09) 107 *Michigan Law Review*, 1349–43. For a general overview and a detailed bibliography, see M Fabre-Magnan, *Droit des obligations I Contrats et engagement unilateral*, 3rd edn (Paris, PUF, Thémis, 2012) 720f.

[51] O Holmes, Jr , *The Common Law* (Boston, Little, Brown, & Co 1881) 107–10, 299–301; 'The Path of the Law' (1897) *Harvard Law Review*, Vol 10, No 8 (25 March 1897) 457–478.

('contracts must be honoured') by the maximisation of utility, then heteronomy has been finally expunged from the contractual order and reduced to something quantifiable. The efficient breach theory was enthusiastically received, and is now widely applied in the US, as well as having some supporters among French legal scholars.[52]

As for the equal dignity of human beings, it represents the incalculable *par excellence*. Kant famously defines dignity as follows: 'In the realm of ends everything has either a *price* or *dignity*. Anything with a price can be replaced by something else as its equivalent, whereas anything that is above all price and therefore admits of no equivalent has dignity'.[53] Since dignity is 'above all price', it by definition cannot be subjected to calculation. Dignity has a further drawback: as a categorical imperative, it is a duty, and not only an individual right. Dignity thus places heteronomy at the heart of subjectivity. It is the equivalent in law of the fact, noted by Castoriadis, that 'the institution of the social individual means the imposition on the psyche of an organisation which remains essentially heterogeneous to it'.[54] Such heteronomy remains incompatible with the 'perfect sovereignty of self over self' by which postmodernity characterises the subject.[55]

This dual drawback may be overcome in two ways: either abolish the principle of dignity, or convert it into something quantifiable so that it can be fitted into a cost–benefit analysis. Unsurprisingly, the first path was chosen by postmodern legal scholars, the second by upholders of the *Law and Economics* doctrine. The postmodern camp vilified the principle of dignity for its 'anti-modern' refusal of 'the subjectivism inherent in human rights' modernity'.[56] To this argument, based on a value judgment, they added the—somewhat contradictory—one that with dignity's axiomatic value one 'left the arena of science'[57] and thus forfeited any de jure discussion of legal axiomatics, law's anthropological function or the value choices underlying legislation and case law. Yet in the founding texts drafted in the wake of the Second World War's atrocities, dignity is and remains a first and

[52] Y-M Laithier, *Étude comparative des sanctions de l'inexécution du contrat* (Paris, LGDJ, 2004), pref Muir-Watt. Also C Fluet, 'La rupture efficace du contrat', in C Jamin (ed) *Droit et économie des contrats* (Paris, LGDJ, 2008) 155–67 and J Rochfeld, 'La rupture efficace', in ibid, 169–92. Arguing the case against this theory, see D Friedmann, 'The Efficient Breach Fallacy' (1989) 18, *The Journal of Legal Studies* 1, 1–24.

[53] Kant, *Groundwork of the Metaphysic of Morals*, Ch 2, in *Practical Philosophy*, translated by Mary Gregor (Cambridge, Cambridge University Press, 1996).

[54] C Castoriadis, *The Imaginary Institution of Society*, tr K Blamey (Cambridge, Massachusetts, MIT Press, 1987).

[55] See above, ch 6, p 118.

[56] O Cayla, in O Cayla and Y Thomas, *Du droit de ne pas naître* (Paris, Gallimard, 2002) 47.

[57] S Hénette-Vauchez, 'Droits de l'homme et tyrannie: de l'importance de la distinction entre esprit critique et esprit de critique' (2009) *Recueil Dalloz* 238. Also, an earlier work along the same lines by C Girard and S Hénette-Vauchez, *La dignité de la personne humaine. Recherche sur un processus de juridicisation* (Paris, PUF, 2005) 215ff.

inviolable principle.[58] Why, then, should legal analysis not refer to it, and be charged with lacking scientificity if it does so? Does the science of law not extend to the principles which positive law declares to be the 'the basis of every human community, of peace and of justice in the world'?[59] Unless the new fundamental axiom organising legal thinking were this very prohibition of the concept of dignity, branded as 'anti-modern' and 'liberticidal'? This prohibition would become the emancipatory axiom of a legal order without axioms, reduced to a juxtaposition of sovereign monads. But this move comes at the cost of brushing aside the texts which precisely constitute the 'science of law', and hence of abandoning what in legal thought precisely corresponds to the 'arena of science'.

The second solution, which is just as dogmatic but less convoluted, involves submitting dignity to a cost–benefit analysis. This was the method used by the *Law and Economics* school to settle the issue of the use of torture in the context of the 'War on Terror'. The prohibition of torture is a primary corollary of the principle of dignity and as such is enshrined both in the Universal Declaration of Human Rights (Article 5) and in the EU Fundamental Charter (Article 5). From the perspective of the economic analysis of law, however, it should be weighed up against other values. Richard Posner was the first of a long list of American legal scholars to claim that 'If the stakes are high enough, torture is permissible'.[60] Here, the resultant social utility is calculated by balancing the dignity of the supposed terrorist—which would be an argument for not torturing him—against the anticipated harm done to his countless potential victims. The Hand Formula can be applied here: if the cost B of violating the prisoner's dignity is set at 100, the probability of a terrorist attack at 0.1 and the expected damage at one million then it is an open-and-shut case: the prisoner should be tortured in the name of overall social utility. As with the hero of Sartre's *Huis Clos* (*No Exit*), the only question is 'Where are the stakes, the racks, the leather funnels?'.

This method, in which dignity, reduced to a quantifiable value, must be balanced against other interests, has been adopted by the Court of Justice of the European Union. Unlike our postmodern experts, the Court's judges are not entitled to assert their sovereign right to exclude the principle of dignity from the arena of law; they have no choice but to admit its pre-eminent value in positive law. However, this value is balanced as Richard Posner

[58] *cf* M Fabre-Magnan, 'La dignité en Droit: un axiome' (2007) 58 *Revue interdisciplinaire d'études juridiques* 1, 1–30.

[59] Basic Law for the Federal Republic of Germany (1949), Art 1.

[60] Posner, The Best Offense (n 1). This position was supported by many other American jurists. For general surveys, see KJ Greenberg and JL Datel, *The Torture Paper. The Road to Abu Ghraib* (Cambridge, Cambridge University Press, 2005) 1284; M Terestchenko, *Du bon usage de la torture ou comment les démocraties justifient l'injustifiable* (Paris, La Découverte, 2008), esp Ch 2 'Des juristes au service de la torture', 27ff.

advocated: everything depends on the sums involved; in other words, everything is processed according to the principle of proportionality. This clearly illustrates Horkheimer and Adorno's diagnosis that 'eqivalence becomes the new fetish'.[61] For example, in the *Viking* case, the European Court of Justice ruled that human dignity has to be 'reconciled' with freedom of competition, the free circulation of goods and capital, and the freedom to provide services, in the name of the principle of proportionality:

> the exercise of the fundamental rights at issue, that is, freedom of expression and freedom of assembly and respect for human dignity, respectively, does not fall outside the scope of the provisions of the Treaty. Such exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality.[62]

Evoking the principle of proportionality makes it possible to reduce every sort of rule to its calculated utility, and hence to expel from legal reasoning any idea of an inviolable law. In Germany's Basic Law, however, human dignity is precisely qualified as inviolable.[63] So it should come as no surprise that one of the rare courts to resist this trend of relativisation is the German Constitutional Court, which declared that 'The right to free and equal participation in public authority is enshrined in human dignity … The principle of democracy may not be balanced against other legal interests; it is inviolable.'[64]

This brief foray into the legal debates surrounding the concept of dignity aimed to show that when faced with something which is 'beyond price', the *Law and Economics* doctrine obliterates it by setting a price on it nonetheless. In the total market, nothing which is price-less can have existence.

IV. NEW COMPARATIVE ANALYSIS AND THE MARKET IN LAW

Political economy, in its emphasis on understanding economic phenomena which really exist, and studying them scientifically, has always been particularly attentive to the diversity of legal and institutional systems. This is also central in the economic theory of regulation and the economics of conventions,[65] which treat diversity as a constitutive feature of economic

[61] M Horkheimer and T Adorno, *The Dialectic of Enlightenment*, *op. cit*. Introduction, n 6.

[62] Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* [2008] IRLR 143, 46.

[63] *cf* E Christodoulidis, The European Court of Justice and 'Total Market' Thinking (2013) 14 *German Law Journal* 10, 171–86.

[64] *Bundesverfassungsgericht*, Judgment of 30 June 2009—2 BvE 2/08 (Lisbon Treaty) §§ 211 and 216 (accessible at www.bundesverfassungsgericht.de).

[65] *cf* particularly P d'Iribarne, *La logique de l'honneur. Gestion des entreprises et traditions nationales* (Paris, Seuil, 1989); R Salais and M Storper, *Les mondes de production*.

life, in which different systems cannot be evaluated and hierarchised by reference to any ideal order.

The *Law and Economics* doctrine, by contrast, presupposes that the spontaneously generated market order can be helped to function well, or hindered from doing so, by a particular legal system. The doctrine is by definition prescriptive and normative, because it is forever seeking the rules which may optimise mutual adjustments of calculated individual utilities. One of the tasks of the economic analysis of law would thus be to *assess the performances of national legal systems against this normative optimum*. Once this assessment has been made public in all transparency, it will trigger a mechanism whereby the best legal systems in terms of economic efficiency will prevail by natural selection. Instead of free competition within the framework of the law, the law itself shall be generated as a by-product of free competition. Applying Darwinism to the normative sphere had already been theorised by Hayek, who trained in law. Unconvinced by the concept of the 'rational actor' in economic theory, he had turned to the natural selection of normative systems through competition between laws and cultures on an international scale. In his view, Social Darwinism was wrong to focus on the selection of congenitally fitter individuals, because the timescales involved were too long. It should, rather, have attended to 'the selective evolution of rules and practices'.[66] This type of Darwinism today goes by the name of *benchmarking* in management (both private and public). The '*selection of best practices*' consists of using the practice which has obtained the best results as a standard, or *benchmark*, against which other practices are measured. Since the best practice is itself perfectible, benchmarking creates an upward spiral of emulation. This thinking informed the International Organisation for Standardisation in its production of the ISO 9000 norms (which are currently being updated in order to 'respond to the latest trends'). They benchmark the good practices required by quality management systems to obtain certification. In the management audits of large companies, ISO 9000 standards play a central role, and many people are employed to ensure that the company conforms to them. Currently they are being extended to include human resources management, in the framework of the draft standard ISO 26000 on corporate 'social responsibility'.[67]

Enquête sur l'identité économique de la France (Paris, EHESS, 1993); R Boyer, 'Variété du capitalisme et théorie de la régulation' (2002–03) L'année de la régulation 6, 125–94; R Boyer *Une théorie du capitalisme est-elle possible?* (Paris, O Jacob, 2004).

[66] FA Hayek, *Law, Legislation and Liberty*, Vol 3: The Political Order of a Free People, (London, Routledge & Kegan Paul, 1982).

[67] *cf* I Cadet, 'La norme ISO 26000 relative à la responsabilité sociétale: une nouvelle source d'usages internationaux' (2010) XXIV *Revue internationale de droit économique* 4, 401–39. This extension was criticised by certain employers' associations (for example, the BDA in Germany and the International Organisation of Employers at the ILO), who complained that a) despite declarations to the contrary, these standards would encroach upon the ILO's areas of

The new type of normativity which is thus emerging in the world of work is characterised by a) *universality*: these standards are applicable in every country and every industry; b) *voluntary participation*: businesses may choose to comply or not; c) the *privatisation of standards*, in two senses: the ISO standards absorb elements from the public domain into the private sector (ISO 26000 includes certain ILO standards as 'best practice'), and the standards are marketed (they are bought and sold).

In order to enlist national legal systems into this virtuous striving for ever-better practice, it seemed expedient to put together some methodological principles. This was the role of New Comparative Analysis. A group of researchers from Yale, Harvard and the World Bank began developing instruments for measuring investment risk, by coding and benchmarking the rules of company law and of financial market regulation.[68] They then extended this method to labour law in an article entitled 'The Regulation of Labor', published in 2004.[69] This article described how the economic efficiency of social and employment legislation in 82 countries was measured:

> We constructed a new data set that captures different aspects of the regulation of labor markets in 85 countries. Our measures of labor regulation deal with three broad areas: (i) employment laws, (ii) collective relations laws, and (iii) social security laws. […]
>
> For each of the three areas of law, we examine a range of formal legal statutes governing labor markets. We then construct subindices summarizing different dimensions of such protection, and finally aggregate these subindices into indices. We construct all measures so that higher values correspond to more extensive legal protection of workers.[70]

For employment legislation, these subindices concerned the cost of using atypical employment contracts, the cost of overtime, and the cost of severance pay and dismissal procedures. Systems of equivalence were devised to enable the different provisions in a law to be quantified, from zero (the lowest level of social protection) to 1 (the highest level of social protection). For example, where a temporary contract can be signed only if there is a corresponding temporary task to be performed, the score is 1, whereas if this condition is absent, the score is 0. Where there is no provision for severance pay, the legislation gets a higher ranking, etc. The aggregate data is

responsibility; b) that such standards would curb the freedom of business managers; and c) that they would be detrimental to the diversity of national legal cultures, as expressed in each body of labour legislation. *cf* M Maupain, *L'OIT à l'épreuve de la mondialisation financière. Peut-on réguler sans contraindre?* (Geneva, BIT, 2012)).

[68] R La Porta, F Lopez-de-Silane, A Shleifer and R Vishny, 'Law and Finance' (1998) 106 *Journal of Political Economy*, 1998, 6, 113–15.

[69] J Botero, S Djankov, R La Porta, F Lopez-de-Silanes, and A Shleifer, 'The regulation of Labor' (2004) *Quarterly Journal of Economics*, November, 1339–382.

[70] ibid, 1346.

then classified by legal culture, and correlated with governments' attitude to trade unions (more, or less, positive). This results in the following table:[71]

		Employment laws index	Collective relations laws index	Social security laws index	log GNP per capita 1997	Chief executive and largest party in congress have left or centre political orientation (1928–1995)
Panel D: Data by legal origin						
English legal origin:	Mean	0,2997	0,3313	0,4236	7,8045	0,5204
	Median	0,2886	0,3170	0,4311	7,7266	0,4779
Socialist legal origin	Mean	0,5944	0,4925	0,6923	7,3650	0,8646
	Median	0,6233	0,4970	0,7337	7,2442	0,9118
French legal origin:	Mean	0,5470	0,4914	0,5454	7,9034	0,4484
	Median	0,5161	0,4792	0,5855	7,9202	0,3750
German legal origin:	Mean	0,4529	0,4787	0,7110	10,0557	0,2725
	Median	0,4527	0,4807	0,6957	10,2545	0,2647
Scandinavian legal origin:	Mean	0,6838	0,4814	0,8324	10,3310	0,7721
	Median	0,7110	0,4792	0,8354	10,3356	0,7647

Figure 7.2: New Comparative Analysis: quantifying labour law and social legislation

The World Bank developed its *Doing Business* programme with explicit reference to this research. The programme evaluates national legal systems in terms of their economic and financial efficiency.[72] Its regularly updated database of figures gives 'objective measurements' of the legal systems of 183 countries (renamed 'economies'). It comes with an illustration: a globe representing the earth as a space of competing legislations, and with a time-trend cursor showing the proud onward march of economic rationality. The database is meant to help investors choose the most hospitable countries for their purposes. It is also designed to enlist countries to reform their legislation in order to make it more 'business-friendly'. The resultant 'market in legislative products' is designed to eliminate in the long term the systems of rules least able to satisfy the financial expectations of investors. Competition for the favour of the financial markets should thus not be confined to businesses and the economic field alone, but should include whole states and thus become a general principle organising the sphere of law. This is how

[71] ibid, 1354.

[72] *cf* www.doingbusiness.org, where one can find a globe representing the earth as a collection of legislative areas in competition ('Business planet mapping the business environment').

we could leave behind the dark ages of the relativity of laws and gradually arrive at the universal laws based on calculation which Condorcet was already dreaming of.[73]

In theory, this quantification is axiologically neutral and does not favour any particular type of law. Yet all these studies come to the same conclusion: the culture of common law is better than all others. We should not necessarily see in this some unacknowledged chauvinism. It is, rather, the logical consequence of the close links between the *Law and Economics* doctrine and the culture of common law. Common law conceives the law not as the expression of a sovereign will, but as a spontaneously created order, requiring for its ongoing development only a judge and the free play of individual rights.[74] In many respects, the *Law and Economics* doctrine is a fundamentalist variant of this legal culture. Besides, 'fundamentalism' is originally a Protestant notion, a late-nineteenth-century doctrine developed in traditionalist American circles, advocating a literal interpretation of the Scriptures in opposition to theological liberalism and the Social Gospel movement. But confining thought within the letter of a text also characterises what we today call Islamic fundamentalism. It too seeks to subject national legal systems to a literal interpretation of Sharia and to attack the diversity of traditions, customs and schools which have always also informed Muslim legal doctrine. What these many different fundamentalisms have in common is their reference to a universal norm which human laws are meant to relay and implement, but never antagonise. This is why fundamentalist doctrines are so implacable and ruthless.

The World Bank's 2005 'Doing Business' report contained a chapter on labour law entitled 'Hiring and Firing Workers', explicitly using the research done by the Botera / La Porta team at Yale and Harvard. The chapter measures, country by country, how labour legislation deters investment—since the whole process of quantification is ultimately designed to demonstrate that social protection for employees is economically inefficient.[75] Labour legislation not only causes costly 'rigidities'—so the argument goes—which in turn generate high unemployment rates, a larger 'informal sector' and a relative decrease in the proportion of income reaching the poorest, but more generally it compromises the maximisation of social utility, which labour market deregulation precisely optimises. We are familiar with this kind of argument and its unmistakable political message, tirelessly relayed by the OECD, the IMF and the European Commission. Yet one might have thought that after the collapse of the financial markets in 2008, the most urgent task would be to regulate them. But no: the principal lesson drawn by

[73] See above, ch 5, p 101.
[74] See above, ch 2, p 44ff.
[75] For a critical analysis, see J Berg and S Cazes, *Les Indicateurs Doing Business: Limites méthodologiques et conséquences politiques* (Geneva, ILO, 2007) 23.

international economic organisations from this financial disaster was that countries should urgently deregulate their labour markets and dismantle their institutions of solidarity. According to Mario Draghi, the President of the European Central Bank (ECB) and former International Vice-President of Goldman Sachs in charge of European Affairs,[76] Europe's social model is of the past, and the duty of member states is now to introduce flexibility into labour markets wherever this has not already been done.[77]

But already before the bankruptcies of 2008 the European Court of Justice had supported the idea of making national legal systems compete against each other, when it ruled, in the 1999 *Centros* case, that a business could dodge the rules of the country in which it was operating by registering in a country with less restrictive legislation.[78] It thus legalised the practice of flags of convenience, but on dry land, allowing businesses to play member states off against each other in favour of the legislation which could provide the highest business profits. Extending this decision to labour law in the famous *Laval* and *Viking* cases, the Court ruled that businesses with headquarters in countries with scanty employee protection should be allowed to fully exploit this comparative advantage when operating in countries still resisting the injunction to deregulate their labour markets.[79] In no time at all, the quantitative criteria advocated by the *Law and Economics* doctrine have become a cornerstone of European case law.[80]

We should not be surprised that case law has embraced the *Law and Economics* doctrine in this way. Ever since its origins in Rome, the law has been instrumentalised by all sorts of ideologies, limited only by the legal order's autonomy.[81] When this autonomy is not respected, and the 'fetishism

[76] On the responsibility of this investment bank in the financial crisis and in fixing the books in the case of Greece, see M Roche, *La Banque. Comment Goldman Sachs dirige le monde* (Paris, Albin Michel, 2010). Also, see the account 'Why I Am Leaving Goldman Sachs', by one of the bank's former managers (Greg Smith), published in the *New York Times* of 14 March 2012.

[77] 'Europe's Banker Talks Tough. Draghi Says Continent's Social Model Is "Gone", Won't Backtrack on Austerity', an interview published in the *Wall Street Journal* of 24 February 2012. On the abandonment of the project of a Social Europe and how to remedy this, see N Countouris and Mark Freedland (eds) *Resocialising Europe in a Time of Crisis* (Cambridge University Press, 2013) 525.

[78] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* ECLI:EU:C:1999:126.

[79] Case C-438/05, *International Transport Workers' Federation v Viking Line ABP* [2008] IRLR 143 and Case C-341-05, *Laval v Svenska* ECLI:EU:C:2007:809. See A Supiot, 'Europe's Awakening', in M-A.Moreau (ed), *Before and after the Economic Crisis, What Implications for the European Social Model?* (Cheltenham (UK) / Northampton (USA), Edward Edgar Publishing, 2011) 292–309.

[80] For the influence of the 'Law and Economics' doctrine on labour law, see T Sachs, *La raison économique en droit du travail. Contribution à l'étude des rapports entre le droit et l'économie* (Paris, LGDJ, 2013) 448; G Bargain, *Normativité économique et droit du travail* (Paris, LGDJ, 2014) 535.

[81] *cf* above, Ch 2, p 51.

of the legal form' is broken, one can no longer talk of legal norms, whatever the pretence. For those in power, the law has always been both a tool and an obstacle; its use as a tool will always be challenged by its dimension of resistance. Tocqueville understood this well, describing the 'spirit of the jurist' as the only counterweight to the tyranny of the majority in a democratic regime.[82] This dual feature of law leads us to examine the incursions of governance by numbers into the law, in order to identify this doctrine's inevitable failures and the legal form's resistance.

[82] Tocqueville, *Democracy in America*, I, II, viii, ed E Nolla, tr JT Schleifer (Indianapolis: Liberty Fund, 2010).

8

The Encroachment of Governance on Law

'The battle of performance will only really be won after several years, because it first has to be won in people's minds.'[1]

THE IMAGINARY REPRESENTATION of society as a set of 'elementary particles' driven only by individual interest has a systematic force whose effects permeate every area of human life. For instance, the way the principle of equality has been interpreted to support the rejection of sexual difference stems from exactly the same type of self-referential calculation as that championed by neoliberal economics.[2] We should therefore look further than the strictly political or corporate realm to gauge the full extent of how governance by numbers has penetrated the sphere of law, and also consider issues of personal status and private life. *Eros* and *Ananké*—the need for the other sex and the need to work—are the basis of every human civilisation, in that they oblige each individual to enter into relation with the others under a common law, or a set of shared representations characteristic of a given culture. Insofar as governance by numbers seeks to programme human behaviour, it cannot fail to leave its mark on issues of personal status and identity. Instead of making the human being mechanically obey rules, as was the case historically with the 'Administrative State' [*l'État administratif*] and the Fordist factory, governance by numbers thrives on the human being's capacity—as highlighted by Norbert Wiener—to give any information received 'a new form in order that it may be used with a view to later stages in the functioning' of the system.[3]

Industrial-era capitalism and communism both sought to impose a supposedly scientific form of organisation of work on the whole of society. Far from disappearing, this desire has simply updated its model: from a machine of weights and forces obeying the laws of classical physics,

[1] D Migaud and G Carrez, *La Performance dans le budget de l'État*, Information Report presented to the French National Assembly, No 1780, 24 June 2009, 7.

[2] On this point, see my earlier *Homo juridicus* (ch 2, fn 10) x–xi and 193–94.

[3] N Wiener, *Cybernetics and Society. The human use of human beings* (ch 1 fn 37), Ch 1.

where the worker was simply a cog which obeyed orders, the vision of the organisation of work has shifted to a system of self-adjusting interacting units automatically responding to signal inputs and feedback, as programmed by computer algorithms. What we see occurring in the legal sphere, where governance by numbers tends to supplant government by laws, has its counterpart in the triumphs of the ICT revolution at all levels of the organisation of work. The individual, the company and the nation are uniformly expected to fulfil objectives, and their success in this is rated by numerical indicators.

Governance by numbers thus has an immediate impact on the division of labour, which it understands in the most restrictive and illusory sense of salaried employment, and which it is anyway unable to address because it is by nature blind to the difference between human labour and machine work. In the comprehensive, Durkheimian sense, the division of labour affects every level of human cooperation, whether between individuals, in the company, in the public sphere or in international relations. At all these levels, the purchase of governance by numbers on the law is palpable in the way concepts and methods originally developed for managing companies, namely 'management by objectives', have been transposed into law.[4] This operation was facilitated by the fact that management is based on a casuistry similar to that of law (at least before it broke up into more or less impermeable disciplinary compartments). The bond between law and management methods has been stressed time and again by Pierre Legendre,[5] and has also been analysed by Romain Laufer, who has shown what the consecration of management science as a university subject owed, over the last century, to the rational systematisation of cases, that is, to a notion of 'case law' common to management and law.[6] This explains the permeability between the two disciplines, as illustrated by the spectacular impact in law of management by objectives, which has become, as Peter Drucker describes

[4] Luc Boltanski and Ève Chiapello analyse this managerial revolution in their *New Spirit of Capitalism* (ch 6 fn 47).

[5] P Legendre, *L'Empire de la vérité. Introduction aux espaces dogmatiques industriels* (Paris, Fayard, 1983) 152.

[6] *cf* R Laufer, 'Proposition for a Comparative History of Education in Law and Management: About the Notion of Jurisprudence' in S Dameron, R Durand (ed), *Redesigning Management Education and Research: Challenging Proposals from European Scholars* (Cheltenham, Edward Elgar Publishing, 2012) 30–55. See also P Napoli 'Pour une histoire juridique de la gestion' in P Bezès, F Descamps, S Kott and L Tallineau (eds), *La mise en place du système financier public 1815–1914* (Ministère de l'Économie, coll 'Histoire économique et financière de la France', 2010) 271–97. The citations from Drucker and others never use the term 'leadership', but always 'management'. It so happens that 'management' was initially a French term taken up into English, which returned to France with its modern sense: Bossuet mentions Francis of Assisi's inability to become a good *ménager* of his father's business affairs (*cf Panégyrique de saint François d'Assise*, in *Œuvres* (Paris, Gallimard, coll 'Bibliothèque de la Pléiade', 1961).

in a chapter devoted to the subject in his book of 1954, 'a new philosophy of management' for businesses:[7]

> What the business enterprise needs is a principle of management that will give full scope to individual strength and responsibility, as well as common direction to vision and effort, one that will establish teamwork and harmonize the goals of the individual with the common good. Management by objectives and self-control makes the interest of the enterprise the aim of every manager. In place of control from outside, it substitutes the stricter, more exacting, and more effective control from inside. It motivates managers to action, not because somebody tells them to do something or talks them into doing it, but because the objective task demands it. They act not because somebody wants them to but because they themselves decide that they have to—they act, in other words, as free men and women.[8]

After repudiating Taylorism, this new philosophy of how to govern human beings had incredible success, in the business world and beyond. It is strikingly similar to Norbert Wiener's reflections in his *Cybernetics and society. The human use of human beings*, published four years earlier.[9] For both authors, *self-control* is the key to how human organisations should function. This new key to the organisation of work was thus theorised in disciplines as far apart as cybernetics and management, and half a century before the generalised use of computers in the real economy. This alone demonstrates the power of a particular period's 'imaginary institution of society', in this case management by objectives which is today's paradigm of the scientific organisation of work, in the public and private sector alike. Staff are no longer subjected to rules defining their tasks in advance, but rather are involved in the elaboration of the task's objectives, which should be quantifiable, and which reflect, at each level, the common goals of the organisation. Each worker is thus 'objectified', measuring (and reducing) the gap between the objectives set and his or her actual performance. This is achieved through 'self-control', which in Drucker's terms is identical with 'freedom', since it satisfies 'a desire to do the best rather than do just enough to get by.'[10] Drucker's prescience, in his chapter 'Management by Objectives and Self-Control', is striking: he warns against misinterpretation and abuse of his method, stressing that the objectives requiring self-monitoring 'must never become the grounds for "management by domination" because this would destroy their very purpose'.[11]

[7] P Drucker, *Management: Tasks, Responsibilities, Practices*, rev ed of *The Practice of Management* [1954] (Harper-Collins, 1973), Ch 25, 'Management by Objectives and Self-Control', 258–69. See also J Humble, *Management by objectives in action* [1970]; O Gélinier, *Direction participative par objectifs* (Paris, Homme et techniques, 1968) 63.

[8] Drucker, *Management: Tasks, Responsibilities, Practices* (n 7) 267.

[9] N Wiener, *Cybernetics and Society. The human use of human beings* (ch 1 fn 37). See above, ch 1, p 26. Peter Drucker does not cite Norbert Wiener and it is not certain that he had read him.

[10] Drucker, *Management: Tasks, Responsibilities, Practices* (n 7) 266.

[11] ibid.

Moreover, he was convinced that not all objectives can be quantified, and he criticised the irrational tendency to pursue one single goal: 'to manage a business,' Drucker writes, 'is to balance a variety of needs and goals, and this requires judgment. The search for 'one right objective' is essentially an unproductive quest for the philosopher's stone. It is irrational to seek to replace judgment with a formula'.[12]

Yet despite these warnings, management by objectives in practice has taken precisely these aberrant paths: management for domination; generalised quantification; and the focus on a single objective—bibliometrics for the researcher; value-creation for the shareholder; or reducing the public deficit to under three per cent of the GDP, for a country. And 'fixing objectives' has burgeoned in all branches of law over the last twenty years.[13] To examine this invasion of the legal sphere by governance by numbers, we shall not, however, start from law's different branches, if only because governance by numbers precisely ignores such divisions, and subjects the whole of law, indifferently, to the same pre-programming of human action. Additionally, since the legal corpus affected is already too large for any exhaustive analysis, we shall confine ourselves to spotlighting different levels in the division of labour. Through this focus, we shall show how the dynamics of governance by numbers affects the legal frameworks of the individual worker, the company, the state, the European Union, and international relations.

I. INDIVIDUAL GOVERNANCE

It is now common practice in the workplace for objectives to be fixed for individuals. This is sometimes done unilaterally by the employer, by virtue of his or her management prerogatives, but they may also be the object of a contract,[14] serving as parameters for pay, or actually mentioned in the contract, when someone is recruited specifically to achieve them. Employees invariably enjoy a certain autonomy in the way they choose to attain objectives. At all events, the legal force behind objectives can have the effect of transferring a certain amount of economic risk to the worker, in line with the theory of agency.[15] Fixing objectives always brings with it procedures for evaluating performance, which can take two complementary forms: a quantified form, which measures performance; and a discursive form, through individual interviews, during which the employee and his manager analyse the employee's performance, and may revise the objectives in the light of this. There is an abundant, and most instructive, literature in

[12] *ibid*, 104 (*tr mod*).

[13] *cf* B Faure (ed), *Les Objectifs dans le droit* (Paris, Dalloz, 2010).

[14] *cf* P Waquet, 'Les objectifs' (2001) *Droit social* 120–25; T Pasquier, 'Réviser les objectifs salariaux' (2013) *Revue de droit du travail* 82–89.

[15] See above, ch 7, p 128ff.

management and workplace psychology on the theory and practice of these evaluations in companies.[16] From the legal perspective, in the terms of the French *Cour de cassation*, 'the employer's management role, as derived from the work contract, authorises him to evaluate the work of his employees'.[17] In a certain number of cases (for example, skills assessment) evaluation is even prescribed by law. In French law, certain obligations such as transparency (advance notification) and the suitability of evaluation methods and techniques are included under the general duty to perform the work contract in good faith,[18] thus giving legal force to the ideals of management by objectives.[19] The counterpart of this management method in the public sector was the—at first piecemeal—introduction of performance-related bonuses, which civil servants received if they met the objectives assigned to them: after the judiciary,[20] the police,[21] certain levels of central government administration,[22] and other branches, the practice of performance-related bonuses was generalised, in 2010.[23] Governance by numbers has also spread into the management of certain self-employed groups in France, if they are financed, at least in part, by compulsory contributions. This applies to certain medical practitioners,[24] who are subject to enforceable principles of good practice in, for example, prescription expenses (in accordance with the *références médicales opposables*, or RMO); and to another self-employed sector, farmers, whose outputs are regulated by objectives imposed by the EU, if the farms are in receipt of European funds.

II. CORPORATE GOVERNANCE

In the corporate sector, the penetration of governance by numbers into the legal sphere is evident in the laws passed to oblige companies trading on the stock markets to respect the imperative of 'value creation' for

[16] See C Dejours, *L'Évaluation du travail à l'épreuve du réel. Critique des fondements de l'évaluation* (Paris, INRA, 2003) 82.

[17] (2002) *Droit ouvrier*, 535, note V Wauquier. See S Vernac, 'L'évaluation des salariés' (2005) *Recueil Dalloz*. Chron 924, A Lyon-Caen, 'L'évaluation des salariés' (2009) *Recueil Dalloz*, 1124.

[18] *French Labour Code*, Art L.1222-1.

[19] *French Labour Code,* Art L.1222-2 to L.1222-4.

[20] *Décret* No 2003-1284 of 26 December 2003.

[21] *Décret* No 2004-731 of 21 July 2004.

[22] *Décret* No 2006-1019 of 11 August 2006.

[23] Law of 5 July 2010 on the Renewal of collective bargaining in the public sector, Arts 40 and 41.

[24] J Tapie, 'Les recommandations de bonne pratique et les références médicales, des outils à généraliser' (1987) *Droit social*, 828; D Tabuteau, 'Assurance maladie: les "standards" de la réforme, *Droit social*, 2004, pp 872-876; Béatrice Espesson-Vergeat, 'La force des avis et recommandations des autorités de santé' (2009) *Revue générale de droit médical*, 15–31; M Chassang, 'Brèves réflexions sur l'avenir de la médecine libérale' (2011) *Revue de droit sanitaire et social*, 7–14; I Vacarie, 'Raison statistique et catégories du droit de la santé' in *Statistique et normes* (Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2014) 57–73.

their shareholders.[25] Many legislative techniques were invented to facilitate these reforms, two of which are particularly significant. The first was the highly successful phenomenon of stock options, or free shares.[26] Agency theory advocated this mechanism as a way of ensuring that company managers fulfilled the objective of improving the company's short-term performance on the stock market. The second example is the leveraged buy-out, a legal and financial arrangement which obliges the company which is bought (the 'target' company) to pay the costs of its own buy-out, by 'squeezing it like a lemon', so that it produces a maximum number of dividends.[27] The expansion of governance by numbers in the corporate sector also results from having abandoned the industrial era's integrated model in favour of today's networked organisation. This type of organisation, aided by digital technologies, which make the subcontractor transparent to the contracting customer, enables the latter to maintain technical and economic control over a section of the production process, without having to assume any legal responsibility for it. The generalisation of this model internationally has created countless dependent entrepreneurs, all over the world, who work under the more or less stringent monitoring of one or several clients, meeting the objectives fixed by them. Although the networked structure is generally justified by the declared wish of companies to refocus their activities on their core business, this trend is also guided by the financial markets, which hope to draw the maximum financial gains from the different 'profit units' of the production chain, through stimulating competition. Recent scandals in the food business and textile industry[28] have shown the large-scale effects on health of the irresponsibility of those in positions of economic power, an irresponsibility authorised by this mode of organisation of work.

Another, rarer, aspect of companies' enslavement to meeting objectives is evident not in company or in financial law, but in labour law. It takes the form of an obligation to negotiate, a process initially restricted to issues of pay, hours of work and the organisation of working time. Later, these obligations were extended to the implementation of public policies such as equality between men and women in the workplace, the inclusion of a disabled or an older workforce, and the provision of collective insurance

[25] A Pietrancosta, *Le Droit des sociétés sous l'effet des impératifs finan- ciers et boursiers* (thesis, Université Paris-I, 1999); Lulu Entreprises Inc (2007) 2 vols, 486 and 748.

[26] For an overview, see R Vatinet, 'Clair-obscur des stock-options à la française' (1997) *Revue des sociétés*, 31–66; 'Quelques incertitudes du régime juridique des stocks-options' (2002) *Droit social*, 690–94.

[27] *cf* J-P Bertrel and M Jeantin, *Acquisitions et fusions des sociétés commerciales* (Paris, Lexis-Nexis, 2001) No 382, 160; see M Bertrel, *L'Incidence du LBO sur la notion de société* (thesis, Université Paris-Est, Presses académiques francophones, 2012); and by the same author, 'L'impact social du LBO sur la société "cible" ou la nécessité de réformer l'abus de majorité' (2013) *Revue des sociétés*, 75.

[28] See below, ch 14, p 269ff.

or profit-sharing schemes. Regarding sexual equality in the workplace in France, heads of companies of more than 300 employees are now obliged by law to draw up, unilaterally, 'an action plan designed to ensure equality in the workplace between women and men'. This plan must be based on 'relevant indicators, particularly quantifiable data, defined by ordinance, which *may* be supplemented by indicators which take into account the company's particular situation'. Having evaluated the objectives fixed and the measures taken in the course of the preceding year, this action plan

> 'determines the progress on objectives to be achieved in the following year, the qualitative and quantitative description of the actions by which these may be achieved, and an estimation of their cost. […] A synthesis of this action plan, comprising at least *the progress on indicators and objectives defined by ordinance*, shall be made known to the employees by the employer.'[29]

We should note in passing the confusion, which is characteristic of governance by numbers, between the objectives assigned and the indicators measuring performance.[30] Governance here devolves a regulatory role previously held by the State onto private individuals. The use of 'negotiated law'—applied overwhelmingly today in labour issues[31]—is the clearest proof of how the social partners are enlisted to define the legal measures for implementing objectives fixed by the public authorities. As we shall see, the heart of the matter is the erosion of the border between private and public spheres[32] because governance obliges unions and companies to carry out roles previously reserved for the State alone, and inversely, the State applies to itself the principles of corporate governance.

In the corporate world, governance by numbers is most clearly expressed in the profit margins fixed by share-holders. In evaluating whether a company is sufficiently profitable, two methods are used, both of which have a legal dimension. One is stock market figures, which are meant to reflect the value of the company in the eyes of the financial markets; and the other is the company's accounts, which are meant to give 'a fair representation of the assets, the financial situation and results' of the company.[33] The impact of governance by numbers on financial legislation has been considerable since the neoliberal turn of the 1980s, with the abolition of state

[29] French Labour Code, Art L.2323-57, al 3 and 4 (Law of 26 October 2012).

[30] See below, ch 9, pp 169–70.

[31] Law No 2007-130 of 31 January 2007, on the modernisation of the social dialogue. This law gives the social partners the right to negotiate the terms of proposed legislative or regulatory labour law reforms falling within the limits defined for cross-sector or national collective bargaining. See N Maggi-Germain, 'Sur le dialogue social' (2007) *Droit social* 798; J-F Cesaro, 'Commentaire de la loi du 31 janvier 2007 de modernisation du dialogue social', *Semaine juridique*, 20 Feburary 2007, 174; A Supiot, 'La loi Larcher ou les avatars de la démocratie représentative' (2010) *Droit Social*, 525–32.

[32] See below, ch 10, p 193ff.

[33] *French Commercial Code*, Art L.123-14. See above, ch 5, p 79ff.

regulation and the reliance on market regulators. The result has been the normative self-enclosure of the world's financial systems.[34] In the context of this drive to self-regulation, the financial markets themselves have been transformed into 'market undertakings', valued on their own market, such as to become entirely self-referential financial products. Moreover, the international association of market regulators—the International Organisation of Securities Commission (IOSCO-OICV)—itself recommends using self-regulatory organisations (SROs), which in its view are the only bodies capable of responding to the technical demands of the financial markets.[35] But when one knows that the majority of orders on these markets are passed by computers programmed to carry out high-speed trading, in which profits may be derived from differences in trading prices as little as a millisecond apart,[36] one can see how extensively the cybernetic dream of having human affairs run themselves on automatic pilot is becoming a reality. One of the best-known consequences of this shift from heteronomy to autonomy has been the exponential development of new financial products and the correlative boom in two highly unstable techniques: securitisation and credit derivatives.

Securitisation brings about what the most knowledgeable authors have called a 'quite extraordinary alchemy', whereby 'debts which are non-derivative and can only circulate with difficulty, may be transformed into securities, that is, into identical fungible assets circulating without difficulty on a market'.[37] We should take this term 'alchemy' in its literal sense: the transformation of lead into gold. The problem is then to prevent gold becoming lead again, and this is why credit derivatives were invented.[38] These derivatives are futures, meaning that a risk inherent in a debt or a group of debts may be transferred, by virtue of a contract with consideration, without having to transfer the debt itself. The best known of these derivatives are *credit default swaps* (CDS), which were phenomenally successful, reaching a monetary volume of 30,000 billion dollars in 2006.[39]

[34] Law No 2007-544 of 12 April 2007. *cf* B Jacquillat, 'La gouvernance des entreprises de marché' (2006) *Revue d'économie financière*, 169–88; S Neuville, 'Les prestataires (entreprises d'investissement et entreprises de marché) et les services d'investissement' (2007) *Bulletin Joly Bourse et produits financiers*, 559–85.

[35] On this issue more broadly, see A Couretet, H Le Nabasque (ed), *Droit financier*, 2nd edn (Paris, Dalloz, 2012) 6.

[36] The algorithms of the computers conducting high-frequency trading enable dozens of orders to be placed per millisecond. Today, 90% of the orders placed on the stock markets in Europe have been issued by these 'high-frequency traders'. The figure is even greater in the US, where several 'flash crashes' on Wall Street have been attributed to these operations, including that of 6 May 2010 (*cf* 'High-Frequency Trading', *New York Times,* 10 October 2011).

[37] Couret and Nabasque, *Droit financier* (n 5) 16.

[38] A Gaudemet, *Les Dérivés* (Paris, Economica, 2010), preface H Synvet, 328.

[39] *cf* Couret and Nabasque, *Droit financier* (n 5) 814. For comparison, the net state budget expenditure in France came to a total of roughly 300 billion euros in 2014 (about 374 billion US dollars).

Although their function was to insure against financial risks, they and other similar instruments increased these risks considerably, and themselves became the object of large-scale speculation. So there is nothing new since Law's financial system[40]—except that we seem to have lost sight of the reasons why, in the eighteenth century, insurance mechanisms too close to games of chance were prohibited.[41] But it is hardly surprising that economic policies based on game theory should generate a casino economy. Such financial instruments have created a monstrous speculative bubble, estimated today at 90 per cent of all financial transactions. Some economists, among them François Morin, warned early on against the risk of this 'wall of money',[42] detached from any real economic basis. Like a tsunami, it is capable of sweeping away real human lives. And as another economist, André Orléan, has shown, the financial markets do not obey the law of supply and demand. This is because every operator is by turns a buyer and a seller, and because the operator does not speculate on the value of goods, but on the value that others will assign to them in the future. As a result, 'price, on the financial markets, does not express a magnitude defined prior to the market interaction, but is a pure creation of the financial community as it goes looking for liquidity'.[43]

Alongside stock market figures, the second tool used to measure the value of companies is their financial accounts. Accounting standards were reformed at roughly the same time as these financial instruments were developed, and there too the impact of governance by numbers and the ideal of self-referential calculations are palpable. Accounting logic has been inverted. Ever since the invention in medieval times of double-entry bookkeeping, the principle of prudence[44] had prevailed to ensure that one could record as assets only the historical cost of goods owned, that is, their purchase value minus depreciation. When in 2002 the European Union farmed out the development of new accounting standards to a private body, the International Accounting Standards Committee (IASC),[45] it simultaneously did away with the principle of prudence, replacing it with the concept of 'fair value', which is the estimated value of the good if sold on the market

[40] Named after John Law who, with the support of the Regent, converted the public debt into paper money backed against future income from the colonies. This first speculative bubble founded on banknotes burst in 1720 (see E Faure, *La Banqueroute de Law* (Paris, Gallimard, 1977)).

[41] See above, ch 5, p 99.

[42] F Morin, *Le Nouveau Mur de l'argent. Essai sur la finance globalisée* (Paris, Le Seuil, 2006) 277.

[43] André Orléan, *L'Empire de la valeur. Refonder l'économie*, Paris, Le Seuil, 2011, p 307.

[44] See above, ch 5, pp 94–96.

[45] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002. The American counterpart, or rather twin, of the IASC is the Financial Accounting Standards Board (FASB), and between them they carve up accounting standardisation for the whole world.

on the date the accounts are drawn up. As Samuel Jubé has shown, these reforms have utterly transformed the role of accounting and the meaning of accountability.[46] Accounts are no longer the quantified reminder of an entrepreneur's legal responsibilities towards third parties, but are now an instrument for measuring a company's market value in comparison with its competitors. The stock market value of companies is largely based on this sort of benchmarking, and since company directors are obliged to espouse the immediate interests of their share-holders, improving a company's accounting image has become an end in itself, independently of its real performance and long-term interests. This has produced the phenomenon of redundancies based on stock-market performance, which improve the company's present value, but harm its future, represented by its human potential. This mode of valuation can be termed procyclical, because it inflates stock market values in boom times, and wipes them out when the markets plunge. After the stock market crash of 2008, the European banks argued successfully for calculating their loans not at their (immediate) 'fair value', but at their historical cost[47]—thus returning to the principle of prudence when it was to their advantage. One could summarise this by saying that when a mafia-style system holds sway, the figure of the guarantor does not disappear, but it abandons overseeing equitable exchange in favour of protecting the ongoing opportunities for predation.

III. PUBLIC SECTOR GOVERNANCE

In the public sector, governance by numbers was introduced in the name of the burgeoning science of organisations through a programme called New Public Management, which applied the rules and methods developed for private sector management to the public sphere.[48] In France, social security law was the first area to be affected by this new methodology, when a national objective of health insurance expenditure (ONDAM) was introduced in 1996, to be fixed annually by a law on funding the social security.[49]

[46] S Jubé, *Droit social et normalisation comptable* (ch 5 fn 17).

[47] *cf* S Jubé, 'Régulation bancaire et régulation comptable' in 'Débats autour de la régulation bancaire et de ses impacts' (2012) *The Journal of Regulation*, May.

[48] For an overview, see OE Hughes, *Public Management and Administration. An Introduction* (London, Palgrave Macmillan, 1994); 4th edn (2012) 373; for a sociological approach, see B Hibou, *La Bureaucratisation du monde à l'ère néolibérale* (Paris, La Découverte, 2012) 223.

[49] French Social Security Code, Art L.O.111-3 and L.O.111-4. *cf* R Pellet, 'Les lois de financement de la sécurité sociale depuis la loi organique du 2 août 2005', *Revue de droit sanitaire et social* (2006, p 136; Anne-Sophie Ginon and Maurice Trepeau, 'L'ONDAM peut-il s'imposer comme outil de régulation des dépenses d'assurance maladie?' (2008) *Revue de droit sanitaire et social* 1096; P Hassenteufel and B Palier, 'Les trompe-l'œil de la "gouvernance" de l'Assurance-maladie. Contrastes franco-allemands' (2005) *Revue française d'administration publique* 113, 13.

However, despite the efforts of Parliament, this innovation did not have a very significant normative impact,[50] unlike the Constitutional Bylaw, or Organic Law, on Budget Acts (the LOLF, or *Loi organique relative aux lois de finances*), which was passed by all parties in 2001.[51] The main issue behind this reform was the 'performance' of public policy. As Didier Migaud and Gilles Carrez, two members of the Finance Committee, stated in their Report to Parliament, 'the battle of performance will only really be won after several years, because it first has to be won in people's minds'.[52] This military vocabulary—the 'battle', and psychological warfare—is characteristic of the rhetoric of total mobilisation in all its forms. In this case, mobilising people's minds involves a revolution in the language of governmental action, in order to make it meet quantified objectives, as illustrated by the following extract from the LOLF:

— the *budget acts* are 'in keeping with a defined economic equilibrium as well as the objectives and performances of the programmes that they determine';
— a *mission* 'covers a set of programmes designed to contribute to a defined public policy';
— a *programme* 'covers appropriations for implementing an action or a consistent set of actions coming under the same ministry and involving both specific objectives, defined in the public interest, and expected results subject to evaluation.'
— An *action* is 'a component of a programme. […] If an action has an identifiable finality, it may be tied to objectives and indicators which are specific to it, among those associated with the programme';
— a *programme's operational budget* (BOP): 'the totality of the means associated with the objectives measured by results indicators. The objectives of the programme's operational budget are defined in the detailed objectives of the programme';

[50] É Douat, 'La valeur juridique de l'ONDAM. Apparence et réalité' in *Finances publiques et santé* (Paris, Dalloz, 2011) 493.

[51] Constitutional Bylaw on Budget Acts No 2001-692 of 1 August 2001 (the LOLF). See the summary, 'Les objectifs et les indicateurs de performance des projets et rapports annuels de performance annexés aux projets de lois de finances', published by the French Department of Budgetary Reform of the Ministry of the Economy, Finance and Industry, 12 December 2003; and the Guide to the Constitutional Bylaw on Budget Acts (2008 English edition), available at www.performance-publique.budget.gouv.fr. See also J-P Camby (ed), *La Réforme du budget de l'État. La LOLF*, 2nd edn (Paris, LGDJ, coll 'Systèmes', 2004); P Parini and M Bouvier, *La Nouvelle Administration financière et fiscale* (Paris, LGDJ, 2011); H Crucis, 'La gestion publique en mode LOLF: quel genre?' (2008) *Actualité juridique Droit administratif (AJDA)* 1017; and by the same author, 'Les objectifs en droit financier public. La fin en soi?', in B Faure (ed), *Les Objectifs dans le droit* (Paris, Dalloz, 2010) 115–33.

[52] D Migaud and G Carrez, *La Performance dans le budget de l'État* (n 1) 7. On this idea and its concrete realisation, see F Jany-Catrice, *La Performance totale: nouvel esprit du capitalisme?* (Lille, Presses universitaires du Septentrion, 2012) 175.

— *indicators*: 'a quantified indicator gives a numerical indication of the performance progress expected and obtained. Each indicator sets a quantified projection for the year of the budget act and for the medium term';
— the *annual performance plans* (PAP) for each programme contain 'the presentation of its actions, associated costs, objectives, and results obtained and expected for the coming years measured by a justified choice of accurate indicators';
— The *annual performance reports* (RAP) show, by programme, 'the objectives and results, expected and obtained, the indicators and associated costs', highlighting 'the deviations from the budget act projections for the year considered as well as from the actual sums reported in the latest budget review act'.[53]

The number of objectives contained in the PAPs and the RAPs can be estimated at around 500, each of which comes with its indicators, to give a 'numerical indication of the performance progress expected and obtained'.[54] To these should be added the avalanche of objectives set internally, from the highest to the lowest level, in each public institution. The introduction of this new type of governance went hand in hand with applying in the public sector the accounting standards used in the corporate sector.[55] Since that date, 'the rules applicable to government accrual-based accounting only differ from those applicable to companies on the grounds of the specific nature of government action'.[56] This has given rise to a lucrative market in the certification of public accounts by private audit firms.[57] Applying these accounting standards means that public institutions are henceforth valued at their estimated market sale price.

To complement these reforms, the programming of public funding and the subordination of governmental action to the accounting imperative of balanced books was constitutionalised in France in 2008. The equivalent of the private sector's 'bottom line', that is, the figure which can be treated as the 'objective indicator' of public action, has become, for the public sector, the budget deficit or surplus. In the terms of article 34 of the French Constitution, 'The multi-annual guidelines for public finances shall be established by Programming Acts. They shall contribute to achieving the objective of balanced accounts for public administrations.'[58] In order to avoid laxism,

[53] Sources: the *LOLF*, Arts 7-I, 51 and 54; *Guide to the Constitutional Bylaw* (n 51) 51–52.
[54] Guide to the Constitutional Bylaw (n 51) 51–52.
[55] *cf* C Eyraud, *Le Capitalisme au cœur de l'État. Comptabilité privée et action publique* (Broissieux, Éditions du Croquant, 2013) 320.
[56] The *LOLF*, Art 30.
[57] Certifying French universities alone requires budget increases of some 50 million euros annually (*cf* Eyraud, *Le Capitalisme au cœur de l'État* (n 55) 231).
[58] M Bouvier, 'La constitutionnalisation de la programmation pluriannuelle des finances publiques' (2008) *Les Petites Affiches* 245, 50; and, by the same author, 'Programmation pluriannuelle, équilibre des finances publiques et nouvelle gouvernance finan- cière publique' (2009) *Les Petites Affiches* 16, 52.9.

which always threatens democratic regimes, some countries have constitutionalised a 'budgetary golden rule', which results in automatic budget cuts (in American law, 'sequestrations') if the authorised deficit is exceeded.[59]

The relations between central and regional and local government, or equally public agencies, are likewise specified by numerical objectives.[60] 'Contracts of agreed objectives' have mushroomed beyond any possible overview, but to give a taste of their range of application, there are: government-region strategic plan contracts; contracts of objectives and means for continuing professional development;[61] territorial climate energy plans;[62] multi-annual contracts of objectives and means in healthcare;[63] contracts of objectives for administrative courts;[64] multi-annual contracts between the state and university establishments,[65] etc. All of these contracts are of course accompanied by performance and procedures indicators, in order to monitor their execution.

France is by no means unique in this development, which seems to have become the norm for public policy implementation throughout the world. The educational reform brought about in the US by the law 'No Child Left Behind' (2002) is a good example. Like the LOLF in France, this law was passed with support from both the majority and the opposition. It fixed 'knowledge stages for different levels of public schooling', and 'a general system for monitoring pupils' results', thanks to yearly performance tests. Both the school and the district are considered responsible for their pupils' results. When schools do not meet the objectives fixed, they are declared as 'fail[ing] to make Adequate Yearly Progress' (AYP). Corrective measures are then taken, sometimes accompanied by a two-year 'turnaround plan'. The school can thereafter be called a '*School in Need of Improvement* (SINI), if the objectives set are not met within these two years, or a *School Under Registration Review*' (SURR). If the 'failure' continues, the district informs

[59] See B Jean-Antoine, 'La règle d'équilibre ou "règle d'or" en droit comparé' (2012) *Revue française de finances publiques* 117, 55.

[60] *Le contrat, mode d'action publique et de production des normes. Rapport annuel du Conseil d'État, 2008* (Paris, La Documentation française, 2008); S Chassagnard-Pinet, D Hiez (ed), *La Contractualisation de la production normative* (Paris, Dalloz, 2008); L Richer, 'La contractualisation comme technique de gestion des affaires publiques' (2003) *Actualité juridique de droit administratif (AJDA)* 19, 973.

[61] Laws No 83-8 of 7 January 1983 (on the allocation of powers between the *commune*, the *département*, the region and the state), No 87-572 of 23 July 1987 and No 92-675 of 17 July 1992 (on apprenticeship); *Education Code*, Art D, 214-5ff.

[62] Programmatic Law No 2005-781 of 13 July 2005 setting energy policy guidelines; *Environment Code*, Art L.226-26; A Fourmon, 'L'essor des plans Climat-Énergie territoriaux' (2009) *Gazette du Palais* 185, 24.

[63] *Public Health Code*, Art 1435-3 and 16114-1; L Cocquebert, 'Le contrat pluriannuel d'objectifs et de moyens est-il un contrat' (2012) *Revue de droit sanitaire et social*, 2012, 34.

[64] Law No 2002-1138 of 9 September 2002 on organising and programming the justice system. See R Denoix de Saint Marc, 'Les contrats d'objectifs des cours administratives d'appel' (2008) *AJDA*, 1246.

[65] *Education Code*, Art. L 712-9.

the parents that they can change school. In the long run, the school can be managed as a 'charter school' (under contract with the state), in which case it has reduced administrative obligations, but it absolutely must meet its objectives if it wants to see its contract renewed. The school can also have its teaching or administrative staff replaced. The public authorities can also request that 'an entity such as a private management company which has proved its efficacy' manage the school. On the other hand, when the school meets or catches up on its objectives, it can receive bonuses (*State Academic Achievement Awards*).[66]

IV. EUROPEAN GOVERNANCE

At the European level, Member States' obligations to attain certain quantified objectives were first enshrined in the Treaty of Maastricht (1992), with the decision to create a single European currency. Four convergence criteria, or objectives common to all Member States, were adopted at the time, namely the control of inflation, the control of the budget deficit and the public debt, a stable exchange rate mechanism and the convergence of interest rates. From the start, this subordination of economic policies to objectives was assessed by 'objective indicators', which were both the goal and the measure of countries' performances. For example, the indicator of price stability is that a country's rate of inflation does not exceed by more than 1.5 points the rate of inflation in the three Member States with the best results. The indicator for the control of public spending is that the deficit of general government and social security does not exceed three per cent of the GDP, and the level of the public debt, not more than 60 per cent of the GDP. As for long-term interest rates, they must not be more than two per cent higher than the rates of the three Member States with the best results in terms of price stability (a technique called 'benchmarking', where performance is measured not by an absolute standard but by reference to the performance of others).[67]

Since this mechanism never worked, rather than examine its workability, the screws were simply tightened over 20 long years. Thus, in 1997, the *Stability and Growth Pact* (SGP) signed in Amsterdam obliged Member States to submit a yearly 'stability programme' for the ensuing three years to the Economic and Financial Affairs Council (ECOFIN). This council adopts a host of objectives every year—the Broad Economic Policy Guidelines

[66] *cf* M Montagutelli, 'L'école américaine dans la tourmente de "No Child Left Behind"' (2009) 1 *Revue française d'études américaines* 119, 94–105; see also A Gamoran, 'Bilan et devenir de la loi "No Child Left Behind" aux États-Unis' (2012) *Revue française de pédagogie*, 178, 13–26.

[67] See above, ch 7, p 138.

(BEPG)—which are implemented by Member States under mutual monitoring. The Pact has introduced financial penalties for Member States with a deficit in excess of the objective indicator of three per cent of their GDP. Why this figure? One of the brains behind it, who was a member of the Budget Directorate at the time, described the process in terms which reveal our leaders' fetishistic worship of numbers, and the attendant loss of contact with the realities of the economy:

> Focusing on the deficit of a particular year doesn't have much sense and relating it to the GDP of the same year has even less. The deficit to GDP ratio […] can in any case never be used to indicate a trend; it does not measure anything: it is not a criterion. The only valid tool is an analysis of the country's capacity to repay its debts, that is, an analysis of their financial health […]. Be that as it may, the political—not economic, but political—question does not go away: how transmute the lead of a reasoned analysis of creditworthiness into the visible gold of an arresting and punchy rallying cry?[68]

The last step in the enslavement of Member States to the imperative of attaining numerical objectives was taken on 1 January 2013, when the *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* (the *Fiscal Stability Treaty*) came into force. Article III of this Treaty is a perfect example of governance by numbers: it fixes an objective, immediately translated into numerical indicators, of a balanced budget or a budgetary surplus, lays down a timeline for achieving this objective, and the evaluation procedures to be employed. Going against an electoral promise,[69] this text was ratified by France. Its most important sections contain the following:

> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Article III:
>
> 1. The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:
>
> (a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;
> (b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5% of the gross domestic product

[68] G Abeille, 'À l'origine du déficit à 3% du PIB, une invention 100 % … française', *La Tribune*, 1 October 2010.

[69] One of the promises on which the French President was elected in 2012 was that he would not ratify this text as it stood; no sooner elected, than he did just that. The Constitutional Council handed down a particularly tortuous decision to the effect that this ratification did not require prior revision of the Constitution (*Conseil constitutionnel*, No 2012-653 DC, 9 August 2012).

at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

(c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

(d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60% and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1.0% of the gross domestic product at market prices.

Where this Treaty is really new, catapulting us into the era of legal cybernetics, is in its introduction of a corrective mechanism which '*is triggered automatically* in the event of significant observed deviations from the medium-term objective or the adjustment path towards it. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time' (Art 3e). In France, this mechanism has taken the form of the *Haut Conseil des finances publiques* (Higher Council on Public Finances), an independent body headed by Didier Migaud, one of the fathers of the LOLF, and Chair of the Cour des comptes (France's highest institution for auditing public finances). If a significant gap is observed between the path for re-establishing a balanced budget and the objective assigned, the government must respond to this in its public expenditure or social security proposals during that year.[70]

But how solid is this legal armature through which economic policy choices are funnelled? Not one of the quantified objectives fixed by European law since the Maastricht Treaty has ever really been fulfilled, and the 'golden rule' imposed on all the Eurozone countries by the *Stability and Growth Pact* probably has the same fate awaiting it.[71] Iron discipline was imposed not there but elsewhere, in the Maastricht Treaty's obligation on the European Central Bank to follow one single objective only, that of price stability,[72] and in its prohibition on lending to Member States.[73] These are

[70] Constitutional Bylaw No 2012-1403 of 17 December 2012 on the Programming and Governance of Public Finances.

[71] See A Taillefait, 'Les "automatismes budgétaires" à l'épreuve du politique. À propos des dettes publiques' (2012) *Revue française des finances publiques*, 118, 133; D Wilsher, 'Law and the Financial Crisis: Searching for Europe's New Gold Standard' (2013) 19 *European Law Journal* 3, 241–83.

[72] Treaty on the Functioning of the European Union (TFEU), Art 105, § 1.

[73] TFEU, Art 101; Protocol on the Statute of the European System of Central Banks and of the European Central Bank, Art 21.

two major differences from the US Federal Reserve, which is allowed to buy government bonds, and whose primary role is to ensure full employment. Since Eurozone countries cannot get financing from the Central Bank, they are at the mercy of the whims of the financial markets. The numbers really endowed with normative force are not the ones mentioned in the Treaties, but rather the interest rates on the bond markets.[74]

V. GLOBAL GOVERNANCE

Governance by numbers on an international level has two facets: public and private. Its public aspect is clearest in the conditions imposed by international institutions on the assistance they give to countries in financial difficulty. Aid is provided either within the framework of global plans—structural adjustment plans—or within narrower programmes. All aid programmes come complete with their quantified indicators, by which the country's success in attaining the assigned objectives is measured. These numerical indicators have given the IMF a lot of power, ever since the dollar left the gold standard in 1971, under Richard Nixon, with the resulting floating of currencies. Currencies were then themselves treated as though they were products, with the price being determined by the financial markets, such that the IMF's mission as guardian of the international monetary order became meaningless. Since then, the IMF's main aim has been to force countries to obey the three commandments of neoliberalism: abolishing trade barriers; deregulating the labour markets; and privatising public services. The financial assistance proposed by the IMF is at that cost.[75] The payment of the financial aid is staggered, and is conditional upon attaining the agreed objectives, as evaluated by quantitative criteria,[76] which invariably include macro-economic variables such as certain monetary and credit aggregates, international reserves, budgetary balances and foreign borrowing. Failure to meet one of the quantitative targets may be tolerated by the IMF when the deviation in question is insignificant or temporary, or if national authorities have taken, or will take, corrective measures—this principle has also been adopted for monetary discipline in the Eurozone. Structural adjustment plans, which were first tested in Latin America, particularly Argentina (leading to its bankruptcy), were later applied to many Southern countries, particularly in Africa, and were later prescribed to Eurozone countries under the aegis of the Troika (the European Commission, the European Central Bank and the IMF).

[74] For a similar argument see F Lordon, *La Malfaçon. Monnaie européenne et souveraineté démocratique* (Paris, Les liens qui libèrent, 2014) 23ff.

[75] *cf* J-M Sorel, 'Sur quelques aspects juridiques de la conditionnalité du FMI et leurs conséquences' (1996) 7 *European Journal of International Law*, 1.

[76] The IMF adopted new conditionality regulations in 2009. The monitoring of compliance is now contained in 'programme reviews', rather than being assessed through structural criteria.

The mechanism of 'conditionality', with its numerical indicators, is not the preserve of the IMF. The EU and the World Bank also apply such conditions in their aid programmes to poor countries. The social and economic disasters they have generated led to the introduction of another type of programme, using other quantified objectives: the fight against poverty; good governance; and human development.[77] These have been the objectives of the UN's Development Programme (the UNDP) since 1990, and, since 2000, of the 'UN Millennium Development Goals'.[78] It was from within the UNDP that Amartya Sen and Mahbub ul Haq came up with their 'human development index'. After several changes, it stabilised in 2011 into the following formula:

$$IDH = \sqrt[3]{I_{Life} \times I_{Education} \times I_{Income}}$$

where I_{Life}, $I_{Education}$ and I_{Income} are the indicators for longevity, level of education and standard of living respectively.

This index is constructed by aggregating sub-indices designed to measure health, lifespan, level of education and standard of living. For example, the level of education is measured by the average length of formal education for 25-year-old adults, and the expected length of education for school-age children. Similar indices were developed to measure 'good governance'.[79] These indicators of 'well-being' have been all the rage recently,[80] particularly in anti-poverty plans, which invariably replaced structural adjustment plans. The question is whether they can provide useful remedies or whether they simply push these countries further down the blind alley of generalised quantification.

The first non-financial objective to be quantified as an internationally binding target was the reduction in CO_2 emissions set out by the Kyoto

[77] World Bank, *World Development Report 2000/2001: Attacking Poverty* (Oxford, OUP, 2001); J-P Cling, M Razafindrakoto and F Roubaud (ed), *Les Nouvelles Stratégies internationales de lutte contre la pauvreté* (Paris, Economica, 2003) 463.

[78] *cf* The Millennium Declaration adopted by the UN General Assembly (Resolution 55/2 of 13 September 2000). Social and environmental objectives have pride of place in this Resolution (which also enshrines the principle of solidarity), including: development, and eradicating poverty; protecting the environment; promoting democracy and good governance; protecting the vulnerable; and meeting the specific needs of Africa.

[79] S Knack and N Manning, *Towards Consensus on Governance Indicators*, World Bank, March 2000, 28; M Besançon, *Good Governance Ranking: The Art of Measurement* (Cambridge Mass, World Peace Foundation-Harvard University, 2003) 40; S Van de Walle, 'Peut-on mesurer la qualité des administrations publiques grâce aux indicateurs de gouvernance?' (2005) 3 *Revue française d'administration publique* 115, 435–61.

[80] J Gadrey and F Jany-Catrice, *Les Nouveaux Indicateurs de richesse*, 2nd edn (Paris, La Découverte, 2007); J Stiglitz, A Sen and J-P Fitoussi, *Richesse des nations et bien-être des individus. Rapport au Président de la République*, preface by N Sarkozy (Paris, Odile Jacob, 2009) 351.

Protocol. This normative instrument emanating from the United Nations Framework Convention on Climate Change (UNFCCC) held in Rio in 1992, was signed in 1997 and came into force in 2005. By 2010, it had been ratified by 168 countries, but not by China, nor by the United States.[81] Its objective was to reduce over the period 2008–12 the emissions measured in 1990, by at least five per cent. The method used here is a good illustration of what is called the theory of property rights,[82] which works neither through rules or levies, but by setting up a market in tradeable pollution rights. An amendment adopted in Doha in December 2012 extended the period of measurement to 2013–20, using this mechanism. However, the failure of the 2009 UN Climate Change Conference in Copenhagen, and the desertion of several countries which had initially signed the Protocol (Canada, Japan, New-Zealand and Russia), have resulted in a mere 15 per cent of world CO_2 emissions being covered today by the agreement, and its very conception has been discredited by the most reliable economists.[83]

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Assessing countries' performance quantitatively also has a private sector dimension, in the form of rating agencies which produce figures to describe a country's actual and projected financial performance, and the trustworthiness of its debt securities. The ratings in turn generate risk indicators of variable sophistication.[84] Internationally, these agencies are only regulated by a non-legally binding Code of Conduct, the Statement of Principles Regarding the Activities of Credit Rating Agencies, adopted in 2003 by the International Organization of Securities Commissions (IOCV). The EU favoured the principle of self-regulation for rating agencies up to 2006, but after the financial markets crashed in 2008 it adopted a series of regulations[85] designed to define the activities of credit rating agencies,

[81] A-S Tabau, *La Mise en œuvre du Protocole de Kyoto en Europe* (Brussels, Bruylant, 2011) 527; A Borde and H Joumni, 'Le recours au marché dans les politiques de lutte contre le changement climatique' (2007) *Revue internationale et stratégique*, 67, 53.

[82] See above, ch 7, p 130ff.

[83] *cf* R Guesnerie and H Tulkens (eds), *The Design of Climate Policy* (MIT Press, CESifo Seminar Series, 2008); R Guesnerie, *Pour une politique climatique globale* (Paris, Éditions Rue d'Ulm/Presses de l'École normale supérieure, 2010) 96.

[84] See, concerning the *InternationalCountryRiskGuide* (ICRG), A Linder and C Santiso, 'Not Everything that Counts Can be Counted: A Critical Look at Risk Ratings and Governance Indicators' (2003) 29 *Nordic Journal of Political Economy*, 105–32.

[85] Regulation EU No 1060/2009 of 16 September 2009, amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 and completed by five delegated acts of 31 March and 12 July 2012. On this question, see *Les Agences de notation* (Paris, la Découverte, coll 'Repères', 2010); T Bonneau, 'Coup de projecteur sur les agences de notation' (2011) *La Semaine juridique* édition Générale *(JCP G)* 45, 1184; 'Règlements délégués' (2012) *Revue de droit bancaire et financier*, 5, fn 173.

in order to prevent conflicts of interest,[86] to guarantee the soundness of the rating methods used and to have the agencies monitored by a European Securities and Markets Authority, established in 2010. One of the lessons of the financial collapse of 2008—the same lesson which should already have been learnt from the *Enron* scandal (2001) regarding accounting practices—was that governance by numbers gives immense power to those who construct the figures, because this is conceived as a technical exercise which need not be exposed to open debate.[87] The disasters we have seen recurring are never ascribed to a design fault in the very mechanism used, but always to human failings. Yet governance by numbers is itself a dead end, unsustainable in the long run. It generates the return of new forms of allegiance between people, as we shall see in the second part of this book.

[86] J-M Moulin, 'Conflits d'intérêts chez les agences de notation' (2008) *Bulletin Joly Bourse*, special issue, December, 580.

[87] The Libor case clearly illustrated this error. The Libor is a grouping of rates supposed to represent the market price of inter-bank loans and to serve as a benchmark in a large number of credit operations. The Libor rate is fixed daily on the basis of the declarations made by London banks on the borrowing costs practised between them. It came to light that several of them had agreed a price between themselves, which led to Barclays Bank being fined 365 million euros in the British courts.

9

The Limits of Governance by Numbers

> If you try to improve the performance of a system of people, machines, and procedures by setting numerical goals for the improvement of its individual elements, the system will defeat your efforts and you will be picking up the pieces where you least expect it.[1]

BOTH GOVERNANCE BY numbers and government by laws pursue the ideal of a society whose rules derive from an impersonal source and not from the will of the powerful. However, governance by numbers parts company with government by laws in its desire to liquidate all heteronomy, including that of the law. When the law is the sovereign ruler,[2] its heteronomous authority, to which all are subject, is the primary condition for the autonomy of the individuals it governs. The institution of language has the same normative structure: language-speakers can express themselves freely only if they have first accepted the law of the language they speak; we must obey the impersonal rules which refer certain signifiers to certain signifieds in order to achieve the autonomy of thought and expression which the mastery of a language gives us. Without this, we have no access to the reflexive universe of (natural) language, in which we can observe ourselves and speak, for example, about the rules which govern us. However, in natural languages, there is no univocal link between signifier and signified, so a statement is open to a multitude of possible interpretations.

Logico-mathematical language, by contrast, is univocal and non-reflexive. The symbols used have one meaning, and one only, even if they can only be discussed in the natural languages on which they are based. One of the breakthroughs of modern mathematics was the coding of some of its own formulas, in a movement of reflexivity which Gödel explored further in his demonstrations that undecidable propositions exist—undecidable because open to several possible interpretations.[3] Computing language rests on this

[1] M Tribus, *Quality First. Selected papers on quality and productivity Improvement*, 4th edn (Washington DC, National Society of Professional Engineers, 1992) 1459).

[2] Plato *Letter VIII*, *Plato in Twelve Volumes*, Vol 12, 334c–337e, tr HN Fowler (Cambridge, Mass, Harvard University Press; London, William Heinemann Ltd, 1921).

[3] *cf* D Hofstadter, *Gödel, Escher, Bach: an Eternal Golden Braid* (London, Penguin, 1979).

discovery, and the reflexivity of one program taking another as an item of data.[4] Computers are thus self-governing machines, within the limits of the programs they are running. Their invention made it possible to envisage a society which functions according to immanent and impersonal rules, that is, an inherently self-programming society purged of any heteronomy. However, this notion of society as a machine had fired the imagination of Western legal thought for a long time, at least since Hobbes.[5] Governance by numbers simply replaced the clock with a new fetishised object, the computer, coupled to its vision of a self-regulating order in which subjection to any over-arching laws is superfluous. The radiant future promised by neoliberalism conceives society as governed solely by the calculated utilities of a host of contracting particles. Its basis is thus, as Karl Polanyi has called it, pure 'economic solipsism'.[6]

There are, however, solid reasons for doubting that this kind of future will ever materialise. In its pursuit of the utopian dream of entirely calculable norms, governance by numbers undermines the foundations of any rational, scientific calculation. Gödel demonstrated that a formal system built out of an indefinite series of logically linked axioms will nevertheless have an irreducible element of incalculability to it. And, as one of the people whose discoveries led to the invention of computing, he was also one of the first to point out that the human mind is not reducible to a machine.[7] The mathematician Jean-Yves Girard characterised this position as follows: 'if we had to summarise in a single sentence the significance of Gödel's refutation of Hilbert's programme, it would be: 'there are things which cannot be explained in terms of machines'.[8] Many scientists turn a deaf ear to the implications of such discoveries, continuing to adhere to a mathematical formalism, and a mechanistic and totalising vision, whose only advantage is giving a simple and reductive access to the world.[9] Moreover, outside the realm of mathematics, Gödel or Turing are the victims of the most fantastical extrapolations.[10] This is only to be expected, since the scientific discoveries

[4] A Nicolle, 'Comparaison entre les comportements réflexifs du langage humain et la réflexivité des langages informatiques', in S Stinckwich (ed), *Réflexivité et auto-référence dans les systèmes complexes* (Paris, École nationale supérieure des télécommunications, 2005) 137–48; and, by the same author, 'La question du symbolique en informatique', in H Paugam-Moissy, V Nyckees, J Caron-Pargue (ed), *La Cognition entre individu et société* (Paris, Hermès, 2001) 370.

[5] See above, ch 1, p 19ff.

[6] K Polanyi, *The Livelihood of Man*, ed H Pearson (New York City, Academic Press, 1977).

[7] *cf* E Nagel, JR Newman, K Gödel, J-Y Girard, *Le Théorème de Göde l* (Paris, Le Seuil, 1997); P Cassou-Noguès, *Les Démons de Gödel. Logique et folie* (Paris, Le Seuil, coll 'Points', 2007) esp 173ff.

[8] J-Y Girard, 'Le théorème d'incomplétude de Gödel' in N Bouleau, J-Y Girard, A Louveau, *Cinq conférences sur l'indécidabilité* (Paris, École nationale des Ponts et Chaussées, 1982) 23.

[9] ibid, 20.

[10] ibid, 23–24.

of a particular period inevitably inform that period's imaginary, including ideas about how society should be governed.[11]

To give some idea of the unsustainability of governance by numbers, we shall first look at its structural effects on the legal order, and then at the latter's inevitable resistance.

I. THE STRUCTURAL EFFECTS OF GOVERNANCE BY NUMBERS

Insofar as the legal order helps anchor in reality the image we have of the world in which we live, and of what it could or should be, legal normativity contributes to the institution of reason. This anthropological function of the law can be achieved only if one respects at once the realities of the world *and* human beings' specific capacity to transform them. This is done, in Proudhon's words, by having ideas 'in the palm of one's hand'.[12] Under a Taylorist system, the capacity to reflect on one's actions was the privilege of a minority of leaders (the bourgeoisie or the 'vanguard of the proletariat'), while the majority of workers were reduced to the status of cogs obeying mechanically the rules of the workshop and the rhythms of the machines. The dichotomy generated—between those whose role was to think and lead, and those whose role was to obey without thinking—tends to disappear under governance by numbers. This would be good news indeed, if only the effect was to anchor managers' thinking in real experience and to enable the workers, who live this experience, to communicate what they think and put it into action. However, governance by numbers produces quite the opposite effect. Rather than release us from the fantasy of the governing machine, it intensifies this fantasy and ensnares managers and workers alike in feedback loops governed by numerical representations of the world increasingly disconnected from experience. Far from reconciling objectivity and subjectivity in the conduct of human affairs, it impairs both by replacing the territory with the map, and action with reaction.

II. THE ECLIPSE OF THE OBJECT: THE MAP REPLACES THE TERRITORY

In theory, management by objectives claims to make a sharp distinction between the time of action and the time of evaluation. The 'structure of

[11] On the genetic imaginary, see B Duden, *Die Gene im Kopf—der Fötus im Bauch. Historisches zum Frauenkörper* (Hannover, Offizin Verlag, 2002) 266.

[12] PJ Proudhon, *Literary Property*, p 14, para 2, at http://wiki.proudhonlibrary.org. (tr mod). This is a partial bilingual translation of P-J Proudhon, *Les Majorats littéraires. Examen d'un projet de loi ayant pour but de créer, au profit des auteurs, inventeurs et artistes, un monopole perpétuel* (1862).

self-control' which it champions thus in principle has three stages, comprising: a) the setting of objectives; b) the actions carried out to meet these; and c) the assessment of the performance, which itself, through feedback, serves to redefine the future objectives or actions. However, the numerical indicators used in c) to assess the performance are endowed with a normative function, which results in a 'management of domination' (rather than self-management) which Peter Drucker's governance by numbers expressly warned against.[13] A conflation between *satisfying indicators* and *realising objectives* gives rise to what can be called an '*objective indicator*', in which two different meanings of 'objective' are fused: as a noun it is a *goal* assigned to an action, and as an adjective, it qualifies the *objectivity* of a judgment on reality. In any purely quantitative evaluation, this fusion of objectives and indicators is inevitable, because the numbers are already informed by a qualitative value which the assessor cannot modify.

A good example of this fusion occurs when research assessment methodologies ignore the issue of how a piece of research contributes to furthering knowledge, and instead assign value through bibliometric indicators, according to the ranking of the journals in which the research is published. The academic world, which was left unscathed by Taylorism, has become the chosen playground of governance by numbers. Researchers in economics are at the cutting edge of this replacement of judgement by calculation in evaluation procedures. They are like the hero of Kafka's *Penal Colony*, applying management methods to themselves with the greatest rigour, and advocating that they be applied to all domains of human existence. Thus, in a report by the *Cour des comptes*, France's highest budget auditor, the Toulouse School of Economics is reported as having 'introduced a system of payment "on merit"', in order to 'reward excellence' and the individual performances of its researchers, 'based on awarding bonuses to the researchers who publish in the 100 best economics journals' (none of which are French). A complex formula, based on the status of the article, the number of co-authors, its volume and the journal's ranking, gives an objective figure for the bonus. The maximum bonus is awarded for articles published in one of the top five journals in the world.[14] With this kind of procedure, no one actually needs to read the academic articles, and even less ask themselves whether the real economy in the real world is any more intelligible or could be better managed as a result, because a value judgement is already present in the numerical ranking of the journals. All one has to do is calculate. And that can be entrusted to a machine, to ensure the 'objectivity' of the process. The assessment as a whole thus exemplifies something Günther Anders noted half a century ago: the desire to 'transfer decision-making power to an instrument (since the "last word" must be objective, and only the judgements

[13] See above, ch 8, p 146.
[14] Cour des comptes, *Rapport public annuel 2012*, 605.

declared by objects are today considered to be "objective")'.[15] Despite harsh criticism from some researchers,[16] not least mathematicians,[17] these procedures are increasingly applied, and are used to decide on funding allocations and the nature of the research to be undertaken. For example, in the top Chinese universities, promotion for legal scholars is dependent on their publications in a limited number of journals, all of which are in English. In practice, they are thus encouraged to abandon any in-depth research into legal systems other than common law ones (because any serious legal research needs to work in the language of the legal system it is studying). A university can thus improve its overall score only at the cost of considerably impoverishing its real research capacities in comparative law.

On a much larger scale, the famous 'Shanghai Ranking' has become *the* standard by which all the universities in the world are assessed. This *Academic Ranking of World Universities,* devised by researchers at the Shanghai Jiao Tong University, respects the following weightings for calculating a university's rank: the number of Fields Medals and Nobel Prizes among its members (20 per cent) and ex-students (10 per cent); the number of researchers most quoted in their discipline (20 per cent); the number of articles published in the journal *Nature* or *Science* (20 per cent), or which have been indexed in the *Science Citation Index* or the *Arts & Humanities Citation Index* (20 per cent); and the relation of these performances to the size of the institution (10 per cent).[18] This ranking exerts an enormous influence on higher education policy-makers, and drives the tendency to ever-larger units: if all universities in France were fused into a single institution called 'University of France', this entity would—at least provisionally—come top of the tables in any such global benchmarking operation. Arguably, this system is the exact remake of the 'control figures' which China inherited from its socialist economic planning past.[19] The same causes continue to produce the same (devastating) effects: through governance by numbers, and the priority of calculation over judgment, decision-makers lose touch with the real performances of institutions, and with the complexity of the real. The map replaces the territory.

[15] G Anders, *Die Antiquiertheit des Menschen* (Munich, Beck, 1956).

[16] See W Blockmans, *Bibliometrics: Use and Abuse in the Review of Research Performance* (London, Portland Press, 2014) 178 (findings of the conference of the Academia Europæ).

[17] *cf* R Adler, J Ewing and P Taylor (Joint Committee on Quantitative Assessment of Research), *Citation Statistics*, A report from the International Mathematical Union (IMU) in cooperation with the International Council of Industrial and Applied Mathematics (ICIAM) and the Institute of Mathematical Statistics (IMS), December 2008, at www.mathunion.org/fileadmin/IMU/Report/CitationStatistics.pdf. See also the Editorial of the review *Mathematical Structures in Computer Science*, 'Bibliometrics and the curators of orthodoxy' (2009) 19 *Mathematical Structures in Computer Science* 1–4.

[18] NC Liu and Y Cheng, 'Academic Ranking of World Universities—Methodologies and Problems'(2005) 30 *Higher Education in Europe* 2, 127–36.

[19] See above, ch 6, p 109ff.

This divorce from the real is evident in all the legal mechanisms employed to implement governance by numbers. The Constitutional Bylaw LOLF by which 'New Public Management' was instituted in France created an ocean of performance indicators divided into main groups (efficiency indicators, quality indicators and effectiveness indicators), whose common denominator was that they were quantified.[20] Thus, the text of the Decree of 29 August 2011, which generalised performance-related bonuses for civil servants, states that 'defining a mechanism for collective performance-related bonuses involves fixing 1. Objectives, indicators, and the results to be achieved over 12 consecutive months. This period can form part of a multi-annual programme of objectives'.[21] The sequence 'objectives, indicators, and the results to be achieved' is an indivisible whole. The circular concerning the Decree's application takes these different terms to be synonymous, and the examples it gives of indicators for the 'quality of service provided' show that this quality must always be reduced to quantities: 'the *proportion* of sites or bodies inspected; the *rate* of implementation of the rules applied to a policy; the *rate* of development of e-governance; the *level* of user satisfaction; the processing *times* for requests; the average *time-frame* for processing cases; the *level* of user information'.[22]

As such, those involved will seek to achieve the targets, independently of any real improvement in the services provided. This is one of the lessons learnt from the American initiative we mentioned above, *No Child Left Behind*.[23] To improve their scores, the schools became less demanding in their evaluations, and to improve their bonuses the teachers lowered their teaching standards by 'cramming' and teaching to the test, sometimes even giving the pupils the answers in order to ensure good results.[24] There were so many nefarious effects of the reform that, after the election of Barack Obama to the presidency, there was a debate as to whether the legislation was too profoundly flawed, or whether it could still be reformed.

This disconnection from reality is also produced by the statistical qualification on which macro-economic indicators are built.[25] For example,

[20] See above, ch 8, p 153ff. On these measurements of the state's performance, see Jany-Catrice, *La Performance totale* (ch 8 fn 52) 91ff.

[21] D No 2011-1038, 29 August 2011, establishing incentive awards for collective performance in civil service departments, quoted Art 2, para 3. See L Cluzel-Métayer, 'La prime de fonctions et de résultats dans la fonction publique' (2010) *Droit administratif* 1; D Jean-Pierre, 'La prime d'intéressement à la performance collective: entre dits et non-dits'(2011) *La Semaine juridique* A, 2305; M Pochard, 'La prime d'intéressement dans la fonction publique. Risques et chance' (2011) *AJDA*, 1705.

[22] Circular of 29 August 2011 on the establishment of incentive awards for collective performance in civil service departments and in public agencies, Art 3.1.1.

[23] See above, ch 8, pp 156–57.

[24] Montagutelli, 'L'école américaine dans la tourmente de "*No Child Left Behind*"' (ch 8 fn 66) 99–100; from the same perspective, see A Gamoran, 'Bilan et devenir de la loi "No Child Left Behind" aux États-Unis' (ch 8 fn 66) 13–26.

[25] For the notion of statistical qualification, see above, ch 5, p 92.

in order to comply with the 'objective indicator' of three per cent of the GDP as the maximum public deficit,[26] all one need do is transfer to the private sector the deficit accrued for services provided by the public sector. For example, by consistently reducing the coverage of 'minor risks', French public health insurance both shaves figures off its deficit and automatically boosts the private health insurance market.[27] The problem is that private health insurance is not comprehensive—those who cannot afford it are not covered—but it has the advantage of not showing up in the public accounts. In other words, improving one's score does not result in any real reduction in expenditure—and it can have the opposite effect, as soaring opticians' costs illustrate—and moreover it brings with it a decline of the level of health protection in the population as a whole.

A similar logic, but on an international scale, informs the 'fighting poverty' programmes, which in many countries have superseded years of 'structural adjustment'. 'Poverty' is treated in this context as a numerical indicator expressed in dollars, a piece of statistical information which can be applied all over the world, like the occurrence of an epidemic or a natural disaster. The definition of 'extreme poverty' adopted by the United Nations Millennium Goals, as living with less than 1 US$ per day, excluded everything which in a person's standard of living and quality of life depends on their social and cultural context, and cannot be assessed in financial terms. Although within a national framework it is possible for parliament or trade unions to challenge this statistical representation of society, and thus for its normative purchase to be monitored democratically, these checks do not exist wherever numerical representations of society are endowed with superior value and universality. The risk which emerges is that of becoming enclosed in the self-referential loops of a technocratic discourse which irons out the realities of human life rather than re-presenting them.

Despite the fact that these indicators are supposed to be the product of a rational technical process, their construction involves power struggles which are never the subject of democratic deliberation.[28] The sociologist Corine Eyraud has described the negotiations between the French Treasury and the Higher Education Ministry, as their civil servants fought it out to define higher education performance indicators.[29] For the academics, the indicators proposed were those most likely to protect their budget allocations (for example, the number of students registering); for the Treasury inspectors, the indicators proposed were those most likely to be difficult to attain (for example, pass rates at the end of the first two university years), which could

[26] On this indicator, see above, p 157ff.

[27] See below, pp 263–64.

[28] On the nefarious impact of the politics of numbers on democracy, see A Ogien, *Désacraliser le chiffre dans l'évaluation du secteur public* (Versailles, Ed. Qae, 2013) 117.

[29] Eyraud, *Le Capitalisme au cœur de l'État* (ch 8 fn 55) 197–207.

show up some 'inefficiency' on the part of the 'operators'. This is the type of alchemy which transmutes university courses and research into figures, and decides upon budget allocations accordingly. As for research, the indicators constructed for use in the Annual Performance Reports (RAP)[30] are a good illustration of how reality is expelled in favour of the imaginary products of benchmarking. Programme No 150 of the Constitutional Bylaw LOLF, concerning 'Higher Education training, and academic research', has as its Objective No 7 'the Production of academic knowledge to the highest international standard', which is measured by indicator 7.1, 'Programme operators' academic production'. This indicator is arrived at by dividing the 'number of internationally recognised publications by the programme operator', by the 'EU-27 leading publications' or the 'number of world-leading international publications (global proportion)'.[31] This gives the following table:

Indicator 7.1: Progamme Operators' Academic Production

(from the citizen's point of view)

Mission Indicator

	Unit	2009 Achievement	2010 Achievement	2011 Forecast APP* 2011	2011 Forecast mid 2011	2011 Achievement	2013 Target APP* 2011
Share of international reference publications by programme operators in the academic production of the EU	%	8,59	8,68	>8,2	>8,2	8,66p	>=8,5
Share of international reference publications by programme operators in the academic production worldwide	%	2,75	2,75	>2,2	>2,2	2,72p	>=2
Share of international reference publications by programme operators in the academic production of France, Germany and the UK	%	18,2	18,5	>17,9	>17,9	18,7	>=17,7

*APP: Annual Project Performance

Figure 9.1: Quantified representation of French research performance

This indicator therefore equates the progress of knowledge with a supposedly measurable relative share of each programme operator's 'output' on an international market of research 'products'. This type of 'objective indicator', apart from being divorced from the real development of knowledge areas, obliges research bodies to focus primarily on improving their rank in this international benchmarking competition. Researchers are expected to replace the activity of research with reactions to numerical signals: this cannot but choke the wellspring feeding an individual's research motivation, which is not to increase one's score but, in Thomas Kuhn's words, to

[30] See above, ch 8, p 155.

[31] PLR 2011. See 'Mission interministérielle. Projets annuels de performance. Annexe au projet de loi de finances pour 2012', *Recherche et enseignement supérieur*, 64. This calculation takes into account the number of research centres which sign each publication.

solve enigmas.[32] There is a certain irony in the fact that the very fetishism of quantification and mathematical symbols once promoted by researchers now comes back to haunt them. This 'non-ontological' use of quantification not only prevents the world of research from reflecting on the real in all its complexity, it also—particularly in economics—leads to sterile simulations which from the start expel the real in favour of mathematical representations.[33]

III. THE ECLIPSE OF THE SUBJECT: ACTION BOWS TO REACTION

Embracing the fiction that people have property rights in their own bodies, the law provided that a person's 'labour force' could be rented out just like a cart-horse or a mill. Taylorism transposed this reification into management, by founding the 'scientific organisation' of labour on the neutralisation of the mental capacities of the worker. The employment contract gave legal form to this divorce between the thinking subject (reduced to the figure of the contracting party) and the work, emptied of subjective input (reduced to a pure quantity of time in subordination). It was labour law which made this fiction bearable and sustainable, through the minimum physical and economic security it afforded employees, so that they could maintain their capacity to work over the longer period of a human life. Understood in this light, the employment contract made it possible to institute a 'labour market', and thus brought to an end the two legal forms which had organised the economy until then: the status of slave (which consigns work to the realm of things, in qualifying the worker as himself a thing); and guild membership status (which does the opposite, making work one of the elements of a person's identity).[34]

Governance by numbers swept all this away by treating the human being as an intelligent machine. Work ceased to be an energy source one owned and could hire out to someone in return for subordination; it was no longer an object or a thing separable from the contracting subject. Rather, governance decrees a new type of subject, the programmed subject, capable of self-objectification. The programmed worker is an 'objective subject', motivated entirely by calculated interest, and capable of adapting in real time to variations in the environment in order to meet the objectives assigned to him or her. In legal terms, this new figure of the worker impacts upon the

[32] T Kuhn, *The Structure of Scientific Revolutions* (Chicago, Chicago University Press, 1962) ch 2.

[33] *cf* F Patras, *La Possibilité des nombres* (Paris, PUF, 2014) 36–39.

[34] These points are developed in my *Critique du droit du travail* (Paris, PUF, 1994; coll 'Quadrige', 2002) 280.

binding force of the contract. The employment contract made it possible to treat work as a negotiable object, of which the counterpart was the employee's qualification as a contracting party. This role provided a minimum of legal protection: for example, employers cannot reduce employees' salary or increase their working hours without their consent. This 'rigidity' of the work contract—not to be confused with the 'rigidity' of the law, the target of neoliberalism's obsessive attacks—puts a brake on the logics of governance, which require 'a skilled, trained and adaptable workforce and labour markets responsive to economic change, with a view to achieving the objectives defined' (Treaty on the Functioning of the European Union, Article 145). In other words, governance requires what today we would call 'flexibility' (a term borrowed from materials science). 'Flexible' arrangements were previously confined to legal provisions and collective agreements, but recent reforms in France have extended such arrangements to individual employment contracts through the possibility of company-wide agreements on lowering salaries or on enforced geographical mobility.[35] A new type of legal tie emerges here, which, unlike the contract, does not bear on a given quantity of work, measured in time and money, but on the very person of the worker. Since the worker's 'reactivity' and 'flexibility' are incompatible with the binding force of the contract, governance will necessarily strip workers of some of the attributes of a contracting party.

This programmed working subject runs a risk unknown to the previous industrial revolutions: that of harm to mental health.[36] Under Fordism, workers might lose their physical health and sometimes their lives,[37] their work was back-breaking and dull, but they did not risk losing their minds. A legal analysis can outline quite precisely the emergence and spread of this new risk. Its first appearance in the French Labour Code was in 1991, and mental and behavioural disturbances were first added to the ILO's list of occupational diseases in 2010. Reports by occupational health doctors of cases of suicide in the workplace began trickling in towards the end of the 1990s.[38] The numbers have increased in recent years, not only in Europe

[35] See below, ch 13, p 251–53.

[36] L Lerouge, *La Reconnaissance d'un droit à la santé mentale au travail* (Paris, LGDJ, 2005); N Maggi-Germain, 'Le stress au travail' (2003) *Revue de jurisprudence sociale* 3, 191; P Adam, 'La prise en compte des risques psychosociaux par le droit du travail français' (2008) *Droit ouvrier*, 313.

[37] These risks have not disappeared; far from it. They take on new forms—asbestos, exposure to new chemical products, radiation, etc. See A Thébaud-Mony, V Daubas-Letourneux, N Frigul and P Jobin (eds), *Santé au travail. Approches critiques* (Paris, La Découverte, 2012) 357.

[38] *cf* an overview of the situation at the time, in the joint report by the WHO and the ILO, Gaston Harnois and Phyllis Gabriel, *Mental Health at Work: Impact, Issues and Good Practices* (Geneva, WHO/ILO, 2000) 66. Predictably, these reports were concerned above all to produce quantified indicators on these new risks (see P Nasse and P Légeron, *Rapport sur*

(especially France), but also in emerging countries which have imported the same methods of work organisation (especially China).[39] As well as suicide, increased stress and nervous breakdowns attributable to working conditions have been observed.[40] But these new forms of dehumanisation of work are not inevitable, nor are they the price to pay for technological progress. On the contrary, the new information technologies can be an amazing liberatory force, when they allow people to concentrate on the most creative part of their work, that is, the most *poietic* part, in the original sense of the term. Our new computing tools could be the chance to wrest work from the stultifying activity it was under Taylorism. But this will be impossible as long as one conceives of the worker as a kind of computer rather than conceiving of the computer as a way of humanising work. The worker under governance by numbers is enclosed in a form of virtual reality, obliged to react in 'real time', and assessed by performance indicators divorced from the conditions under which the work is actually carried out. Work then ceases to be the most significant way in which human beings realise their involvement with the world's realities, one which allows them to exercise—and not lose—their minds. Instead, workers are trapped into a system of signifiers without signifieds, in which performance requirements keep rising, while at the same time any real capacity to act is confiscated, that is, the capacity to act freely on the basis of one's own professional experience and within a work community united around the task to be carried out. Taylorism was based on the total *subordination* of workers to a rationalised system imposed from outside, whereas today the organisation of work is predicated on *programming*. Through massive use of psycho-technical methods, the disciplinary practices previously applied to the body are now applied to the worker's mind.[41] Work outcomes are mostly measured by numerical indicators, but subjects need to be implicated in the process in order to react positively to the discrepancies revealed between their own performance and the assigned objectives. This is why in large organisations a particular management technique quickly became standard practice: the individual performance review. Robert Castel was the first to point out that this extension of corporal disciplinary techniques to the mind was something new. He called it 'therapy for

la détermination, la mesure et le suivi des risques psychosociaux au travail (Paris, Ministry of Labour, 2008), 42; M Gollac and M Bodier (ed), *Mesurer les facteurs psycho-sociaux de risque au travail pour les maîtriser*, Report to the Minister of Labour (Paris, La Documentation française, 2011).

[39] An episode which received widespread media coverage—but which is by no means an isolated case—was the suicide of 11 young employees, in the first quarter of 2010 alone, on the production site of the largest manufacturer of electronic components, Foxconn Technology (which is under contract from firms like Apple, Dell and Nokia).

[40] Y Clot, *Le Travail à cœur. Pour en finir avec les risques psychosociaux* (Paris, La Découverte, 2010) 190.

[41] On the first uses of these psycho-technical methods, see S Weil, 'La rationalisation' [1937] in *La Condition ouvrière* (Paris, Gallimard, 1964) 314–15.

normal people'.[42] The idea, in management theory, is to enable employees 'to give meaning to their work and understand their place in the company', and to enable the company 'to mobilise people's maximum commitment, as the source of their performance'.[43] This is simply the good old judicial and religious technique of confession, repackaged for economic ends. But whereas confession instated the subject as capable of assuming his or her conduct, today's psycho-therapeutic interview does the opposite, generating dependence and disempowerment, as Gladys Swain and Marcel Gauchet have shown,[44] as well as a number of medically recognised pathogenic effects.[45]

The conversion of the subject into a reactive object characterises governance by numbers more generally. In the fight against poverty, which we mentioned above, local knowledge and skills are never mobilised to *conceive*, but only to *implement* plans. Local researchers are not involved in formulating the issues raised by the everyday living conditions of their fellow citizens, but to fill out questionnaires conceived in advance by international organisations. Yet the situation is not so different in France. 'The poor'—unlike the rich—are endlessly profiled as objects of the social sciences, and as objective—but also, it is hoped, reactive—subjects of 'Back to work' programmes. It is only quite exceptionally that they are genuinely treated as *subjects*, and consulted on their own experience of poverty.[46]

Moreover, the changes occurring in the legal subject do not only affect natural persons, but also companies. They too are treated as 'objective subjects', and are enslaved to the programmed signals they receive to achieve certain results. Today, every company over a certain size is both a *subject* operating on the markets and an *object* of market speculation. The company yoked to short-term financial goals experiences the entropic time of the disorganisation of organisations.[47] Its visions for the future collapse, as does the quality of its products. Although still an economic subject, it is pre-programmed, vulnerable to becoming a dispossessed object, in the most

[42] R Castel, *La Gestion des risques. De l'anti-psychiatrie à l'après- psychanalyse* (Paris, Minuit, 1981) 169.

[43] *cf* M Thévenet, Maurice, C Dejoux and E Marbot (eds), *Fonctions RH. Politiques, métiers et outils des ressources humaines* (Paris, Pearson Education, 2009) 107 and 110. On the role of this performance appraisal in the history of management theories, see L Cadin, F Guérin and F Pigeyre, *Gestion des ressources humaines*, 3rd ed (Paris, Dunod, 2007), ch 7: 'L'appréciation'. And on the origins of the idea of 'maximum mobilisation', see below, ch 13, p 248.

[44] *cf* M Gauchet and G Swain, *La Pratique de l'esprit humain. L'institution asiliaire et la révolution démocratique* (Paris, Gallimard, 1980) 406.

[45] *cf* C Dejours, *L'Évaluation du travail à l'épreuve du réel. Critique des fondements de l'évaluation* (Paris, INRA, 2003) 82.

[46] From a similar perspective, see the research carried out under the aegis of the charity ATD-Quart-Monde, *Le Croisement des savoirs et des pratiques* (Paris, Éditions de l'Atelier, 2009) 703.

[47] Jubé, *Droit social et normalisation comptable* (ch 5 fn 17), 558ff.

technical sense of the term. This possibility of dispossession was enacted in France by the *Loi Strauss-Kahn* of 2 July 1998,[48] which destroyed a centuries-old mainstay of commercial law, that a company is forbidden to buy back its own shares. The justification for shareholders' receipt of dividends was that they helped finance the joint stock company's operations. But when companies are allowed to buy their own shares to increase their value artificially for their shareholders, the bond of obligation is inverted, with shareholders getting richer at the expense of the company.[49] The 1998 reform was a gift from heaven for a certain category of shareholders who are indifferent to a company's entrepreneurial capacity (its long-term economic viability) and who want only to rake in the maximum amount of money in the shortest possible time.[50] In other words, this change in legislation privileged speculation over investment. And after the financial crisis of 2008, when central banks flooded the financial markets with liquidity in the hope of restarting the economy, a large part of these sums was used by multinationals to repurchase their own stock in order to enrich their shareholders, making even Bloomberg raise an eyebrow.[51]

Lastly, governance by numbers transforms states themselves—those sovereign subjects *par excellence*—into 'objective subjects' which no longer *act* freely, but *react* to numerical signals. The imposition on countries of structural adjustment programmes, supposedly to bring their budgets back into balance, embodies this loss of sovereignty. In the Eurozone countries in particular, these programmes have subjected the work of nations to the same sort of 'scientific rationality' as work in a business, according to principles which are never open to political debate. The activities of the Troika[52] in Europe have shown that if one thinks that managing a country and managing a company are one and the same thing, then it is not only conceivable but even essential, if a financial crisis strikes, to put the country

[48] Law No 98-546 of 2 July 1998. Commercial Code, Art L. 225–07ff. See, in favour of this reform, R Mortier, *Le Rachat par la société de ses droits sociaux* (Paris, Dalloz-Sirey, 2003) 708.

[49] *cf* J-L Gréau, *L'Avenir du capitalisme* (Paris, Gallimard, 2005) 174ff.

[50] On the buyback by EADS (Airbus) of 15% of its capital for its shareholders, see M Orange, 'EADS: le grand pillage par les actionnaires', *Mediapart*, 23 March 2013.

[51] 'The proportion of cashflow used for repurchases has almost doubled over the last decade while it's slipped for capital investments […]. Buybacks have helped fuel one of the strongest rallies of the past 50 years as stocks with the most repurchases gained more than 300 percent since March 2009. Now, with returns slowing, investors say executives risk snuffing out the bull market unless they start plowing money into their businesses.' L Wang and C Bost, 'S&P 500 Companies Spend 95% of Profits on Buybacks', *Payouts*, Bloomberg, 6 October 2014.

[52] Eurozone countries in receipt of EU bailouts were obliged to agree to the Troika's conditions (the 'Troika' comprises the IMF, the European Commission and the European Central Bank). The Troika's operations were unreservedly criticised by the European Parliament in two resolutions voted on 13 March 2014: one, the *Inquiry into the role and activities of the Troika* (P7_TA-PROV(2014)0239), and the other, the *Inquiry into the social aspects of the role and operations of the Troika* (P7_TA-PROV(2014)0240) in the Eurozone countries (Reports available at www.europarl.europa.eu).

into receivership and liquidate its assets,[53] since one cannot sack its inhabitants. Within that logic, turning to the electorate will naturally be deemed as 'irresponsible' as letting a bankrupt entrepreneur continue to run his or her business.[54] Governance by numbers thus dispossesses not only companies and individuals, but entire populations.

And since human beings are not computers, and can never be entirely programmed or objectified, they are either driven to mental illness and suicide, or they start playing the numbers game themselves, with their own ends in view. Unlike machines, they are quick to understand that satisfying indicators is an irrebuttable presumption with respect to meeting objectives. Valéry remarked that 'Monitoring an action anyway corrupts and perverts it […], for whenever an action is monitored, the subject's deeper motivation ceases to be the performance of the action itself, but rather the control, and how to get round it'.[55] Soviet planning provides an endless supply of examples in which, in order to meet the objective of, say, doubling the length of material produced annually by a particular factory, exactly the same length was produced—but at half the width. Or, in order to meet the quotas for the production of boots, but without an adequate supply of leather, factories simply produced boots in cardboard or only in small sizes.[56] Or again, in order to boost the bibliometric scores used to measure performance, researchers can make four articles out of what they would otherwise have published as a single article, or even cheat with their sources and falsify the results.[57] Receptionists who know that their performance is measured by the number of inquirers whose calls are not answered before the fifth ring, will programme their phones to pick up automatically after the third ring, thus improving their scores under 'quality of service provided'. And, regarding the implementation of structural adjustment programmes in Africa, Ousmane O Sidibé, with his excellent knowledge of facts on the ground in Mali, recounts how the international funders first had a large number of teachers fired, as dictated by the programme, but then conditioned their aid upon improving schooling rates (as a component

[53] Including some of its territory, after some German Members of Parliament called on Greece to sell off a number of its islands (*cf Le Figaro Économie*, 5 March 2010).

[54] When in 2011 the Prime Minister of Greece, Georges Papandreou, envisaged holding a referendum on the austerity plan imposed on Greece until 2020 by the other Eurozone countries, he was forced to resign under pressure from Nicolas Sarkozy and Angela Merkel (*cf* S Halimi, 'Juntes civiles', *Le Monde diplomatique*, December 2011).

[55] P Valéry, 'Le bilan de l'intelligence' [1935] in *Œuvres*, Vol 1 (Paris, Gallimard, coll 'Bibliothèque de la Pléiade', 1957) 1076.

[56] *cf* A Gourevitch, *Économie soviétique. Autopsie d'un système* (Paris, Hatier, 1992) 13ff.

[57] On the increase in these frauds, see FC Fang, RG Steen and A Casadevall, 'Misconduct accounts for the majority of retracted scientific publications' (2013) 109 *Proceedings of the National Academy of Science* 42, 17028–33 www.pnas. org/content/109/42/17028.full; JPA Ioannidis, 'Why Most Published Research Findings Are False', *PLOS Medicine*, 30 August 2005 (DOI: 10.1371/journal. pmed.0020124).

of the human development indicator).[58] In order to successfully square this circle, the African countries in question hastily recruited a mass of unqualified and underpaid stand-in teachers, who dispensed their classes without pedagogical aids in warehouses filled to bursting. 'Progress', in the terms of the indicator, was thus achieved at the cost of impoverished education for generations of children and adolescents. Deprived of their traditional modes of transmission of knowledge and culture, these groups had no access to a school system worthy of the name either. When meeting targets becomes the goal of a piece of work, not only does this deflect from productive activity (more and more time is spent entering the required performance information), but it also disconnects the work from the realities of the world, and replaces these with a numerical image constructed dogmatically.

IV. THE LAW'S RESISTANCE

While the law is overrun by governance by numbers, and lends it normative force, it also resists this invasion, and has developed what can be called immune defences against it. These defences are structural, because the legal form, a tripartite arrangement, cannot be totally absorbed into the universe of governance by numbers, which has a binary structure. As long as the law resists, it carves out areas of freedom, however reduced these may be. Alexander Zinoviev has shown how this works, in terms which reflect his thinking as a mathematician and a logician. In his work *The Yawning Heights*, he imagines a conversation in a text, A, which can be characterised as hostile to the status quo (an 'anti-' text) when a system of legal rules, B, is applied to it. The author N of text A is liable for prosecution. But, Zinoviev asks,

> How characterise a text 'N affirms that A', from the viewpoint of B? Might it itself be 'anti-'? Alright, but then how about the prosecutor when he accuses me in court of maintaining that 'N affirms that A'? Will he be accused in turn of expressing a text which is 'anti-'? Why not? What formal criterion can distinguish between us? True, I used the term 'affirm' once, and the prosecutor will use it twice. If this were made into law, all I would have to do is declare in advance the following text: 'M affirms that N affirms that A' […] Draw up a code B which contains laws by which texts may be qualified as 'anti-', and I bet you that, using any 'anti-' text, I will be able to write a text which cannot be judged 'anti-' by B, but which will anyway be understood as the text of an opponent. All legality is a priori the possibility of its infringement.[59]

Communist society obeyed its own normative system which was not, according to Zinoviev, a system of law: 'the norms governing people's conduct do

[58] OO Sidibé, 'Les indicateurs de performance améliorent-ils l'efficacité de l'aide au développement?' (Nantes, IEA, 2012), available online in French and English on the site of the Institute of Advanced Studies, Nantes: www.iea-nantes.fr/fr/actus/nouvelles/actualite_69.

[59] A Zinoviev, *The yawning heights*, tr G Clough (New York City, Random House, c 1979).

not correspond to legal principles, but rather to reason of State, the interests of particular groups or of the whole country. Power is the only judge'.[60] The law's formalism resisted the fundamental principles and the very nature of power in a Communist society. When the regime of governance by numbers contradicts too starkly democratic principles and fundamental rights, not least the right to physical and mental integrity, a legal analysis can precisely lay bare this form of resistance.

V. THE DEMOCRATIC PRINCIPLE

Despite the optimistic claims of those who identify democracy with quantification,[61] when governance by numbers takes hold it *limits democracy*. This is an essential part of Hayek's thought, when—in the footsteps of Lenin—he calls for a 'dethroning of politics'.[62] In the eyes of neoliberals, citizens should not meddle with the organisation of the economy because:

> To them [an ever-increasing part of the population of the Western World] the market economy is largely incomprehensible; they have never practised the rules on which it rests, and its results seem to them irrational and immoral. […] Their demand for a just distribution in which organized power is to be used to allocate to each what he deserves, is thus strictly an *atavism,* based on primordial emotions.[63]

This is why Hayek's battle-cry was 'The last struggle against arbitrary power is still ahead of us—the fight against socialism and for the abolition of all coercive power to direct individual efforts and deliberately to distribute its results'.[64] This idea that economic calculations must be removed from democratic inspection was also advocated by the great Italian statistician active under Mussolini, Corrado Gini, the inventor of the coefficient which bears his name. The title of an article of his leaves no room for doubt: 'The Scientific Basis of Fascism'.[65] And one could also mention General Pinochet's Chile, where Hayek's neoliberal theses were first tried out on a large scale, eliciting his remark that 'Personally, I prefer a liberal dictatorship

[60] A Zinoviev, *The reality of communism* (University of Michigan, Schocken Books, 1984).

[61] *cf* N Rose, 'Governing by Numbers: Figuring out Democracy' (1991) 16 *Accounting Organizations and Society*, 1991 7, 673–92. For another interpretation, and a much more critical stance, see K Prewitt, 'Public Statistics and Democratic Politics', in W Alonso and P Starr (eds), *The Politics of Numbers* (New York City, Russel Sage Foundation, 1987) 261–74.

[62] FA Hayek, *The Political Order of a Free People* [1979] in *Law, Legislation and Liberty* (London, Routledge, 1998 (1982)) 128ff.

[63] ibid, Epilogue, 'The three sources of human values', 165.

[64] ibid, Ch 18.

[65] C Gini, 'The scientific basis of fascism' (1927) 42 *Political Science Quarterly* 1, 99–115; see also J-G Prévost, 'Une pathologie politique. Corrado Gini et la critique de la démocratie libérale'(2001) *Revue française d'histoire des idées politiques* 13, 105–28.

to a democratic government from which all liberalism is absent'.[66] And indeed, a shining example of the thriving association between the market economy and dictatorship is today's China, which—in a particularly apt formulation—calls itself a 'democratic dictatorship'. The First Article of its Constitution states that 'The People's Republic of China is a Socialist State of popular democratic dictatorship governed by the working class and founded on the alliance between workers and peasants'.

As for the EU, although it restricts democracy in a much less brutal way, it nevertheless shields its economic policies from electoral scrutiny by putting power into the hands of non-elected bodies. And for the last 20 years or so, it has become something of a habit for EU leaders to respect electoral results only if they correspond to what they hoped for: the rejection of the Maastricht Treaty by Danish voters, of the Treaty of Nice by the Irish, of the Constitutional Treaty by French, Dutch and Irish voters, and of the Treaty of Lisbon by the Irish (twice) was simply passed over. In addition, when the Greek Prime Minister declared he would call a referendum, in 2011, on the structural adjustment programme designed by the Troika to reduce Greece's public deficit in accordance with certain numerical objectives, he was forbidden to do so.

These infringements of national sovereignty come on top of the restrictions already required of Member States by the construction of the European Union. In themselves, these restrictions of national sovereignty pose no threat to democracy as long as European institutions can guarantee the same democratic process as national ones. But this is far from being the case. The 'democratic deficit' of the EU has become so flagrant that it even drove the German Constitutional Court to issue a word of warning in its decision concerning the ratification of the Treaty of Lisbon.[67] Its decision—largely ignored or caricatured in France—is in fact a legal turning point in the history of the construction of the EU, and is worth dwelling on. The Court began by recalling what is meant by a democracy. It is a regime in which 'the exercise of public authority is subject to the majority principle of regularly forming accountable governments and an unhindered opposition, which has an opportunity to come into power'.[68] In a democracy,

> the people must be able to determine government and legislation in free and equal elections. This core content may be complemented by plebiscitary voting on factual issues […]. In a democracy, the decision of the people is the focal point of the formation and retention of political power: Every democratic government knows the fear of losing power by being voted out of office.[69]

[66] Cited by C Laval, 'Démocratie et néolibéralisme', FSU Research Institute http://institut.fsu.fr/Democratie-et-neoliberalisme-par.html; see also P Dardot and C Laval, *La Nouvelle Raison du monde. Essai sur la société néolibérale*, (Paris, La Découverte, 2009).

[67] German Constitutional Court (*Bundesverfassungsgericht*), 2 BvE 2/08, Judgement of the Second Senate of 30 June 2009. Décision 2 BvE 2/08 du 30 juin 2009.

[68] ibid, § 213.

[69] ibid, § 270.

Having spelt out its understanding of democracy, the Court compares it with the workings of the European Union. There are two points in its lapidary conclusion. First, that in the current state of European Treaties the European Parliament is unable to guarantee democratic representation of European citizens:

> Measured against the requirements of a Constitutional State, even after the entry into force of the Treaty of Lisbon, the European Union lacks a political decision-making body based on equal elections by all citizens of the Union and able to uniformly represent the will of the people. In addition, connected with this first failing is the lack of a system of organisation of political rule in which the expression of a European majority leads to the formation of the government sustained by free and equal electoral decisions and thus enabling genuine competition, transparent for citizens, between government and opposition. Even in the new wording of Article 14.2 of the Lisbon Treaty on European Union (TEU), and contrary to the claim that Article 10.1 seems to make through its wording, the European Parliament is not a representative body of a sovereign European people.
>
> Representation of citizens in the European Parliament is not linked to the equality of citizens of the Union (Article 9 Lisbon TEU), but to nationality, a criterion that is actually an absolutely prohibited distinction for the European Union.
>
> (2 BvE 2/08, Judgment of the Second Senate of 30 June 2009, §§ 280, 287)

As though to add salt to the wound, the German Constitutional Court also dwells upon the fact that the Lisbon Treaty itself violates the grand principles it proclaims at the outset, such as equality between European citizens (TEU, Article 9) or the claim that 'the functioning of the Union shall be founded on representative democracy' (TEU, Article 10.1). So if one introduced the principle of 'one man one vote' into elections for the European Parliament, would that wipe out the democratic deficit? No, says the German Constitutional Court, because—and this is the Court's second point—the European Parliament's legislative power would still be shared with bodies which have no democratic legitimacy, namely the Council, the Commission and the Court of Justice of the European Union. The latter, says the German Court in passing, obeys the principle of 'one state, one judge', and is thus 'under the determining influence of Member States'.[70] In other words, it neither represents European citizens, nor is it independent of governments. Which is why the Constitutional Court concludes that the democratic deficit can neither be offset, nor justified, by other provisions in the Treaty: 'The deficit of European public authority that exists when measured against requirements of democracy in states cannot be compensated for by other provisions of the Treaty of Lisbon and, to that extent, it cannot be justified'.[71]

[70] ibid, § 288.
[71] ibid, § 289.

The democratic principle's resistance through law is also evident at an international level, on social-democratic issues. For example, the ILO Committee on Freedom of Association condemned the fact that Trade Unions were excluded from consultations when the European Troika imposed a programmed reduction of social rights on the Greek government.[72]

VI. THE EMPLOYER'S LIABILITY FOR HEALTH AND SAFETY

The new risks to mental health which governance by numbers generates in the workplace have been addressed—without much effect to date—in negotiations between the social partners, under the title of 'stress at work',[73] and through legislative action around 'psychological harassment'.[74] But, in France, case law is what has really entrenched the employer's responsibility for achieving results (*l'obligation de sécurité de résultat*) in the domain of health and safety,[75] and has led to restrictions on the use of new management techniques in companies.[76] New notions, implying a qualitative approach to work, have emerged in this context: the 'hardhip' (*la pénibilité*)[77] and the 'physical or mental burden' (*la charge physique ou nerveuse*) of work.[78] More generally, the use of new digital and biological technologies to check up on and observe employees has been contained by legislation and case law.[79] The Cour de Cassation has also set limits on the proliferating use

[72] 316th Session of the Governing Body, 1–16 November 2012, § 784-1003.

[73] European Framework Agreement on stress at work, transposed into French law by the National Cross-Industry Agreement of 2 July 2008. See C Sachs-Durand, 'La transposition dans les États membres de l'accord conclu par les partenaires sociaux au sein de l'Union européenne sur le stress au travail' (2009) *Revue de droit de travail* (*RDT*), 243.

[74] French Labour Code, Art 1152-1ff.

[75] Soc 28 February 2002, No 99-17201; see M Babin, *Santé et sécurité au travail* (Paris, Lamy, 2011) 324; see also the special section 'Protection de la santé et charge de travail' published in *Droit social* in July–August 2011, with the contributions of M Blatman, E Lafuma, M Grévy, P Lokiec, L Gamet and J-D Combrexelle.

[76] Soc 28 Nov. 2007 (Groupe Mornay) No 06-21964, *Bull civ* V, No 201 (the implementation of annual appraisal interviews, which, in their methods and significance, 'were clearly liable to generate psychological pressure which would have repercussions on working conditions').

[77] A qualification recognised by the law of 9 November 2010, French Labour Code, Art L.4121-1 and D.4121-25. On this notion of 'arduousness', see 'Les négociations professionnelles relatives à la pénibilité au travail' (2006) *Droit social*, 834; see also B Lardy-Pélissier, 'La pénibilité: au-delà de l'immédiat et du quantifiable' (2011) *Revue de droit du travail*, 160.

[78] French Labour Code, Art L 3221-4. See E Lafuma, 'Charge de travail et représentants du personnel' (2012) *Droit social*, 758.

[79] H Bouchet, *La Cybersurveillance sur les lieux de travail*, Report by the CNIL, March 2004, available on the website of the *Documentation française*; J-E Ray, *Le Droit du travail à l'épreuve des NTIC* (Paris, Liaisons, 2001) 247; and, by the same author, 'Droit du travail et TIC' (2007) *Droit social*, 140 and 275; L Flament, 'La biométrie dans l'entreprise', *Semaine juridique*, édition S (2006) 1468; A de Senga, 'Autorisations uniques de la CNIL de mise en œuvre de dispositifs biométriques' (2007) *Droit ouvrier*, 31; E Supiot, *Les Tests génétiques. Contribution à une étude juridique* (thesis, Paris-I, 2012) 298ff (Marseille, Presses universitaires d'Aix-Marseille, 2015).

of new objectives-based management and evaluation techniques in companies.[80] It validated, for example, the idea that psychological harassment could be inherent to certain management methods, independently of any intention to harm.[81] And it gave the judge the right to suspend ways of organising work which were likely to compromise the mental health of employees.[82] More recently, it criticised a certain practice of ranking, in which assessors divide the staff into graded groups, each group containing a predetermined percentage of employees.[83] Some employees are thus inevitably downgraded, whatever the quality of their work. In the words of the Court, 'A system of assessment based on pre-set quotas, even if they are meant to be only indicative, in order to divide employees into different groups, necessarily implies using criteria which are unrelated to the evaluation of the employee's professional skills'.

A ruling by the *Tribunal de grande instance* in Lyon in 2012[84] illustrates how the notion of the employer's obligations regarding employees' health and safety can be invoked to resist new managerial techniques. The ruling prevented a bank from introducing a staff performance management system based on benchmarks. The constant assessment of employees was to have been organised as follows:

> Every branch […] has its performances analysed by comparison, and hence in competition, with the performances of other branches; within, and independently of, each branch, the performance of each employee is examined in relation to the performance of the other employees; no objective is imposed officially on the branches or the employees, except that of doing better than the others; no one can know at the end of any given day whether he or she has worked well or not, because the assessed quality of his work will depend primarily on the results of the others; in such a system, one starts from zero again every day, which creates a permanent state of stress, especially since computers allow everyone to follow, from any terminal, the live performance of every member of the sales team for the whole bank.

The health and safety inspector's report was ratified by the Court, which concluded that this sort of system was likely to have the following effects:

— the infringement of dignity, since employees are permanently devalued in order to generate ongoing competition between them.
— a feeling of instability because employees cannot situate themselves in relation to annual targets since one's personal results are conditioned by those of all the others.

[80] P Waquet, 'Les objectifs' (2001) *Droit social*, 120; S Vernac, 'L'évaluation des salariés en droit du travail' (2005) *Recueil Dalloz*, Chronique, 924.

[81] Soc 10 November 2009, *Association Salon Vacances Loisirs,* No 07-45321 (2001) *Droit social*, 109, obs C Radé.

[82] Soc 5 March 2008, *Snecma*, No 06-45888, *Droit social* 2008, 605, note P Chaumette.

[83] Soc 27 March 2013, No 11-26539 P, Hewlett-Packard, France.

[84] *Tribunal de Grande Instance*, Lyon, 4 September 2012, No 11/05300, *Semaine sociale Lamy*, 10 September 2012, 1550, 15.

— a constant sense of guilt because of the individual's responsibility in the results of the group.
— a feeling of shame because one has privileged selling a product over advising the client.
— a pernicious encouragement to break the rules in order to boost the figures.
— increased occurrences of physical and mental disturbances among employees.

The bank's defence was that it had intended to set up a 'pscyho-social risks observatory', a free helpline, and a 'work quality' action plan. This argument was dismissed by the Court, which observed that such measures, aimed at dealing after the fact with foreseeable hazards which had already materialised, did not meet the employer's obligations to achieve results regarding employees' health and safety. It accordingly forbade the company from introducing this way of organising work. This judgment now forms part of the Cour de Cassation's case law, and it enables judges to ban modes of organisation or assessment of work which it considers dangerous.

Since health protection has always been the backbone of social legislation, it is hardly surprising that the resistance of the law to the penetration of governance by numbers should express itself most forcefully in this area. This resistance has a particularly powerful purchase because it obliges the issue of the organisation of work to be situated once again as an issue of social justice, whereas the Fordist compromise had precisely excluded it. Historically, social legislation developed in concentric circles around measures to protect the bodies of women and children—the core physical resources of the nation. Today, a similar movement could be generated to take measures to protect the nation's core intellectual resources. Already the resistance of the law to governance by numbers has surfaced in fields other than physical protection.

For example, in October 2012, certain measures taken by the Greek government, under pressure from the European Troika, were condemned by the European Committee of Social Rights (the body which monitors compliance with the Council of Europe's Social Charter). The Committee stated that

> a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights under labour law, which protect them from arbitrary decisions by their employers and from fluctuating economic circumstances.[85]

But the immune defences mobilised by the law in order to resist governance by numbers lead to a profound transformation of the legal order itself. As we shall see in the following chapter, the law is forced to adapt in order to survive.

[85] European Committee of Social Rights, *GENOP-DEI and ADEDY v Greece*, Collective Complaints Nos 65/2011 and 66/2011.

10

The Withering-Away of the State

The State is not 'abolished'; it dies out.[1]

THE REGIME OF governance by numbers dismantles the legal order most effectively through its subordination of the public sphere to private interests. Since calculations of individual utility are the lynchpin of this type of governance, the only heteronomous rules admitted as legitimate are, at best—in the case of ordoliberalism—those which ensure that calculations are dependable: the rules of private law. Any intrusion by the state into the sphere of these computations in the name of the 'general interest' is immediately considered suspect. This inversion of the hierarchy between public and private is the outcome of a long history which started with expelling the *res publica* from the sphere of the sacred and replacing it with a purely technicist conception of norms.

I. THE SACRED NATURE OF THE PUBLIC SPHERE

Contrary to what one might imagine, the public–private distinction does not originate with the Enlightenment, but comes down to us from the very matrix of both continental law and common law traditions, the Code of Justinian (*Corpus iuris civilis*). In the Code's best-known formulation, penned by Ulpian, 'there are two branches [*positiones*] of legal study: public and private law. Public law is that which respects the establishment [*statum*] of the Roman commonwealth, private law that which respects individuals' interests'.[2] Today this distinction is understood as an opposition between two bodies of rules (as the translation by 'branches' suggests), whereas at stake are actually different *positions* of the *same* corpus of rules.[3] The body

[1] Engels, *Anti-Dühring* (1878), part III, Ch 5.

[2] 'Hujus studii duæ sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei romanæ spectat. Privatum quod ad singulorum utilitatem', A Watson (ed), Latin text eds T Mommsen and P Krüger, *The Digest of Justinian* (Philadelphia, PA, University of Pennsylvania Press, 1985) 1, 1, §2.

[3] See on this point Pierre Legendre's remarks in *Le désir politique de Dieu. Essai sur les montages de l'État et du Droit*, 2nd edn (Paris, Fayard [1988], 2005) 237f. For the gradual

of law (*corpus iuris*) can link two different positions because the mutual adjustment of private interests in the horizontal plane and the stability (*status*) of public institutions in the vertical one are interdependent: the former depends on the latter. In other words, the *res publica* must stand tall if relations between individuals are to be governed by the rule of law and not by the 'law' of the strongest. The subordination of the private to the public realm is what makes legal systems intelligible and dependable.

This institutional configuration is the West's response to an anthropological dilemma confronted by all human civilisations. In their vital need to metabolise society's potential for violence, they refer power to an origin which both legitimates and limits it.[4] The containment of individual interests necessarily depends on the establishment of a *res publica*, which is the bearer of what Ulpian calls 'sacred things'.[5] Today we would call the latter the 'founding prohibitions' in which each legal system expresses its own particular axiological principles. The reference to the sacred, understood in these terms, has in no way disappeared from our own founding texts. It is present in the 1789 Declaration in its proclamation of the 'natural, sacred and inalienable rights of man', and the 'inviolable and sacred' right to property. And it was solemnly reaffirmed at the end of the Second World War in the Preamble to the French Constitution of 1946, which provides that 'each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights'. This same sacred character is also implicitly affirmed by the declared intangibility of certain constitutional principles. For example, in Germany's Basic Law, Article 79 places the principle of dignity, and the federal, democratic and social nature of the state, beyond the reach of the constituants.[6] This articulation of the sphere of the general interest with that of individual interests has underpinned legal systems as varied as those of Classical Rome, the monarchies of the Ancien Régime, nation states and colonial empires. Over the last 200 years, it has expanded spectacularly successful across the whole world, in step with Western domination, and has

abandonment of the notion of 'position' in favour of 'opposition' between public and private, see G Chevrier, 'Remarques sur l'introduction et les vicissitudes de la distinction du "jus privatum" et du "jus publicum" dans les œuvres des anciens juristes français' (1952) *Archives de philosophie du droit*, 5–77.

[4] See Legendre, ibid.

[5] 'some matters being of public, others of private interest. Public law covers sacred things, the priesthood, and offices of the state'. ('*Sunt enim quædam publice utilia, quædam privatim. Publicum jus in sacris, in sacerdotibus, in magistratibus consistit*'), *Digest*, *op. cit*. ch 2, n 23.

[6] We should therefore attribute the criticisms made by certain French politicians of Art 6 of the new Tunisian constitution to ignorance of their own constitutional roots. Article 6 guarantees at once religion, the protection of the sacred, freedom of conscience and belief, and freedom of worship.

forced onto the defensive other ways of civilising power, such as Asian[7] and African[8] ritualism, or Jewish[9] and Muslim religious legalism.

The modern state is thus heir to 'the establishment [*statum*] of the Roman *res publica*', which it figures as an immortal being capable of ensuring respect for 'self-evident' truths and 'unalienable and sacred rights,' and of giving lasting continuity to a people over the generations. However, a whole swathe of Western thought since the Enlightenment has sought to eradicate the dogmatic dimension of this institutional configuration, and to found the legal order on 'laws of nature'. Consideration of 'sacred things' has been relegated to the private sphere of 'religious feeling', leaving a purely instrumental conception of the law.

II. THE 'SCIENTIFIC' GOVERNMENT OF HUMAN BEINGS

The totalitarian regimes which flourished in the twentieth century were the first to claim that they had freed the law, and state institutions, from any trace of metaphysics. They claimed to anchor them in the 'true laws' discovered by racial biology or scientific socialism. From this scientistic perspective, relations between individuals are not subordinated to a public law which is itself grounded in 'sacred things', but are dictated by a truth inherent in the power relations between races or classes.

Nazism, for example, in its pursuit of the advent of a 'master race' destined to dominate all others, referred to laws derived from the biology of its time.[10] 'We shape the life of our people and our legislation in accordance with the verdicts of genetics', the *Hitler Youth Manual* proclaimed.[11] For Hitler, 'The State is only the means to an end. The end is: conservation of the race'.[12] Law is here entirely conflated with the will of the strongest or, in Goering's hedonist version, '*Recht ist das, was uns gefällt*' ('Law is what it pleases us to dispose'). Instead of simply obeying laws as laid down, the 'healthy' citizen's duty was to examine and even anticipate the will of the Führer, who set the goals to be attained rather than the rules to be observed.

[7] See L Vandermeersch, 'Ritualisme et juridisme' in *Études sinologiques* (Paris, PUF, 1994) 209f.

[8] See *Le Chemin du rite. Autour de l'œuvre de Michel Cartry* (Paris, Félin, 2010) (esp the contribution of A Adler: 'Logique sacrificielle et ordre politique: le statut de la personne du chef en relation avec son statut de sacrifiant' 149–68).

[9] For the former, see J-M Modrzejewski, 'Tora et Nomos', in *Un peuple de philosophes. Aux origines de la condition juive* (Paris, Fayard, 2011) 193f.

[10] See A Pichot *Pure Society: From Darwin to Hitle* (London/New York City, Verso, 2009) and his *Aux origines des théories raciales. De la Bible à Darwin* (Paris, Flammarion, 2008).

[11] *Nazi Primer*, quoted by H Arendt, *The Origins of Totalitarianism* (London, Allen & Unwin, 1967) 350.

[12] Quoted by Arendt, *The Origins of Totalitarianism* (ibid) 357.

The Single Party made sure that no one could ignore the Führer's will, and the state was simply a tool at his disposal.[13] Loyalty to a person thus supplanted obedience to the law. From this perspective, it was logical that the National Socialist regime's only constitution should be martial law.[14] This transformation of a state of exception into the very foundation of the legal order corresponded to Carl Schmitt's theories,[15] which disregard whether political power is bound by a founding legal rule or not, and thus refuse to distinguish between a totalitarian state and a state governed by the rule of law.[16] This stance is of the same order as the refusal to distinguish between reason and madness, and the totalitarian state is indeed a state of madness, as writers as divergent as Orwell and Ionesco have shown.

For the Marxist-Leninist totalitarian regime, the true laws of history would bring about a society without class and without law, as a result of the transformation of the society's economic base. Since 'bourgeois' laws were simply there to serve class domination, it was imperative, in order to hasten this historical change, to make the legal form itself wither away, and to eliminate all legal guarantees that might hinder the advent of the scientific government of human beings. This vision of a world purged of the political in favour of the technical was dear to the fathers of Marxism. Already for Engels, once the proletarian revolution was achieved,

> State interference in social relations becomes, in one domain after another, superfluous. The government of persons is replaced by the administration of things, and by the conduct of processes of production. The state is not 'abolished'. It dies out.[17]

The Maoist regime took this further than most, especially during the Cultural Revolution. And many of its former followers have now quite naturally turned up among the theorists of anarcho-capitalist 'deregulation', in China and the West alike.

[13] According to the views Hitler expounded in a speech held in Weimar in July 1936, the Party's task was to govern and to legislate, while that of the state was to administer. But this formal distinction had no real practical purchase, because the Party controlled everything at all levels (*cf* E Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Oxford, Oxford University Press 1941, reprint Clark, New-Jersey, Lawbook Exchange, 2006) XV.

[14] Decree of 28 February 1933, suspending the fundamental rights guaranteed by the Weimar Constitution.

[15] Schmitt, who had no time for the concept of 'rule of law' (*Etat de droit*), attempted to accommodate the Nazi regime's concern for respectability by forging the concept of German Rule of Law of Adolf Hitler (*cf* M Stolleis, 'Que signifiait la querelle autour de l'État de droit sous le Troisième Reich?' in O Jouanjan (ed) *Figures de l'État de droit* (Strasbourg, Presses universitaires Strasbourg, 2001) 378).

[16] *cf* E Fraenkel (n 13) 9–56; W Ebenstein, *The Nazi State* (New York City, Farrare & Rinehart, 1943) 3f; M Stolleis, *The Law under the Swastika. Studies on Legal history in Nazi Germany* (Chicago, University of Chicago Press, 1998) 263; O Jouanjan, 'Prendre le discours juridique nazi au sérieux?' (2003) 1 *Revue interdisciplinaire d'études juridiques,* 70, 1–23; 'Qu'est-ce qu'un discours 'juridique' nazi?' (2014) 1 *Le Débat* 178, 160–77.

[17] F Engels, *Herr Eugen Dühring's revolution in science (anti-Dühring)*, tr E Burns, ed CP Dutt (New York City, International Publishers, *c* 1939).

However, seeking to base a political regime on science is perfectly illusory. The system of law underlies scientific research, and not the other way round. Without a legal basis, which endows science with value, and protects it, it cannot develop freely. Indeed, nowhere is it more threatened than in a system founded on an official 'scientific' truth. The regimes which, over the last 100 years, have claimed to rest on scientific foundations (racial biology or scientific socialism, for instance) are also those which have muzzled scientific endeavour by forbidding any research which might contradict them. This is an interesting lesson because it proves that science cannot ground itself. Moreover, human laws always end up getting the better of the pseudo-scientific ones to which these political regimes refer. Western nations were obliged to accept the categorical imperative of respect for human dignity, after the Second World War, as the basis on which they would agree to collaborate in the establishment of a new worldwide legal order which could further social justice.[18] This entailed the proclamation of a 'new generation' of human rights—economic, social and cultural. Since these needed state intervention for their implementation, the Western European social state underwent a period of unprecedented growth.

However, this imperative that economic transactions should work towards social justice did not survive the upheavals of the last three decades. The neo-conservative revolution brought back a belief in the existence of super-human forces—market forces this time—capable of generating a self-regulating 'spontaneous order'. Centuries previously, Hume likewise thought he had discovered the ultimate grounds on which law and morals could be based. In his *Treatise Of Human Nature* (1740)—whose sub-title clearly conveys its scientific pretentions: 'Being An Attempt to introduce the experimental Method of Reasoning into Moral Subjects'—he identified 'three fundamental laws of nature' on which the government of human societies should be based: 'We have now run over the three fundamental laws of nature, that of the stability of possession, of its transference by consent, and of the performance of promises. It is on the strict observance of those three laws, that the peace and security of human society entirely depend; nor is there any possibility of establishing a good correspondence among men, where these are neglected'.[19] Unsurprisingly, Hayek referred to these laws two centuries later, in his affirmation of the existence of a spontaneous order of the market, and in order to combat the 'mirage of social justice'.[20]

[18] On the post-war rehabilitation of dogma, see my *Spirit of Philadelphia. Social Justice* vs *the Total Market,* tr S Brown (London / New York City, Verso, 2012).

[19] D Hume, *Treatise on Human Nature*, Section VI, 'Some Farther Reflections Concerning Justice and Injustice' in *Philosphical Works* (Edinburgh, 1826) II, 302.

[20] See FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Volume 2: The Mirage of Social Justice* (Chicago, University of Chicago Press, 1973).

The three laws in question belong to private law: property rights; the freedom to contract; and contractual liability. If the market order is to be extended over the whole globe, then private law, which is the expression of these 'fundamental laws of nature', will take precedence over public law. As previously in the relation between human law and divine law, public law becomes simply an 'organisational law', a necessary evil whose role is to 'reinforce', and certainly not obstruct, the action of the Invisible Hand of the Market.[21] That is the fate reserved for the law in the global market order.

III. THE PUBLIC–PRIVATE HIERARCHY OVERTURNED

This is the ideology which has carried the day since the 1980s. Economic and social rights are decried as false rights, and the privatisation of the institutions of the welfare state tops national and international political agendas. The utopia of a worldwide legal order which would no longer be a patchwork of states but rather a great 'Open Society' peopled by clouds of contracting particles pursuing their private interests, has given rise to a financial, technological and economic space which disregards national frontiers. The abolition of barriers to the free circulation of goods and capital, along with the new information and communication technologies, has struck hard at the sovereignty of states and crippled their legislative power. According to Hayek, 'the only ties which hold the whole of a Great Society together are purely economic […] it is the … "cash-nexus" which holds the Great Society together, [and] the great ideal of the unity of mankind in the last resort depends on the relations between the parts being governed by the striving for the better satisfaction of their material needs'.[22] No longer, then, should individual interests be subordinated to the general good, but on the contrary, the state should be transformed into a means of maximising one's individual utilities. As regards the law, this inversion of the public–private hierarchy brings with it a movement of *privatisation of the power to make binding legal rules*. This movement is a consequence of the way the public sphere has been squeezed out in favour of the private sector, as a direct result of awarding contracts for public initiative to private operators. This trend affects not only the services provided by the social state, but also sovereign prerogatives such as justice (with the rise in arbitration) or prison management. In the United States, the most radical proponents of this approach seek to 'starve the beast', a strategy which Grover Norquist, the figurehead of the fight against tax, has described in his particularly colourful

[21] FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy, Volume 1: Rules and Order* (Chicago, University of Chicago Press, 1973).

[22] Hayek, *The Mirage of Social Justice* (n 20), p 112.

style as the goal of 'cutting government in half in 25 years, to get it down to the size where we can drown it in the bathtub'.[23] Prior to the emergence of this powerful political movement, theoretical writings from the most diverse quarters had already defended the idea of a society in which the unwieldy and oppressive figure of the state had been done away with.[24] The current neoliberal avatar of the prophecy of the 'withering-away of the state' is true to the West's eschatological vision of history, of which Marxism is just one competing version. That is why the collapse of the Soviet Union, while it clearly demonstrated the inanity of believing in 'laws of history', was nevertheless interpreted as the sign of the universal and lasting triumph of market forces, that is, again, as an expression of the enduring laws of history, and even, for the most enthusiastic, as the 'end of History'.[25]

These grandiose visions are of course absent from positive law, which reflects, rather, the way governance by numbers has come to pilot whole countries. Structural adjustment plans or European monetary governance are the most visible agents of this subjugation.[26] Insofar as EU law identifies the general interest of the EU with defence of economic freedoms, it plays a key role in inverting the public–private hierarchy. Member States of course have a structural role, but it is a subordinate one. EU law is not founded on the distinction between public and private, but rather on the distinction between the economic (the exclusive domain of EU law) and the social (the concern of Member States only). By defining an undertaking as 'every entity engaged in an *economic activity*, regardless of its legal status and the way in which it is financed,'[27] the Court of Justice transformed the notion of 'economic activity' into a dogmatic category embracing any activity which can be performed by a private entity, regardless of whether it is operating in the private or public sector.[28] The opposition which it established between economic rights (universalisable) and social rights (by nature particular) is thus entirely ideological. There is no legal bond which is not at once social and economic.[29] We must therefore take this opposition for what it really is: not a scientific fact but a dogmatic construction which implies marginalising the

[23] E Kilgore, 'Starving the Beast' *Blueprint Magazine*, 30 June 2003.

[24] *cf* D Friedman, *The Machinery of Freedom* (Chicago, Open Court, 1973). And Robert Nozick's most moderate version, *Anarchy, State and Utopia* (New York City, Basic Books, 1974). Compare Pierre Clastres's arguments, using ethnographic data from Amazonian societies, in *La société contre l'État* (Paris, Minuit, 1974).

[25] F Fukuyama, *The End of History and the Last Man* (New York City, Harper Perennial, 1993).

[26] See above, ch 8, p 157.

[27] Case C-41/90 *Höfner and Elser* ECR [1991] I-01979, 21. Case C-244/94 *Fédération française des sociétés d'assurance* ECR [1995] I-4013, 14; Case C-67/96 *Albany*, [1999] I-05751, 77. VS Hennion-Moreau, 'La notion d'entreprise en droit social communautaire' (2001) *Droit Social* 957.

[28] *Höfner and Elser* (ibid), 21–24.

[29] For example, the employment relationship is indissociably an economic and a social relation, in which the employee is both its subject and its object.

role of the state. For instance, the Court of Justice ruled that the solidarity between the different branches of social security was a permissible exception to the principles of free competition, but gave the applicability of this exception a very restrictive interpretation.[30] Similarly, collective agreements were interpreted as restricting competition between the companies which sign them, and it is only because they pursue a social policy objective that they have escaped being branded as a form of illegal economic collusion.[31] The aptly named *Viking* ruling is particularly instructive in this respect because in it the use of flags of convenience is analysed as an issue of freedom of establishment. The application of the law would thus appear to be a function of calculations of individual utility.[32] As Pierre Rodière has noted, 'For the Court, the question is always one of checking whether a restriction of economic freedoms may be admitted exceptionally. The baseline is always economic freedoms, as enshrined in EU law, from which one may, if it is really necessary, grant an exception or an exemption'.[33] The same argument turns up in relation to monopolies by public-service enterprises. This sort of monopoly is tolerated only insofar as it it necessary to 'balance profitable sectors with less profitable ones, and hence limit the competition between individual enterprises which operate in economically profitable sectors'.[34]

Domestic law is similarly affected by this undermining of the public sphere to the benefit of the private sector. In fields as diverse as arbitration[35] and collective bargaining,[36] the scope of mandatory rules is increasingly narrow. It is worth looking closer at the case of collective bargaining because it directly affects the foundations of the social state. Whereas a contract in private law cannot prevail over public policy rules, things are less clear-cut in labour law, where in France there are two sorts of public policy: there are absolutely overriding public policy rules; and there is 'social' public policy, which may admit variation by agreement if the conditions agreed are more favourable to the employee.[37] In the eyes of the highest French administrative court, the Conseil d'Etat, this 'social' public policy is a 'general principle of labour law'.[38] Parliament, in thus empowering trade unions and

[30] Case C-159 and 160/91 *Poucet et Pistre* (1993) *Droit Social*, 488, note P Laigre and obs J-J Dupeyroux; Case C-244/94 *Coreva* (1996) *Droit Social*, 82, note P Laigre; Case C-238/94 *Garcia*, *Droit Social* 1996, 707. J-J Dupeyroux 'Les exigences de la solidarité' (1990) *Droit social*, 741; P Rodière *Traité de droit social de l'Union européenne*, 2nd edn (Paris, LGDJ, 2014), No 354–55, 394 f.

[31] Case C-67/96 *Albany* (n 27) § 60f.

[32] Case C-438/05, *Viking* (ch 7 fn 62).

[33] P Rodière, 'Actualité des solidarités sociales en droit européen' in A Supiot (ed). *La solidarité. Enquête sur un principe juridique* (Paris, Odile Jacob, coll des travaux du Collège de France, 2015).

[34] C-320/91 *Corbeau* ECLI:EU:C:1993:198, 865, note F Hamon, quoted § 17. The same reasoning can be found in the provisions of the TFEU concerning economic services of general interest (Art 14; ex-Art 16 TEC).

[35] *cf* É Loquin and S Manciaux, *L'ordre public et l'arbitrage* (Paris, Lexis Nexis, 2014) 258.

[36] *cf* F Canut and F Gaudu (ed), *L'ordre public en droit du travail* (Paris, LGDJ, 2007) 513.

[37] French Conseil d'État, Opinion of 22 March 1973 (1973) *Droit social* 514.

[38] French Conseil d'État, 8 July 1994, *CGT*, Case No 105471, published in the *Rec*.

employers' associations to impose on employers provisions not already contained in laws or regulations, was reintroducing neo-corporatist practices in a new guise, whereby intermediate groups could gain a quasi-legislative power.[39] From the start, then, this 'social' public policy was a means of privatising the prerogatives of Parliament. But, initially at least, it operated exclusively to improve the welfare conditions of the weaker party to the employment contract. It simply completed the public policy of France's *République sociale*, and did not challenge the authority of its laws. However, increasingly, labour and management have been authorised to waive measures which protect employees in favour of their own rules for employment relations. This legal technique has become ever more widespread since 1981 (when the first exemptions concerning working time were agreed) up to the law of 14 June 2013 (concerning job security), which gave substance to a programme drawn up by employers' organisations already in the late 1970s. This programme was called the '*contrat collectif d'entreprise*' ('collective company contract') and involved the company's right to abandon its legal obligations—except for a few esssential public policy rules—and set itself up as an autonomous legal order governed only by the rules of private law. The *Barthélémy-Cette Report* produced by the French Council for Economic Analysis recently unearthed this idea in its recommendations for 'refounding labour law' through collective bargaining, which, it maintained, should no longer be subordinated to the law or the individual employment contract.[40]

The domination of the private over the public is also an indirect result of New Public Management, which aims to apply private-sector management methods to the public sector.[41] The idea of subjecting the whole of society to a single science of organisations, based on criteria of efficiency alone, is nothing new, if we recall the tenets of the Bolshevik Revolution. This idea reappears with the contemporary universe of governance by numbers in which the law is no longer conceived as a norm transcending the individual's interests, but as an instrument at the latter's disposal. Once individual will has been elevated into the necessary and sufficient condition of the legal bond, it follows logically that every person should be able to choose the law which suits him or her best (having the law for oneself) and be able to lay it down (having oneself as law).

[39] *cf* A Supiot 'Actualité de Durkheim. Notes sur le néo-corporatisme en France' (1987) *Droit et Société* 6, 177–99, which shows that the neo-corporatist tendencies identifiable in political science in the 1970s were present also in France (see P Schmitter and G Lehmbuch (eds) *Trends towards Corporatist Intermediation* (Beverly Hills/London, Sage Publications, 1979) 328).

[40] J Barthélémy and G Cette, *Refondation du droit social: concilier protection des travailleurs et efficacité économique,* Rapport du Conseil d'analyse économique (Paris, La Documentation française, 2010) 199.

[41] See above ch 8.

IV. A LAW FOR ONESELF AND ONESELF AS LAW

There are many examples of these two tendencies in law today. The formula 'A law for oneself' aptly describes the increasing number of cases in which people *have the right to choose the law* to be applied to them, and can thus elude the common rule which applies equally to all. Private international law has proved to be more than hospitable to this development. With the lifting of trade barriers in the free market economy, the freedom of contracting parties to choose the law to be applied to them has gained a new lease of life. The objective criteria for determining the relevant jurisdiction governing a particular legal operation, and the principle that there are mandatory rules in force and inexorably applicable in that jurisdiction, have limited purchase in a world in which economic operators are free to move their products, production sites and profits wheresoever they please. The old principle of the autonomy of the will, which international private law elaborated some 150 years ago, has been resurrected in order to justify an international market of legal rules on which different national legislations compete like commercial products for the favour of the punter out to get the best value for his money. Such legal forum[42] shopping, facilitated by the removal of trade barriers, allows private persons to choose the public framework most likely to maximise their individual utilities.[43] The *Centros* ruling[44] confirmed this interpretation of 'freedom of establishment', and in the social field, the *Viking*[45] and *Laval* rulings confirmed a company's right to choose the law deemed best to serve its interests, regardless of where its operations are located. Flags of convenience have now taken up residence on dry land, and the pursuit of private interests clearly overrides respect for public policy rules. Such legal forum shopping is of course incompatible with a system based on *the rule of law*, but it has its place in one based on *rule by laws*.[46] The maxim 'no contract without law' has been turned on its head: there is no law without contract, that is, without contracting parties who agree to apply whatever law they have chosen. Ultimately, the only law which holds is that of the pursuit of individual interest. In the light of this trend, one can understand the importance of the theory of the *efficient*

[42] In law, the *for*, from the Latin *forum*, refers to the court competent to judge cases, within a particular territory.

[43] See HM Watt 'Aspects économiques du droit international privé (Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions)' (2004) 307 *Académie de droit international de La Haye, Recueil des cours* (Leiden/Boston, Martinus Nijhoff, 20050, 383; A Supiot, 'Le droit du travail bradé sur le marché des normes' (2005) *Droit Social* 12, 1087f.

[44] Case C-212/97 *Centros* [1999] ECR I-01459, concl *La Pergola*; see above, p 142.

[45] See above, p 137.

[46] For this opposition, see H Berman, *Law and Revolution* (Cambridge, Mass., Harvard University Press, 2003) Vol II, 19.

breach of contract, promoted by the economic analysis of law:[47] a promise is binding on the person who makes it only if it is in his interests to keep it, otherwise he should be free to break it, as long as he compensates the other contracting party, who had placed his trust in it. This is the logical conclusion of today's rejection of heteronomy, which strips even the spoken word of its value as a pledge between people.

The other tendency may be summarised by the maxim: 'Oneself as law'. It applies to the cases where a private person obtains *the right to act as legislator*. It defines a universe in which legal rules find their ultimate source in the individual will and every individual is deemed—in the words of the filmaker Wim Wenders—to be a 'mini-state'.[48] Under its influence, rules which appeared beyond question, such as the fact that violating another person's physical integrity is unlawful, have been challenged, as the European Court of Human Rights' recent judgments on torture show. In 1997, it had ruled that 'one of the roles which the State is unquestionably entitled to undertake is to seek to regulate, through the operation of the criminal law, activities which involve the infliction of physical harm. This is so whether the activities in question occur in the course of sexual conduct or otherwise'.[49] By 2005, however, it had dismissed this 'unquestionable' principle in the case of a woman savagely tortured by her husband and by third parties, to whom the husband had offered the spectacle of his wife's torment in return for a fee. The ECHR overturned its 1997 ruling in deciding that 'the criminal law could not in principle be applied in the case of consensual sexual practices, which are a matter of individual free will'.[50] This conception of freedom is poles apart from the Greek ideal handed down to us, in which 'Freedom is obedience to the law'.[51] To make enjoyment of someone else's suffering into the source of a right, and moreover a human right which no national law can override, is a perversion of the anthropological function of the law. It exalts the omnipotence of the individual will as in Goering's definition of the law as 'what it pleases us to dispose' (*was uns gefällt*).[52] François Ost rightly notes that the Sadeian hero's pleasure stems in part from the fact that 'he substitutes for the common law a law of exception, of which he alone is the author, thus depriving his victims of the right to seek

[47] See above, ch 7, p 134ff.

[48] 'The German people has splintered into as many mini-States […] as there are individuals' (inner monologue of a driver in *Der Himmel über Berlin* (*Wings of Desire*), a film by Wim Wenders, 1987).

[49] *Laskey v UK*, [1997] 24 EHRR 39, [1997] ECHR 4 §.43.

[50] *KA and AD v Belgium (Application Nos 42758/98 45558/99)* ECHR, §.84. VM Fabre-Magnan, 'Le sadisme n'est pas un droit de l'homme' (2005) *Recueil Dalloz,* 2973–81; B Edelman, 'La Cour européenne des droits de l'homme: une juridiction tyrannique?' (2008) *Recueil Dalloz,* 1946.

[51] *cf* J de Romilly, *La loi dans la pensée grecque* (Paris, Les Belles Lettres, 2001) 146.

[52] Quoted by R Rhees 'Wittgenstein's Lectures on Ethics' (1965) 74 *The Philosophical Review* 1, 25.

society's protection'.[53] Instead of channelling human passions and keeping at bay the darker side of our nature, which lurks within each of us, the law here serves to give them free rein. The consent of the workers was used in the nineteenth century to justify inhuman working conditions. And social law in its entirety was conceived in opposition to the idea that the consent of the weak could serve as a justification for the domination of the strong. This position is still firmly anchored in our labour law, but it is increasingly challenged in the name of individual freedoms.[54] Today, it is easier for the individual employee's consent to be determinant, even if it deprives him or her of the protection of a law or a collective agreement.

It is noteworthy that none of these perverted uses of the law have lasted very long. They led to deadly stalemates and the need for new solutions. This is why dogma was reinvested after the Second World War. Pre-war scientisms were rejected, and the need to ensure the survival of humankind once again prevailed through the recognition that the law is not there to pander to the egoism, violence, greed and madness of human beings, but on the contrary to channel these and keep their lethal power at bay. We thus also have historical reasons for doubting that relations between individuals may be 'regulated' without reference to a heteronomous instance able to defend the public interest over private ones. The increasing number of countries in which the state is non-existent, particularly in Africa and the Middle East, are not exactly models of well-ordered societies: one should be living in a libertarian paradise, but it can often look like hell on earth. It is necessary, time and again, to submit the whims of the strong to something which is binding on everyone and which is even stronger than they are, so that human society does not degenerate into the law of the jungle.

V. 'FEARING NEITHER GOD NOR MAN': THE UNSUSTAINABLE SOCIETY

Any society lacking a heteronomic instance will inevitably collapse into civil war. One might dream then of a world held together exclusively by love or by calculations of individual interest. But neither of these produces the solidarity needed for people to live together in the same society. To mistake this dream for a possible reality is a recipe for violence. The promise of just such a world, purged of the heteronomy of the law, originates with Christianity, and is not found in the other monotheisms. It typifies a certain philosophy of history which has taken many different forms and, as Karl Löwith has shown, has theological roots.[55] As so often with Christianity, the seminal

[53] F Ost, *Sade et la loi* (Paris, O Jacob, 2005) 194.

[54] T Sachs (ed) *La volonté du salarié* (Paris, Dalloz, 2012) 272; P Adam, *L'individualisation du droit du travail. Essai sur la réhabilitation juridique du salarié-individu* (Paris, LGDJ, 2005) 553.

[55] K Löwith, *Weltgeschichte und Heilsgeschehen. Die theologischen Voraussetzungen der Geschichtsphilosophie* (1953), in his *Sämtliche Schriften* 2 (Stuttgart, Metzler Verlag, 1983) pp 7–239.

author here is St Paul. In two famous *Epistles*, he proclaims the end of the epoch of the law and the advent of a time of grace, when all people will commune in the same shared faith. The most radical of these writings is the *Epistle to the Galatians*, which was addressed to pious Jews who adhered to observance of the Law with a capital 'L', the Law of Moses which gives the Jewish people its identity and endurance:

> But before faith came, we were kept under the law, shut up unto the faith which should afterwards be revealed.
>
> **24** Wherefore the law was our schoolmaster to bring us unto Christ, that we might be justified by faith.
>
> **25** But after that faith is come, we are no longer under a schoolmaster.
>
> **26** For ye are all the children of God by faith in Christ Jesus.
>
> **27** For as many of you as have been baptized into Christ have put on Christ.
>
> **28** There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus.[56]

Apart from its evident anachronism, this rousing text anticipates both globalisation and Simone de Beauvoir. Globalisation: since Christ's message is addressed to all human beings without distinction, the differentials of nationality ('There is neither Jew nor Greek'), and of socio-legal status ('there is neither bond nor free') have become irrelevant. And Simone de Beauvoir ('One is not born a woman; one becomes one'): since the difference between man and woman, in the same way as the differences between nationalities and social ranks, are a legal construction, they are destined to disappear and make way for the communion of all humankind. Christian communities are meant to embody this ecumenical idea on earth, although it will only be realised at the end of time. Until then, the question is: what relation should Christians have to the law? Paul replies in a serener tone, in the *Epistle to the Romans*. He knows—as he explicitly states—that he is 'speak[ing] to them that know the law'.[57] He distinguishes between the contingent law imposed by the authorities of the moment—whom one should obey, 'For there is no power but of God: the powers that be are ordained of God'[58]—and the highest law, which is binding on Christians. But this law for Christians is not really a law because Paul mentions it only in order to announce its dissolution in mutual love:

> Owe no man any thing, but to love one another: for he that loveth another hath fulfilled the law.
>
> **9** For this, Thou shalt not commit adultery, Thou shalt not kill, Thou shalt not steal, Thou shalt not bear false witness, Thou shalt not covet; and if there be any

[56] *Epistle to the Galatians*, 3:23–28 (King James Version).
[57] *Epistle to the Romans*, 7:1.
[58] *Epistle to the Romans*, 13:1.

> other commandment, it is briefly comprehended in this saying, namely, Thou shalt love thy neighbour as thyself.
>
> **10** Love worketh no ill to his neighbour: therefore love is the fulfilling of the law.[59]

Of the tomes of glosses this *Epistle* has generated, we shall only mention Jacob Taubes's trenchant observation: Paul never mentions God's love. His only commandment is to love *one's neighbour*.[60] The *Epistle to the Romans* thus already adumbrates Christianity's secularisation, its transformation into a religion of man, as Feuerbach depicted it.[61] Or, to put it more simply: from the very start, Christianity prophesises the abolition of law in a society exclusively governed by mutual love; that is, it prophesises an end of history which will also be the end of the law. This prophecy has had an immense influence on the history of institutions throughout the Christian world, although it took different forms in the West and the East. While waiting for the end of days—the *eschaton*—which was thought to be imminent but whose arrival was always deferred, Medieval Europe adopted the *Code of Justinian*, which, as Pierre Legendre has shown, thus became the second book, after the Bible.[62] In the sedimentary history of institutions, the writings of St Paul re-emerged with new interpretations at the beginning of the Early Modern period, giving rise to Protestantism and its doctrine of salvation by faith alone. This was the standpoint of the great Protestant jurist Carbonnier, who ended his *Essays on Laws* with a postface entitled 'Is every law in itself an evil?'.[63] In it, he says exactly the same thing as St Paul: 'For a people of Saints, the law would have no use'.[64] Since the law is bound up with the existence of evil, and laws themselves are a necessary evil, they will vanish when evil vanishes.

This promise of a world purged of the heteronomy of laws took secular forms as from the nineteenth century. Fraternity and abundance were no longer reserved for another world, but were thought to be imminent for this world, where mastery of the laws of nature would lead to the withering-away of the state and of the law. Marx described in the following terms the 'higher phase of communist society' in which work would no longer be a livelihood but a principal vital need:

> after the productive forces have increased with the all-round development of the individual, and all the springs of co-operative wealth flow more abundantly—only

[59] *Epistle to the Romans*, 13:8–10.

[60] J Taubes, *Die Politische Theologie des Paulus* (Paderborn, Wilhelm Fink, 1993), tr J Taubes; *The Political Theology of Paul*, eds A Assmann, Jan A, H Folkers, W Hartwich, and C Schulte, tr D Hollander (Stanford, Stanford University Press, 2004).

[61] L Feuerbach, *Das Wesen des Christentums* (Leipzig, Otto Wiegand, 1841), English tr; *The essence of Christianity*, tr G Eliot, intro W Vondey (New York City, Barnes and Noble Books, 2004).

[62] P Legendre, *L'Autre Bible de l'Occident: le Monument romano-canonique. Étude sur l'architecture dogmatique des sociétés*' (Paris, Fayard, 2009) 582.

[63] *cf* J Carbonnier, *Essais sur les lois* (Paris, Defrénois, 1979) 281ff.

[64] Carbonnier (ibid) 295.

> then can the narrow horizon of bourgeois law be left behind in its entirety and society inscribe on its banners: from each according to his ability, to each according to his needs![65]

In order to hasten the realisation of this prophecy, Lenin set about providing the 'economic basis of the withering-away of the state':

> So long as the state exists there is no freedom. When there is freedom, there will be no state […] The state will be able to wither away completely when society adopts the rule: 'From each according to his ability, to each according to his needs', i.e., when people have become so accustomed to observing the fundamental rules of social intercourse and when their labor has become so productive that they will voluntarily work according to their ability. […] Each will take freely 'according to his needs.[66]

The aim of providing the 'economic basis of the withering-away of the state' in no way disappeared with the collapse of real communism. The credo of an arithmetically produced social harmony re-emerged with neoliberal globalisation and libertarian demands, which are two sides—economic and cultural—of the same coin. The new prophets again announced the advent of a world of abundance in which no one will have to suffer a constraint that is not self-imposed, since all will be self-governing. The difference is that the Communist prophecy announced the salvation of the wretched of the earth, whereas neoliberal eschatology rejects any idea of social justice. As Philippe d'Iribarne has shown, the modern promise of emancipation is not for the weak. On the contrary, it casts into poverty and isolation the vast numbers of people who do not manage to assert themselves as masters in this universe of generalised competition.[67] Yet despite the considerable media resources available to preach the new faith, it is far from certain that the majority of people will be lastingly converted to this credo. To have any chance of cementing a human community, the message must be addressed to all its members, regardless of whether the salvation promised is for this world or the next. At any rate, that is the lesson we learn from the history of religions. Buddhism could never have taken root as it did in the Far East had it not proclaimed the doctrine of *mahāyāna*, the 'Great Vehicle', which promises awakening to all beings, unlike *hīnayāna*, the 'Smaller Vehicle', which is for a small elite only.[68] On a much smaller scale,

[65] Marx, *Critique of the Gotha Programme* (1875) Marx/Engels Selected Works (Moscow, Progress Publishers, 1970) Vol 3, 13–30.

[66] Lenin, *The State and Revolution. The Marxist Theory of the State & the Tasks of the Proletariat in the Revolution* (1917) Collected Works, Vol 25, 381–492.

[67] *cf* P d'Iribarne, *Vous serez tous des maîtres. La grande illusion des temps modernes* (Paris, Seuil, 1996) 209.

[68] On these two schools and on the spread of Buddhism in Asia, see R de Berval (ed), *Présence du Bouddhisme* (Paris, Gallimard, 1987) Part 2, 419–702. For a synthetic overview, *cf* J-N Robert, *Petite histoire du bouddhisme* (Paris, Librio, 2008) 38ff.

the economic achievements of the Islamic brotherhoods such as the *Mourides* in Africa[69] or the *Naqshbandi* in Turkey,[70] or of the various minority religions in India,[71] are linked to the strong feeling of solidarity between their members. Even Protestantism, which Weber considered to be at the origin of modern capitalism, does not deny anyone the possibility of salvation, and no one can claim to be excluded from it. By contrast, neoliberalism inherently excludes any kind of solidarity, in the name of competition and selection of the fittest. And this, not within small communities, but on a global scale. Unlike the prophecies of St Paul, neoliberalism's message cannot hope to establish a lasting and shared faith to compensate for the abolition of the law. It gives us no future, because no society can survive in lawlessness and without shared dogma. In attacking the heteronomy of the law, while failing to generate a common conviction that generalised competition is for the best and that the resulting inequalities are just, neoliberal and libertarian politics cannot but destroy what we call civil society. This assertion is based on the concrete historical experience of countries whose state system has fallen apart or ceased to fulfil its function of a third party which safeguards individuals' identity and the binding force of the pledged word.

[69] See C Prudhomme (ed), *Les religions dans les sociétés coloniales (1850–1950)* in *Histoire, Monde et Cultures religieuses*, March 2013.

[70] *cf* S Mardin, 'The Nakshibendi Order of Turkey' in ME Marty (ed) *Fundamentalism and Society* (Chicago, University of Chicago Press, 1993) 204–33.

[71] *cf* P Lachaier, C Clémentin-Ojha, *Divines richesses. Religion et économie en monde marchand indien* (Paris, École Française d'Extrême-Orient, 2008) 238. For the case of *Pârsîs*, see E Kulke, *The Parsees in India: A minority as agent of social change* (Munich, Weltforum, 1974) 300.

11

The Return of 'Rule by Men'

> Should Iraqi President Saddam Hussein choose not to disarm, the United States will lead a coalition of the willing to disarm him.[1]

IN THE ABSENCE of a shared, but heteronomous, point of reference, human relations will inevitably collapse into the binary logic of 'friend' and 'enemy', which Carl Schmitt regarded as the essence of the political.[2] This—unsustainable—situation is precisely what the shrinking of the state has generated, and with it the re-emergence of other ways of instituting society from the rubble of the reign of the law. In Europe, what has reappeared is a particular from of rule by men, namely networks of allegiance.

I. THE BINARY LOGIC OF FRIEND v ENEMY

The works of Carl Schmitt give us some insight into the structural effects of 'exiting from the law'. For Schmitt, it is not the law which, in the last instance, binds together human groups, but the capacity to distinguish between friend and enemy. In this respect, he is yet another disciple of Saint Paul, whose *Epistles* he pored over at length. However, in his secularisation of St Paul's message, he was ahead of his time, and produced an almost structuralist definition of friendship: political friendship only takes on meaning and consistency in the face of an enemy who incarnates and actualises an existential threat.[3] Carl Schmitt was here attacking the pacifist illusions on which, in his view, the Weimar Republic and the Society of Nations rested (and his anti-Semitism, as well as his support for the National Socialists in his theoretical writings, are beyond doubt).[4] In order to survive, a political

[1] GW Bush, Press conference with Vaclav Havel, Prague, 20 November 2002. Consulted at http://edition.cnn.com/2002/WORLD/europe/11/20/prague.bush.nato/index.html.

[2] C Schmitt, *The Concept of the Political*, tr G Schwab (Chicago, London, University of Chicago Press, 1996).

[3] *cf* his interpretation of the notion of 'enemy of the gospel', used by St Paul to refer to the unconverted Jews (Romans, 11:28); see J Taubes, *La Théologie politique de Paul. Schmitt, Benjamin, Nietzsche et Freud* (ch 10 fn 60) 81.

[4] For the political background to Schmitt's constitutional theories, see O Beaud, 'Carl Schmitt ou le juriste engagé', preface to the French edition of *Verfassungslehre*, in C Schmitt, *Théorie de la Constitution* (Paris, PUF, 1993) 5–113.

society must therefore be able to name a common enemy. Schmitt defines the enemy as the other, the stranger:

> But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible. These conflicts can be resolved neither by a previously determined general norm nor by the judgement of a disinterested and therefore neutral third party.[5]

More often than not, the other and the stranger are one and the same. In a normal situation, in which a state ensures social harmony within its own frontiers, the enemy is situated beyond its borders, and the recognition of a common enemy is what brings into being the community of friends. This does not necessarily lead to open conflict, but supposes its ever-present possibility.[6] Human beings therefore come together as a political society only under threat of death, since the hostility between friend and enemy is a concretely existential question, not one of sympathy or antipathy:

> The concepts of friend, enemy and combat thus gain their objective meaning from their permanent relation to the real possibility of causing the physical death of another person. War derives from enmity, which is the existential negation of another being. War is simply the ultimate actualisation of enmity.[7]

When the friend / enemy dichotomy is not concentrated at the frontier, but becomes active within the state, it is no longer the stranger who is the object of this existential negation, but a group of fellow citizens, identified through their class, race, religion or opinions. This is when the destabilising threat of civil war hangs over the society. The outcome will depend on whether the country's leaders are able to impose their will at this decisive point, either by reuniting the society in the face of a named external enemy or by officially designating an internal enemy and managing to eliminate it.[8] For Schmitt, the imposition of the leader's will by force is the foundation of every political and legal order.[9] This is why Carl Schmitt's thought had such success, not only with the Nazis, but more generally and more recently, with all those who think law is nothing but an instrument of power. It is in such 'exceptional circumstances', when the legal order is collapsing or about to collapse that its true nature is revealed. At that moment all depends, says Schmitt, on the decisions taken by the person who reaffirms the state's sovereignty by placing himself at the limits of the legal order to judge 'when it is truly a

[5] Schmitt, *The Concept of the Political* (n 2) 27.
[6] ibid, 28.
[7] ibid, 33.
[8] ibid, 45.
[9] On this point, see C Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Berlin, 1922, 2nd edn 1934); tr *Political Theology. Four Chapters on the Concept of Sovereignty*, ed and tr G Schwab (Chicago, University of Chicago Press 1985, 2nd edn, 2005).

case of an extreme emergency, and [of] how it should be eliminated'.[10] The law is therefore not founded on some hypothetical basic norm, but on the decision taken by someone who manages to impose his will from outside the body of laws in force. For Schmitt, this is the only realistic theory possible. It parts company both with the legal positivists, who refuse to acknowledge this brutal primal scene of the law, and with natural law theorists, who attempt to occupy this scene in order to impose their idea of a 'higher order' transcending positive law.[11] When they succeed, says Schmitt, their rule is absolutely merciless because it claims to speak for all humanity.[12]

These critiques of legal positivism and natural law theory are not unconvincing or irrelevant.[13] But the problem is elsewhere and more serious, in the fact that Schmitt's legal theory is basically yet another version of social darwinism. When Schmitt attributes a determinant role to 'the capacity to distinguish friend from enemy,'[14] and to the 'existential negation' of the latter, he is simply positioning himself within a current of thought which applies the ideas of natural selection to groups rather than individuals.[15] Alfred Wallace introduced this approach in 1864 and, in his footsteps, Darwin argued that mutual assistance between members of the same group (sometimes called 'biological altruism'), is an advantage in the competition between groups. Darwin explains that:

> when two tribes of primeval man, living in the same country, came into competition, if (other circumstances being equal) the one tribe included a great number of courageous, sympathetic and faithful members, who were always ready to warn each other of danger, to aid and defend each other, this tribe would succeed better and conquer the other. […] Selfish and contentious people will not cohere, and without coherence nothing can be effected. A tribe rich in the above qualities would spread and be victorious over other tribes: but in the course of time it would, judging from all past history, be in its turn overcome by some other tribe still more highly endowed. Thus the social and moral qualities would tend slowly to advance and be diffused throughout the world.[16]

Wallace's and Darwin's theory sought to bring together biology, law and morals. But in shifting from the selection of the individual to this bio-sociologism, they gave a decisive role to war in the selection of the fittest groups.

[10] Schmitt, *Political Theology* (n 9) 6–7.
[11] ibid.
[12] ibid.
[13] See particularly his analysis of liberal thought and its tendency to annihilate the political in favour of ethics and economics, in Schmitt, *The Concept of the Political* (n 2) 71.
[14] ibid, 27.
[15] On these bio-sociological theories, see A Pichot, 'Biologie et solidarité', in A Supiot (ed), *La Solidarité* (ch 11 fn 33).
[16] C Darwin, *The Descent of Man, and selection in relation to sex* [1871], revised edn (New York City, D Appleton and co, 1889) Part I, 130.

The effects of this move were soon apparent in the First World War, which was also the first total war aimed at eradicating the enemy's biological resources, and then in the Second World War, which was conceived by Hitler as a decisive struggle between the Aryan and the Jewish races.[17] Like all the intellectuals of his generation, Carl Schmitt was immersed in this scientistic vision of humanity, and profoundly affected by the First World War. The cornerstone of his legal theory was the distinction friend / enemy, and armed struggle, which he described as the 'decisive moment *par excellence*'.[18] That is why, among the legal qualifications of sovereignty, he chose *jus belli*, the right to declare war, rather than, for example, the role of judge or legislator.[19]

The re-emergence of this binary logic of friend / enemy is in fact a symptom of an of an institutional crisis which rocks the legal field in much the same way as an earthquake shakes a whole building to its foundations: it is an acid test of the structure's solidity. We are probably living through a crisis of this sort due to globalisation and loss of sovereignty in Europe in the face of 'market forces' and competition from emerging countries. No sudden collapse, but strong tremors whose recurrence is enough to weaken our societies' legal frameworks. With the inversion of the hierarchy between the common good and particular interests, the free circulation of goods and capital becomes a means whereby the more powerful can flout the law binding on all. The result is a fracturing of the political community. The distinction between friend and enemy begins to take shape *within* nations, and across the political spectrum, with political leaders frantically looking round for an internal enemy against whom they can mobilise the maximum number of people, in order to preserve or take power. This internal enemy is always an 'other', whether this is a Muslim (conflated with an Islamist), an immigrant (figuring as a welfare scrounger), or a member of the 'Cathosphere' (a blinkered obscurantist). And as the awareness of a common law recedes, so public discussion is replaced by a slanging match, and reasoned debate is replaced by tactics of disqualification of the opponent. The crisis we are living through today is thus, arguably, as much institutional as it is economic.

The criterion friend / enemy has an undeniable heuristic value, since it helps us identify and interpret the symptoms of the crisis of legitimacy affecting the law. However, it tells us nothing about how this legitimacy

[17] In a speech of 30 January 1942, Hitler declared that: '*Wir sind uns dabei im klaren darüber, daß der Krieg nur damit enden kann, daß entweder die arischen Völker ausgerottet werden, oder daß das Judentum aus Europa verschwindet*.' (We should be quite clear about the fact that the war can end only in two ways, either the Aryan peoples will be annihilated or the Jews of Europe will disappear'). M Domarus, *Hitler. Reden und Proklamationen, 1932–1945*, Vol 2, 2 (Munich, Süddeutscher Verlag, 1965) 1828.

[18] Schmitt, *The Concept of the Political* (n 2) 35.

[19] ibid, 45ff.

was constructed. Schmitt's phrase, 'there must be an established order for the legal order to have meaning',[20] dodges the issue, which is perhaps best summarised in the humourist Pierre Dac's remark that 'Order established by force is often of the lowest order'.[21] For the problem is not whether decisiveness and the use of force can help establish a legal system: no doubt about it! Rather, what needs to be understood are the conditions under which 'strength transforms into right and obedience into duty'.[22] Neither willpower, nor decisiveness nor force nor friendship nor love can alone set up a sustainable legal order. The permanent state of exception of the Nazi regime lasted 12 and not 1,000 years, despite the promises of the Führer. A legal *order* requires more than *restoring order*, in the military or policing sense. Setting up a legal order—in the strong sense of establishing a lasting *state*—implies instituting a society, and one which can endure from generation to generation. This process has a subjective dimension, because every government needs its citizens to accredit it with serving their best interests.[23] It is a question of belief, of dogma, of accepting a legal truth as valid for all. But this belief is not a private affair; it is a claim enforceable by each and every citizen, and guaranteed by a third. The stronger the population's belief in the justice of the order established, the less the regime needs to use force to keep power.

This subjective dimension of instituting society is nothing new. Tocqueville observed that 'without such common belief no society can prosper; say, rather, no society can exist'.[24] Nearer to us, Cornelius Castoriadis and Pierre Legendre drew attention to this aspect, bringing to it the additional insights of psychoanalysis. Peace can only reign in society if interdiction is internalised, first and foremost the foundational interdiction of murder. In secular societies, it is the role of the law to embody concretely the logic of interdiction, so that human beings can together form societies. The anthropological function, and structural necessity, of interdiction for the survival of the species gives no indication as to the actual prohibitions which any given society should observe.[25] This approach is thus entirely different from that of natural law, which believes that the laws of nature can be discovered rationally and that they should be imposed universally, for example Hume's 'three fundamental laws' of nature. Grasping the *anthropological* function

[20] Schmitt, *Political Theology* (n 9).

[21] P Dac, *Pensées* (Paris, Presses de la Cité, coll 'Pocket', 1972) 18.

[22] J-J Rousseau, *The Social Contract*, tr HJ Tozer (Ware, Wordsworth Editions, 1998), Book 1, Ch 3, 8.

[23] *cf* Introduction, p 6–7 and ch 5, p 80–81.

[24] *cf* A Tocqueville, 'Of the principal source of belief among democratic nations' in *Democracy in America*, 7th edn, II, I, Ch 2, tr H Reeves (New York City, Edward Walker, 18470 517.

[25] This point is developed in my *Homo Juridicus: On the anthropological function of the law* (ch 2, fn 10).

of law can help us understand periods of legal crisis, in which there is a loss of faith in institutions.

In the aftermath of the two World Wars, a number of attempts were made to establish a new international order based on the rule of law. Organisations were commissioned to develop common rules for cultural, economic, monetary and welfare issues, in order to lay the legal foundations for a just and lasting peace. These projects were gradually abandoned, however, after the collapse of the Bretton Woods system in the early 1970s, and the shift to freely floating exchange rates. This is when governance by numbers took hold, making the market into the sole arbiter of the value of money, of nature and of work, on a global scale. This 'liquidation' of monetary, natural and human resources has led not only to financial, ecological and social catastrophes, but it has also fanned the flames of fundamentalisms and of violence. Only fervent neoliberals are blind to the scale of these disasters and their causes. Neither the collapse of the financial markets in 2008, nor the failed goals of 'tradeable pollution rights', nor the increase in ecological hazards, nor mass pauperisation, nor the multiplication of civil wars seem capable of waking them from their dogmatic slumber.[26]

Yet the effects of breaking up the legal frameworks of social justice are so well known that we hardly need to dwell on them again: a giddying rise in inequalities; widespread casualisation of labour; mass unemployment, affecting particularly the young in many countries; new threats to mental health at work—and the list goes on. In 2008, the ILO summarised the effects of globalisation on working conditions, as part of its annual World of Work Report. In its preface, the then Director-General, Juan Somavia, outlined the conclusions of the study, which is one of the few precise and well-documented analyses of the taboo subject of the social effects of free-market policies:

> A comprehensive overview of key factors underlying income inequalities shows that these have risen more than can be justified by economic analysis and that they entail major social and economic costs. What emerges is an evidence-based critique of the way financial globalization has occurred so far.
>
> The findings assembled here provide analytical support to the ILO's view that the growth model that led to the financial crisis is not sustainable. It confirms that a rebalancing between economic, social and environmental goals is vital both to recovery and also to shaping a fair globalization.[27]

[26] *cf* A Supiot, 'Le sommeil dogmatique européen' (2012) *Revue française des affaires sociales* 1, 185–98, tr 'Europe's awakening', in M-A Moreau (ed), B*efore and after the Economic Crisis, What Implications for the European Social Model?* (Cheltenham (UK)/ Northampton (USA), Edward Edgar Publishing, 2011) 292–309.

[27] J Somavia, Director-General of the ILO, Preface to the *World of Work Report 2008, Income Inequalities in the Age of Financial Globalization* (Geneva, ILO, 2008).

Since the financial crisis of 2008, the effects of globalisation have not diminished, but intensified. Almost half of the world's wealth is now held by only one per cent of its population; seven out of 10 people live in countries where economic inequality has increased in the last 30 years; the one per cent of richest people have seen their income increase between 1980 and 2012, in 24 out of the 26 countries surveyed; the one per cent of richest people in the USA captured 95 per cent of the growth following the financial crisis of 2008, that is, since 2009, whereas the 90 per cent of poorest people got poorer.[28] These soaring income inequalities go together with the disintegration of employment protection. At the top of the scale, a small number of high-level managers obtain both job security and a share of the profits, while at the bottom of the scale casualised labour, and what is called the 'informal' sector, represent 51 per cent of the workforce in Brazil, and 85 per cent in India.[29] In France, the last 'Working Conditions' survey (2005) showed that 27 per cent of the working population were in unstable employment, and of these, 17 per cent were in precarious work, and 10 per cent in employment which was likely to disappear.

To this astronomical rise in inequalities, and increasingly precarious living conditions, should be added the multiplication of wars and violence. The media invariably attribute these to religious or particularist factors, whereas the deeper causes can be found in the fact that, as the ILO Constitution states, 'lasting peace can be established only if it is based upon social justice'. Even the IMF's economists have acknowledged, in a recent report, that increased inequality has negative effects on economic prosperity.[30] The correlation between lack of social justice and violence applies to the Arab uprisings, as Gilbert Achcar has shown,[31] but equally to the disintegration of the social bond in the poorest districts of Western cities. Throughout the world, mass unemployment and poverty are the seedbed of dislocated family structures, delinquency and religious or identity-based 'struggles for recognition'.

The loss of trust in the figure of the third, its discredit, is what has caused the binary confrontation of friend and enemy to reappear. With no common referent to ensure a place for each recognised by all, society risks breaking up into antagonistic groups. However, contrary to what Carl Schmitt

[28] Oxfam International, *Even it Up: Time to End Extreme Inequality* (Oxford, January 2014). On the evolution of inequalities in the long term, see Piketty, *Capital in the Twenty-First Century* (ch 7 fn 12).

[29] Source: ILO, 'Measuring informality: A statistical manual on the informal sector and informal employment' (2013). See, for the case of India, S Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (Abingdon, Routledge, 2014) 288.

[30] JD Ostry, A Berg, CG Tsangarides, *Redistribution, Inequality, and Growt*h, International Monetary Fund—Research Department, February 2014, 30.

[31] G Achcar, *The People Want. A Radical Exploration of the Arab Uprising*, tr GM Goshgarian (Berkeley, LA, University of California Press, 2013).

argues, this sort of crisis does not necessarily issue in the declaration of a state of exception. The collapse of one legal structure can lead to the reactivation of another, which had existed before it and returns in new forms.

II. TIES OF ALLEGIANCE

A striking change took place around the beginning of the twenty-first century in the way the United States sought to refashion the world order. As the only imperial power for a time, it chose to neglect international organisations in favour of ad hoc groupings, which assembled as many countries as were willing to rally round a particular enterprise. In 2003, for instance, the invasion of Iraq, in contempt of international law, took the form of a 'coalition of the willing'.[32] The countries of the 'New Europe', which in the meantime had aligned themselves with the US in becoming die-hard neoliberals, were eager to join its ranks. This war, then, effectively resuscitated the feudal stipulation that vassals come to the monarch's aid to assist him in his military campaigns, bringing all their equipment, and a number of men proportional to their rank and quality.[33] President Bush's coalition was thus swelled by 7,100 British, 700 Poles, 97 Czechs and 29 Ukrainians. This type of coalition would shortly become the standard way of treating international crises, in flagrant violation of United Nations rules.

A similar turning point occurred in the field of international trade rules. The World Trade Organisation, the last major post-war global organisation to be set up, was commissioned in 1994 to come up with a multilateral framework for the application of its general rules on tarifs and trade. It was already equipped with a dispute settlement mechanism. Although it achieved a lot, it failed to extend free trade regulation agreements multilaterally, particularly in the service sector and in agriculture. Concurrently, bilateral free trade agreements were flourishing. These favour larger trading blocks such as the US or the EU, which can dictate their conditions to smaller countries and demand their allegiance, in return for opening up their large markets to them. The two sides are obviously much more equally matched in the case of the Transatlantic Trade and Investment Partnership (the TIPP), which is under negotiation at present between the European Commission and the United States. But the fears are the same: that the Treaty will legally seal Europe's infeudalisation to American norms in the fields of work and welfare, tax and the environment.

[32] This notion of 'coalition of the willing', coined by the then United States Defence Secretary Colin Powell in 2001, was described by the US President George W Bush in the preamble to the *Security Strategy of the United States of America*, September 2002 (http://www.state.gov/documents/organization/63562.pdf). It later became the rallying cry of the 49 countries which supported the American invasion of Iraq.

[33] M Bloch, *Feudal Society* [1939], 2 vols (Chicago, Chicago University Press, 1961).

This abandonment of international organisations in favour of coalitions, and concomitantly the decline in international rules in favour of unequal treaties are the symptom of a more general transformation of modes of government. There are not an infinite variety of types of legal structure, even if each one has hundreds of different versions. Schematically, following a distinction found in Chinese political philosophy, one can distinguish 'government by laws' from 'government by men'.[34] In a system of *government by laws*, the condition of freedom for each member of the society is that all should be subject to general and abstract laws. This is a structure which rests on the institution of a third which secures the legal order and transcends the will and interests of individuals. The third enables the two legal planes which the opening of the *Digest* so carefully distinguishes to be articulated: the rules which cannot be the object of a calculation of individual interest, which belong to the realm of deliberation and the law; and the rules which fall within the realm of calculations of individual interest and therefore within that of negotiation and the contract.[35] Their articulation is what allows men and things to be treated as abstract, exchangeable, entities in a contract, whose value can be determined by a shared monetary standard. Their qualitative differences, meanwhile, are protected by the law, as the domain of the incalculable. In a system of *government by men*, by contrast, each person is placed within a network of relations of dependence. The key idea is not that all should be subject to the same abstract law, but that each person should behave according to his or her place in the network. Each must serve the interests of those on whom he depends, and be able to count on the loyalty of those who depend on him. Legal subjects, in their mutual relations as well as in their relations to things, are consequently defined in terms of ties of allegiance, not in terms of subjection to the same impersonal law. The figure of the third does not disappear altogether in these forms of government, but functions as a guarantor of personal ties, not of impersonal law. This mode of government can do without the figure of the sovereign state. No third instance lays claim to the domain of the incalculable, necessarily merges with that of the calculable, breaking down the distinctions between public and private.[36]

Several forms of government by men have existed historically. There is ritualism, which we mentioned briefly earlier,[37] and also feudalism, which played a much greater role in European history. Few political systems have really managed to fuse government by laws and government by men in the way Imperial China did (which perhaps explains in part the Empire's exceptional longevity). More frequently, one of the models has

[34] See above, ch 3, p 58ff.
[35] See above, ch 6, p 103ff.
[36] *cf* on this point, Chevrier, 'Remarques' (ch 10 fn 3) 16ff.
[37] See above, ch 3, p 53ff.

predominated, but elements of the other are always also present. When the power of one falters, the other makes a comeback, since it has never completely disappeared from institutional memory. We can see this in twelfth to thirteenth-century Europe, when the decline of feudalism and its mode of government by men was contemporaneous with the rise of sovereign states founded on the reign of the law. We have reason to believe that the period introduced by this change is now coming to an end. With today's crisis in the legal order, and the blind alley of governance by numbers, government by men has resurfaced in novel forms. Thus contemporary China attempts to circumvent the need for a genuine rule of law by reactivating Confucian ideals of social harmony.[38] In Europe, as government by law recedes, so feudal legal structures resurface. This is because, where security is no longer assured by a law which applies equally to all, people take refuge in ties of allegiance which they forge with others. Ties of allegiance give access to protection from those more powerful than oneself, and to the support of those weaker than oneself, whom in turn one protects. These bonds emerge in real life before they appear in law. They have taken root in the most disparate areas, for example, in drug-dealing networks, civil war zones, but also political parties;[39] in the relations between the political world and the world of finance,[40] and between subisdiaries or sub-contracted companies and their principals. In its sabotage of the heteronomy of the law, governance by numbers does not bring about the reign of unfettered individual autonomy, but rather promotes networks of allegiance which erode the distinction between private and public interests. This outcome is nothing if not ironic, in the light of the goal sought: the quest for the most impersonal guarantees of power (numbers) has ultimately caused a mode of government to reappear and take centre stage that is based on ties of allegiance.

When these networks of allegiance permeate the whole of society, we can say, as several authors have argued, that the legal structures of feudalism have made a comeback.[41] Rather than signalling a return to the Middle Ages,

[38] On this revival, see the summaries of the lectures of Anne Cheng in the *Annuaire du Collège de France*, 2010 to 2013. See also J Zhe, 'Confucius, les libéraux et le Parti. Le renouveau du confucianisme politique', *La Vie des idées*, May 2005, 9–20; and by the same author, 'L'éthique confucéenne du travail et l'esprit du capitalisme à la chinoise', *Revue du MAUSS permanente*, 30 March 2012.

[39] *cf* C Le Bart and F Rangeon, 'Le néo-féodalisme politique: l'éternel retour des fiefs', in J Lefebvre (ed), *L'Hypothèse du néo-féodalisme. Le droit à une nouvelle croisée des chemins* (Paris, PUF, 2006) 115–36.

[40] See C Chavapneux and T Philipponnat, *Lacapture* (Paris, La Découverte, 2014).

[41] See in particular Supiot, 'Actualité de Durkheim' (ch 10 fn 39) 177–99; 'La contractualisation de la société' in Y Michaux (ed), *Université de tous les savoirs*, Vol 2, *Qu'est-ce que l'humain?* (Paris, O Jacob, 2000) 156–67; P Legendre, 'Remarques sur la re-féodalisation de la France' in *Études en l'honneur de Georges Dupuis* (Paris, LGDJ, 1997) 201–11 (reprinted in *Nomenclator. Sur la question dogmatique en Occident, II* (Paris, Fayard, 2006) 271ff); J Lefebvre (ed), *L'Hypothèse du néo-féodalisme. Le droit à une nouvelle croisée des Chemins* (n 39).

however, this phenomenon suggests that the structures against which, and on the rubble of which, the nation state was first erected, have re-emerged. For bygone dogmatic categories do not fit neatly into a linear history, but flow into a subterranean reserve from which they can always resurface and produce new normative effects.[42]

Feudal structures have tended to be revived whenever central authority loses its grip. Each time the form they take is different.[43] For example, Chinese and Japanese feudalism have little in common with the feudalism of the Medieval West.[44] Yet common ground exists between feudalism and ritualism, namely the importance of the personal tie. After the fall of the Roman Empire, one of the unique features of the Western feudalism which rose from its ruins was the legal character given to these ties of dependence.[45] The most fundamental bond, and the backbone of the social order, was vassalage, that is, a contract of a very particular sort, combining a personal element with a real element.[46] The personal element consisted in one person being made dependent on another. The form this took varied with the status of the parties concerned, and could be homage or serfdom. The real element resided in granting a possession to the dependent party, who in return fulfilled certain obligations towards the grantor. Again, the conditions varied with the status of the parties, and land could be held in noble (fief) or non-noble tenure. This type of relation provides a useful approach to changes in contemporary law, where we see emerging new techniques of infeudalisation of people and tenure of things.

III. FEUDAL RIGHTS IN PEOPLE

The techniques whereby people are infeudalised today go by the name of 'networks'.[47] The representation of the world as a network of communicating

[42] *cf* A Al Azmeh, 'Chronophagous Discourse: A Study of Clerico-Legal Appropriation of the World in an Islamic Tradition' in FE Reynolds and D Tracy (eds), *Religion and Practical Reason* (Albany, State University of New York Press, 1994) 163ff.

[43] *cf* P Anderson, *Passages from Antiquity to Feudalism* (London, New Left Books, 1975); and, by the same author, *Lineages of the Absolutist State* (London, Verso, 1979); J-P Poly and É Bournazel, *La Mutation féodale* X^{e}–XII^{e} *siècles*, 2nd ed (Paris, PUF, 1991) 535.

[44] *cf* Vandermeersch, 'Nature de la féodalité chinoise' (ch 10 fn 7) 63–104. And, for a similar position, Bloch, *Feudal Society* (n 3).

[45] *cf* Bloch, *Feudal Society* (n 3).

[46] For an overview, see J-F Lemarignier, *La France médiévale. Institutions et société* (Paris, A Colin, 1970, 416; Poly and Bournazel, *La Mutation féodale* (n 43).

[47] See M Castells, *TheRise of the Network Society* (Oxford, Blackwell, 1996); F Ost and M van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Brussels, Publications des Facultés universitaires Saint-Louis, 2002) 587; L Amiel-Cosme, 'La théorie institutionnelle du réseau', in *Aspects actuels du droit des affaires. Mélanges Y Guyon* (Paris, Dalloz, 2003) 1–40; E Peskine, *Réseaux d'entreprises et droit du travail* (Paris, LGDJ, 2008) 363.

particles was first championed by cybernetics in the post-war years, and later by postmodern philosophy and the *Law and Economics* doctrine. Today, participatory management puts these techniques into practice, in the way it subjects people to fulfiling objectives rather than observing rules.[48] Governance by numbers thrives on the structure of the network, for which authors have proposed biological or computing models.[49] However, its legal character becomes clear when we recall that feudalism was essentially a world of networks, and when we examine the feudal legal categories handed down to us. The feudal relationship, as it reappears today, is signalled by a double displacement: from sovereign to suzerain and from law to bond.

The shift from sovereign to suzerain power is the most visible sign of the extension of vassalage in Europe today. The suzerain has immediate authority over his vassals, but not over his vassals' vassals, whereas the sovereign's power is supreme, self-positing and bears its cause within itself. This power can be exercised directly over all the sovereign's subjects, which is why, as from the end of the Middle Ages, sovereignty became the cornerstone of the modern theory of the state. However, it can no longer account for the changes occurring today, since the state increasingly appears as a suzerain rather than a sovereign power. The European Union provides the best illustration of this revival of relations of suzerainty today. European political institutions are clearly not sovereign, a fact officially clarified by the Maastricht Treaty's 'principle of subsidiarity'.[50] The EU has no army, no real government, and a tiny number of civil servants compared to the populations under its rule. It does not raise taxes and most of the rules it issues (through Directives) are applied in the national legislation of Member States only after being filtered through the transposition procedures. When Jacques Delors was President of the European Commission, he even called the EU 'an unidentified political object'.[51] But if one starts thinking of European institutions in terms of suzerainty rather than sovereignty, everything becomes clear. The EU's power over the populations it governs is only indirect, and requires the mediation of the states which agree to be its vassals. Member States are consequently beholden to a legal entity which does not itself have the full panoply of attributes of sovereignty over its

[48] See above, ch 8, p 144ff.

[49] See particularly G Teubner, 'The Many-Headed Hydra: Networks as Higher-Order Collective Actors' in J McCahery, S Picciotto and C Scott, *Corporate Control and Accountability* (Oxford, Oxford University Press, 1993) 41ff; and by the same author, *Netzwerk als Vertragsverbund Virtuelle Unternehmen* (Baden-Baden, Nomos Verlag, 2004) 286.

[50] TFEU, Art 5. On this principle and its history, see the convincing critical analysis of Julien Barroche, for whom 'subsidiarity' 'names Europe's aporia, and has joined the new arsenal of ultra-liberal governance', in *État, libéralisme et christianisme. Critique de la subsidiairité européenne* (Paris, Dalloz, 2012) 748, cited 563.

[51] Speech by the European President Delors at the first intergovernmental conference (Luxembourg, 9 September 1985), *Bulletin des Communautés européennes*, September 1985, 9, 8.

citizens. In other words, Member States are vassals of an entity which has only the diminished power of a suzerain.

The EU's structure of suzerainty can be found in certain international economic organisations like the IMF, which can only wield effective power over states if the latter agree to lose a portion of their sovereignty by pledging to carry out the reforms they are prescribed.[52] The acceptance of these programmes is not strictly contractual, but involves precisely an act of allegiance, confirmed by a letter addressed by the country concerned to the IMF. These letters, and the associated documents, are published on the IMF's web site. They all look more or less the same.[53] For example, the letter from the government of Mali to the IMF dated 2 December 2013 certifies that the country has made progress in implementing the policies recommended, and has 'achieved the [applicable] indicators'. It presents the economic and financial policies it intends to introduce in the ensuing three years, with a view to maintaining macroeconomic balance, improving budget management and encouraging the private sector, particularly the financial sector. Lastly, it requests a sum of 46 million dollars as extended credit facility.[54] Whereas these international organisations appear to be dealing with 'economic governance' alone, they are clearly using techniques of vassalage which are ultimately incompatible with the sovereignty of the countries concerned.

This trend grew rapidly after the collapse of the financial markets in 2008. Central banks and countries threw untold sums at the banks to bail them out and to limit the social and economic effects of their greed and ineptitude, thus managing to convert a mountain of private debt into a bottomless pit of public debts. And no sooner had they done this and footed the bill for the financial sector's meltdown, then they were enjoined, precisely in the name of the debts thus contracted, to privatise whatever was left of their public services and to entirely deregulate their labour markets. And—why do things by halves?—the political leaders initially chosen to carry out these policies often came from the banking world which had sparked the crisis in the first place. As the 'Greek crisis' perfectly illustrates, there is much more at stake here than the familiar practice of privatising profits and having taxpayers bear the losses. What we are witnessing, rather, is an undisguised challenge to a people's right to govern themselves. Friedrich Hayek's battle cry of 'dethroning politics'[55] and introducing a 'limited democracy', which

[52] See above, ch 1, p 28.

[53] www.imf.org/external/index.htm.

[54] www.imf.org/external/np/loi/2013/mli/fra/120213f.pdf (accessed on 4 September 2014).

[55] *cf* FA Hayek, *Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy, Vol 3 The Political Order of a Free People* (Chicago, University of Chicago Press, 1978).

puts the question of the distribution of wealth beyond the reach of the ballot box, is close to becoming a reality in Europe today.

The *shift from law to tie* would be an apt definition of the plethora of recent contracts which not only oblige someone to give, do, or refrain from doing something specific, but which additionally create between the parties a bond obliging one party to behave according to the expectations of the other. This is the type of contract generally used to establish a bond of economic dependence between one (natural or legal) person and another. These contracts, which integrate one person into another's economic activity, affect the status of the two parties after the fact, and oblige them to create relatively stable ties. Examples are relational contracts, studied by Ian R MacNeil for the United States, where they are used increasingly.[56] Life time contracts also belong to this category, for instance employment contracts, tenancy agreements and real-estate loans, on which a group of researchers headed by Luca Nodler and Udo Reifner have recently carried out important research.[57]

Similar techniques are also used in public contracts. The state allows private and public bodies to define how they will meet the objectives it sets and, rather than regulate their activities, it delegates the task of monitoring whether these objectives are attained to ad hoc authorities. The state simply reserves the right to intervene after the fact if failings are observed.[58] We have already mentioned these techniques, which go by the name of the 'contractualisation of public policy initiatives' in domestic law, and which are used extensively in the relations between central and regional or local government, and between central government and executive agencies.[59] The ideal of governance by numbers is implanted here by the use of an abundance of indicators and quantitative performance assessment procedures. In legal terms, these are what Michel Laroque has called 'techniques of administrative accountability',[60] such that public agencies, for example, no longer

[56] IR MacNeil, 'Contracts: Adjustments of long-term economic relations under classical, neoclassical and relational contract law' (1978) *Northwestern Law Revue*, 854; 'Relational contract: What we do and do not know' (1985) *Wisconsin Law Revue*, 483; 'Reflections on relational contract' (1985) *Journal of Institutional and Theoretical Economics*, 541; C Boismain, *Les Contrats relationnels* (Marseille, Presses universitaires d'Aix-Marseille, 2005) 526; Y-M Laithier, 'À propos de la réception du contrat relationnel en droit français' (2006) *Recueil Dalloz*, 1003.

[57] L Nodler and U Reifner (eds), *Life Time Contracts. Social Long-term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague, Eleven International Publishing, 2014) 666.

[58] *cf* M-A Frison-Roche (ed), Droit et économie de la régulation (Paris, Dalloz, 2004), esp Vol 1, 'Les Régulateurs économiques: légitimité et efficacité', 205.

[59] *cf* Conseil d'État, *Le Contrat, mode d'action publique et de production de normes*, Rapport public 2008 (Paris, La Documentation française, 2008) 398; and above, ch 8, p 153ff.

[60] M Laroque, 'La contractualisation comme technique de tutelle: l'exemple du secteur social' (2003) *AJDA* 976.

act solely in view of the law, but also of the contractual bonds they have made. The battery of figures produced by this mode of governance conceals a web of relations of vassalage between the state and intermediary bodies such as regional health agencies[61] or university groupings.[62] These distance the state from the public and even from the service providers themselves.

These types of contracts are extensively used in EU law for the Union's economic governance, that is, its finality of permanently monitoring states' budgetary balance through control mechanisms, themselves inspired by governance by numbers.[63] However, this cybernetic dream of putting human affairs on automatic pilot works out quite differently in the real. The Maastricht criteria have in actual fact almost never been respected by Eurozone countries, so it is unlikely that the corrective mechanisms foreseen by the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union will be 'automatically' triggered. The net result of these mechanisms is thus essentially to place countries in a relation of dependence with respect to the Commission and the European Central Bank, and to create ties of allegiance to these two non-elected bodies. These ties end up having more influence on the determination of economic and social policy than the law itself.

IV. FEUDAL RIGHTS IN THINGS

The proliferation of techniques for granting rights in things is the other symptom of this revival of government by men. In the feudal system, where wealth was essentially vested in land, men were considered simply as custodians of worldly goods, which ultimately belonged to God. This idea still persists in English law, where no subject can technically 'own' land, even if he or she has exclusive enjoyment of it, because the land belongs to the sovereign.[64] Thus land was always granted by someone else, and only exceptionally (the exception being allodial land) were one's rights *not* tied to a relation of dependence on another person. Hence the medieval distinction between the *dominium utile* of the vassal or tenant, and the lord's *dominium eminens* over the land granted in fief or on the basis of the peasant's dues or his serfdom. The granting of land was indissociable from certain personal

[61] Law No 2009-879 of 21 July 2009 on the reform of the hospital and on patients, health and geographical areas.

[62] Code of Education, Art L.718–7ff.

[63] See above, ch 8, p 157ff.

[64] FH Lawson and B Rudden, *The Law of Property*, 2nd edn (Oxford, Oxford University Press, 1995) 80; K Grey and S Grey, *Elements of Land Law*, 5th edn (Oxford, Oxford University Press, 2009), 67. On the historical origins of the eminent domain of the King of England, see Anderson, *Passages from Antiquity to Feudalism* (n 43).

bonds between grantor and grantee, which could take the form of acts of loyalty (owed by the vassal to his suzerain), or of economic contributions (owed by peasants or villeins to their lord). The same system of concessions can be found in feudal law for the allocation of public and ecclesiastical office. The holder received remuneration (or 'benefice'), in the form of the revenue from the goods attached to that office. This link between *officium* and *beneficium* was the basis of the venality of offices and charges which lasted until the end of the ancien régime,[65] and is still current in some regulated professions in France such as notaries or taxis. The relations between people and things thus always preserved the imprint of relations between people.[66] But, as Louis Dumont has shown, economic ideologies seek to make relations between people secondary to relations between people and things because, in the market economy, the goods to be exchanged must be stripped of any trace of personal bonds.[67] Once again, an analysis of law can show how feudal structures have re-emerged, in the form of the fragmentation of ownership and the delegation of public functions.

The *dismemberment of ownership* is clearly a consequence of the extension and consecration of intellectual property rights. Intellectual property implies that one person can have rights over something which is the physical property of another. The bearer of these rights has prerogatives which vary from case to case, but they always restrict the otherwise absolute rights of material ownership.

This is because intellectual property rights are attached to the thing, regardless of its physical owner. As Mauss noted, intellectual property brings back into the modern world something we thought was confined to 'archaic' societies, namely the 'spirit of the thing', which follows it wherever it goes, and must always return to whoever put it into circulation.[68] This is precisely what the TRIPS agreement signed in the framework of the WTO enshrines: freedom of circulation, and the obligation on every custodian of the thing throughout the world to honour his or her debt to the owner of the spirit of the thing.[69] What is this structure, if not the revival of the feudal distinction between *dominium utile* and *dominium eminens*? When rights in the physical object are overlaid by intellectual property rights, the

[65] *cf* A Esmein, *Cours élémentaire d'histoire du droit français* (Paris, Larose, 1898) 139ff, 271ff and 411ff.

[66] For a clear and concise overview, see P Ourliac and J de Malafosse *Histoire du droit privé*, t 2, *Les Biens*, 2nd edn (Paris, PUF, 1971), 148ff.

[67] L Dumont, *Homo æqualis I. Genèse et épanouissement de l'idéologie économique*, 2nd edn (Paris, Gallimard, 1985) 13. English tr, *From Mandeville To Marx: The Genesis And Triumph Of Economic Ideology* (Chicago, Chicago University Press, 1977).

[68] M Mauss, *Essay on the Gift, The form and reason for exchange in archaic societies* [1950], tr WD Walls, foreword by M Douglas (London and New York City, Routledge, 1990).

[69] Agreement on Trade-Related Aspects of Intellectual Property Rights, signed in Marrakesh, 15 April 1994.

latter inevitably end up dominating the former. Thus the US Supreme Court decided that since intellectual property rights can extend to living organisms, they encompass the organisms' reproductive capacities, which automatically become objects of the patents as well.[70] Farmers who purchase their seed from Monsanto will thus be infringing this company's intellectual property rights if, in the following seasons, they plant the seed produced. Nor do they have the right to buy grain meant for consumption from another producer, if the producer has signed a similar contract. This has enslaved crop-growers in unprecedented ways to the power of the seed-supplying companies. Instead of being independent producers, they have been transformed into tenant farmers responsible for crops which they do not fully own, and this for the entire life of the patent—20 years in this case. More generally, intellectual property is the basis of an economy founded on unearned income which extends its dominion not only over individuals but also over whole states.[71]

However, intellectual property is not the only factor in the fragmentation of ownership. The legal concept of ownership is today incapable of covering how economic control over certain goods is really held, because the rights may be spread across several bearers, from private persons to public authorities. This insufficiency comes as no surprise regarding 'things' such as labour, natural resources and money, which anyway can only be traded thanks to a fiction.[72] Since the preservation and renewal of human and natural resources affect the common good, these fictitious commodities can only enter the market if we limit the rights of those who appropriate them. It is only because labour law and environmental legislation have set reasonable limits on the exploitation of these 'resources' that labour and nature may be treated *as though* they were commodities. These legal constraints, which work towards what is now called 'sustainable development', show the limited power of private property rights over these types of resources, which belong to the *dominium eminens* of transcendent beings such as the common heritage of the Nation or of Humanity.[73] The French term *patrimoine* (heritage and patrimony) successfully articulates, in the longer term, the

[70] Supreme Court of the United States, 13 May 2013, *Bowman v Monsanto* (569 US 2013).

[71] On these neo-feudal and neo-colonialist effects of intellectual property, *cf* A Rahmatian, *Copyright and Creativity. The Making of Property Rights in Creative Works* (Cheltenham, Edward Elgar Publishing, 2011) 247ff.

[72] *cf* K Polanyi, 'The Self-regulating Market and the Fictitious Commodities: Labor, Land, and Money' in *The Great Transformation: The Political and Economic Origins of Our Time* [1944], foreword by J Stiglitz, Ch 6 (Boston, Beacon Press, 2001).

[73] The notion of a shared heritage of humanity first appeared in the law of the sea (see the Montego Bay Convention of 10 December 1982), and later encompassed outer space and heritage on land. On the revival of the notion of 'commons', see B Parance and J de Saint Victor (ed), *Repenser les biens communs* (Paris, CNRS Éditions, 2014) 314; D Bollier, *La Renaissance des communs* (Paris, Éditions Charles Léopold Meyer, 2014) 192.

legal categories of persons and things.[74] It now even includes the human genome, with a view to limiting its exploitation and commercialisation.[75]

Developments in tort law have also contributed to this superposition of different legal relations in the same object. The regime of strict liability devised in the late nineteenth century to oblige the custodian of a thing to answer for the damage it caused had the effect of resuscitating the idea of a thing's guardian who might be distinct from its owner. This transformation of the exclusive relation between someone and his property is even clearer in the rules concerning liability for defective products.[76] It is the producer of the thing—whoever manufactures the product or puts it into circulation—who is liable for the harm caused by the product's defects, whether or not the producer is bound by a contract with the injured party. As in the case of intellectual property, the producer's liability follows the product, thus requiring procedures of 'traceability' to be set up.[77]

However, unlike in the case of intellectual property rights, here it is the producer's debt and not the author's claim that circulates with the product. The producer continues to be answerable for the safety of the product, whoever its temporary owner may be, such that the liability for damage caused by things splits up into two forms: *utile* (the guardian's) and *eminens* (the producer's, a liability which cannot be eluded).

The formal delegation of functions occurs in both the public and the private sector, and blurs the distinction between the two. It first came to prominence in the management of private companies. Under pressure from the financialisation of the economy, companies divided up their business into cost and profit centres, and set them ever more stringent performance targets. This move towards more autonomous units went hand in hand with outsourcing the least profitable processes and focusing on what was called a company's 'core business', that is, whatever operation appeared at the time to be the most competitive in the eyes of the financial markets. The structure

[74] *cf* A Sériaux, 'La notion juridique de patrimoine. Brèves notations civilistes sur le verbe avoir' (1994) *Revue trimestrielle de droit civil* 801; F Terré, 'L'humanité, un patrimoine sans personne' (Paris, Mélanges Phillipe Ardant, LGDJ, 1999) 339; D Hiez, *Étude critique de la notion de patrimoine en droit privé actuel* (Paris, LGDJ, 2003) 459.

[75] See the *Universal Declaration on the Human Genome and Human Rights* of 11 November 1997, Art 1. *cf* GB Kutukdjian, 'Le génome humain: patrimoine commun de l'humanité', in *Héctor Gros Espiell Amicorum Liber* (Brussels, Bruylant, 1997) 601–10; M Bedjaoui, 'Le génome humain comme patrimoine commun de l'humanité ou la génétique de la peur à l'espérance' in *Federico Mayor Amicorum Liber* (Paris, Unesco and Brussels, Bruylant, 1995) Vol II, 905–15; B-M Knoppers, *Le Génome humain: commun de l'humanité?* (Québec, Fides, 1999) 41.

[76] European Directive 85/374/EEC of the Council of the European Union, 25 July 1985. See Y Markovits, *La Directive CEE du 25 juillet 1985 sur la responsabilité du fait des produits défectueux* (Paris, LGDJ, 1990), preface J Ghestin; S Taylor, *L'Harmonisation communautaire de la responsabilité du fait des produits défectueux. Étude comparative du droit anglais et du droit français* (Paris, LGDJ, 1999), preface G Viney.

[77] *cf* P Pedrot, *Traçabilité et responsabilité* (Paris, Economica, 2003) 323.

of businesses changed accordingly, in ways familiar to us today: the Fordist model of an integrated and highly hierarchical organisation gave way to the model of a network in which the company contracts out an increasing proportion of the operations needed to manufacture its products. Various legal techniques accompanied this process. Those used by business groups involve a company (called the parent company) holding a sufficiently large share of the capital of a subsidiary to exert a 'dominant influence'[78] over it. New contractual techniques are also used, such as concessions or franchises in distribution networks,[79] sub-contracting contracts in industry,[80] 'integration contracts' in agriculture,[81] listed suppliers for supermarkets,[82] and so forth. All these techniques have a similar structure, that of 'tenure-service' in which a dominant company grants to a tenant (subcontractor, distributor, supplier, etc) a profitable economic activity, in return for a pledge to respect certain rules and inspections defined by the company. The 'tenant' can in turn use the services of other companies, for example in a two-tier sub-contract, which is the equivalent of the feudal vavasour (the vassal's vassal).[83] The vavasour can in turn engage a third-level sub-contractor. In order to gain some autonomy with respect to the dominant company, the sub-contractor can also serve several lords at once. A sub-contractor for car elements—air-conditioning or electronic components, say—can thus work for several competing makes. So, as in feudal networks, these commercial networks are not necessarily pyramidal, or rather the pyramid can sometimes be standing on its tip. The same vassal can be bound to several lords, thus creating potential competition, or a conflict of loyalties, between them. This was why, in feudal times, the notion of 'liege lord' was introduced, to avoid conflicts of interest by ensuring that a vassal gives priority to one

[78] Directive 2009/38/EC of the European Parliament and Council of 6 May 2009 on the establishment of a European Works Council, Art 3; French Labour Code, Art L.2331-1 and L.2341-2; see, similarly, the definition given by the French Commercial Code (Art L.233-3); see P Didier and P Didier, *Droit commercial*, Vol 2 *Les Sociétés commerciales* (Paris, Economica, 2011) 960f; G Teubner, 'Unitas Multiplex: Corporate Governance in Group Enterprises' in D Sugarman and G Teubner (eds), *Regulating Corporate Groups in Europe* (Nomos, Baden-Baden, 1990) 67–104; I Daugareilh (ed), *Le Dialogue social dans les instances transnationales d'entreprises européennes* (Bordeaux, Presses universitaires de Bordeaux, 2014) 171.

[79] P Le Tourneau, *Les Contrats de franchisage*, 2nd edn (Paris, LexisNexis, 2007) 323; M Behar-Touchais and G Virassamy, *Les Contrats de la distribution* (Paris, LGDJ, 1999) 938.

[80] Law No 75-1334 of 31 December 1975 on sub-contracting, which defines it as 'the operation by which an entrepreneur entrusts by means of a sub-contract, and under his responsibility, to another person called the sub-contractor, the execution of all or part of a business contract or of part of a public sector contract signed with the contracting authority'.

[81] L Lorvellec, *Écrits de droit rural et agroalimentaire* (Paris, Dalloz, 2002) 292ff.

[82] Protected by Article L 446-2 of the French Commercial Code, which sanctions sudden termination of established business relations: see R Libchaber, 'Relation commerciale établie et quasi-contrat' (2010) *Répertoire du notariat Defrénois* 1, 114.

[83] *cf* Lemarignier, *La France médiévale* (n 46) 143ff; Anderson, *Passages from Antiquity to Feudalism* (n 43).

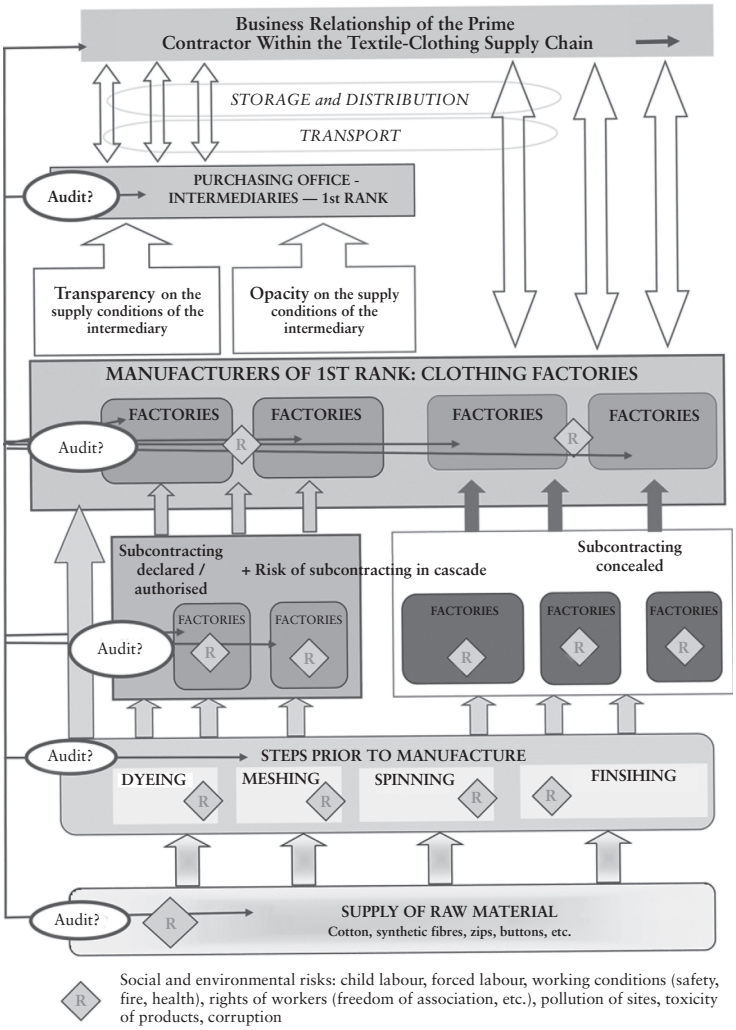

Figure 11.1: The principal's relations in the textile and garment supply chain
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lord in particular in the acquittal of his obligations.[84] An almost identical mechanism today ensures exclusivity in business dealings,[85] as do non-competition clauses in labour law.[86] We can thus, without overstatement,

[84] M Bloch, *Feudal Society* (n 3); Lemarignier, *La France médiévale* (n 46) 144–47.

[85] G Parléani, 'Les clauses d'exclusivité' in *Les Principales Clauses des contrats conclus entre professionnels* (Marseille, Presses universitaire d'Aix-Marseille, 1990) 55; N Éréséo, *L'Exclusivité contractuelle* (Paris, Litec, 2008) 410.

[86] M Gomy, 'L'autonomie de la clause de non-concurrence post-contractuelle en droit du travail' in *Mélanges en l'honneur d'Yves Serra* (Paris, Dalloz, 2006) 199–216.

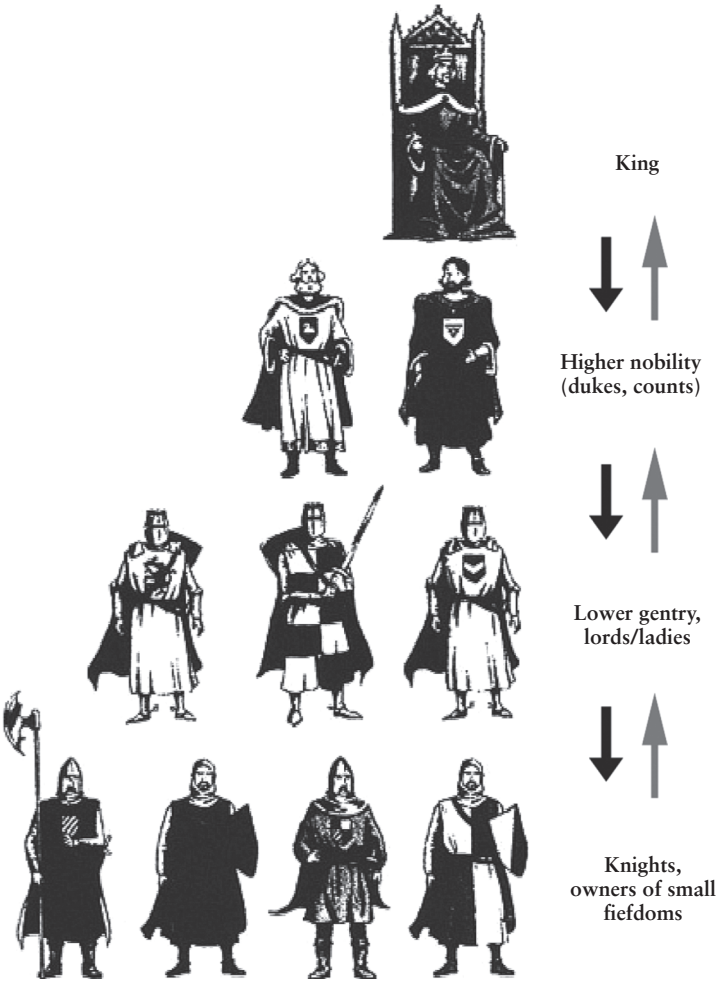

Figure 11.2: Feudal relations of interdependence

reasonably compare any textbook depiction of the relations under feudalism (see Fig. 11.2) with those defining today's networks of suppliers in, for example, the textiles industry (see Fig. 11.1).[87]

Another area in which a legal analysis can reveal the socio-economic dynamics at work is that of the contractualisation of public policy. In imitation of private sector management, the state has, on the one hand, divided up

[87] *Report on the implementation of the OECD Guidelines in the textile and garment supply chain*, 2 December 2013, 16.

its different operations, and, on the other, outsourced those not considered integral to its 'core business'. In the first case, its activities are made into self-contained units, on the condition that certain objectives are pursued, and their attainment measured by quantitative indicators. In the second case, its activities are privatised on condition that companies accept regulation by the regulatory authorities designated to ensure the general interest for a product or a particular service (electricity, highways, telecommunications, the stock exchange, the railroads, prisons, and so forth).[88] A panoply of feudal legal mechanisms resurface here in a new guise. The venality of offices and charges, which a century ago Adhémar Esmein deemed a 'monstrous organisation',[89] has returned with a vengeance, in the name of dismantling the monopolies enjoyed by public companies. For 'services of general economic interest' (Treaty on the Functioning of the European Union, Article 14 and Protocol No 26), relations of 'tenure-service' have once again become the norm. And what the principle of the separation between economic operators and regulators conceals is the much older distinction between power (*potestas*) and authority (*auctoritas*) by which the feudal system attempted to stem absolutist tendencies.

Once again, this does not imply that the world is *returning* to the Middle Ages, but only that the legal concepts of feudalism provide excellent tools for analysing the vast institutional upheavals occurring under the acritical notion of 'globalisation' today. We are not making a value judgement on these revolutions, nor defending the thesis of an 'eternal return', as though history never produced any new legal configurations. It is as inadequate to regard the globalised world as a flattened *tabula rasa* on which governance by numbers is rolled out everywhere in the same way, as it is to imagine the world as a patchwork of unchanging cultures which persist in their being and do not influence each other. After two and a half centuries of colonial domination and economic and cultural imperialism, there is no civilisation in the world, be it on Pacific Islands or in the Amazon Basin, that has escaped the influence of Western ways of governing human societies. Every single one of them is today affected by the destruction of the reign of the law and the instatement of governance by numbers, and all see the increasing power of networks of allegiance in their institutions. So the return of a structure does not mean a repetition of the past, but rather the emergence of new structures which recycle elements of the systems they replace. But we have not yet depicted this world in the making. And no better vantage point exists for understanding the government of men than the way they are put to work.

[88] N Decoopman, 'Les autorités administratives indépendantes et l'hypothèse du néo-féodalisme' in J Lefebvre, *L'Hypothèse du néo-féodalisme* (n 39)137–50.

[89] A Esmein, *Cours élémentaire d'histoire du droit français* (n 65) 403.

12

'Genuinely Human Work in Humane Conditions' I

From Total Mobilisation to the Crisis of Fordism

> The failure of any nation to adopt humane conditions of labour ['*un régime de travail réellement humain*'] is an obstacle in the way of other nations which desire to improve the conditions in their own countries.

GOVERNANCE BY NUMBERS was introduced above all as a way of solving the problems raised by work. The founding fathers of political economy[1] and sociology[2] were quick to realise that the division of labour is a nodal point for society as a whole. If we talk of a 'slave-owning', 'agrarian', 'nomadic', 'feudal' or 'industrial' society, we acknowledge that slavery, agriculture, pastoralism, serfdom and the wage system are all central to a given society's mode of functioning. It is significant that when we try to talk about our own times, we tend to talk of 'post-industrial' society: this is another way of saying how difficult we find it to define exactly what our present regime of work is. Industry has not disappeared, not even in its most Taylorist incarnations, but it has shifted massively away from the West. As for the 'post-', here as elsewhere (as in 'postmodern' or 'post-human') the term is a way of placing a question mark over a world still in its infancy. 'Post-industrial' therefore means that the transformations of the industrial era pushed our institutions to their critical limits, and we are still unable to understand and conceptualise the consequences. This is why we have reason to believe that a legal analysis of the transformations of work over the last century can shed some light on the nature of the crisis of work we are experiencing, and possible ways out of it. We shall start with an overview of how attitudes to work and its organisation have changed, from the

[1] See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* [1776] (London, Methuen, 1904). The first chapter is entitled 'Of the Division of Labour'.

[2] *cf* E Durkheim, *The Division of Labor in Society* (1893), tr WD Halls (New York City, Free Press, 1997).

Treaty of Versailles (1919) to the crisis of Fordism. In the following chapter, we shall examine the structure of the relations of allegiance which have accompanied the implanting of governance by numbers.

I. THE FORDIST COMPROMISE

In order to understand the employment protection provisions resulting from what has been called the 'Fordist compromise', we must first cast a look back at the founding event of industrial society: the First World War. This war contributed two at first sight contradictory things to the history of labour, but which are actually interdependent: the industrial management of 'human material'; and, as we examine in greater detail below, the appeal for humane working conditions.

For the purposes of this war, Ernst Jünger wrote, 'States transformed themselves into gigantic factories, producing armies on the assembly line that they sent to the battlefield both day and night, where an equally mechanical bloody maw took over the role of consumer.'[3] The Taylorist organisation of industrial labour spilled over from the ultra-modern factory to take over society as a whole. Jünger uses the expression 'total mobilisation' to describe this shift. The epoch of 'old-style' wars between European monarchs, which ended in the nineteenth century, had used only a portion of the human and material resources of the warring states. The First World War was the first full-scale experience of 'total mobilisation', a process in which 'every life is converted into energy'.[4] The image of war as armed combat, Jünger continues, 'withers away into the much more comprehensive image of war as a gigantic labour process'.[5] In the final phase of this development, which began with the First World War, 'there is no longer any movement whatsoever—be it that of the homeworker at her sewing-machine—without at least indirect use for the battlefield'.[6] The forms of social organisation introduced during the Great War continued to make themselves felt on the return to peacetime. 'The most important lesson to be drawn from the War', the American engineer George Babcock declared to the Society to Promote the Science of Management, 'is that the expansion and elaboration of the principles of industrial organisation, in the form of Taylor's principles of scientific organisation, have proved themselves in practice under the heaviest burden they have ever had to bear'.[7] Jünger

[3] E Jünger, 'Total Mobilization' [1930] in *The Heidegger Controversy: A Critical Reader*, ed R Wolin, tr J Golb and R Wolin (Cambridge, Mass, MIT Press, 1993) 119–39.
[4] ibid.
[5] ibid.
[6] ibid.
[7] G Babcock, Conference at the Harvard University Graduate School of Business Administration, 3–4 Oct. 1919, quoted by J Querzola, 'Le chef d'orchestre à la main de fer. Léninisme et taylorisme' (1978) *Recherches*, 32/33 (*Le soldat du travail*) 63.

applied this remark, which was made for the benefit of managers, to the organisation of entire countries:

> Despite the spectacle, both grandiose and frightful, of the later 'battles of material', in which the human talent for organization celebrated its bloody triumph, its fullest possibilities have not yet been reached. Even limiting our scope to the technical side of the process, this can only occur when the image of martial operations is prescribed for conditions of peace. We can see that in the postwar period, many countries have tailored new methods of organization to the pattern of total mobilization.[8]

The concept of total mobilisation influenced Carl Schmitt's concept of the Total State and Hannah Arendt's concept of totalitarianism. Its heuristic value remains powerful, because it exists today in the new form of the Total Market,[9] in which every existence is converted into a quantifiable resource[10] and the inhabitants of every nation of the world are precipitated into an unceasing, and pitiless, economic war.

But the First World War had an impact on the regime of work in another, more frequently cited and acclaimed, way, in that the Treaty of Versailles provided for the creation of the International Labour Organisation (ILO).[11] The Preamble to the ILO Constitution sets out why this organisation was set up, adopting for this the terms of the Versailles Treaty:

> Whereas universal and lasting peace can be established only if it is based upon social justice;
>
> And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; […]
>
> Whereas also the failure of any nation to adopt humane conditions of labour ['un régime de travail réellement humain'] is an obstacle in the way of other nations which desire to improve the conditions in their own countries;
>
> The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, […] agree to the following: […] A permanent organization is hereby established for the promotion of the objects set forth in the Preamble.

Without social justice we will have war; social justice implies 'humane conditions of labour' (a '*régime de travail réellement humain*', in the French);

[8] Jünger (n 3).

[9] *cf The Spirit of Philadelphia. Social justice vs the Total Market*, tr S Brown (London/New York City, Verso, 2012).

[10] *cf* L Doria, *Calculating the Human: Universal Calculability in the Age of Quality Assurance* (London/New York City, Palgrave Macmillan, 2013) 210.

[11] Part XIII, Section, Art 387f.

these conditions will not exist without a policing of competition worldwide with a view to safeguarding social justice; an international organisation is necessary to define and apply labour standards which shall be common to all nations. This was, in brief, the other lesson drawn from the experience of the First World War as regards the organisation of work. It proved to be a lasting one, because the ILO was the only international organisation to survive the disappearance of the Society of Nations. Its mandate was reaffirmed and further defined at the end of the Second World War, in the Declaration of Philadelphia, and it is now preparing to celebrate a meritorious 100 years of faithful service, in 2019.

So how were these two legacies of the Great War linked? Is the pursuit of 'humane conditions of labour' compatible with 'the scientific organisation of work' and the total mobilisation of human capital for a global competitive market? The answer will depend on the interpretation one gives to these passages from the Treaty of Versailles, as included in the Preamble to the ILO Constitution. Both French and English were official languages of the Treaty, yet they say slightly different things. The French '*régime de travail réellement humain*' means *at one and the same time* 'a genuinely human (or humane) *regime* of work', *and* 'a regime of genuinely *human* (or humane) work'. In English, where this double emphasis is absent, there is simply the call for 'humane conditions of labour'. If we follow up what is suggested by the French wording—expressing the goals of a renewed vision of the organisation of work (the '*regime* of work'), *and* of work itself ('*human* work'), in the aftermath of the First World War—we shall see that the two directions sketched are the condensed expression of conflictual and even contradictory priorities in the thinking about work, which labour law was called upon to resolve, and which are still with us today.

A '*régime de travail réellement humain*', understood as a 'regime of *genuinely human* work', states that *the work itself* must have a genuinely human quality to it. We could understand this broadly as meaning that the work must be such as to enable whoever carries it out to invest in it a part of him- or herself: that is what makes it *human* labour, rather than the work of animals or machines. In human work, the worker seeks to inscribe his or her mental representations in the universe of things or of symbols. In this respect, work also educates reason. It confronts our mental images with the realities of the outside world and thus forces us to get the measure of both the world and of our representations. Simone Weil expressed this in one of those striking phrases which light up her writing: 'It is through work that reason grasps the world itself, and gets a grip on imagination's folly'.[12] But this interaction exists fully only in what is improperly called 'manual

[12] S Weil, *On Science, Necessity, & The Love of God*, tr R Rees (London, Oxford University Press, 1968).

labour', which mobilises both body and mind in performing 'doing-skills', a *savoir-faire*.[13] Intellectual work also has a physical dimension since it requires one to be minimally healthy. But it does not pit the body against the world as does the work of the farmer, the labourer, the sculptor or the dancer. Proudhon said that 'he who has his idea in the hollow of his hand is often a man of more intelligence, in any case more comprehensive, than the one who carries it in his head, incapable of expressing it other than by a formula'.[14] The work of those whom Robert Reich calls 'manipulators of symbols'[15] mobilises 'saying skills' (*un savoir-dire*), 'writing skills' (*un savoir-écrire*) and 'counting skills' (*un savoir-compter*) but not 'doing skills' (*un savoir-faire*). Intellectual workers are not faced with the realities of their immediate environment, but this can precisely expose them to losing their sanity. Cioran has described the work of intellectuals in the following terms:

> To be intimate with an idea drives one mad, obliterates one's judgment, and produces the illusion of omnipotence. In truth, grappling with an idea leaves one senseless, knocks the spirit off balance; one's pride loses its calm self-assurance […] The thinker who covers with ink a blank page addressed to noone imagines that he sits in judgment over the whole world.[16]

But the pull of insanity is not reserved for thinkers and ideologues alone. It also affects financial engineers, whose work places them at the radioactive core of governance by numbers. As several recent scandals have shown—in France, the Kerviel affair[17]—this type of work 'totally impairs people's judgement and gives them the illusion of omnipotence'. It draws them—and us with them—into speculative loops which can only end in disaster, as the reality principle reasserts itself. In the Kerviel affair, the Cour de cassation ruled that the failure of the bank, the *Société générale*, to keep a sharp

[13] This is why Simone Weil chooses to end her work on the 'duties towards the human being' with the assertion that physical work should be the spiritual centre of an orderly society. See *The Need For Roots. Prelude to a Declaration of Duties Towards Mankind*, tr AF Wills (London, Routledge and Kegan Paul, 1952). *cf* the place occupied by manual labour in Gandhi's conception of sovereignty: MK Gandhi, *Hind Swaraj or Indian Home Rule* [1908], bilingual English / Gujarati, critical edn by S Sharma and T Shurud (New Delhi, Orient Blackswan, 2010) XXIV +102 + 83 pages.

[14] PJ Proudhon, *Les majorats littéraires. Examen d'un projet de loi ayant pour but de créer, au profit des auteurs, inventeurs et artistes, un monopole perpétuel* (Bruxelles, Office de publicité, 1862) 16. ('Literary Entailments: Examination of a bill whose purpose it is to create, for the benefit of authors, inventors and artists, a perpetual monopoly.') See also the historical inquiry by R Sennet, *The Craftsman* (New Haven, Yale University Press 2008).

[15] R Reich, *The Work of Nations. Preparing Ourselves for 21st Century Capitalism* (New York City, Alfred A Knopf, 1992).

[16] EM Cioran, *Essai sur la pensée réactionnaire* [1957] (Fontfroide le Haut, Fata Morgana, 2005) 14.

[17] J Kerviel, an employee of the *Société générale* bank, had made unauthorised trades on stock exchange futures, which ended up costing the bank (and to a certain extent the taxpayer) a total of 4.82 billion euros, in 2008. For comparison, this sum is the equivalent of two thirds of France's annual research budget (excluding military research).

enough eye on this securities trader 'had contributed to the fraud [committed by him] and its financial consequences', and it concluded that the trader had no civil liability for the consequences (despite his being convicted of criminal offences).[18]

So there are two situations in which work loses its humanity: when thought is banished and when reality is banished. *Thought is banished* when human labour is modeled on the machine, however sophisticated it may be. Taylorism was the fullest expression of this form of dehumanised labour. It explicitly forbade thought, and work was reduced to a sequence of timed gestures (others are paid to think, Taylor said). The *banishment of reality* is less readily observed. It occurs when the work of manipulating symbols is severed from any of the experiences which underly them. Metaphorically speaking, this type of work replaces the territory with the map.[19] It expels the facts in favour of their fantasised representation which, dominated by scientism and a numbers fetishism, sets reality at one remove, with the attendant risk of individual and collective madness. This fate does not only befall financial engineers, but more generally political and economic leaders, whenever they see the world only through its quantified representations. These two forms of dehumanised labour are not alternatives. On the contrary, the twentieth century's insane massacres have shown that the two are perfectly compatible, when brainwashed masses are marshalled into the service of delirious leaders. The madness of scientism has the same deadly potential as religious fanaticism, and today we see them working hand in hand.

Work can thus be described as inhuman when it reduces the worker to the condition of an animal or a machine, simply a tool for implementing the thoughts of others. And it is also inhuman when it cuts the worker off from any experience of the realities which he or she is dealing with. Between these two extremes, 'genuinely human' work is irreducibly two-sided. It is both mastery over the world and submission to the world, creation and toil. Had the ILO Constitution's '*régime de travail réellement humain*' been interpreted in this strong sense, in the sense of a regime of 'genuinely *human* work', the *nature* of the work performed would have had to be addressed.

But it was the weaker interpretation which won out, from the First World War onwards. Admittedly not without discussion and protest, but, as Bruno Trentin has shown in his magnificent work on the crisis of Fordism, the discordant voices fell on deaf ears in the political and trade union Left because the Left was already convinced of the idea of the scientific organisation of labour, and even sought to extend this organisational model to society

[18] Cour de cassation, Criminal division, 19 March 2014, No R 12-87.416.
[19] See above, ch 9, p 169ff.

as a whole.[20] Lenin thought Taylorism constituted 'an immense scientific progress'.[21] In his words, 'if the masses of working people, in introducing socialism, prove incapable of adapting their institutions to the way that large-scale industry should work, then there can be no question of introducing socialism'.[22] Trentin quotes Gramsci, for whom the industrial division of labour makes the worker feel 'the need for the whole world to be like a single vast factory, organised with the same precision, method and order that he sees as vital in the factory where he works'.[23]

In its weaker interpretation, then, it is the '*regime* of work', its *conditions*, which must be humane, not the work itself. Understood in this sense, the ILO's goal would be to make work humanly bearable, when it is not intrinsically so. In Norbert Wiener's words, from the subtitle of his book *Cybernetics and society*, only 'the human use of human beings' is to be taken into account.[24] And it is this weak sense which the Treaty of Versailles must have had in mind when it was drawn up, because, as we have seen, the English version of '*un régime de travail réellement humain*' abandons the ambiguity of the French and settles for 'humane *conditions* of labour'. Here the human qualities do not apply to the work itself but only to the conditions under which it is carried out. This more restrictive interpretation is confirmed in paragraph 2 of the Preamble, which gives examples of these conditions. None of them concerns the work as such, but only its price, its duration, its safety, freedom of association and the right to training. In other words, at issue are the quantitative terms of salaried employment but not the qualitative dimension of the work itself.

In Simone Weil's view, this general fascination with the scientific organisation of labour was due to the powerful hold of classical science over society. From the time of Galileo to the nineteenth century, classical physics in particular had been accredited with explaining how the world functions, in terms of mass and energy. The notion of energy was derived from that of work, understood in its most basic sense of physical force. Work as dehumanised mechanical energy was precisely the reductive definition Taylorism adopted.[25] The Taylorist factory is but one of the many expressions, to be found in every field of culture, of this enthrallment to science,

[20] B Trentin, *La città del lavoro. Sinistra e crisi del fordismo* (Milan, Feltrinelli, 1997), French tr *La Cité du travail: La gauche et la crise du fordisme* (Paris, Fayard, 2012) 448.

[21] Quoted by J Querzola, 'Le chef d'orchestre à la main de fer. Léninisme et taylorisme' in *Le soldat du travail* (1978) Recherches 32/33, 58.

[22] Lenin, first version of the article 'The Immediate Tasks of the Soviet Government', *Collected Works*, 4th English edn (Moscow, Progress Publishers, 1972) Vol 27, 235–77, quoted Querzola (n 7) 66.

[23] Gramsci, *La settimana politica. L'operiao di fabbrica* (February 1920), in *L'Ordine nuovo*, 433, quoted in Trentin (n 6) 244.

[24] N Wiener, *Cybernetics and Society. The Human Use of Human Beings* (London, Houghton Mifflin, 1950).

[25] S Weil, 'La rationalisation' (1937), in *La condition ouvrière* (Paris, Gallimard, 1951) 289.

which encourages one to treat the human being as a machine. The industrial boom was accompanied in the second half of the nineteenth century by the development of the social sciences, which flourished on claiming to study human beings in the same way as things. The physical and biological sciences, industrial techniques, the social sciences and the scientific organisation of labour were all linked, and everything pointed to the idea that humans themselves could be observed and treated in the same way as things, and put to use without any thought for the good or the just. Simone Weil observed that 'nothing is more foreign to the good than classical science, since it takes the most basic work, the work of the slave, as the principle on which it reconstructs the world; the good is not even mentioned as a contrast, an opposite term'.[26]

And so a consensus emerged, in the name of scientific progress, concerning the most efficient method of working. Discussions could take place on working hours and on how the rewards for one's labours were to be allocated, but not on the work itself, which was supposed to obey scientific and technical imperatives. This is what was called the 'Fordist compromise', after Henry Ford, who decided to share with the factory workers a portion of the productivity gains achieved through the Taylorist organisation of their labour. In 1914, Ford introduced a kind of 'welfare capitalism'—which proved to be extremely profitable and spread rapidly as a model—when he doubled the hourly wage to gain the loyalty of his workforce and transform them into clients for his cars. The overall result was to confine the issue of social justice to the three fields mentioned in the Preamble to the Constitution of the International Labour Organisation, namely the quantitative terms of the employment contract (salary, working time, social protection); physical safety at work; and collective freedoms (freedom of association and collective bargaining). The work's organisation was treated as an entirely technical issue, a question of efficiency and not of social justice, beyond the concerns of a political or a social democracy. The encroachment of technology on the sphere of justice is a constant in the contemporary history of law. But once technology has justified the division of labour between those forbidden to think and those paid to do so, the nature of this division changes. It is no longer a fundamental injustice which the law must redress, but a necessary evil which the law must indemnify. As such, the aim of labour law ceases to be to introduce a just division of labour and ensure that each of us may experience 'genuinely human work' (*un 'travail réellement humain*') but rather to provide compensation for an alienation at work which is henceforth deemed inevitable for most of us. This is why a 'caring' Left has sprung up ('*une gauche d'accompagnement*'), making humanly more

[26] S Weil, *On Science, Necessity, & The Love of God*, tr R Rees (London, Oxford University Press, 1968).

bearable the sacrifices considered unavoidable in the name of technological and economic progress. Ever since mass unemployment set in, the right to 'care and support' ('*le droit à l'accompagnement*'), initially granted to the terminally ill (as *palliative* care),[27] has positively invaded labour law.[28]

The basic concepts of modern labour law reflect this restrictive interpretation of the scope of social justice. The key concept of *subordination* makes obedience to orders the essential criterion of the legal definition of the employment contract, and the concept of *employment* encompasses all the securities which the law guarantees for this state of subordination: limits on working hours, minimum wage, hygiene and safety, job security, and social insurance. To employ someone is etymologically to make them bow to one's will (*in-plicare*), to im-plicate them, and employment denotes the conditions and limits under which a worker may be made to do this in the execution of his work. 'The right to [obtain] employment' inscribed in the French Constitution is the right to receive the means to live decently from working in subordination to someone else. The Universal Declaration of Human Rights (1948) gives a more comprehensive version in its Article 23, 'The right to work'. This article is particularly striking because it is the only one, along with Article 22 on social security, to link explicitly the rights it proclaims to the notion of human dignity. But this link is construed exclusively in terms of a '*right to just and favourable remuneration* ensuring for himself and his family an existence worthy of human dignity'. In other words, human dignity is linked to financial remuneration, but the contents of the work itself seem to fall outside the scope of human rights.

Labour law thus served to reconcile the two in principle irreconcilable legacies of the First World War: the reification of labour, transformed into 'labour power' which can be bought and sold like units of electricity,[29] and on the other hand, the obligation for every employment contract to contain measures shielding the worker from the physical and economic effects of this reification.[30] In this light, labour law has made the fiction of labour as a commodity into something both tolerable and sustainable, and, along with social security legislation and the public services, it has become one of the institutional pillars of the labour market. The changing vocabulary in

[27] French Code of Public Health, Art 1110-9: 'Every person in ill-health has the right to receive palliative care and support, if their state requires it'. (Code de la Santé publique, Art.1110-9: '*Toute personne malade dont l'état le requiert a le droit d'accéder à des soins palliatifs et à un accompagnement*').

[28] French Labour Code, Art L.5131-3 and R.5131f. *cf* F Petit, Le droit à l'accompagnement (2008) *Droit Social* 413–23. As Franck Petit points out, the French term '*accompagnement*', which was initially used only in the context of medical or social care, especially end-of-life care, is now used in French labour law to designate 'help' of all sorts: 'Help to Work' for young people; assistance for business start-ups; help for accreditation of prior learning, etc.

[29] *cf* T Revet, *La force de travail (Étude juridique)* (Paris, Litec, 1992) 727.

[30] *cf* A Supiot, *Critique du droit du travail* (Paris, PUF, 1994).

this domain is instructive. With the consolidation of employment protection during the post-war boom years, the initial expression 'labour market' gave way to 'employment market'. But with the neoliberal turn of the 1980s, the expression 'labour market' won back first place in political and economic discourse. The European Commission and international economic organisations kept harping on about those 'vitally necessary labour market reforms'—reforms which would have to be 'brave', understandably, since picking on the weak takes some guts—but this refrain was in fact the code name for dismantling the labour law inherited from the Fordist era. Its goal was to inject liquidity into 'human capital' in order to bring about the 'total mobilisation' of labour power on international competitive markets.

II. THE DECONSTRUCTION OF LABOUR LAW

This attack on the Fordist compromise had two principle causes, as summarised above.[31] The first was technological. The digital revolution and the attendant changes in our collective representations transformed our model of work from mechanical (the clock) to cybernetic (the computer). Theories of management shifted accordingly from Taylorism to management by objectives. The second cause was political. The collapse of communism and the liberalisation of trade in goods and capital resulted in global competition not only between companies and between workers, but also between different welfare and tax regimes. These changes undermined the country-specific compromises which had been achieved through welfare and employment legislation, between the reification of work and the protection of the worker. And this is why we have ended up with exactly what the International Labour Organisation sought to avoid: today, the failure of certain countries to adopt humane conditions of labour has indeed become a real '*obstacle in the way of other nations which desire to improve the conditions in their own countries*'. The ILO has been unable to prevent or even temper this regression, which is encouraged by international economic and financial institutions and by the European Commission in the name of these countries' comparative advantage in maintaining a cheap labour force. Politically weakened by the disappearance of East–West rivalry, the ILO has neither carrots nor sticks with which to urge states to ratify its Conventions and apply its Standards.

The digital revolution and the new governance by numbers which has accompanied it have totally transformed how work is organised. It is no longer enough to be obedient, one must be competitive and meet ever-higher targets as well. These are the terms of today's 'total mobilisation'.

[31] See above, ch 1, p 25ff.

However, this way of governing human beings already existed in a similar form in totalitarian regimes, as Murard and Zylberman describe in the case of Nazism: 'The only thing which matters is the constant movement forwards towards objectives which are constantly redefined […]. In a State without laws, obeying to the letter is nothing; the healthy citizen takes his cue not from orders but from the supposed wishes of the leader'.[32] Today, governance by numbers, with the supposed objectivity of its figures, has simply replaced the supposed wishes of the leader. Contemporary forms of human resources management no longer require workers to obey mechanically, like a piston or gears, but to react to signals, in order to meet preprogrammed objectives.

As a result, work is no longer structured by the division of labour between managers and subordinates, with the subordinate's work being broken down into sets of simple and measurable operations. Today, the capacities of all workers, including managers, must be mobilised. Subordinate and manager alike must be quick to react and to fulfil the quantified objectives assigned to them. The opposition between autonomy and subordination is no longer decisive in this new conception of work. Whereas the organisation of industrial labour was predicated on the distinction between independent and salaried work, and the *subordination of those managed* to those managing, post-industrial labour rests on *programming everyone*. The only differences are legal and financial: managers get the carrot (bonuses, stock options, golden handshakes, etc), and the managed get the stick (lack of security in the job, and of job security *per se*). Neoliberals had their hearts set on engineering this break with the Fordist compromise and destroying employment protection, considered to be an obstacle to the spontaneous order of the market, and a source of extra costs and rigidities. Their way of achieving this was principally to introduce competition internationally between workers. This was made possible by keeping energy and transport costs artificially low, such as to make relocation to countries with a cheaper workforce an attractive proposition. Additionally, digital technologies have enabled the deterritorialisation of any work dealing with signs (not with things). Trade union reaction has generally been to protect the status quo against this systematic deconstruction of labour law, a defensive position which can be explained by the drop in union membership and by management's position of strength at a time of mass unemployment and the free circulation of goods and capital. This strategy has led the unions to withdraw into defending the positions least affected by the rise in unemployment and in insecure work, namely the public sector or, within the private sector, those in stable jobs. Although this reaction is understandable, unions thus cut themselves

[32] L Murard and P Zylberman (eds), *Le soldat du travail, Revue Recherches. Guerre, fascisme et taylorisme*, n°32/33 (Paris, Editions Recherche, 1978), p 518.

off from the world of insecure work, particularly from the younger generations, thereby reinforcing the dualisation of the labour market, and the social divide, and so intensifying the effects of the attacks on the Fordist compromise.

Over the last 30 years, employment has thus seen a slow and inexorable erosion of the protections provided by labour law. This development is particularly clear within Europe. From the end of the 1970s to the enlargement of the European Community to ex-communist countries in 2004, the deregulation of the labour markets championed by Great Britain under Margaret Thatcher remained a marginal position. Up to the Treaty of Maastricht, her government managed to block almost all the draft directives in labour law; and in the Treaty itself, Britain managed to obtain an opt-out from the social clauses in the Annex. However, as soon as the European Union opened its doors to the ex-communist countries, Britain's isolation came to an end. Unlike with the preceding enlargements, this one substantially changed the existing balances within the Union, and particularly within the Court of Justice of the European Union (CJEU). As the *Bundesverfassungsgericht* noted, the CJEU, which has considerable normative power, does not obey the democratic principle on which the Union claims to be founded.[33] Its composition and rules of deliberation discount Member States' demographic weight in favour of a one-country-one-seat system. Its earlier case law had been very cautious around social issues, but after 2007–08 it displayed what were clearly neoliberal sympathies in its famous *Laval* and *Viking* judgement. This jurisprudential turn—the neoliberal deconstruction of labour law—has proved irreversible, as shown by a judgement delivered on 15 January 2014 in the *Association de médiation sociale* case.[34] At issue was whether a domestic court can disapply a national provision when it is contrary to a principle recognised by the Charter of Fundamental Rights (today an integral part of the Treaty) and implemented by a Directive. In the *Mangold*[35] and *Kücükdeveci* cases relating to the principle of non-discrimination on grounds of age, as established by Article 21 of the Charter, the European Court had ruled that a national court *can* disapply such a provision. The question was the same in the *Association de médiation sociale* case, but with one difference: it concerned workers' rights to information and consultation, already recognised in Article 27 of the Charter, and implemented through Directive 2002/14 establishing a general framework for informing and consulting employees in the Union. However, in this case, the Court refused to give any normative effect to the provisions of the Charter.

[33] See above, ch 9, p 183–84.

[34] C-176/12 *Association de médiation sociale* ECLI:EU:C:2014:2. See P Rodière, Un droit, un principe, finalement rien? Sur l'arrêt de la CJUE du 15 janvier 2014, *Semaine sociale Lamy,* 17 Feb. 2014, no. 1618, pp 11–14.

[35] CJEU, 22 November 2005, *Mangold*, Case C-144/04.

What were the Court's arguments for refusing to give horizontal effect to workers' rights to information and consultation, while admitting it for the principle of non-discrimination? The Court held that the principle of non-discrimination 'is sufficient in itself to confer on individuals an individual right which they may invoke as such'.[36] And why should the right to be informed and consulted in the cases specified by a legal instrument of secondary law (such as the Directive 2002/14) not also be 'an individual right which they [individuals] may invoke as such'? From a legal standpoint there is no reason whatsoever for this exclusion, and one could even go further and say that the *right* to information and consultation is easier to implement than the *principle* of non-discrimination. There is no need to compare employees in order to know whether any of them have been left out of the bodies set up to represent them (which was the specific issue in this case). A worker's right to information and consultation, just like the right to form trade unions, the right to strike and to collective bargaining are not unenforceable or simply normative claims. They are *individual rights exercised collectively*,[37] overriding rights which must be concretised by employers and which the State must simply protect, as it protects all civil and political rights.

So the Court's decision, just like the *Viking* and *Laval* judgements and all those delivered since then in the same vein, was in no way prescribed by the texts. It expressed a certain conscious orientation of the Court. What it was doing was applying the *Law and Economics* doctrine, according to which every legal rule must be judged in terms of its economic effects. This is why the Court squeezes out collective freedoms, while at the same time, and just as energetically, it enlarges the scope of the principle of non-discrimination. Collective freedoms being a market force, the Court sees them as potential obstacles to the exercise of economic freedoms. Fighting discriminations, by contrast, corresponds to the search for greater liquidity of 'human capital'. This is naturally considered positive, since it responds to what Gwenola Bargain has called 'economic actors' search for anonymity, the freedom to contract at lower rates'.[38] The rights to which the Court gives the greatest effect are thus those which, like the principle of non-discrimination, facilitate the liquidity of human capital on the labour markets by obliging individuals to consider themselves and others as identical and interchangeable contracting particles, regardless of their sex, age or nationality. An example would be the prohibition of women's night work, a prohibition considered discriminatory and therefore made illegal by European legislation,[39] resulting in an

[36] CJEU, 15 January 2014, §. 47.

[37] This notion is developed in Supiot, *Critique du droit du travail* (n 30) 140–49.

[38] G Bargain, *Normativité économique et droit du travail* (Paris, LGDJ-Lextenso, coll Droit & Economie, 2014) § 541.

[39] Case C-345/89, *Stoeckel* ECLI:EU:C:1991:324; see A Supiot, Principe d'égalité et limites du droit du travail (en marge de l'arrêt Stoeckel) (1992) *Droit social* 4, 382–85.

increase across the board of the proportion of workers having to do night work—increases of 100 per cent for women and 25 per cent for men over the last 20 years.[40] This type of development is absolutely in line with a logic of total mobilisation of the labour force, and is diametrically opposed to a logic of work of human quality in humane conditions, which would seek to reduce night work for both sexes. And while the CJEU extends such rights with one hand, with the other it tries to stifle the exercise of rights which might hamper the 'spontaneous order' of the labour market, not least the right to contest this order, a right which can be broken down into elements such as, precisely, workers' rights to information and consultation, and the rights to representation, collective bargaining and strike action.

However, neither defending the status quo nor pulling apart the protections inherited from the Fordist era are viable long-term solutions. Those for whom the Fordist compromise signalled a kind of end of history of labour law forget Marx's account of the inherent instability of modern industry's modes of organisation. Modern industry's revolutionary character is such that it 'is continually causing changes not only in the technical basis of production, but also in the functions of the labourer, and in the social combinations of the labour-process. At the same time, it thereby also revolutionises the division of labour within the society, and incessantly launches masses of capital and of workpeople from one branch of production to another'. This process finally 'destroys all the labourer's guarantees of existence, and constantly threatens, by taking away the instruments of labour, to snatch from his hands his means of subsistence'.[41] This is why, at the other extreme, asserting that a labour market has a viable future when it simply discounts the longer timeframe of human life is to take the fiction of labour-as-a-commodity as a reality, and to sow the seeds of violence, as the ILO makes clear in its Constitution. It doesn't take genius to see that the European Union's abandonment of the goal of social justice and its policy of methodically dismantling the social state inevitably undermine its political legitimacy and will ultimately threaten its very existence.

III. TOWARDS A NEW COMPROMISE

In response to the crisis of the social state, we should not be debating whether to protect or destroy the Fordist legacy, but rather what new compromise can be reached between entrepreneurial freedoms and worker protection. This issue has received much attention since the end of the last century, and the ideas emerging can be put broadly into two camps.

[40] French Ministry for Labour, 'Le travail de nuit en 2012' (2014) *Dares Analyses*, 62.
[41] K Marx, *Capital*, Book One, Ch XV, §.9.

The first goes by the name of *flexicurity*, a notion which the European Commission elaborated in 2007.[42] Inspired by the 'Nordic Model',[43] it has been endorsed in France by a myriad of reports and expert opinions, all of which share the same vision of labour law as a variable to be adjusted in the light of economic policies. The report of the de Virville Commission in 2004, with its 50-odd proposals for 'a more efficient labour code'[44] is an instance of this. The Cahuc-Kramarz Report[45] was behind the creation in 2005 of the *contrats nouvelle embauche* (CNE) and the *contrats première embauche* (CPE), which came under such intense political and legal fire (for their attacks on labour law) that they brought the Villepin government to its knees.[46] The Camdessus[47] and Attali[48] reports were effectively echo chambers for the demands of 'international economic organisations' for a 'fluidification' of the labour market that could 'dynamise' growth.[49] And more recently, three eminent economists decided to endow France with a new social model, beginning with dismantling the minimum wage.[50] One must have a very short memory indeed to think that these ideas are anything new. They were already in circulation in the nineteenth century, to oppose the prohibition of child labour, and they have been constantly preached over the last 40 years by the neoliberal zealots who led the world into bankruptcy in 2008. As Jean-Jacques Dupeyroux remarked, already 20 years back, on reading one of the countless reports of this sort—Mr Minc's, as it happens, for whom the culprit already then was the insane generosity of the minimum wage—'for the last two centuries, the same neurotic obsession of the well-off: the workers are raking it in'.[51] Who can seriously believe that in order to extricate France from its economic doldrums, all one has to do is to get rid of the *seuils sociaux*—whereby the employer's obligations are correlated to the number of employees in the company—make Sunday a work

[42] European Commission, 'Towards Common Principles of Flexicurity: More and better jobs through flexibility and security' COM [2007] 359 final, 27 June 2007.

[43] A Lefebvre and D Méda, *Faut-il brûler le modèle social français?* (Paris, Seuil, 2006) 153.

[44] On these two reports, both of which are published by the Documentation française, see *SSL* Nos 1153 and 1154. See also the Besson Report, 'Flexisécurité en Europe' (February 2008).

[45] 'De la précarité à la mobilité: vers une sécurité sociale professionnelle' Report of 2 December 2004, Liaisons soc V No 10/2005 of 11 February 2005.

[46] Those who dreamt up these new contracts apparently had no knowledge of ILO Convention No 158, despite its ratification by France.

[47] M Camdessus, *Le sursaut. Vers une nouvelle croissance pour la France*, Report to the Ministry of Finance (La Documentation Française, 2004).

[48] The Attali Commission 'for unleashing France's growth', *300 propositions pour changer la France* (2008), sharply criticised by A Lyon-Caen, 'Le songe d'Attali' (2008) *RDT*, 65.

[49] OECD *Employment Protection Regulation and Labour Market Performance* (Paris, OECD, 2004).

[50] P Aghion, G Cette and ÉCohen, *Changer de modèle, de nouvelles idées pour une nouvelle croissance* (Paris, Odile Jacob, 2014) 269.

[51] J-J Dupeyroux, 'Le rapport Minc, une nouvelle trahison des clercs', *Libération*, 17 January 1995, available online.

day, do away with the minimum wage, ban legal challenges to redundancy, and other such wonder-working recipes invented to deconstruct labour law? And this, without ever evaluating the reforms to introduce corporate governance, trade liberalisation and the deregulation of the financial markets? And without a word on the evident design faults of the Euro system? Nor on the responsibility of the French economic elites themselves, who seem—to put it mildly—to lack something of the industrial culture of their German counterparts? Would it not be a more courageous move for political and economic leaders to reconsider their own responsibilities before abolishing what meagre protections the weakest in society still have?

The second approach is to let work, rather than the market, take centre stage, and to reopen the debate on 'genuinely human work in humane conditions' (un '*régime de travail réellement humain*'). This was what the Boissonnat report, entitled 'Work in 20 years' time', did in 1995. It recommended laying new foundations for labour law, to include all forms of work and not only salaried work.[52] This idea found its way into the expert group's Report for the European Commission, '*Au-delà de l'emploi*', published in France in 1999.[53] The Report's key ideas included the notion of 'membership of the workforce', a status designed to allow people real freedom of choice throughout their working lives, enabling them to move from one job situation to another while also achieving work–life balance. The Report recommended introducing 'social drawing rights' to realise this, modelled on special leave (training leave, parental leave, etc), so that workers would have the concrete means to exercise their freedom of choice. This thinking also helped redefine trade union goals in France, which were reformulated in terms of 'social security for working life' and 'securing career tracks' (the French trade union confederations CGT and CFDT respectively).[54]

One has only to compare, term-for-term, what is implied in these two approaches to understand how far apart they are. The notion of 'flexicurity' refers to concepts of flexibility, economic efficiency, the market, human capital and employability. 'Membership of the workforce' rests on those of freedom, social justice, law, work and capacity.

Flexicurity	**Workforce membership**
Flexibility	Freedom
Economic efficiency	Social justice
The market	Law and rights
Human capital	Work
Employability	Capacity

[52] J Boissonnat (rapporteur), *Le travail dans vingt ans* (Paris, Odile Jacob, 1995) 373.

[53] A Supiot (ed), *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford, Oxford University Press, 2001).

[54] On these ideas, see the contributions in honour of Professor Jean-Pierre Chauchard by J-C Le Duigou, P-Y Verkindt and J-P Le Crom (2011) *Droit Social*, 1292–1305.

The first approach is in line with Article 145 of the TFEU (ex-Article 125 TEC), which prompts Member States to work towards 'promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change'. The markets' supposed needs are primary, and these must be met by supplying human 'resources' to businesses in real time. The second approach is in harmony with the Declaration of Philadelphia, which enjoins states to promote 'the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being'; and with the European Charter of Fundamental Rights, which states that 'Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation'. In the first case, the starting point is the supposed needs of the market, to which the workforce must be made to adapt; in the second, the starting point is human creativity, with the goal of constructing a legal system and an economy through which this may best find expression.[55]

According to Roland Barthes, 'History never ensures the pure and simple triumph of something over its opposite: it unveils, in its making, unimaginable solutions and unforeseeable syntheses'.[56] The history of law confirms this idea. The development of labour law since the millennium is the result of the tension between these two approaches to work. It certainly reflects the new state of relations between political and economic forces, which are highly detrimental to workers due to the distortion between collective freedoms (which are recognised—where they still exist—only within national borders) and the freedom of capital and goods to circulate internationally. Among mainstream political parties, belief in the benefits of worldwide competition has achieved the status of dogma, and a broad consensus has emerged that the freedom of capital should have an absolute priority over the freedoms of work. At the opposite extreme from the Declaration of Philadelphia's recommendations, people are at pains today *not* to measure the new international economic order in terms of its effects on social justice. There is a sort of taboo against doing so, with some rare exceptions (for example, the Report produced by the International Labour Bureau in 2008).[57] This is why any genuinely reformist commitment has collapsed, with both Right and Left apparently abandoning any idea of rethinking social justice. They practise what Bruno Trentin, following Gramsci, calls 'transformism', which 'identifies politics with the art of adapting to circumstances and with the precedence given to the governability of evolving mores

[55] *cf* F Gaudu, La Sécurité sociale professionnelle, un seul lit pour deux rêves (2007) *Droit Social* 4, 393.

[56] R Barthes, *Mythologies*, tr A Lavers (London, Jonathan Cape, 1972) 158.

[57] See above, ch 11, p 209ff.

and of society'.[58] As such, it is hardly surprising that the present climate favours taking apart rather than reinforcing what only recently was still called the European Social Model. The President of the European Central Bank announced this model's final demise in 2012 without anyone batting an eyelid. Clearly, the dominant trend is to make national legal systems compete against each other and to 'reform the labour markets' to increase their reactivity and their adaptability to the expectations of investors. It must be said that our politicians have performed quite some feat in making us forget that the 2008 crisis was caused by the financial markets and not by the labour markets combined with our countries' deliriously excessive welfare provision for employees and the unemployed.

But certain labour law reforms, however embryonic they may be at present, show that new definitions of 'human work in humane conditions' are being explored, however tentatively. Europe already has the legal bases for further progress in this direction. The EU Charter of Fundamental Rights is one such instrument—if only the Court of Justice would stop spending its time taking the teeth out of its social clauses. And there are also the Treaties, and secondary law. The social objectives assigned to the European Community and to Member States by Article 117 of the Treaty of Rome have not been removed from the TFEU, despite some attempts to do so.[59] Article 151 provides that:

> The Union and the Member States … shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

In the *Giménez* case of 1987, the Court judged that these provisions were purely programmatic, and that 'the general guidelines of social policy defined by each Member State [cannot] be subject to review by the Court to determine whether they are compatible with the social objectives laid down in article 117 of the Treaty (i.e. art 151 TFEU)'.[60] But at the time it still endorsed the idea that 'the fact that the objectives of social policy laid down in Article 117 are in the nature of a programme does not mean that they are deprived of any legal effect. They constitute an important aid for the interpretation of other provisions of the treaty and of secondary community legislation in the social field. The attainment of those objectives must nevertheless be the result of a social policy which must be defined by the

[58] B Trentin, *La libertà viene prima* (Rome, Editori Reuniti, 2004) 128.

[59] *cf* P Rodière, *Droit social de l'Union européenne*, 2nd edn (Paris, LGDJ-Lextenso, 2014) 33.

[60] Case C-126/86 *Giménez Zaera* ECLI:EU:C:1987:395, § 17.

competent authorities'.[61] The attainment of social objectives thus depends on political will, which seems precisely to have deserted the European institutions, not least the Court of Justice, after 2007. But ignoring these objectives could well end up antagonising certain Member States. The *Bundesverfassungsgericht's* ruling on the Lisbon Treaty laid the foundations for a constitutional review of EU infringements of the basic principles of a social state. The judgement stated that 'the Basic Law not only defensively safeguards social tasks for the German state against supranational demands, but aims at committing the European public authority to social responsibility in the spectrum of tasks transferred to it'.[62] Even in France, it seems unlikely that our higher courts would be able to muster such purposiveness. However, the French Government cannot entirely ignore the French Republic's vocation of social justice, which is why the 'labour market reforms' of 2013, which were undertaken to increase flexibility, actually focused on reducing job insecurity. So we should be wary of any too one-sided interpretation of the transformations occurring in labour law, since some changes also point to new definitions of what genuinely human work and humane conditions could be.

[61] ibid § 14.
[62] Bundesverfassungsgericht (ch 7 fn 64), § 258.

13

'Genuinely Human Work in Humane Conditions' II

From Quantified Exchange to Ties of Allegiance

'People not purse are a man's wealth'[1]

Bamileke proverb

WORK CONTRACTS UNDER the Fordist system represented a quantified exchange: for a certain quantity of work the employee received a certain quantity of money. The terms of this exchange—the number of hours worked and the level of the salary—were negotiated by collective bargaining. In a country like France, there were statutory limits set to this negotiation, namely a minimum salary, a maximum working time, and overtime payments for hours worked in excess of the legally set limit. Social law—labour law and social security legislation—has made this fiction of work as a measurable quantity of time (hence a negotiable commodity) tolerable and sustainable because it introduces into the work contract protective measures which make it viable over the worker's whole life. This covers both the worker's physical and economic security, and his contractual freedom (via guaranteed collective freedoms). The work itself is not part of this construct because the employer is the only person to have the right to organise the time he has bought. This explains the crucial role of legal subordination in the qualification of the work contract. Work is simply a quantifiable length of time during which the employee suspends his own volition and is at the ready to obey the orders he receives from his employer, or the employer's representative (the worker's manager). This definition of work time is statutory: 'Effective working time is the time during which the employee is at the employer's disposal and complies with his or her orders, without being able to go freely about his or her own personal business'.[2]

[1] Bamileke proverb mentioned by J Nguebou Toukam and M Fabre-Magnan, 'La tontine: une leçon africaine de solidarité' in *Du droit du travail aux droits de l'humanité. Études offertes à Philippe-Jean Hesse* (Rennes, Presses universitaires de Rennes, 2003) 299.

[2] French Labour Code, Art L.3121-1.

This 'foreclosure of work'[3] became particularly prominent through a well-known ruling by the French *Cour de cassation* in 2009, in which one of the stars in a TV reality show had his participation requalified as a work contract.[4] The show, 'Temptation Island', sought to 'put the feelings of non-married couples to the test', when invited to spend 12 days together on an exotic island practising leisure activities—diving, horse-riding, water skiing and sailing—alongside members of the opposite sex, all of them single, under the watchful eye of a large number of TV cameras. In return for the sum of 1,500 euros, each participant agreed to 'let the public in on his private life', by allowing the cameras to film 'the interpersonal relations generated naturally when couples and singles live their daily lives together'. There is nothing new about exploiting human misery for entertainment; one need only think of Sydney Pollack's film *They Shoot Horses, Don't They?*[5] in which victims of the 1929 Wall Street crash are recruited into a dance marathon, lured by the promise of prize money. Television exploits the same market when it promises fame to young people invited to perform before millions of people, in games whose rules are always the same—variations of the Prisoner's Dilemma[6]—and basically involve being prepared to do just about anything to outstrip the others. When some of the contestants wanted their commitment to the show to be requalified as work contract, the company replied that participating for free in leisure activities is not work. The *Cour de cassation* dismissed this argument on the grounds that the participants 'were obliged to obey the rules of the programme, which had been defined unilaterally by the producer, that they were given guidelines on how to analyse their behaviour, that some of the scenes were rehearsed in order to bring out their key moments, that the producers set the times at which they would go to bed and get up, that they were obliged to be permanently available, and were forbidden to leave the site or communicate with the external world, and that any infringement of these contractual obligations could be punished by dismissal from the show'. Since the service they provided consisted in 'taking part in obligatory activities and expressing predictable reactions', the contract between them and the production company was finally qualified as a work contract.

Although the *Cour de cassation* received fierce criticism for this ruling, it is perfectly sound from a legal standpoint. The notion of work, as it appears in the work contract is 'abstract work' in Marx's sense, that is, work defined

[3] I borrow this concept from A Berque, *Histoire de l'habitat idéal. De l'Orient vers l'Occident* (Paris, Éditions du Félin, 2010) 347ff. Berque attributes this foreclosure to the 'ontological topos of modernity'.

[4] Cour de cassation, Chambre sociale (Soc) 3 June 2009, No 08-481. Similarly, but rejecting the qualification of the employees as '*artiste interprètes*': Civ 1, 24 April 2013, No 11-19091.

[5] *They Shoot Horses, Don't They?* Film by Sydney Pollack (1969) from the eponymous novel by Horace McCoy.

[6] See above, ch 7, p 127ff.

not by its use value, but by its exchange value.[7] The essential function of the work contract—and hence of the labour market—is to convert the infinite diversity of human activities, and the particular meaning we give to each, into commensurable (and hence exchangeable) quantities of time and money. It was this notion of abstract work that the *Cour de cassation* invoked in the 'Temptation Island' case, stating that 'what the participants contributed to the show was due to produce a commodity with an economic value'.[8] If the employees are not at any physical or mental risk from their activity, it is not for the judge to comment upon its content, its meaning or its usefulness. These are issues only for the manager, as the relay of the employer's prerogatives, according to the contract.

What is most interesting about this case is not the court's application of the criteria qualifying a work contract—on which, as it happens, it cannot be faulted—but the shift of meaning which management by objectives and participatory management have brought to the notion of subordination. TV reality shows are a perfect example of management by objectives and the fiction it relies on: not the worker-commodity, but programmed freedom. By substituting *programmes* for *commands,* these new forms of work organisation give workers a certain amount of autonomy in how they carry out their tasks. TV reality shows make psychological experimentation on human beings into a lucrative spectacle, in which the guinea pigs obey the aptly named 'programme rules' (rather than a manager's orders). They are programmed, do not act freely, and express, accordingly, 'predictable reactions'.

This limit case shows that labour law has no difficulty integrating programmed activities of this sort, if their performance can be shown to involve a relation of subordination. However, the work contract is thereafter modified from within: programming is now included in the notion of 'subordination' (and not simply obedience). Over the last 30 years, we have seen 'new forms of subordination',[9] which blur the limits between freelance and subordinated work. The evolution of labour law shows a certain *autonomy in subordination*, resulting particularly from the employee's right to interrupt the relation of subordination for reasons of security (the right to leave, or to refuse to return), and from the right to pursue other activities, whether remunerated or not (special leave). And, symmetrically, workers who are freelance encounter situations of *dependence in autonomy*, resulting particularly from contracts which integrate their activity into production or distribution networks. These two movements complement each other, and transform working relations—whether salaried or freelance—into relations of allegiance.

[7] Marx, *Capital* [1887], Book 1, Vol 1, para 4, ed F Engels, tr S Moore and E Aveling (Moscow, Progress Publishers, 1887).

[8] Civ 1, 24 April 2013 (n 4).

[9] A Supiot, 'Les nouveaux visages de la subordination' (2000) *Droit social*, 131.

These trends have amplified in recent years, and so they can be analysed more finely. We shall restrict ourselves to looking at changes in the economy of the work contract, which has been the foundation of the labour system since the industrial era. Our legal analysis shows that, as the strictly quantified exchange which previously characterised the contract declines, so ties of allegiance between the employer and the employee have become more visible. This allegiance combines two elements: a personal element whereby the employee is obliged to be available and responsive to the employer's expectations at every moment; and a real element, consisting of the rights attached to the worker to make him or her more autonomous and less dependent on his present employment.

I. TOTAL MOBILISATION AT WORK

In a work system organised through management by objectives, total mobilisation requires qualities other than obedience, namely the ability to react in real time to signals received, in order to meet objectives assigned by a programme.[10] Under this new regime of work produced by governance by numbers, workers do not carry out orders in a timeframe agreed in advance, but must be prepared to respond to the needs of the market as judged by the employer or, if they are unemployed, by the back-to-work agencies.[11] In other words, they must be ready to be mobilised at any moment, and must spring into action when the time comes, in order to realise the objectives they are assigned.

Availability and response time are the two aspects—passive and active—of this total mobilisation, which in legal terms takes the form of a certain indeterminacy in the terms of the contractual exchange.

A. Availability: The Indeterminacy of Working Conditions

One of the most explicit signs of the requirement of constant availability in this legal regime of allegiance is the 'zero-hours contract' (ZHC). It has had immense success in the UK recently, totalling 1.4 million contracts at the beginning of 2014, of which 583,000 were for the person's main employment.[12] This new type of contract reveals the ambitions of the system of allegiance: to make the worker totally available, and correlatively

[10] See above, ch 1, p 26 and ch 8, p 147ff.

[11] Belgian law pioneered the 'activation' of the unemployed. See D Dumont, *La Responsabilisation des personnes sans emploi en question* (Brussels, La Charte, 2012) 613.

[12] Office for National Statistics, 'Analysis of Employee Contracts that do not Guarantee a Minimum Number of Hours', 30 April 2014, 21.

to remain totally vague as to the contents of the work. ZHC is a generic term for agreements where a worker is at the employer's disposal, with the employer specifying the number of hours of paid work, and when they are to be carried out.[13] These contracts derived from new practices, in the context of drastic reductions in unemployment benefits, and they were initially confined to a few industries, primarily the hotel and catering trade, services to individuals, retailing, and the building trade. The worker's availability in ZHC should not be confused with being 'on call', when the worker must also be ready to react to the employer's mobilisation orders, because in the latter case the length of time worked and the amount of pay received will be known in advance. ZHC should also be distinguished from employment 'at will', which is the rule in American law, and refers to the employer's discretionary right to terminate a contract whenever he or she wishes.

The boom in ZHCs raises a problem of legal qualification, which can best be addressed comparatively. Should the workers involved be regarded as 'workers' or as 'employees'? The closest equivalent of this distinction in French law is that between freelance and salaried workers. This is a rough equivalent only, however, because the UK does not have codified labour law; that is, a systematic set of rules applicable to all employees. Every UK statute has a different scope. Some statutes cover both workers and employees, others apply only to certain categories of employees. However, the differences between the two categories of worker are discernable in case law, where salaried work can be summarised as work carried out: a) personally; b) under the supervision of the employer or his or her representatives; and c) within a relationship of mutual obligation.[14] This third parameter is the vaguest, and it is what caused the problems with the ZHC. The courts accordingly dealt with litigation on a case-by-case basis. In 2012, the UK Employment Appeal Tribunal requalified a ZHC into an employment contract because the regularity of the hours worked *in practice* testified to the mutual character of the obligations in the context of a 'framework contract' (which the judge called a 'global or 'umbrella' contract of employment').[15]

The fundamental issue here is whether a 'pure' ZHC—that is, one which has no minimum guaranteed hours of work—is a contract at all. In French law, such a contract would be considered void. As the French Civil Code states, 'An obligation is void when it has been contracted subject

[13] See D Pyper and F McGuiness, *Zero-hours contract,* Report to Parliament, No SN/BT/6553, 20 December 2013, House of Commons Library, 16; I Brinkley, *Flexibility or Insecurity? Exploring the rise in zero hours contracts*, The Work Foundation, University of Lancaster, August 2013, 29; V Alakeson, G Cory, M Pennycook, *A Matter of Time: The rise of zero-hours contracts*, Resolution Foundation, June 2013, 21.

[14] *cf* S Deakin and G Morris, *Labour Law*, 6th edn (Oxford, Hart Publishing, 2012) 3, 78ff, 145ff.

[15] *Pulse Healthcare v Carewatch Care Services Ltd* UKEAT/0123/12/BA.

to a potestative condition on the part of the party who binds himself'.[16] The employer does not commit himself to anything because he will only provide work for the employee 'if he wants to'. The employee's obligations, on the other hand, are real enough (being at the employer's disposal), but since there is no counterpart, the contract has no 'cause' in the legal sense, and hence may have no effect.[17] In common law, this sort of contract should also be void: the contract in common law is defined not as a relation of free wills, but as a bargain which requires an offer, an acceptance and also a *consideration*, that is, something in return which has economic value.[18] So the ZHC is not a real contract; it is a pure bond of allegiance, which transforms the worker into a resource which can be mobilised at any moment.

In French law, the requirement of availability has not given rise to such extreme indeterminacy concerning what each party brings to the work relation. But indeterminacy has nevertheless gained ground in recent years, partly due to changes, since 1996, in how contracts may be varied. In principle, for the contracting parties, contracts substitute for the law, and can only be modified by mutual consent. In the case of the employment contract, however, this principle must be reconciled with the power which one of the parties has to control the activities of the other. The contract underlies, but also restricts this power. So where should the limit pass? Until 1996, the guiding thread was *the interpretation of the intentions of the parties*. If the employer changed an 'essential' provision, that is, one which had been decisive in the employee's consent to contract, then this was a 'substantial variation' to the contract, and required the other party's consent. Already in 1987, in case law, the employee's consent could not be presumed simply because the contract continued, and it was the employer's responsibility to solicit the employee's consent, even at the risk of having to begin dismissal procedures if the modification was refused.[19] This change reflected a move towards greater autonomy for the employee not only when entering into contract, but also throughout the contract's execution. It implied, essentially, autonomy in subordination. A further step in the transformation of subordination was taken in 1996. The *Cour de cassation*, in order to decide if a change constituted a variation to the employment contract, replaced the subjective interpretation of the parties' intentions with an objective

[16] French Civil Code, Art 1174 (Art 1304-2 since 2016).

[17] French Civil Code, former Art 1131: 'An obligation without cause, or founded on a false cause, or an illicit cause, can have no effect'. The idea of 'balance' replaced that of 'cause' in 2016, as the wording of the new article 1169 suggests: 'An onerous contract is a nullity where, at the moment of its formation, what is agreed *in return for* the benefit of the person undertaking an obligation is illusory or derisory' [my emphasis].

[18] *cf* H Collins, *The Law of Contracts*, 4th edn (Cambridge, Cambridge University Press, 2003) 58ff.

[19] Soc 8 October 1987, No 84-41902 and 84-41903, *Bull civ* V, No 541, 344 (*Raquin* and *Trappiez*).

definition of the employer's management prerogatives.[20] The employer may not vary the contract unilaterally, but he or she can impose changes in the employee's working conditions, since this is one of his management prerogatives.

The change involved here is not simply terminological, but affects how the employment relationship itself is conceived. It has generally been interpreted as strengthening the individual contract, whose binding force cannot henceforth be overridden by the employer, even on minor (non-substantial) points. There is a great deal of truth in this. In 1982, the French Auroux labour law reforms advanced the idea that employees do not cease to be citizens on entering the workplace.[21] The reforms sought to ensure that employees did not lose their status as legal subjects due to the employer's management prerogatives. This was why new rights were admitted, such as the right to leave dangerous situations or the right to have a direct voice; and also functional limitations were set on management's powers, as laid down in the Law of 4 August 1982: 'No one may put restrictions on the rights of persons, and individual and collective freedoms, which are not justified by the nature of the task to be carried out nor proportionate to the end pursued'.[22] This fine principle already suggested that the notion of subordination was changing. Employees are not simply tools for use by the employer, but are acknowledged as active subjects, bearers of individual and collective rights, which should be preserved as far as is possible. But there was the other side of the coin: the law explicitly recognised the employer's right to restrict the rights and freedoms of employees to the extent that this was necessary for the work to be performed effectively.

The new rules for varying a contract pointed in the same direction. They 'introduced citizenship into the company' by preserving the attributes which the employee had as a contracting party, but they also strengthened the employer's right to change the employee's working conditions, by giving it an objective basis, whether or not the clauses were important to the employee. In the case at the origin of this change, the employee had not managed to meet the financial objectives prescribed by his employer, so he was downgraded to his previous post, on a lower salary. The *Cour de cassation* decided that the employee's refusal to accept the changes in his working conditions decided by the employer justified dismissal for gross misconduct, that is, without advance notice or severance pay.[23] This ruling,

[20] Soc 10 July 1996, No 93-41137 and No 40-966, *Bull civ* V, No 278, 196 (*Gan vie* and *Sté Socorem*).

[21] '*Citoyens dans la Cité, les salariés doivent l'être aussi dans leur entreprise*' ('Employees in the company should be like citizens in the State'), J Auroux, *Les Droits des travailleurs. Rapport au Président de la République et au Premier ministre* (Paris, La Documentation française, 1981) 4.

[22] French Labour Code, Art L.1121-1.

[23] Soc 10 July 1996, No 93-41137 (GAN vie).

handed down in this context of management by objectives, transformed—and did not simply weaken—the notion of subordination. Clearly, as soon as the employee regains all his attributes as a contracting party, he must at once be mobilised to meet all the objectives defined by his employer. And mobilisation here means accepting in advance all changes in working conditions, whatever the subjective importance they might have for him. The employment contract here implies *advance acceptance* by the employee of any changes in working conditions decided by the employer.[24]

The indeterminacy which results from this is in principle limited by the intangibility of the obligations which the employer has himself assumed. But case law brought about changes on this point also, in defining 'objectively' the employer's management prerogatives. This undermines the binding force of the contract itself, through the introduction of clauses presented as 'purely informative' into the employment contract, which are consequently not binding on the employer. The case at the origin of these changes concerned an accountant in a company.[25] Since her contract stated clearly that her place of work was in a Parisian suburb called Anthony, she refused to go and work in the company's new premises some 10 miles away, but more than one hour away by public transport. After being dismissed for gross misconduct, she appealed, invoking the binding force of her employment contract. But in vain, because the *Cour de cassation* decided that 'the mention of the place of work is for information only, unless a clause states clearly and precisely that the employee will perform his or her work exclusively in this place'.[26] Since then, this case law from 2003 has been confirmed through the 'objective' notion of 'geographical sector' of activity,[27] which overrides the indications in the contract. Despite its supposed objectivity, it appears extremely vague, accommodating—perhaps—the availability of public transport,[28] but not the distance from the employee's home to the new place of work, which, although considered 'subjective', was taken into account before the case law changes of 1996. The *Cour de cassation* subsequently took a further step towards objectifying the employer's prerogatives when it stated that

> if an employee is occasionally required to work outside the geographical sector in which he or she usually works, or outside the limits stipulated in a contractual clause concerning geographical mobility, this may not constitute a variation to

[24] See, for similar cases, the notion of 'blanket consent' formulated by M Fabre-Magnan, in 'Le forçage du consentement du salarié' (2012) *Droit ouvrier* 459–70.

[25] Soc 3 June 2003, No 01-43573, *Bull* V, No 185, 181.

[26] ibid.

[27] Soc 2 February 2011, No 09-43022. See F Canut, 'Le secteur géographique' (2011) *Droit social*, 929.

[28] Soc 15 June 2004, No 01-44707, Chaussures Bailly, *Bulletin civil des arrêts de la Cour de cassation* (*Bull*).

> the employment contract […] if this posting is in the interests of the company, is justified by exceptional circumstances, and if the employee is informed of the temporary nature of this posting, and its anticipated length, a reasonable amount of time in advance.[29]

Hence the contract must give way before the requirement of mobility or, more precisely, the solidity of the contractual *bond* is inversely proportional to the binding force of its *content*.

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This erosion of the binding force of the employment contract is also evident in the French law of 14 June 2013 'relating to job security'.[30] Proposed by a left-wing government, it was the result of a cross-industry national agreement, and was meant to arrive at new compromises between flexibility for the company and employment security. With this in view, two new types of company-wide collective agreement were invented, in order to suspend certain clauses in individual employment contracts. One concerned *agreements on mobility within a company*, for companies with no redundancy plans, but which wanted to be able to count on greater mobility from their workforce, between posts and geographically.[31] The second type concerned *agreements to maintain employment*, and applied to companies suffering from 'serious circumstantial economic difficulties', which were allowed, under certain conditions, to envisage lowering salaries.[32] In both cases, any employees who refused the suspension of the related contractual clauses would be fired, a dismissal qualified in the legislation in such a way that it could not lead to judicial proceedings.

These new agreements not only relativise the binding force of the contract, they also impose new obligations on the employer, which would previously have been termed 'paternalistic'. The employer must henceforth take into account employees' family situations, and see to it that they maintain and improve their skills.[33] Instead of a predictable quantity of time and money, these contracts promise a lasting personal bond. Of course, the promise of secure ties is often hollow, whereas the insecurity concerning the hours

[29] Soc 3 February 2010, No 08-41412, *Bull civ* V, No 31.

[30] On this reform, see the Law on Securing Employment, the *Loi relative à la sécurisation de l'emploi* (2013) *Droit social,* dossier, 772–849; A Lyon-Caen and T Sachs, 'L'ADN d'une réforme' (2012) *Revue de droit du travail*, 162.

[31] French Labour Code, Art L.2242-21ff. See G Auzero, 'De quelques effets de l'ANI du 11 janvier 2013 sur le droit du contrat de travail' (2013) *Revue de droit du travail*, 179; P-H Antonmattéi, 'L'accord de mobilité interne: il faut l'essayer!' (2013) *Droit social*, 794.

[32] French Labour Code, Art L.5125-1. See G Couturier, 'Accords de maintien dans l'emploi' (2013) *Droit social*, 805; E Peskine, 'Les accords de maintien dans l'emploi' (2012) *Revue de droit du travail*, 168.

[33] See French Labour Code, Art. L 2242-22.

worked and the place of work, and even concerning pay, is absolutely real. Yet a legal analysis shows that this shift from exchanging specific services to infeudalising persons is a deep-seated trend. The agreements on mobility and on maintaining employment were based largely on older plans called 'competitiveness-employment agreements',[34] invented under a previous French government of the opposite political colour, suggesting that these changes to the work contract are subtended by an implicit political (and not trade union) consensus, and are not the product of a moment of political hyper-activity.

This is but one sign of a much broader phenomenon, which is the erosion of the binding force of individual employment contracts with respect to collective agreements and habitual practice in the company. The French Constitutional Council decided, without batting an eyelid, that the establishment of a collective agreement concerning annualising the working hours, 'does not constitute a variation to the employment contract'. This measure had been introduced under a right-wing government and was not repealed when the Left came to power.[35] Yet it potentially imposed major constraints on employees, since they can no longer anticipate when they will be working, and it may also contradict clauses in their employment contracts, and thus curb contractual freedom, which is recognised as a constitutional freedom. The Constitutional Council decided that

> the law-maker intended to enable employees' working time to be adapted to the company's rhythms of production; […] this possibility of organising working time without having to gain the consent of each individual employee is conditional upon the prior existence of a collective agreement in the company, which permits this sort of modification […]; it follows that these provisions, since they are based on sufficient grounds of general interest, do not infringe contractual freedom in a manner contrary to the Constitution.[36]

Making employees adaptable to the rhythms of production is thus presented as justifiable despite infringement of contractual freedom. A similar spirit imbues Article 145 of the TFEU, which calls for a labour force that can adapt and react rapidly to the needs of the economy. This position implicitly derives from the economic analysis of law, and its balancing of law and efficiency. The constitutional blessing given to employees' adaptation to the rhythms of production rides roughshod over 'the general principle of adapting work to the worker', as a European directive concerning health and safety at work, and the organisation of working time, clearly states.[37]

[34] *cf* 'Accords de compétitivité: quels engagements sur l'emploi? Controverse entre M.-A. Souriac et M. Morand' (2012) *Revue de droit du travail*, 194.

[35] French Labour Code, Art L.3122-6, Law No 2012-387 of 22 March 2012 on the simplification of the law and the reduction of administrative procedures.

[36] French Constitutional Council, Decision No 2012-649 DC of 15 March, 2012.

[37] Explanatory memorandum on the Directive 2003/88/EC of 4 November 2003, concerning certain aspects of the organisation of working time.

The French Constitutional Council, in admitting the opposite principle—the employee's obligation to adapt to the company's rhythms of production—also demonstrated how little it respects the employee's contractual freedom. We shall see that its attitude is quite different when it is the employer's contractual freedom which is at stake.[38]

B. Readiness: The Indeterminacy of Work Operations

New management methods seek to mobilise the intellectual capacities of workers. Instead of having their work broken down into a set of simple operations which must be performed in the shortest possible time, workers are driven by the results to be attained. For employees this change is double-edged. On the one hand, they regain a certain mastery over the performance of their tasks, which can mean a certain freedom in the work, for which they are answerable. On the other hand, the fixing of objectives by management means the obligation to produce set results while being prevented from participating in the meaning of the work, which can increase workers' alienation. On the legal plane, this change in the forms of organisation of work raises the question of the place of objectives in the work contract: can the employer decide them unilaterally? By what method will their achievement be assessed? And if they are not met, what conclusions can be drawn? If we can answer these three questions, we will be able to shed light on the nature of the new ties of allegiance which are forming today in the economic sphere.

Fixing objectives is one of the manager's prerogatives[39]—or even a duty, if the employment contract stipulates that all or part of the worker's pay will be dependent on achieving these.[40] For the objectives to be enforceable, they must fulfil three conditions defined in case law: the employee must have been informed of them;[41] they must be realistic ('reasonable and compatible with the market');[42] and the worker must have the personal and material means to achieve them (they must have received the required training and have the required qualifications to carry out the tasks).[43]

Assessing the attainment of objectives is the corollary of the autonomy granted the worker to meet them. This is why issues of assessment are

[38] French Constitutional Council, Decision No 2013-672 DC of 13 June, 2013.

[39] *cf* P Waquet, 'Les objectifs' (2001) *Droit social*, 120.

[40] Soc 29 June 2011, No 09-65710, Sté Prompt, *Bull* No 173; Soc 24 October 2012, No 11–23843.

[41] Soc 2 March 2011, No 08-44977; 30 March 2011, No 09-42737.

[42] Soc 30 March 1999 No 97-41028, *Sté Samsung*; see also Soc 19 April 2000, No 98-40124, *Sté Moulinex*; Soc 13 January 2009, No 06-46208, *Sté Cap Gemini et Ernst Young*, D 2009, 1931, note Pasquier.

[43] Soc 11 July 2000, No 98-41132, *Axa Conseil*; Soc 10 February 2004, No 01-45216, *Sté KPMG Fiduciaire de France, Bull* No 44.

inseparable from systems of governance by numbers. Michael Power has shown in a seminal work that evaluation is the new, and far from neutral, core ritual of what he calls the Audit Society, and one which produces many nefarious effects in the way organisations function.[44] One such effect is to introduce new risks to mental health.[45] 'Employee evaluation methods and techniques'[46] cover a vast range of tools which the management sciences have attempted to inventory.[47] The majority are for quantitative assessment, but some are also qualitative, the most emblematic of these being the Appraisal Interview, for which the employee is expected to go back over the tasks he was assigned and reflect on how he performed them.

The *legal force of objectives* is limited because in the employment contract the employee's obligations consist in using certain means and not obtaining certain outcomes. A decision of the *Cour de cassation* states that in general 'insufficient results cannot in themselves constitute a cause for dismissal'.[48] But this does not mean that the setting of objectives has no effect on the performance of the contract. Not meeting objectives can, for example, justify a reduction in salary.[49] If we recall that the amount of salary paid is the very core of the employer's obligations, and that the sum cannot be modified even with good disciplinary justifications, then we will get a sense of how deeply management by objectives has affected the economy of the employment contract.[50] Henceforth, the employer can also lower pay after unilaterally revising the objectives assigned to the employee. The *Cour de cassation* has accepted that this is the employer's right, since 'the employment contract provides that the definition of the objectives which condition the variability of the employee's pay is one of the employer's management prerogatives.'[51] This position goes against the rule that a reduction in salary cannot be imposed on employees without their consent, a rule which for some commentators was the pre-eminent sign of the renewed weight given

[44] M Power, *The Audit Society. Rituals of Verification* (Oxford, Oxford University Press, 1999) 208.

[45] See above, ch 9, p 176ff.

[46] French Labour Code, Art L.1222-3. See 'L'Évaluation en débat' (2010) *La Semaine sociale Lamy* 1471; S Vernac, 'L'évaluation des salariés en droit du travail' (2005) *Recueil Dalloz*, 924; A Lyon- Caen, 'L'évaluation des salariés' (2009) *Recueil Dalloz*, 1124.

[47] Law and case law tried to set limits on the multiplication of these instruments: see above, ch 9, p 185ff.

[48] Soc 30 March 1999, No 97-41028, Samsung, *Bull* No 143; Soc 13 January 2004, No 01-45931 01-45932, Sté Follet Boyauderie Blesoise, *Bull* No 3.

[49] Reductions in salary are justifiable if the contract states that all or a part of the salary will be pegged to the results obtained. This clause of variation is valid in civil law and also in labour law, as long as the sum can be determined, and it is not lower than the statutory minimum, or the amount set by collective agreement.

[50] French Labour Code, Art. L 1331-2.

[51] Soc 2 March 2011, Neopost. This case law establishes that potestative conditions, already admitted in other types of contract, can be used in contracts under labour law. *cf* J Rochfeld, 'Les droits potestatifs accordés par le contrat', in *Le Contrat au début du* XXI*e siècle. Études offertes à Jacques Ghestin* (Paris, LGDJ, 2001) 747ff.

to the binding nature of the individual contract.[52] With this new clause, however, the employer can lower the pay without having to renegotiate the contract or start disciplinary proceedings, where using reduction of pay as a penalty is forbidden.

What conclusions can be drawn from this rather technical overview of today's total mobilisation of employees, as expressed in law? First, it shows that the vocabulary imposed by the *Cour de cassation*, when it states that 'the personal life of the employee' falls outside the employer's management prerogatives, is in fact misleading.[53] What falls outside are the choices made by employees in their private lives, which employers could previously monitor: employees' ways of life, family status, religion or way of dressing. The power over the employee's person has, by contrast, been considerably reinforced by management by objectives. Salaried employment had always involved a certain reification of the person, who is both subject and object of the employment contract. In return for the performance of the work, the worker received employment protection, which constructed the worker's professional identity, that is, a relatively stable *objective* form of recognition. But today, with management by objectives, there is, paradoxically, a much greater *subjective* investment required of the worker. The worker's (programmed) autonomy, and the destabilisation in time and space of the performance of the work are major factors here. This trend is reinforced by the more general demand that the workforce be always at the ready. This obsession, which in France is shared by both left- and right-wing governments, is expressed most crudely in their determination to destroy the Sunday rest.[54] One would think that the very idea of a period of collectively shared time escaping the grip of the market is anathema to them, while at the same time the most successful German firms are doing just the opposite, reconstituting 'humane conditions of labour' by deactivating employees' work mailboxes during their rest periods.[55] Yet the destructive effects of Sunday opening or night work—which is also on the increase—on family life are no secret; simply, the economic indicators used under the regime of governance by numbers do not take these effects into account. Other signs of the increasing grip of governance by numbers are the new notions arising

[52] See P Waquet, 'Les objectifs' (n 39) 121–22.

[53] On this notion from case law of the 'personal life of the employee' see P Waquet, 'La vie personnelle du salarié' in *Droit syndical et droits de l'homme à l'aube du* XXI*e siècle, Mélanges en l'honneur de Jean-Maurice Verdier* (Paris, Dalloz, 2001) 513.

[54] The French President Sarkozy did much in this direction, but destroying the weekly rest day was also a priority in President Hollande's economic thinking, influenced by the Tourism Minister Laurent Fabius, and the Minister for the Economy, Emmanuel Macron.

[55] Beginning in 2011, the Volkswagen Group blocked its mail servers from 6.15 pm to 7 am. The Daimler Group installed an 'Absence Assistant' which removed the mail addressed to employees during their holidays, and suggested to the sender either that they contact another person, or that they resend the mail on the person's return. (*Le Figaro*, 4 September 2014).

in the area of health and safety, such as work intensity and stress at work, harsh conditions and psycho-social risks. These risks are not only imposed through orders from above but also from within, through the internalisation of constraints and risks which, under the Fordist regime, the employer had shouldered alone.

The legal limits placed on acts of allegiance show that workers are treated as free and rational beings: they cannot be subjected to restrictions or inspections without being informed in advance, and they have the right to challenge those which appear unjustified or disproportionate in the light of the task to be performed. They are like free men who, having pledged allegiance to someone, are obliged to do their utmost to be of service to them. As for employers, they no longer have the right to intrude upon the employee's private life, but they are obliged to take it into account, for example when they wish to impose new constraints which may be difficult to reconcile with family life.

Additionally, employers can legitimately set objectives, but only if employees receive the training and material means necessary to meet these. They have the right to dismiss staff for economic reasons, but only if they have done everything possible to keep them on, including changing their conditions of employment or even reducing their salary. Of course, this picture of the legal rules applied to employment does not faithfully reflect actual practice, but it does enable us to foreground the structure of allegiance, in which a certain number of new rights are linked to increasing demands for availability and responsiveness.

II. THE 'NEW RIGHTS' ATTACHED TO THE PERSON

The fiction of work as a commodity has thus been progressively replaced, in the employment contract's new economy, with the fiction of the free worker. This fiction is sustained by granting employees new rights, which are supposed to help them assume their responsibilities throughout their working lives. Workers' relative emancipation exposes them to dangers from which they were previously shielded. To explain this, we must return to the originary meaning of 'emancipation' in law. In Roman law, emancipation first appeared as the *pater familias*'s punishment of his son, who was thus deprived of his protection[56]—and of his inheritance. This punishment was less severe than being put to death or sold abroad, but it was worse than simple disinheritance. Emancipation made the child *sui iuris*, that is, it invested him with legal capacity, only if he simultaneously ceased to exist for his former family, and suffered a series of *capitis deminutiones* (reductions in rights). Over time, this regime of emancipation became less

[56] *cf* P-F Girard, *Manuel élémentaire de droit romain* (Paris, Rousseau, 1911) 189ff.

harsh. For example, the emancipated son could later retain ownership of his *peculium profecticium* that is, the goods he had managed to acquire with the money his father had given him before his emancipation. A frequent form of emancipation, with *remancipatio patri*, equated the emancipated son with a freedman, over whom the father had the prerogatives of an employer.[57]

The status of the emancipated son sheds light on the ambiguous status of post-Fordist workers. They are, of course, spared the Taylorist straightjacket: the work is not broken down into a prescribed sequence of gestures, and there is more autonomy in the way it is carried out. But it is an autonomy in subordination, which implies less contractual protection and more responsibility. Freed from Taylorist constraints and with greater scope of action, workers are also more directly exposed to the constraints of the market, to which they must try to adapt. In order to accommodate these new risks, and to ensure that workers are fully mobilisable and reactive, they obtain protection which is not linked to a particular profession or company, but rather to their person, throughout their working lives. The counterpart of the demand for permanent availability is thus the personalisation of certain rights, which, like the *peculium profecticium*, are attached to the person and enforceable against the employer. And indeed, the number of these employee rights has soared since the beginning of the 2000s. But, contrary to what one would expect from an increase in effective freedoms, these rights seem designed to encourage the worker to adapt to the expectations of the labour market, and to compensate for the loss in employment and welfare protection. To these new rights correspond new duties for the employer. The employment contract no longer obliges employers solely to pay a sum of money, but additionally they must ensure that employees maintain their work skills. Not simply their physical abilities, but also their mental capacities and their employability. The duty of care for the person of the worker, and not only for his physical well-being, had been gradually excluded from the employment relationship as paternalism waned, and as social security took over responsibility for the longer period of the employee's life. This duty is making a comeback today, but in new forms. Broadly, among the new obligations incumbent upon the employer, there are those he must discharge himself, and those he can pay an organisation outside the company to fulfil.

Supporting employees' capacities belongs to the first category.[58] This duty was invented by the French *Cour de cassation* in 1992,[59] and later

[57] ibid, 191–92.

[58] On this change in the concept of capacity, see S Godelain, *La Capacité dans les contrats* (Paris, LGDJ, 2007), 591; S Deakin and A Supiot (ed), *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy* (Oxford/Portland, Hart, 2009) 184.

[59] Soc 25 February 1992, *Bull civ* V, No 122 *Expovit*.

became law, containing provisions on the employer's obligation to achieve certain results (to ensure employees' adaptation to their jobs), an obligation of means (ensure that their occupational skills are maintained) and a simple moral obligation (encourage skills development).[60] The second of these obligations—monitoring employee skill levels—is particularly important here because it is emblematic of ties of allegiance. Typically, emphasis shifts from law to contract to embody the master's duty to attend to the long-term interests of those who serve him. This is the type of relation pertaining between contracting companies and their interlocking chain of service companies.[61]

A. Developments in Collective Social Insurance

The other category of duties incumbent upon the employer covers those he meets through financial contributions to collective funds, managed by a third party. The funds are private social insurance schemes (*la prévoyance*).[62] It is worth looking at these more closely because they are the site of an obstinate struggle between two approaches. For one school of thought, these funds constitute a form of property rights guaranteed by the insurance market. For the other, these are social rights based on social solidarity. In order to grasp the importance of this divergence, we must take a brief step back in time.

In France, from the abolition of the corporations to the creation of the social security system, social protection was in the hands of private actors. The initiatives came from the employees themselves, who built up precautionary savings, or from employers who considered they had a moral debt to their employees when they were old, ill, incapacitated through a work accident, or heads of household. These individual initiatives took on a *collective dimension* when employers turned to insurance companies to spread the financial burden between them, and when employees founded mutual benefit associations, which played the same role, as regards collective assistance, as trade confraternities had played under the Ancien régime. These mutual benefit societies, which were legalised in 1852 and are today covered by a specific legal code, are non-profit-making bodies managed by representatives of their members. So already at that time there were two types of collective protection funds, both of which were private initiatives.

[60] French Labour Code, Art L.6321-1: 'Employers must ensure that employees are adapted to their job positions. They must ensure that employees maintain the capacity to perform their tasks, particularly in the light of the evolution of their jobs, of technology and of work organisation. They may suggest training to help boost skills or combat illiteracy'.

[61] See below, ch 14, and above, ch 11, p 211ff.

[62] For this notion, see G Lyon-Caen, *La Prévoyance* (Paris, Dalloz, 1994), 126.

One was linked to the insurance market and the other to occupational solidarity schemes.

When French social security was created in1945, it inherited this tradition to a certain extent. Unlike its British counterpart, which was a public service run by the state, French social security involved a mixture of public and private law. The originality of the French system was its social-democratic principle, according to which representatives of the interested parties themselves managed a system which covered the whole population. But this new scheme also represented a qualitative break with earlier collective endeavours. It was based on 'national solidarity';[63] it was obligatory (no longer voluntary); and the rights which it generated were attached to individuals and accompanied them 'from the cradle to the grave'. Social security is the primary agent in protecting career paths, and it is also the main way in which employers can externalise their social responsibilities. It has become a required third party to any employment contract, endowing employees with personal rights which replace their dependence on an employer's paternalism. Since these rights are necessarily limited, the creation of the social security system did not do away with the need for what thereafter was called 'complementary social protection'. The social partners were subsequently authorised by law to set up non-profit-making joint representative bodies by collective agreement, to ensure fair distribution between the contributors to the fund of the burden of the sums to be paid out to employees or their beneficiaries.[64] These institutions operated alongside the mutual benefit societies. Profit-making insurance companies were, however, excluded from schemes for complementary risk cover. At the time, it was considered that these complementary schemes should be based entirely on principles of voluntary solidarity and social democracy. This was the normative matrix in which complementary retirement pension schemes were set up, in 1947, then unemployment insurance in 1958, which was again the result of a collective agreement, and was managed jointly by the social partners. When these different regimes became obligatory, they began to resemble the social security system. European law treats them as all the same, even if they are still managed separately. For the other risks covered by complementary protection schemes, voluntary solidarity remains the norm.

The ultra-liberal turn and the pressure exerted by European law as from the 1980s had the effect of integrating private insurance into the complementary social protection system, and of gradually forcing all the operators on this gigantic and lucrative 'market' to follow the same rules. Between

[63] French Social Security Code, Art L 111-1.

[64] *cf* P Durand, 'Des conventions collectives de travail aux conventions collectives de sécurité sociale' (1960) *Droit social*, 42. These joint representative bodies (*institutions paritaires*) were called 'L4', referring to the article of the Social Security Code which regulated them at the time.

1985 and 2003, no less than eight laws and *ordonnances* were passed.[65] The most important of these was the Evin Law of 31 December 1989. Its primary aim was to bring into force, in the sector of collective protection plans, the European directives relating to the free provision of services regarding personal insurance. In the name of 'reinforcing the guarantees offered to people insured' (the law's title), the joint representative bodies (*institutions paritaires*) and the mutual benefit societies (*mutuelles*) were obliged to have a certain level of capital corresponding to their commitments. This implied abandoning the principle of redistribution in order to fluidify the market and make the three types of operators—the joint representative bodies, the insurance companies and the *mutuelles*—compete.[66] The link established in 1945 between the various dimensions of complementary social protection—based on collective agreements, non-profit-making and democratically managed—was thus broken. As a trade-off, the insurance companies which were accepted into this market had to obey certain rules inspired by the principle of solidarity—life-long cover, uniform fees, no individual surcharges—with a tax break for contracts deemed 'in a spirit of solidarity and social responsibility', for healthcare without any selection on medical grounds.[67]

Today, collective social protection takes the form of 'social guarantees'[68] or of 'collective guarantees for employees'.[69] They are financed by the company, and attract tax incentives and favourable rates for the employers' contributions. In principle, they are the result of collective agreements, and are designed to include risks not covered by the social security, or only incompletely.[70] They are at the intersection of labour law, social security law and insurance law, and have two features in common. The first is that *their financial management is externalised*; collecting social contributions from companies and paying benefits to employees are tasks devolved upon specialised agencies. Employees thus hold a debt claim against these bodies, distinct from the salary claim, although it too stems from the employment contract. As in social security law, the involvement of a third party, who owes the welfare benefits, is a mechanism enabling the short time of the contract to be harmonised with the long time of the worker's life, without

[65] J-J Dupeyroux, M Borgetto, R Lafore, *Droit de la sécurité sociale*, 7th edn (Dalloz, coll 'Précis' 2011), 1030ff.

[66] *cf* J Barthélémy, 'Les fondamentaux du droit de la "PSC"' (2013) *Droit social*, 873ff.

[67] This advantage was considerably reduced in 2011 under the presidency of Nicolas Sarkozy. Today, these contracts are taxed at 7%, compared to 9% for normal contracts. They were criticised in the same year by the European Commission, which regards this provision as state aid contravening the rules of the European market.

[68] French Labour Code, Art 2221-1, which states that the book of the Labour Code devoted to collective bargaining and collective agreements 'defines the rules for the exercise, by collective bargaining, of employees' rights concerning all their conditions of employment, their professional training, *and their social guarantees*'.

[69] French Social Security Code, Art L.911-1ff.

[70] Art L 911-2 of the Social Security Code gives an indicative list of these risks.

the latter being dependent on an employer's paternalism. The other feature these guarantees have in common is that they *spread the financial burden across the contributing members*. But the way this equalisation is organised is the cause of irreconcilable tensions between two different visions of the system. For some, this is first of all a market, and as such should be open to competition between service providers. For others, it is the expression of occupational solidarity, which should be encouraged. *From the perspective of free competition*, the equalisation is achieved exclusively through actuarial techniques applied to aggregate risks; that is, it involves simply a calculation of probability, true to its vision inspired by governance by numbers. Consequently, it is hostile to social bonds, viewing them as nothing but a risk factor. *From the perspective of solidarity*, the role of equalisation is to ensure that everyone enjoys certain protections, and also to compensate for inequalities in wealth and in exposure to these risks. In other words, it obeys the rule of 'to each according to his capacity, to each according to his needs'. This is still the crowning principle of the *mutuelles* today, whose mission is, through 'securing against risk, through solidarity and mutual aid […], to contribute to the cultural, moral, intellectual and physical development of their members, and the improvement of their living conditions'.[71] These goals are of course entirely alien to the insurance market.

When a scheme for 'employment security' became law in 2013, it created a head-on clash between these two visions. In return for 'negotiation over anticipated economic changes', that is, the weakening of the binding force of employment contracts, 'new individual rights for securing career pathways' were introduced.[72] However, this resounding announcement proved hollow, as the very first article shows: the provision simply extended the right to complementary cover for illness, maternity and accident to all employees. How are we to understand this abuse of language by which one of the oldest rights granted to employees—the right to health cover—is presented as a 'new right'? The solution to this enigma can be found not in labour law but in social security legislation, which increasingly refuses to cover what are called 'minor health risks'. Over the last 20 years, as Didier Tabuteau has shown, French social security has operated a 'salami policy' whereby it 'cuts up obligatory health cover into fine slices so that it is gradually absorbed, and not rejected, by the bodies handling complementary social protection'.[73] In the context of drastic reductions in 'public spending', this underhand process which privatises the most profitable sectors of the gigantic market in health, seems by now to

[71] *Code de la mutualité*, Art L.111-1.

[72] Cross-industry national agreement of 11 January 2013 and Law No 2013-504 of 14 June 2013. On this reform, see above, ch 13, p 253ff.

[73] D Tabuteau, *Démocratie sanitaire. Les nouveaux défis de la politique de santé* (Paris, Odile Jacob, 2013) 141ff, 146–47.

be irreversible.[74] The total expenditure on health in 2012 was 243 billion euros, the equivalent of 12 per cent of the GDP.[75] But—through the magic of governance by numbers—one has only to privatise the service for the figure to disappear from the expenditure column and transform miraculously into an economic growth factor for the nation. This is what occurred with the market in health protection, which represented 31.1 billion euros in 2011,[76] a figure which automatically increases every time the social security reduces the number of situations it covers. It is much clearer, in this light, why complementary health cover was given such a high profile in the law on employment security. Far from giving employees 'new rights' to help them face the increased insecurity of the job market, these rights simply tempered the effects of the reduced health cover provided by the state's social security, while at the same time the methodical privatisation of health cover continued, under the label of reducing 'public expenditure'.

B. The Market versus Solidarity

There remained, then, the issue of the type of privatisation to choose: should there be free competition and the insurance market, or national solidarity systems and non-profit-making bodies? The generalisation of complementary health insurance, introduced with the law of 2013 on employment security, gave the insurance lobby the chance to table this vexed issue, which had been coming back and back ever since 1945. The 2013 law authorised the social partners to develop 'a high degree of solidarity' within occupational sectors, by providing that a single body should handle this protection. In 2011, the lawfulness of designating this one body was recognised by the Court of Justice of the European Union, despite its penchant for economic liberalisation.[77] But the French Constitutional Council handed down a decision of infringement of the right to free enterprise and freedom of contract, and achieved the near-impossible in not even mentioning solidarity.[78] Whereas this decision satisfied a long-standing

[74] For a recent overview, see the Annual Report of the Higher Council for the Future of Health Insurance (*Haut conseil pour l'avenir de l'assurance maladie*) Paris, 2013, 273, which focuses on this issue.

[75] M-A Le Garrec and M Bouvet, *Comptes nationaux de la santé 2012*, Drees, Working Document, série Statistiques, No 185, September 2013. Public accounts on health 2012.

[76] Source: *Autorité de la concurrence* (Competition watchdog), Opinion No 13-A-11 of 29 March 2013.

[77] J Barthélémy, 'Clauses de désignation et de migration au regard du droit communautaire de la concurrence' (2011) *Jurisprudence sociale Lamy* 296.

[78] J-P Chauchard, 'La prévoyance sociale complémentaire selon le Conseil constitutionnel' (2014) *Revue de droit sanitaire et social* (*RDSS*) 4. J Barthélémy, 'Le concept de garantie sociale confronté à l'article L.1 du code du travail et la décision des sages du 13 juin 2013' (2013) *Droit social* 673–79; and by the same author, 'Protection sociale complémentaire. La survie des clauses de désignation'(2014) *Droit social*, 10.

demand on the part of the insurance sector, small and medium-sized businesses regarded it as a disaster, and stressed the vulnerability of small businesses, henceforth exposed to the 'soliciting and pressures of all sorts which the insurance sector will not hesitate to exert', as the representative of the Union of Artisans stated.[79]

The generalisation of complementary health insurance highlighted two very different conceptions of the rights designed to protect the worker's employment over time. The version chosen by Parliament was that of *collective guarantees which are realised individually*. They are collective not only because of the nature of the act which creates them (a collective agreement), but also because the agreement's signatories are authorised to ground these rights in a *regime of solidarity* managed by the representatives of those who finance it. When these individual rights, which are meant to secure employees against risk throughout their working lives, are backed up by this sort of regime of solidarity, these rights are *social rights*. The conception imposed by the French Constitutional Council was, by contrast, that of purely individual rights, which are not rooted in a regime of solidarity between members of the same profession, but in a debt claim against a financial body or insurance company. In other words, these are not strictly speaking social rights but *patrimonial rights*, based not on solidarity but on capitalisation.

This second, purely financial, vision supports an expansionist market forever in search of greater liquidity of 'human capital'. It ousts the principle of solidarity, increases inequalities between employees, and endorses the 'Matthew effect', whereby those who have will receive even more, and those who have not will receive even less. As the latest developments in other areas of social protection have shown, one of the determinant conditions of the system's efficiency is protection of the principle of solidarity. A particularly striking example of this is professional training. The French Constitution states that 'the Nation guarantees equal access of the child and the adult to instruction, professional training and culture'.[80] The 'Delors' Law of 16 July 1971 realised this social guarantee, and laid the foundations for the French system of continuing professional development (CPD). At the time, it was decided to set up a *market in training services,* rather than making CPD into a public service (like education), or linked to a non-profit-making regime of solidarity. So on this particular market, a demand for training from companies meets a supply from training providers. The system is financed not by welfare contributions but by taxes. Companies must spend at least a minimum sum on training, which may be partially spent by the training activities they organise for their own staff; the rest is handed over to certified bodies, whose structure is repeatedly rethought. Since 2009, these bodies

[79] Quoted by S Chabas, 'Complémentaire santé: le Conseil consti tutionnel rejette les "clauses de désignation"', Batiactu.com, 14 June 2013 www.batiactu.com/edito/complementaire-sante---le-conseil-constitutionnel--35457.php (accessed 2 August 2014).

[80] Preamble to the Constitution of 1946, para 13.

must jointly represent the social partners, and cannot themselves be training providers. This market in training is regulated by industry-level collective negotiation and by central government and regional administrations.

Despite the many attempts since 1971 to reform this market, it has continued to generate considerable inequalities in access to training. Those who lose out the most are small- and medium-sized enterprises, women, and job-seekers—the sign that the 'Matthew effect' is indeed taking its toll. As a recent report to Parliament states: 'The system is so unsuccessful in redistribution that SMEs of 10 to 49 employees finance the training policies of larger-sized businesses to the tune of 50 million euros. Less than 3% of the sums collected for training provision are disparity-adjusted to the benefit of SMEs.'[81] This report illustrates the ongoing inequalities generated by dismissing the principle of solidarity when establishing rights attached to the employee's person. In the case of professional training, these inequalities were so glaring that in 2014 a cross-industry agreement between the social partners became law, in order to include an element of solidarity in favour of small business employees, and not simply follow the rules of the market in professional training.[82] Another effect of this relative retreat of market logic in favour of the principle of solidarity was the law's provision for the creation of a personal training account open to all individuals, and valid from leaving school right up to retirement.[83] The account is available not only for employees in work. It can be used by account-holders as they wish; for example, they do not have to obtain their employer's consent to the training—which is partly financed by the company—if it takes place outside of working hours. Lastly, 'the account-holder's accumulated training hours are not lost when changing jobs or in the event of loss of employment'.[84] This is called the 'portability' of professional training rights, which, like a savings account, can be drawn on throughout the individual's life in the case of career difficulties or, at the other extreme, to achieve new career goals.

Although many of these 'new rights' attached to the individual—working time accounts, skills' assessments (or skills' 'balance sheets'—*bilans de compétence*), personal training accounts, etc—use a vocabulary drawn from banking, this does not necessarily mean that they are backed on capitalisation. As part of the individual's labour force status, they are inalienable

[81] French Senate, Report No 359 (2013–2014) by M Claude Jeannerot representing the Commission for Social Affairs, submitted on 12 Feburary 2014.

[82] Cross-industry national agreement (ANI) of 18 December 2013 and Law No 2014-288 of 5 March 2014. This reform increased the financing and the role of the Fund set up by the social partners for safeguarding career paths. 20% of the Fund will be pooled across industry sectors to benefit the employees of small businesses, who lost out heavily in the previous system, which was entirely founded on the idea of regulating a market in professional training.

[83] French Labour Code, Art L.6323-1, modified by Law No 2014-288 of 5 March 2014.

[84] French Labour Code, Art L.6323-3.

and non-distrainable. They are a grey area between patrimonial and non-patrimonial rights.[85] And above all, they are mostly backed by the solidarity of the members of an occupational group, and not by an amount of capital. As such, these rights are a modern version of a type of wealth well known in some traditional societies, in which a person is rich not because they have accumulated a pile of gold but because they have forged links with a sufficient number of other people to be able to rely on their help. 'People not purse are a man's wealth', as a Bamileke proverb puts it.[86] The rich man is one who has 'lots of people' he can rely upon. This does not dispense with the need for contingency planning, but, as in the case of African tontines, the safest savings prove to be those backed up by solidarity between people, who are, by turns, creditors and debtors in the same system.

Yet the idea of economic security underpinned by solidarity between people rather than by an individual's capital is anathema to ultra-liberal dogma. It regards society as a collection of subjects surrounded by objects, in which the alpha and omega of the subject's relation to the object is individual ownership. That is why ultra-liberals have such immense difficulty envisaging human beings as interconnected with their lived environments, both social and natural.

The concept of 'social drawing rights' is useful for understanding these new rights attached to the person, as well as their similarities and differences from social security, which also embodied a return to rights founded on solidarity.[87] These rights are attached to the person of the worker and not to their employment, which is why they can ensure the person's continuing status within the workforce whatever the disparities and discontinuities in their working lives. They allow employees to step outside the relation of subordination and devote themselves for a time to another socially useful activity. They are *drawing* rights, because they can only be 'drawn', or exercised, under two conditions: attaining a certain level of 'reserves', and the decision to use these. And they are *social* rights, not only in the way they are constituted (different sources of matching funds, mobilising different circles of solidarity), but also in their objectives (exercising these rights gives access to socially useful activities). Social security protects against the risks of everyday life, while social drawing rights enable people to have real freedom of choice in how they conduct their professional lives. Recent legislation on 'securing career paths' seems to adopt the perspective of these new

[85] *cf* P Catala (1966) 'La transformation du patrimoine dans le droit civil moderne', *Revue trimestrielle de droit civil* 185, 185; J Audier, *Les Droits patrimoniaux à caractère personnel* (thesis, LGDJ, 1979); J Ghestin, G Goubeaux and M Fabre-Magnan, *Traité de droit civil: Introduction générale*, 4th ed (Paris, LGDJ, 1994) 217f, 170ff.

[86] Nguebou Toukam and Fabre-Magnan (n 1) 299.

[87] *cf* A Supiot, 'Du bon usage des lois en matière d'emploi' (1997) *Droit social*, 229–42; A Supiot (ed), *Beyond Employment. Changes in Work and the Future of Labour Law in Europe* (ch 12 fn 53) 90ff.

rights, particularly with respect to professional training and development, and health and safety at work. However, the overwhelming tendency is still for work to be conceived in a reified way, as 'human capital' held hostage to the total market. We can see, therefore, that ties of allegiance are indeed advancing inexorably, but the form they take is not set in stone. All depends on the strength of collective action and the political responses to it.

The employment relationship has always been at the heart of how people are governed in the modern age. This somewhat austere legal analysis of its contemporary metamorphoses was the prerequisite for proceeding to identify, in more general terms, the structure of the ties of allegiance developing at all levels of our societies.

14

The Structure of Ties of Allegiance

Ubi emolumentum, ibi onus.[1]

THE TIES BETWEEN controlling companies and subsidiaries, and imperial states and controlling companies, have a similar structure to the ties of allegiance examined above, which are operative in the individual employment relationship.

I. ALLEGIANCE IN BUSINESS NETWORKS

A vivid image of the ties of allegiance operating in business networks is provided by a particularly monstrous case, that of the Rana Plaza disaster and its aftermath. The facts were widely reported in the Press: a Bangladeshi garment factory situated on the outskirts of Dhaka supplied cheap clothing to many Western retailers. On 24 April 2013, the company's premises in the building called Rana Plaza collapsed, causing 1,133 deaths, most of them women workers, and 2,000 injured, many of them handicapped for life. The images of this industrial catastrophe, the largest since the Bhopal disaster in 1984, were seen the world over, turning the spotlight—for a brief moment—on the realities of work in poor countries in the age of globalisation.

The day before the accident, cracks had been observed in the building, which was in imminent danger of collapsing.[2] The building was then evacuated. The following day, the female garment workers, under the threat of fines and wage deductions, were forced to return to their workstations. Designed as residential accommodation, the building was built on marshy ground and its use violated the most basic safety regulations. Without permission, four extra floors had been built on top of the initial five. A generator had been place on the roof, and its vibrations, coupled with those of the machines, caused the building to collapse. The garments found in the rubble

[1] 'Whosoever benefits bears the burden', *Liber Sextus Decretalium*, *De regulis juris*, LV. On this adage, see H Roland and L Boyer, *Adages du droit français*, 4th edn (Paris, Litec, 1999) 913–20.

[2] OECD Report by the NCP of France, 'Implementation of the OECD Guidelines in the textile and garment supply chain', 2 December 2013.

had labels from many big Western brands, especially French (Auchan, Tex (Carrefour), Camaïeu, Casino and Leclerc), Italian (Benetton), English (Primex) and American (Walmart, among others).

Figure 14.1: Rana Plaza, 24 April 2013 © Abir Abdullah

This accident gave the lie to the fable that globalisation provides workers in emerging economies with a fulfilling and prosperous life. For a while, it drew the Press's attention to the social impact of the new forms of organisation of work in the globalised economy. And since it risked casting doubt on the civilising virtues of economic globalisation, the latter's devotees were quick to stress the proper message. In the words of the Editor of a major French Left-wing weekly, 'We would be quite wrong to embark on an angelic condemnation of globalisation or declare that its days are numbered […] For these young women, the workshop is preferable to the family and the economic oppression they experience in rural areas. Paradoxically, their job at Rana Plaza gave them a form of freedom.'[3] This colonial discourse in a new guise claims, as it did previously, that one can decide from Paris what is good for these 'natives' in southern countries, while bracketing out the fact that some died crushed by the steamroller of all-out trade. The President of the Chamber of Commerce in Lyon had already—at the end of the nineteenth century—summed it up: 'civilising people means teaching them to work in order to buy, trade, and spend'.[4] Conscious of their

[3] L Joffrin, *Le Nouvel Observateur*, 24 April 2014.

[4] Cited by H Wesseling, *Le Partage de l'Afrique* (Paris, Denoël, 1996; Gallimard, coll 'Folio', 2002) 169; *Divide and Rule: The Partition of Africa, 1880–1914* (Westport, CT, Praeger Publishers Inc, 1996).

image, most of the Western firms involved in the tragedy made much of their 'social responsibility', but when the Press—whose role regarding the deregulation of international trade is similar to that played by the major industrial-era strikes—voiced its indignation, these companies were forced to confront their real responsibilities. Faced with pressure from the media, and from two international organisations which had developed good practice guidelines in the area of corporate social responsibility—the ILO and the OECD—these companies, which in 2013, the year of the accident, raked in 24.5 billion dollars from Bangladesh, were obliged to take action to prevent such accidents in the future.

This event shows that removing barriers to trade also has negative effects for transnational companies. On the one hand, they have thrown off state control and can thus freely relocate, and practise fiscal, employment and environmental forum shopping. The larger companies create networks across the globe, in which they enslave smaller companies. On the other hand, they enter a sort of legal vacuum which exposes them to new risks, which they attempt to contain by brandishing their capacity for self-regulation and their 'social responsibility'.

As long as the international legal order was made up of juxtaposed sovereign states who controlled their own frontiers, business activities were situated at the intersection of private and public law. The state dealt with what the *Digest* calls 'sacred things', that is, the domain of things which are beyond calculation, such as personal status and the survival of the political community.[5] Relieved of this responsibility, exchanges between individuals could then be pursued purely according to a logic of calculated utility. Milton Friedman's famous line that 'the one and only social responsibility of business is to increase its profits',[6] can be seen as displaying a very primitive conception of business,[7] but it is not in itself scandalous: as long as entrepreneurs obey the law and pay their taxes, there is indeed no reason why they should be required to envisage occupational and environmental issues over the longer period of human life. Small businesses operate within these limits, but today transnational companies escape state control because of trade deregulation, and are allowed to choose the laws most profitable to them from the whole planet. In other words, the present context enables them to elude what the Universal Declaration of Human Rights of 1948 calls the rule of law.

The Rana Plaza disaster is a tragic illustration of the opportunities and risks for transnational firms of stepping outside the law. They can

[5] See above, ch 6, pp 103–195.

[6] M Friedman, 'The Social Responsability of Business is to Increase Its Profits', *The New York Times Magazine*, 13 September 1970.

[7] *cf* O Favereau, 'La "fin" de l'entreprise privée' in A Supiot (ed), *L'Entreprise dans un mode sans frontière* (Paris, Dalloz, 2015).

ignore workplace and environmental rules, and drive their profits to giddying heights by using what Pope Francis has rightly called 'slave labour',[8] through the intermediary of subcontractors. The collapse of the relative cost of labour in the price of a T-shirt sold on Western markets is painful proof of this. It stands at 0.6 per cent; that is, at 1/100th of the distributor's margin:[9]

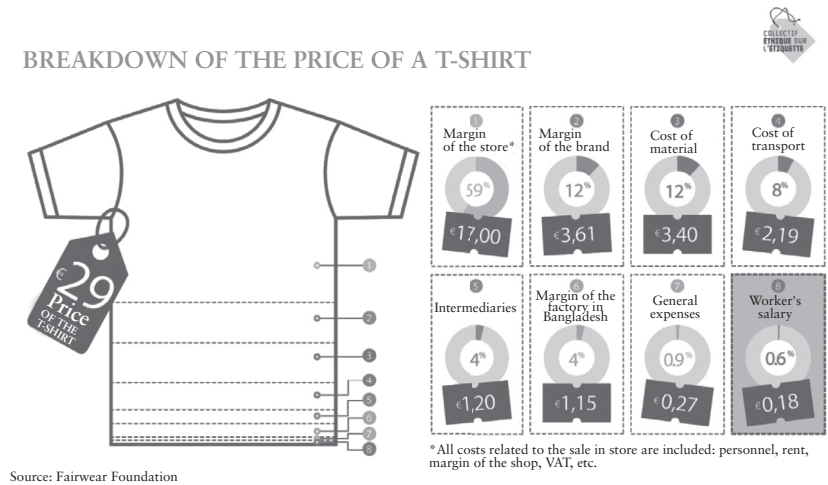

Figure 14.2: © Collectif Éthique sur l'étiquette. (The author thanks the Collectif for its kind permission to reproduce this figure.)

But on the other hand, these multinationals run the risk of having to answer for violations of fundamental human rights, when the over-exploitation of human beings and natural resources becomes known to the public. Unlike the integrated production chain of the Fordist manufacturing system, transnational businesses create networks of autonomous legal and economic entities, in a typically feudal structure.[10] Legally speaking, these companies are not liable for any wrongdoings committed, or risks incurred, by their subsidiaries, their sub-contractors or their suppliers. Legal personality protects them from prosecution if there is an accident. To a certain extent, therefore, this mode of work organisation enables the sites of economic power to be separated off from the sites of imputation of liability, as the last 20 years of sub-standard food product scandals have shown on numerous occasions. The other side of this coin, however, is that the transnationals no longer

[8] *cf Le Figaro*, 1 May 2013.
[9] Source: Fairwear Foundation, cited in the *OECD Report*, Annex 7, 107.
[10] See above, ch 11, p 221ff.

have direct control over manufacturing conditions, and the indirect control they try to keep is diluted along the chain of sub-contractors and suppliers. This has two negative consequences for them: they lose their technical skills, such that their vassal companies can one day become their competitors—one of the bitter truths to emerge from European and American firms' conquest of the Chinese market; and they also risk finding themselves at the centre of a humanitarian and ecological scandal, their brand name dragged through the mud in the media, spattered with the blood of the female garment workers of Rana Plaza. In such cases, the façade of legal personality is no longer much help to them because public opinion, that is, their customers, will hold them responsible.

As a result, major businesses have chosen to restructure their relationships with suppliers and sub-contractors to avoid being held directly responsible for work-related or environmental damage. They want to be able to monitor their activities and provide them with the means to operate in a responsible fashion. Although technically the ties of allegiance forged between companies are not the same for a relation between parent company and subsidiary, contracting company and contractors, or clients and suppliers, these relations are all modes of vassalage, and can consequently be treated together. The relation of vassalage becomes clearer if we compare it with the relation of salaried employment and its recent transformations, as discussed in the last chapter. Allegiance in employment is perceptible in the employee's autonomy-in-subordination with respect to the employer; as we have seen, where the bond of allegiance requires greater commitment from the employee's person. Employees can no longer simply obey orders mechanically for a certain length of time in a certain place prescribed in advance, but they have to be totally mobilised to achieve the objectives assigned, and they must also accept the related performance evaluation procedures. In exchange, the employer must be mindful of employees' mental and physical health, and their professional capacities, in order to maintain their 'employability' on the labour market.

Similar ties of allegiance are formalised in the two agreements signed after the Rana Plaza disaster, one between mostly European companies,[11] the other between North American ones.[12] The 'American' agreement was less restrictive, and made sure the unions had no hand in supervising its application. The 'European' agreement was more ambitious and provided more food for thought. It was signed, on 15 May 2013, by a number of multinationals and the international unions of the relevant industry sector, Industri ALL and Uni Global Union, under the auspices of the ILO. It was applicable

[11] *Accord on Fire and Building Safety in Bangladesh*, 13 May 2013.

[12] *The Alliance for Bangladesh Worker Safety*, 13 July 2013. These Agreements can be found in full in the OECD Report, 'Implementation of the OECD Guidelines in the textile and garment supply chain', Annexes 5 and 6.

for a five-year period, during which security and fire risk inspections in the textile industry would be stepped up, and workers' health and occupational safety conditions would be improved. To date, the agreement applies to 103 brands of purchasers, with planned inspections of 1566 factories. Its implementation is supervised by a steering committee chaired by a representative of the ILO and comprising equal numbers of customer companies and trade unions. A binding dispute settlement mechanism has also been devised. The Agreement has five goals: to set up credible *inspections*; to work on *prevention*, ensuring that factories comply with safety standards; to provide *training* on safety issues; to introduce a bottom-up *communications* system; and to guarantee *transparency* on the audited sites (access to data). The signatory companies have pledged funds corresponding to the pro rata value of their orders, to train the inspectors, carry out the inspections, and to get factories up to standard. The first inspection report was delivered in autumn 2014: it revealed 80,000 infringements of safety rules, and prescribed work estimated at more than one billion dollars.[13]

Three features of ties of allegiance become apparent in this collective formalisation of relations of production. The agreement confirms *suppliers' dependence* because they are obliged to accept the inspections commissioned by the consortium of signatory companies, and they must apply the corrective measures prescribed by the inspectors, and implement the training programmes on staff safety. The economic penalty for non-compliance is extremely harsh: they will not be allowed to trade with any of the companies which are parties to the agreement, a situation which amounts to *economic banishment*. This dependence means that suppliers must bare all for the signatory companies, just like employees in their appraisal interviews. Secondly, *the customer companies must support their suppliers* so that they can assume their new responsibilities. This requires the economic relationship to be viewed in a long-term perspective, a dimension usually ignored by 'value-creating' cost-killers. The customer companies vow to 'maintain long-term sourcing relationships with Bangladesh' and to negotiate terms such that the supplier factories are financially able to 'respect the security requirements stipulated in the Agreement'. This support can also take the form of financial aid provided by the main company to the supplier. The agreement also sets up a system of financial solidarity between the signatories, whereby the amount contributed by each company for inspection and training is proportional to its turnover in Bangladesh. Together with the adoption of shared safety standards, this mutualised auditing framework functions as a genuine working conditions watchdog, so that the costs of safety at work are never the object of a competitive race to the bottom. Lastly, the agreement establishes that customer–supplier relations are *jointly*

[13] *Le Monde,* 14 October 2014.

and severally liable with respect to certain third parties. The supplier's employees can thus get behind their employer's façade of legal personality, and submit their case directly to the customer company to which their employer is answerable. The customer company consequently has a right to intervene in the management of the supplier's staff on issues concerning the application of the agreement.[14] This Agreement, considered exemplary not only by the unions, but also by the ILO and the OECD, is indeed a model of its kind, due to its international dimension and its standard-setting character. Although its geographical focus is limited (the textile industry in Bangladesh), as is its material range (the safety of buildings, fire prevention), its normative structure is much the same as many mandatory provisions already present in domestic and European law.

Transnational companies are not, however, the only ones to develop a legal definition of allegiance. The relations of dependence between companies have long been the object of legislation and case law in domestic law, where the same three characteristics are evident: the supervision of the vassal by the suzerain; the support of the suzerain by the vassal; and the responsibility of the suzerain for the doings of the vassal.

As customers, multinationals have thus been given the *power* and the *duty to supervise* the supply chain, and to combat illegal work by checking their subcontractors' registration and employee declarations.[15] A similar legal obligation emerged from the *Erika* case, concerning the chartering of shipping vessels. The *Erika* ecological disaster in the Atlantic was caused by the break-up in heavy seas of a 25-year-old oil tanker unfit to sail. The company Total denied civil and criminal liability, on the grounds that it was neither the owner nor the charterer of the vessel, since the transport contract had been drawn up by one of its subsidiaries. However, Total was found guilty of not exercising 'the due diligence incumbent upon it', insofar as it had not carried out the technical checks which it had itself envisaged, in accordance with which it 'had the right to board the tanker *Erika*, to observe operations of loading and unloading, to inspect the cisterns and to have access to the ship's documents, all of which gave it the power to supervise the cargo and also the ship's functioning'.[16] Here, French law mirrored the solutions found by the USA after the *Exxon Valdez* oil spill, since in American law

[14] The scope of this right includes: a guarantee of employment during the works to implement security standards; the right to withdraw from dangerous situations; the right to collective representation (50% on health and safety committees, which are to be created by the Agreement); a complaints procedure.

[15] French Labour Code, Art L.8222-1, which obliges customer companies to ensure their sub-contractors are not employing illegal workers.

[16] Cour de cassation, Chambre criminelle, 25 September 2012, No 10-82938 (*Erika* case), *Revue de droit des transports,* October 2012, No 4, comm, Martin Ndendé. See P Delebecque, 'L'arrêt "*Erika*": un grand arrêt de droit pénal, de droit matitime ou de droit civil ?' (2012) *Recueil Dalloz*, 2711.

all those directly or indirectly involved in a transport are considered liable, a rule which prompts charterers to check the conditions under which their contracted transporters operate.[17]

Concretely, the *duty to support* means that the suzerain company must make sure that its vassals are economically viable. This duty is enshrined in the French Commercial Code for the relations between large retailers and their suppliers, in the form of a prohibition on

> subjecting or seeking to subject a trading partner to obligations that create a significant imbalance in the rights and obligations of the parties; obtaining, or seeking to obtain clearly abusive terms concerning prices, payment times, terms of sale or services that do not come under the purchase or sale obligations, under the threat of an abrupt total or partial termination of business relations; abruptly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices.[18]

The obligation to make sure that the vassal company is economically viable has also been confirmed in case law, regarding clandestine labour.[19] More generally, a duty to be mindful of sub-contractors explains why companies are obliged to keep them informed.[20] This could make a company liable for the consequences of closing down its subsidiary, when there are no grounds for this other than increasing its own profits to the detriment of jobs in the subsidiary.[21]

Joint and several liability is a technique increasingly used for the legal control of company networks, in both domestic and European law. The suzerain company is accordingly responsible for the doings of it vassal. Unsurprisingly, the EU Court of Justice admitted this 'lifting of the veil' on companies' legal personality whenever it was a question of enforcing EU competition rules.[22] After recalling that in European law, an undertaking 'encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed', the Court

[17] According to the Oil Pollution Act of 1990, 'any person owning, operating, or demise chartering a vessel' is liable for the pollution it causes.

[18] French Commercial Code, Art L.442-6-I. See R Libchaber, 'Relation commerciale établie et quasi-contrat' (2010) *Répertoire du notariat Defrénois* 1, 114.

[19] Crim 11 March 1997, No 95-82009, *SCA La Moutonnade*.

[20] French Labour Code, Art L.2323-16.

[21] This conclusion can be deduced from the decision of the Labour Division (*Chambre sociale*) of the Cour de cassation, *Goodyear Dunlop* of 1 February 2011, F-P+B, No 10-30.045, 10-30.046, 10-30.047, 10-30.048. The Commercial Division is much less bold, and tends to keep the iron curtain of legal personality down, for example, in order to protect a parent company from liability for its subsidiary's bankruptcy, even when its actions were contributory factors. (Chambre commerciale, 3 July 2012, *Sodimédical,* No 11-18026 (2012) *Recueil Dalloz,* 2212, obs R Dammann and Sl François).

[22] Case C-97/08 P *Akzo Nobel v Commission* 2009 I-08237.

stated that 'the concept of an undertaking, in the same context, must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal'. When an economic unit of this sort infringes competition rules, the Court continued, 'according to the principle of *personal responsibility*, that entity must answer for the infringement'. But who should be personally liable for the infringement when the undertaking is an 'economic unit' which transcends the legal personality of the companies comprising it? The Court had no doubt about it: 'the conduct of a subsidiary *may be imputed to the parent company* in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company … having regard in particular to the economic, organisational and legal links between those two legal entities'. In such a situation, the Court went on, 'the parent company and its subsidiary form a single economic unit and therefore form a single undertaking'. The parent company may therefore be fined 'without having to establish [its] personal involvement in the infringement'. This case law is particularly interesting because it allows the courts to get round the different legal personalities and impute responsibility to where the power really lies.

In French labour law, a similar solution was adopted to combat clandestine work: any person who indirectly uses clandestine workers is jointly and severally responsible for paying the corresponding taxes and employer's contributions, and for settling their wages. In the case of sub-contractors, the company and the sub-contractor are jointly and severally responsible.[23] More generally, joint and several responsibility results from the concept of 'co-employers' in French labour law, a concept which the courts can use to enable employees of a subsidiary to identify the controlling company, and to bring proceedings accordingly.[24]

In English law, a parent company's joint and several liability has recently been upheld in case law concerning the health and safety of a subsidiary's employee. Following a particularly interesting reasoning, the parent company was judged responsible for this employee's health and safety.[25] Here, the company's responsibility was not deduced from the effective supervisory power of the parent company over the subsidiary, but was due to the

[23] French Labour Code, Art L.8222-5.

[24] Soc 18 January 2011, FS-P+B+R, No 09-69.199, *Sté Jungheinrich finances holding v Delimoges*. See C Hannoun and S Schiller, 'Quel devoir de vigilance des sociétés mères et des sociétés donneuses d'ordre?' (2014) *Revue de droit du travail*, 44; F Géa, 'Pouvoir et responsabilité en droit du travail' in A Supiot (ed), *L'Entreprise* (n 7) 219–32.

[25] Court of Appeal (Civil Division) [2012] EWCA CIV 525 (2013) *Revue critique de droit international privé*, 632, obs H Muir-Watt.

superior knowledge it had, or should have had, of the dangerous nature of the working conditions managed by its subsidiary.

The judge considered that, consequently, 'the parent company knew, or ought to have known that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection'. The duty of care incumbent upon the suzerain extends over both the vassal and the vassal's employees. This duty is therefore not the consequence but the cause of the parent company's involvement in the affairs of its subsidiary, an involvement which is necessary in order to protect the subsidiary and its employees.

European law recently introduced the joint and several liability of customer companies, with a view to increasing protection for posted workers providing services. Ever since the Bolkestein proposal, European authorities had attempted to introduce competition between national legislations, using the international posting of employees as a key weapon. This was a way for companies to practise forum shopping for social legislation without even having to relocate their activities—a recipe taken straight out of the book of governance by numbers. For example, a 1996 Directive authorised, under not very stringent conditions, employees to work under the foreign legislation of countries where there were lower levels of protection, using a foreign company of service providers.[26] Thus European law, in a gesture which takes us back to the personality of laws, encourages competitive practices between employees in the same country but working under different legislations. The number of posted workers employed in France, as a way of dodging employer's contributions, has soared to an official figure 20 times higher than 12 years ago, a hike from 7,495 in 2000 to 169,613 in 2012.[27] In 2014, a complementary Directive attempted to remedy the most flagrant abuses arising from these practices, yet without challenging the 'competitive advantage' which some Member States gain through exporting low-cost employees.[28] Labour-exporting companies thus continue to evade payment of the social contributions which their competitors in the same country are obliged make. The 2014 Directive principally sought to protect the employees concerned from not being paid by the traders in people who hire them to work abroad for the destination company. It provided that the destination company has joint and several liability for the payment of the salaries of these posted workers.[29] This applies only

[26] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[27] *cf* the Savary Report on the government bill to increase the liability of contracting authorities and companies regarding sub-contractors, in the fight against social dumping and unfair competition, *Travaux Assemblée nationale* (2014) Report No 1785, 22.

[28] See É Pataut, 'Détachement et fraude à la loi. Retour sur le détachement de travailleurs salariés en Europe' (2014) *Revue de droit du travail*, 23.

[29] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014, Art 12.

to the building trade, but Member States can tighten the provisions and include other sectors. They can also authorise companies to guard against this risk by fulfilling *due diligence obligations*.[30] This *internalisation of rules* is a technique on the rise, as we shall see regarding compliance programmes.

Joint and several liability also figures in *environmental law*, when a parent company wrongfully contributes to the bankruptcy of a subsidiary, which is therefore unable to finance the rehabilitation of the site(s) it occupied. Today, liability extends not only to the parent company, but, where applicable, to the companies of which this parent company is itself a subsidiary or a sub-subsidiary.[31]

The 'Catala' draft bill for the reform of French contract law suggested that this type of liability be given broader scope, and that 'one who manages or organises the work of another person and gains an economic advantage from this is liable for the harm caused by the latter in carrying out this activity'. A similar rule was planned, namely that 'one who controls the economic or patrimonial activity of a dependent professional, although acting in his own interests, when the victim establishes that the harmful event is related to this control' will be considered liable.[32] The adoption of this bold proposal would have provided a legal basis for the adage *ubi emolumentum, ibi onus* ('Whoever benefits bears the burden'), extending liability for the harmful consequences of an economic activity to whoever controls it and profits from it. It could have prevented the involvement of French companies in the Rana Plaza disaster, for instance. But the Medef, the French employers' union, wheeled out the heavy artillery and effectively blasted the proposal off the legislative map,[33] such that the draft bill presented in October 2012 by the Ministry of Justice for reforming the law of contract bore no trace of it. In 2013, in the aftermath of the Rana Plaza tragedy, the idea re-emerged in the form of a bill introducing a duty of vigilance on the part of parent and customer companies.[34]

II. MULTINATIONALS' ALLEGIANCE TO IMPERIAL STATES

The case of the out-of-court settlement of 10 billion dollars which the French bank BNP Paribas paid the US in 2014 to avoid judicial proceedings has

[30] Directive 2014/67/EU, art. 12.5.

[31] French Environment Code, Art L.512-17.

[32] Catala draft reform of the law of obligations (Arts 1101 to 1386 of the French Civil Code), Report to the Minister of Justice, 22 September 2005 (draft Art 1360).

[33] *cf* on the threats of relocation by companies operating out of France, the *Rapport d'information* No 558 by M Anziani and M Béteille, *Travaux parlementaires* (French Senate, 2008–09) 64ff.

[34] French Law No 2017-399 of 27 March 2017 regarding the duty of care of parent and customer companies. See A Supiot (ed) *La dynamique de la solidarité en droit de la responsabilité* (Paris, Collège de France, coll Conférences, 2017).

drawn attention in the French media to a practice developing over the last 20 years in the United States: multinationals suspected of having infringed American legislation on corruption or tax fraud, or who breached the embargos decided by the American government against certain countries, were obliged to submit to 'compliance programmes'. The accusations were based on texts which provide for the application of US law abroad. Examples include the *Helms-Berton* (1996) and *Amato-Kennedy* (1996) Acts, concerning the embargos against Cuba and Iran. Or the *Dodd-Franck* Act of 2010, which ignored the Supreme Court's *Morrison* ruling,[35] and endowed the *Security Exchange Commission* (SEC), the stock exchange watchdog, with the power to crack down on 'any conduct in the United States which contributes significantly to an infringement, even if the financial transaction was agreed outside the US and involves only foreign investors.' Or equally, the *Foreign Corrupt Practices Act* (FCPA) in its 1998 revised version, which applies to all people connected in some way to the American territory. This can include a company trading on the American markets,[36] or even one which has signed agreements whose currency is in dollars. These provisions also make it possible to get behind the corporate veil of the different companies which make up a business.[37]

Compliance procedures can be implemented by companies voluntarily in the countries in which they operate, to avoid legal proceedings, but they can also be imposed, and not solely by the United States. The World Bank uses them to exclude companies suspected of corruption from bidding for the projects it helps finance.[38] But the US is the only country powerful enough to oblige multinationals to accept some of its laws, in the form of compliance programmes. A remarkable joint research project, headed by Antoine Garapon and Pierre Servan-Schreiber, has recently shown the extraordinary growth in these programmes over the last decade.[39] This new form of negotiated justice should not be confused with the practice of the 'guilty plea'. The latter takes place before a judge, whereas these procedures to bring companies into line are precisely aimed at keeping the courts out of any bilateral negotiations between the Department of Justice and the company

[35] *Morrison v National Australia Bank* 130 S Ct 2869 (2010).

[36] FPCA, § 78dd–1, which extends the scope of the law to 'any issuer which has a class of securities registered pursuant to section 78l of this title or which is required to file reports under section 78o (d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer'.

[37] Piercing the veil of legal personality is also the goal of the British equivalent of the FPCA, the UK Bribery Act 2010.

[38] *cf* S Manacorda, 'La dynamique des programmes de conformité des entreprises' in A Supiot (ed), *L'Entreprise* (n 7) Ch 12; A Fiorella (ed), *Corporate Criminal Liability and Compliance Programs,* Vol 1, *Liability 'ex crimine' of legal entities in Member States* (Naples, Jovene, 2012) 638.

[39] A Garapon and P Servan-Schreiber (eds), *Deals de justice. Le marché européen de l'obéissance mondialisée* (Paris, PUF, 2013).

under suspicion. Bilateral negotiation of this sort is what the *Speedy Trial Act* of 1974 enabled, because it ensures that defendants have sufficient time to prove that their conduct has been blameless. In practice, however, the suspected company is required to confess its wrongdoing during this time period, and without any of the normal guarantees of an adversarial process.

The procedure is as follows: the US Department of Justice (DoJ) receives information suggesting that a certain company has infringed American law, for example by trading with Cuba, corrupting a foreign civil servant in order to obtain a market opening, or helping to commit tax fraud against the US. The indicting information can come from any source—and the DoJ is not obliged to reveal its provenance—including from informers enticed by the prospect of receiving a reward proportional to the penalty inflicted on the company: the traditions of the Far West die hard. There are sound reasons to believe that the information can also be supplied by the National Security Agency (NSA), whose immense ears pick up information which it can see no good reason not to divulge, at times, to the DoJ. Armed with these suspicions, the DoJ announces to the company that it will be taken to court, unless it fulfills the following three conditions.

The first condition is that the company should confess its wrongdoing in greater detail, in a statement of facts which confirms the DoJ's version, and which the company pledges never to contest subsequently (a 'muzzled clause'). This confirmation of the facts, as presented by the DoJ, is not an acknowledgment of guilt in the legal sense because it is produced under threat of legal proceedings, not as part of them. The consent simply confirms a certain state of the facts, which the company is thereafter obliged to investigate (at its own cost) by means of an internal inquiry carried out by a lawyers' office approved by the public prosecutor. The company thus pledges to be entirely open with the investigators, who behave like directors of conscience—inquisitorial but also protective of those who confide in them.[40] The cost of this inquiry, which involves combing through all the documents and correspondence connected with the alleged facts, can reach astronomical figures—one billion dollars, in the case of Siemens[41]—to which should be added the settlement fine negotiated between the parties.

The second condition is precisely the payment of a settlement fine. The figures for these attain millions, even billions, of dollars, and they are a particularly profitable source of revenue for the US Treasury because they are mainly levied against foreign firms.[42] The American authorities

[40] On this schizophrenic position, see P Servan-Schreiber, 'L'avocat, serviteur de deux maîtres?' in Garapon and Servan-Scheiber, *Deals de justice* (ibid) 101ff.

[41] O Boulon, 'Une justice négociée' in Garapon and Servan- Scheiber, *Deals de justice* (n 39) 74.

[42] They have ranged from 137 million dollars (payable by Alcatel Lucent in 2010) to nine billion dollars (payable by BNP Paribas in 2014).

can also demand punitive measures against natural persons who abetted the violations. The idea here is to prevent corporate liability from replacing the responsibilities of those who benefitted from the wrongdoing: the persons involved are liable to disciplinary sanctions (losing their job) and criminal proceedings.

The third condition is to bring the company into line with American law by setting up a compliance procedure, based on programmes supplied by the DoJ, and supervised by an independent monitor ratified by the DoJ.[43] Unlike the idea of *conformity*, which implies the state of corresponding to a norm, the term *compliance* implies a procedure of standardisation, and hence the programming of how a company should operate: any deviation from the norm by the company must be abolished, so that the latter's normal state of functioning conforms to the demands of the American authorities. Additionally, unlike voluntary monitoring of conformity, the programming involved in compliance is supervised by an independent inspectorate for the entire duration of the agreement (from one to four years). Its role is to supervise the application of the agreement, report any shortcomings, and certify at the end of the process that the company has now adopted a sufficiently robust compliance programme for the attested violations not to recur. Another particularity of this system is that it requires compliance with American law alone, despite its possible conflict with the legislation of other countries in which the company also operates. For example, on issues of transparency, American law may force a French company to disclose to the American authorities information which under French law is expressly classified.

The commitments emerging from the compliance programme are set out in a 'deferred prosecution agreement', which guarantees that there will be no legal proceedings for as long as the company respects the agreement. The threat of prosecution is extremely effective because were prosecution to be triggered, the multinationals concerned would be banished from the American markets until the end of the trial. The post-Rana Plaza agreements also brandished this threat of banishment, but whereas the *market power* of multinationals is within particular industries and within the countries in which they operate, the USA's *power market* is infinitely greater, effectively sovereign, and it cannot be challenged without economic death. To date, no multinational has taken the risk of banishment, and all have complied with the DoJ's desiderata. They have thus sworn allegiance to the American authorities, entering into a legal structure similar to the one identified in the employment relationship and in the relations between customer companies and their sub-contractors or suppliers.

[43] See the provisions of the Anti-bribery and Books & Records Provisions of the Foreign Corrupt Practices Act, Title 15, Ch 2B, § e.

Conclusion

Ways Forward

> Mathematical formalism, whose medium, number, is the most abstract form of the immediate, arrests thought at mere immediacy. The actual is validated, knowledge confines itself to repeating it, thought makes itself mere tautology. The more completely the machinery of thought subjugates existence, the more blindly it is satisfied with reproducing it.
>
> Max Horkheimer and Theodor Adorno, 'The concept of Enlightenment'[1]

ALTHOUGH A FEELING of civilisational disquiet is nothing new—it was diagnosed by Freud in 1929, in the aftermath of the Wall Street crash[2]—it certainly seems to have gripped Europe today with an intensity unknown since the Second World War. Legal analysis may not probe to the depths of psychoanalysis, but it can certainly help identify the underlying forces at work in a given society, and diagnose the ills affecting it. Our contemporary economistic *credo* simply explains away this disquiet by means of formulas, indicators and charts. Thus we are shown graphs of variations in unemployment rates, with the promise that the curve will shortly 'show an upturn', according to a logic which blithely confuses how a situation develops with its geometrical representation.[3] These sorts of confusion reflect more generally how the regime of governance by numbers loses all contact with reality, and substitutes the map for the territory in its organisation and running of public affairs. The dismissal of the real in favour of its quantified representation leads to what the American economist Paul Krugman has called 'an intellectual breakdown' (applied here to the French leadership),[4] the result not of mental, but of institutional deterioration. This phenomenon has various causes, and has taken various forms over its long history, as we have attempted to show.

[1] 'The Concept of Enlightenment' in Horkheimer and Adorno, *Dialectic of Enlightenment. Philosophical Fragments* [1944] (ch 2 fn 62) 20.

[2] 'Men have now come so far in dominating the forces of nature that with the help of the latter it is easy for them to exterminate each other down to the last human. They know it, and that is a large part of their present disquiet, unhappiness and their underlying anxiety' (Sigmund Freud, *Civilisation and its Discontents* [1930]).

[3] On this confusion, *cf* J-P Dupuy, 'La croissance vaut-elle d'être vécue?' *Le Monde Eco et Entreprises*, 4 February 2014, 12.

[4] 'When Mr. Hollande became leader of the second-ranked euro economy, some of us hoped that he might take a stand [on neoliberalism]. Instead, he fell into the usual cringe—a cringe

With the advent of modernity, the age-old Greek ideal of government by laws rather than by men developed a new figure: government as a machine. An identical collective imaginary thereafter subtended the development of science and technology, and of law and institutions. It was the dream of a world entirely mastered and transparent to itself, in which each person may act as a sovereign subject, freed from the power of men as from material needs. Classical physics, the second industrial revolution and the rule of law contributed, each differently, to giving this imaginary its first modern form, that of a world ruled by general, abstract laws which can ensure that actions are performed efficiently. After the Second World War, a new mode of this impersonal power developed, with numbers progressively superseding laws as the basis of obligations between people. Governance by numbers, sustained by the ICT revolution, attempted to bring about a society in which there would be no heteronomy, in which legislation would be replaced by programming and rules by technical regulation. Soviet central planning was the first system to reduce the function of the law to an instrument for implementing calculations of usefulness. The cybernetic imaginary amplified this tendency by imposing its vision of a networked natural and human world in which the difference between humans, animals and machines tends to zero, since each can be conceived as a homeostatic system communicating with the others. This new stage corresponded to the passage from economic liberalism, in which economic calculations were subject to the law, to neoliberalism, in which the law was piloted by economic calculations. The market paradigm is today applied to all human activities; it has replaced the Basic Norm on a global scale. Capitalism has thus mutated into an anarcho-capitalism which destroys frontiers, subjugates states and dismantles the rules designed to protect the three fictional commodities identified by Karl Polanyi: nature; work; and money. And not a day passes without the media—that modern equivalent of religious zealotry—banging on about how necessary this subjugation is. Yet it cannot but result in the collapse of the whole system: it was only within the framework of national legal systems which can ensure some damage-limitation that the fiction of nature, work and money as commodities was sustainable.

Whenever an ideology loses a sense of limits, these will inevitably return in catastrophic ways, as soon as its limitless pretentions come up against the reality principle. So it is with our anarcho-capitalism, which gave us a foretaste of its destructive potential in the 2008 financial crisis, despite the amazing sleight of hand of arguing in its aftermath for a rapid dismemberment of the social state. We can predict that this dismemberment and the establishment of calculations of individual utility as the sole norm—flying in the face of democratic principles—will generate new forms of violence,

that has now turned into intellectual collapse. And Europe's second depression goes on and on' (P Krugman, 'Scandal in France' *The New York Times* (16 January 2014)).

combined with the ecological disasters generated by the over-exploitation of the planet's natural resources. When the state no longer assumes its role as guardian of people's identity, and of their physical and economic security, then people will inevitably pledge allegiance to any group claiming to provide such guarantees—be it clans, religious factions, ethnic identities or mafia networks. Such networks of allegiance, both legal and illegal, have already penetrated every level of human activity. Within them, each person depends on the protection of those stronger than he and on the dedication of those weaker. Governance by numbers, as a radical form of impersonal power (an impersonality to which the law already aspired), has thus paradoxically spawned a world of bonds of dependence. In it there can be no difference marked between countries and businesses, or public and private. The realm of the law had been structured around the vertical axis of a public sphere (the sphere of the incalculable), and the horizontal plane of private interests (which can be conceived as the sphere of mutually adjusting calculations of individual utility). The suppression of the Law's heteronomy—legal rules treated as just another product competing on a market of norms—has generated a double movement of privatisation of public responsibilities and 'publicisation' of private ones. This is not a value judgment on our state of affairs, but simply a snapshot of the laws in force today. It can show us why governance by numbers is an unsustainable system, and why our representation of the future is no longer one of revolution but of catastrophe.

One of the defining characteristics of the West is that it idolises ideas, a tendency as dangerous when its object is law as when it is numbers. The role of a legal system, in the epoch of ruling by law, was precisely to temper this idolatrous tendency by filtering laws through systems of interpretation which the law-makers themselves were obliged to respect. Arguably, the same critical filters should be applied to numbers. Mathematics are a potent tool, but they may also generate a sort of mysticism, as the great Polish late-nineteenth-century mathematician Sophie Kowalevski described, in a letter to a friend: 'Everything in life seems to me so drab, so uninteresting. In such moments, there is nothing better than mathematics. No words can describe the balm of feeling that a world exists from which the Self is entirely absent. If only one could always speak only of impersonal subjects!'[5] Kowalevski's experience shows us the fascination exerted by numbers, ever since Pythagoras, but also the exorbitant price paid for letting calculation dominate the legal sphere: it eliminates any thought for people of flesh and blood. In order to avoid this, a sense of measure must be preserved in every practice of quantification. Law can help maintain or

[5] S Kowalevski, quoted by A Barine, 'La rançon de la gloire. Sophie Kovalesky' in *Revue des Deux Mondes*, 1 May 1894, Vol 123, 379.

restore this measure, by making it obligatory to observe the adversarial principle in the way numbers are treated and interpreted, whenever the results are to have normative force.[6] However, restoring this sense of measure cannot be achieved without challenging politically the power which the plutocratic ruling classes have won in most countries today. Their motivation is anything but mystical, and their unbridled greed and destructive power make Marx's critique of capitalism from 150 years ago once again acutely topical.

In view of the dogmatic position acquired by neoliberal economic doctrine, including in the sphere of law, there is little chance that criticism of this system of belief will be heard on the 'market for ideas'[7] which seems to have replaced the public forum today. Criticism can nonetheless help us reflect on the future, and make the transition from diagnosis to antidotes. And the first thing to do is to dismantle the systems of allegiance being woven before our very eyes as defensive reactions to the unsustainability of the regime of governance by numbers.

This is why the employment relation, which has been the matrix of many forms of government since the industrial era, has been a major focus here. In tracking its transformations, we identified the emergence of the tie of allegiance, which in its modern form has two essential features. First, the total mobilisation of one person in the service of another. Unlike its Taylorist version, however, this mobilisation manages the mind as much as the body, organising work not through mechanical obedience to orders but through the programming of feedback. The corollary of the sphere of autonomy granted to workers for carrying out their prescribed objectives is the right of employers to have their workers' 'functioning' measured and evaluated at any time. The work objectives are thus made inseparable from quantitative performance indicators which the worker has no part in defining. Workers subjected to these 'objective indicators' are divorced from the reality of the world on which they act, and bound into a speculative spiral from which they may not escape other than mentally deranged or criminally indicted. The second feature of the tie of allegiance is the employer's responsibility to ensure that employees continue to be economically productive, to adapt in 'real time' to the needs of the market, whether they are in work or have been made redundant. The degree of commitment required of the employer depends on the occupational status of the employee, ranging from a maximum for highly qualified staff on permanent contracts, and hardly any at all for the unqualified casual worker. A similar situation obtains in relations between dominant and less dominant businesses, and between the American

[6] *cf* on this point A Supiot, *The Spirit of Philadelphia, op. cit.* Ch 6; as well as above ch 9, p 181ff.

[7] On this expression coined by Ronald Coase, see above, ch 7, p 125.

Empire and multinationals: vassal businesses swear to stand always at the ready, constantly scrutinised and called to account by suzerain businesses or the sovereign authority, which in return promise to see to their economic survival.

The disappointing ruling of the French Constitutional Council on the French Law on employment protection of 2013, discussed above,[8] is a good example of how the total market can capture new protective measures while stripping them of their dimension of solidarity. Employee protections, which the employer must contribute to, were to be attached to the employee in person, and not to his or her job. There are two ways of conceiving this protection beyond the particular employment contract: in terms of insurance, using actuarial risk assessments; or in terms of pooling risks, based on solidarity within each industry sector. The Constitutional Council's decision in favour of the insurance lobby points to what will doubtless be the most important institutional challenge of the years to come: how much space will be given, in the legal order, to the market and how much to solidarity. If the ideas I have developed in this book are correct, then we are no more likely to return to the reign of the law than we are to see governance by numbers become a permanent fixture. As we have seen, contemporary social relations of production have revived the tie of allegiance, and this is probably an irreversible trend in the new historical era opening before us. Like every legal bond, the tie of allegiance implies the existence of a third which guarantees its binding force. For example, in the agreement made between European companies in the aftermath of the Rana Plaza disaster, the ILO guarantees the fund these companies set up for legal and financial solidarity with their Bangladeshi providers. By contrast, in the French Constitutional Council's ruling on complementary employee health cover, solidarity between companies was destroyed, and the protection owing to employees was left to the insurance market.

The principle of solidarity is today the legal order's last bastion against the market.[9] Hayek, a remarkable, if remarkably limited, thinker understood this, and declared it bluntly: 'Solidarity', he said, 'is an instinctual hangover from the days of tribal society'.[10] It must be eradicated in order for *catallaxis* to rule on a global scale, that is, 'the order generated by the mutual adjustment of many individual economies on a market'.[11] 'A Great Society', he declared, 'has no place for "solidarity" in the strict sense of the term, that is, for people coming together around known goals. The two

[8] See above, ch 13, pp 254–255.

[9] *cf* A Supiot (ed), *La solidarité. Enquête sur un principe juridique* (Paris, Odile Jacob, coll des travaux du Collège de France, 2015).

[10] Hayek, *The Mirage of Social Justice* (ch 10 fn 20).

[11] ibid.

are even incompatible'.[12] Since the total market requires the liquidity of 'human capital' in order to establish itself globally, it thereby also requires the liquidation of all the forms of human 'alliance' implied by solidarity. If, however, in the footsteps of Karl Polanyi, one says that the markets are 'a useful, but secondary, element in a free society',[13] things look quite different. The problem is then to 're-embed' markets in society, and not to reduce human life to economic life, nor economic life to the market economy. A break with capitalism's present form is vital for restoring a balance between competition and cooperation, which in turn is essential for making work humane, for the spirit of enterprise,[14] the successful functioning of the markets in products and services, and the protection of the planet.

The social state was a first attempt to do this, re-embedding the economy in society. Despite its real successes, it had two weaknesses. The first and most obvious weakness was that it rested on national legal frameworks. These have been drastically affected by the elimination of trade barriers and by the introduction of competition between social, tax and environmental legislation internationally, as well as by the digital revolution, which has made it possible to deterritorialise all tasks focusing on signs not things. The second weakness, which is more rarely noted, is that the social state, in this similar to Communist regimes, excluded fair organisation of work from the field of social justice. There was a consensus to the effect that the organisation of work at its different levels (the individual, the company, the nation and international trade) was a purely scientific and technical issue, illustrated by Taylorism in the past, and today incarnated in management by objectives and governance by numbers. What is overlooked here is the anthropological dimension of work, understood in its broadest and most concrete sense of human beings' need to inscribe into their everyday living environment the mental images which guide their action and collaboration. Excluding this dimension has had devastating effects not only on the institution of reason, but also on creativity and respect for the ecumene. Restoring sustainable institutional frameworks requires regaining a sense of limits—not only territorial limits, but also limits on the *hubris* of accumulation and on humankind's omnipotent treatment of nature—and also a sense of solidarity: solidarity within and between human communities, and also ecological solidarity between the human species and its lived environment.[15]

This is the broad context within which today's revival of ties of allegiance and their reshaping of the legal order should be placed. This revival

[12] ibid.

[13] K Polanyi, *The Great Transformation* (ch 11 fn 21).

[14] *cf* A Supiot (ed) *L'état de l'entreprise dans un monde sans frontières* (Paris, Dalloz, 2015).

[15] *cf* A Berque, *Poétique de la Terre. Histoire naturelle et histoire humaine, essai de mésologie* (Paris, Belin, 2014), 238. For a similar position, see the concept of 'anthropo-cosmic solidarity' outlined by A Cheng, 'Solidarités horizontales et verticales en Chine ancienne' in *La solidarité: enquête sur un principe juridique*, Ch 7, p 139–50 (ch 10, note 33).

catalyses the decline of the state, and brings back the law of the jungle, as many regions of the world demonstrate. But this change can also encourage us to examine the functions of the state afresh. Now that it has lost its monopoly on organising solidarity, the state's role should be to guarantee the articulation between national solidarity and solidarity organisations within civil society and internationally, which are woven through these networks of allegiance. In the face of private interests, and financial or religious powers, however, the state must remain the ultimate guarantor, capable of making the general interest and democracy prevail for everyone. A first step in this direction would be to restore the principle of democracy, not only in the political sphere (where it has been discredited by the EU), but also in the economic sphere, by empowering those who work to have a say in the goals and meaning of what they do.

Index of Names

General Index