Is 'Legal Tinkering' Irrational?

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In this time of transition, the process known as 'legal globalisation' remains unfinished and seems to defy rationality: globalisation is not a totality, aggregated once and for all, but merely an accumulation, both heterogeneous and temporary, of expansionary movements in space. The 'polycrisis' we are experiencing and the search for a global community based on the rule of law undoubtedly call for a break with nation-states, with which legal systems are still most often identified. It is thus because of this discrepancy between facts and the legal narrative that the apparent irrationality leads to 'legal tinkering': in the absence of a global State, the awareness of belonging to an emerging global community encourages certain actors in globalisation to 'tinker'. Hence the question: is this tinkering, which initiates a transition but creates uncertainties about the validity of legal norms, rational? My hypothesis is that the variations between formal rationality (which determines the predictability of the norm), empirical rationality, (which controls its effectiveness and efficiency), and finally axiological rationality (which conditions ethical legitimacy) can help to understand the divergences between discourse and observable

practices. Knowing that failures teach as much as successes, I will take examples from two 'laboratories': European law and climate justice.

Is "Legal Tinkering" Irrational?

In this time of transition, the process known as 'legal globalisation' seems to defy rationality. Admittedly, it remains unfinished: globalisation is not a totality, aggregated once and for all, but merely an accumulation, both heterogeneous and temporary, of expansionary movements in space either relating to flows — financial flows, information flows, flows of people — or risks — social, ecological, health, climatic. Such movements, according to Junger Habermas, resulted in uniting our fragmented societies into an involuntary community of risks. Let us add to that the appearance of global crimes eliciting universal condemnation — e.g. crimes 'against humanity', or the impending crime of 'ecocide', still in the planning stage. Mutual dependencies have strengthened to a point that no State can pretend meeting major contemporary challenges alone: humanitarian tragedies like migration or extreme poverty, global terrorism, financial, social and health crises — the list goes on. However, one blatant example illustrating the powerlessness of national communities to counter the global nature of the challenge is climate change. (1)

Climate change shows that new realities call for a departure from the narrative of the nation-state. In our time, where humanity is transforming itself into a telluric force, capable of influencing the future of the planet — a phase that geologists sometimes call '*Anthropocene*'— it would be paradoxical if humankind remained incapable of governing itself, unaware of its limits — whether biological limits of human beings or ecological limits of the planet's resources, i.e. *planetary boundaries*.

When evoking common bounds and shared responsibilities, one could assume that this notion of limit would presuppose a law-based community; but how can such a community build itself on a global scale when current systems of law still remain associated with nation states?

It is thus because of this discrepancy between facts and the legal narrative that the apparent irrationality leads to 'legal tinkering': in the absence of a global State, the awareness of belonging to an emerging global community encourages certain actors in globalisation to 'tinker'. Used in

anthropology by Claude Lévi Strauss — 'tinker' there means using 'what's to hand' — and in biology by François Jacob — 'tinker' here means 'making something new out of the old'— the term may come as a surprise in the legal field, and may even alienate lawyers, who have a more noble vision of law. And yet, tinkering in globalisation consists of a double process of interaction between the national and international levels. On the one hand, it is a matter of 'internationalising' national laws by harmonizing them, however without standardizing them: a routine process in the laboratory that is now Europe. On the other hand, it is a question of 'contextualising' international law by broadening its reach: a reverse process which can be observed in another 'laboratory', that of climate justice.

This dual process leads to a complexity, which drowns law students into despair, but fills professors with delight and lawyers with fortune. But what is most serious is that this complexity, misunderstood by leaders, is poorly explained to citizens who often fail to grasp it and thus, end up rejecting it. Besides, they now can — which is a leap forward for democracy — express their concerns and federate their anger on social networks. What is more, concern and anger are all the stronger since the pace at which the internationalisation of practices happens is even too brisk to be fully understood by lawyers and accepted by litigants, while contextualisation, which is almost invisible, is largely ignored. Thus, the temptation arises for political leaders to give in to the demagogy of great sovereignist tales, claiming to simplify and solve everything by rejecting globalisation, whereas this phenomenon is, without a doubt, inexorably linked to the spherical shape of the earth which, as Kant wrote, prevents it from dispersing itself *ad infinitum*. Brexit shows how difficult it is to leave the European Union (EU), so how could one leave the planet? Let us simply remember how, by withdrawing the American signature from the Paris Climate Agreement, President Trump could still not prevent the commitment of transnational corporations (TNCs), cities, states and other local authorities.

Hence the question: is this tinkering, which initiates a transition but creates uncertainties about the validity of legal norms, rational? In an attempt to answer this, and drawing inspiration from the theories on the plural validity of legal systems – notably from François Ost and Michel van de Kerchove – I shall distinguish between *formal rationality*, which determines the predictability of the norm, *empirical rationality*, which controls its effectiveness and efficiency, and finally *axiological rationality*, which conditions ethical legitimacy. My hypothesis is that the variations between these three types of rationality can help to understand the divergences between discourse and observable practices. Knowing that failures teach as much as successes, I will take examples from the two 'laboratories' mentioned above: European law and climate justice.

Formal rationality: from binary logic to 'non-standard' logics

Despite formal rationality often being associated with the principle of non-contradiction and binary logic, the appearance of 'non-standard' (non-binary) logics can contribute to rationalising certain forms of tinkering, particularly in the two areas explored here.

In European law, tinkering is almost permanent. There, doing something new with the old implies starting from unified and stable systems of law – national and international – and moving towards a more complex, harmonised and unstable law, which mixes national, intergovernmental and supranational sources. On the one hand, national laws are 'Europeanised', for example when mutual recognition requires criminal legal systems of different countries to be aligned through a process of harmonisation around common objectives. On the other hand, however, when absolute unification appears as a disproportionate project, European judges rather try to 'contextualise' the European standard. For instance, the European Court of Human Rights (ECtHR) has introduced a national 'margin of appreciation' (subsequently enshrined in an additional protocol to the European Convention on Human Rights) regarding the obligations of Member States under the Convention, making it possible to take into account the national context (cultural, economic, historical, political, etc.). This method grants European standard a certain space of manoeuvre in sensitive cases concerning, for instance, the wearing of the veil. Similarly, national judges, with regard to the liability of TNCs, practise a different kind of tinkering between *soft law* (flexible, non-binding and non-legalised law) and *hard law* (precise, binding and legalised law) — the distinctions between the two types of normativity are however becoming porous.

Such methods, by increasing the margin of interpretation, give rise to a fear of arbitrariness on the part of judges, since their reasoning escapes binary logic. Decisions then are 'rational' only if they follow other 'non-standard' logics, such as *fuzzy logic* — which is in fact a gradation logic. It substitutes an obligation of proximity for that of identity and thus leads to a decision of compatibility instead of conformity. In order for the decision to then be rational, it must meet two conditions: greater transparency in the motivation (the criteria for assessing proximity must be made explicit) and rigour in the weighting (the criteria must be defined in the same way and with the same weight from one case to another). These conditions make it possible to allow a 'margin' and thus to determine a 'compatibility threshold,' while avoiding the risk of arbitrariness. They show that it is still possible to make a rational use of fuzzy concepts by means of an argument which remains logical while allowing, thanks to the compatibility threshold, for the conciliation of two different sets.

In 2005, European leaders failed to understand this, and consequently failed to explain it to the people. Thus, the draft '*Treaty establishing a Constitution for Europe*,' submitted to a referendum vote in France and the Netherlands, was defeated. Described as a 'legal monster,' this hybrid project was nevertheless necessary in Europe, as it combined common

objectives set out in a 'constitution' (supranational) with their implementation based in a 'treaty' (intergovernmental). Had the project been successful, the method could have been transposed to a global scale, particularly in the area of climate change.

As far as climate is concerned, the causal links between the operative event and the damage are multiple and interacting, making the imputation of responsibility uncertain. The same applies to the choice of measures to be taken when facing such risk of irreversible damage: the punishment comes too late and reparation is imperfect. An attempt must therefore be made to anticipate the damage by combining, as the Paris Climate Agreement suggests, common objectives, which can be regularly updated, and 'common but differentiated responsibilities': 'common' because of the joint objectives, but 'differentiated' because their implementation varies according to the national context, itself evolving. The difficulty is that this method presupposes that the evaluation of responsibilities follows the same criteria in all States, whereas in practice, each State communicates its contribution, which is determined at national level without a genuine common grid guaranteeing comparability. In other words, there is a close link between formal and empirical rationality.

Empirical rationality: or how to govern without government

We will start with climate justice: global governance operates without any government strictly speaking at its head, since the legislative and executive powers remain in the hands of the States. In contrast, we are seeing the powerful upswing of judges, which could eventually place judicial 'power' at the global level. Several international courts promptly jump to mind, including the potential role of the International Criminal Court or the International Tribunal for the Law of the Sea, or the impending International Tribunal for the Environment, already put forward by some. Right now, national courts are the most effective, since their judges act as global judges and sanction violations of international commitments. But the most powerful driving force seems to come from non-state actors, which are beginning to act as real counterweights: the combination of the scientific knowledge with the lived experience of populations edifies the will of the world's citizens, which drives NGOs and other civic actors. Ideally, this alliance of Knowledge (Savoir) and Will (Vouloir) would provide a framework for political and economic Power (Pouvoir), which we will call the 'SVP' governance.

In concrete terms, the 'recipe' for a successful climate lawsuit would be simple: bring together particularly vulnerable plaintiffs, 'tangible' legal defendants and 'innovative and solid' legal foundations. The example of the Julianna case — a lawsuit brought against the US federal government by a group of 9-19-year olds and their guardian with regards to the risks to future generations created by carbon dioxide emissions — is generally cited. The case was declared admissible and a decision is thus awaited. (2)

In reality, climate lawsuits illustrate the extraordinary complexity of a global law, characterised by an interactive normativity (arising from multiple horizontal and vertical, top-down and bottom-up interactions) and evolving with unpredictable shifts, downturns or bounces, which call for vigilance and inventiveness. They also reveal the extent of the change in legal thought, which cannot any longer bind the concept of law to that of the State, and is thus forced to build a rule of law without a global State. Thus, the rule of law lies 'between the national and the international' and, perhaps, goes even beyond this distinction, as it is the case in Europe.

As for European law, governance was from the beginning oriented around two poles. Indeed, the treaties had built the European communities on the one side around the concept of common markets (Coal/Steel Market, or ECSC, Common Market, Single Market, Economic Community, and finally the European Union); and, on the other side, around the Council of Europe, COE. The most astonishing event was the creation of the two aforementioned jurisdictions (CJEU and ECtHR). Initially, it seemed possible to align the two courts (as embodied in the EU Charter of Fundamental Rights in 2000), who agreed to avoid clashes that were too obvious.

But the case law of the Luxembourg Court (EU) hardened after the creation of the World Trade Organisation, WTO (1994), and then again after the crisis of 2008. The separation between the protection of the common market and human rights subsequently worsened, considering how human rights legislation stagnated at the global scale. All the more so since, in the aftermath of the 09/11 attacks, the United States, confronted with global terrorism, renounced the democratic separation of powers and openly transgressed human rights.

And now, we discover with Brexit that the European construction is not irreversible. On the contrary, a process of deconstruction, provided for in the Lisbon Treaty but never really debated on, can take place, despite the previous failures of all attempts at stabilisation and coherence — starting with the aforementioned Constitutional Treaty. Even the cautious readjustment attempted in Lisbon — where 'European values' were recognised (including the rule of law) and a procedure in the event of violation was created (Article 7 of the Treaty of Lisbon) — could not prevent the exit of the United Kingdom (Brexit), nor the arm wrestling with Hungary, then Italy, displaying its xenophobia, or Poland, committed to put judges under the tutelage of the executive power. Thus, the failures, whether observed in the climate justice laboratory or in that of European law, lead us to believe that an anthropological refoundation is necessary, in order to consolidate the empirical rationality of the legal tinkering by reference to common values.

Axiological rationality: an unusual compass

Where can we find a compass when our societies have lost the North Pole? In 1945, at the end of World War II, adherence to the triptych 'Democracy, Rule of Law and Human Rights' seemed assured. In 1948, the victors also believed to have given the world a compass with the Universal Declaration of Human Rights (UDHR). The path for the construction of both Europe and the world hence seemed delineated. All the more so, since the fall of the Berlin Wall in 1989 heralded the end of the Cold War. However, it was not long before the universalism of the UDHR was challenged at the 1993 Vienna conference. It was then confirmed: the creation of the WTO in 1994 quickly changed the economic balances and underlined the unequal financial equilibria created during the post-war period (Bretton Woods Agreement). In December 2018, the anniversary of the UDHR was celebrated in a gloomy atmosphere, with Chancellor Angela Merkel openly expressing her doubts about the adoption of such a declaration 70 years later. So, what happened?

Perhaps the victors of the war, locked in their vision inherited from the Renaissance and the philosophy of the Enlightenment, remained blind to the transformation of humanist values. Blind especially to the ongoing geopolitical upheaval. For a long time, societies had constructed their own compasses. Each community had a symbolic pole of attraction imposed by legal provisions, written or customary law, rites and even religious commandments. Depending on the way memory and oversight had structured its history, each community had organised itself around 'its' North Pole. And now, with the process of globalisation, communities have lost their North and their national compasses fade away, one after the other. Turning like weathervanes to the four corners of the globe, we wander in nostalgia for a memory which hardly exists on a planetary scale, and which, even on the scale of Europe, is quite thin.

In place of the pledges, made from the post-war period to the UDHR, climate change is substituting a disaster story, that of the collapse of the ecosystem. Humanity slowly discovers that it merely is a component, depending on this very Mother Earth it thought it owned. This interdependence calls for solidarity, hardly compatible with the spirit of competition and the growth objective laid out in the programme of the *All Market*, revisited by China and its new Silk Roads, which caresses the perspective of a *World Empire*. Finally, the post-humanist dream of an augmented humanity could take us out of that state of humankind and into a world of the *All-Digital*, put at the service of societies whose social bond would be, as an alternative to profit, only fear...

In order to regain an axiological rationality, i.e. common values, it is necessary to integrate various visions of humanity. Indeed, as essential as it is, Enlightenment humanism is insufficient in the face of current challenges (financial crises and the attendant social inequalities, climate change, health crises, etc.).

'Relational' humanity, undoubtedly the oldest, evokes the human being in a proximity relationship. With migration, we rediscover the somewhat

forgotten principles of fraternity and hospitality. The French Constitutional Council recognised in 2018 (even if it drew few practical consequences from it), the applicability of the principle of fraternity to frame the offence of 'solidarity' (by helping migrants to stay in France). This vision of humanity is currently poorly accepted, yet it is in line with most historical traditions.

Nevertheless, it is the *emancipated humanity*, born in Europe during the Renaissance and the Enlightenment, which will be inscribed in the 18th century Declarations and then in the UDHR, the ECHR and other regional conventions. By recognising the equal dignity of human beings (Art. 1), the UDHR regulates both security and freedom and opposes security abuses in order to limit their excesses. For example, in the fight against terrorism, this principle prohibits torture, regardless of the seriousness of the threat. And the same principles of equality and dignity regulate the excesses of freedom (prohibition of eugenics and human reproductive cloning).

As interdependencies develop, not only between States or between living humans, but also between present and future generations — and even between living humans and non-human beings — they mark a break with the humanism that separated man from nature. Instead of wanting to 'un-bestialize Man,' as Erasmus advocated during the Renaissance, we recognise that humans belong to nature. He is only one of its components, not its owner (see above). This *humanity of interdependence* calls for two new principles on a planetary scale, still little or poorly applied: a principle of solidarity between humans (social solidarity) and between humans and non-humans (ecological solidarity, within the Earth's ecosystem). Thus, new legal categories appears, modifying the definition of 'persons' and 'property', and going as far as recognising the legal personality of the elements of nature (rivers, mountains, regions) and attributing rights to future generations (solidarity over time), as evidenced by the emergence of the climate trials since 2015. But these are people without responsibility, and rights without reciprocity. Perhaps it is better to speak of human duties to declare global common goods non-appropriable, and criminalize their destruction: to genocide would be added ecocide.

Finally, *undetermined humanity* would condition the principles of responsibility and creativity. Indeed, a debate has opened on the notion of 'dangerousness' (the individual labelled dangerous is no longer responsible). The debate could be revived with the appearance of biotechnologies and a 'manufactured', selected human being (embryo sorting in medically assisted procreation practices, MAP), or even the human being 'augmented' by the artificial intelligence of the post-humanist current.

When added over time, these four humanisms form a spiral that can generate regulatory principles. In resonance with the winds of globalisation, they make it possible to reconcile seemingly irreconcilable

couples as security/freedom (principles of equality and dignity); integration/exclusion (principles of fraternity and hospitality); competition/cooperation (principles of social and ecological); innovation/conservation (principles of responsibility and creativity). In this sense, the spiral of humanisms and the octagon of regulatory principles perhaps foreshadow the compass that would enable us to find our way through the headwinds of globalisation. An unusual compass because neither globalisation nor Europeanisation can legitimise one axiological choice over another: security without freedom leads to totalitarianism, but freedom without security can lead to chaos; competition without cooperation reinforces inequality and fuels conflict, but cooperation without competition can become collectivism; exclusion without integration leads to wars, but integration without exclusion can lead to deadly fusion; innovation without conservation can lead to ecosystem collapse, but conservation without innovation leads to paralysis.

We therefore need a compass without a magnetic pole, but with a centre of attraction where the regulatory principles born of the spiral of humanisms would meet to reconcile the irreconcilable. Immersed in this octagonal centre, which may seem empty because it does not impose any model, the plumb line of good governance can accommodate various possible destinies. The whole, conceived as a mobile installation, would be our compass. An anti-compass, one might say, thinking of the anti-matter in the black holes of our galaxy. In any case, an instrument of orientation towards a dynamic equilibrium, that is to say, an equilibrium whose movement would allow to stabilize societies without fixing them and to pacify humans without standardizing them. In these suspended moments between the *World of Before*, which has become increasingly chaotic, and the *World of After*, where the project of a static, perfectly rational and predictable world order points, I would like to believe that it is possible to substitute such a dynamic balance for a static order. Without renouncing a 'universalisable' common law without a world state or an acceptable world governance without a world government, we must soften formal rationality (non-standard logics), make empirical rationality more complex ('SVP' governance) and invent a compass to move towards an open and plural axiological rationality. Lucid about a collapse that is more threatening than ever, we could then remain confident in the possible upturns of this story of the human adventure that can be called 'globality'.

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NOTES

1. This study, which dates back to the beginning of 2020, does not mention the pandemic that broke out in March, although it confirms the above observation of growing interdependencies and demonstrates the absurdity to which the lack of global governance can lead.

2. See Les procès climatiques - Entre le national et l’international, C. Cournil et L. Varison, Pedone, 2018.