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Zouridis, Stavros; Muller, Sam; Polakovic, Peter

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The Future of Law and the Law of the Future

Stavros Zouridis, Sam Muller and Peter Polakovic*

In 2011, we published the world's first *Law of the Future Scenarios*.[1] It was an attempt to picture the trends most relevant for the global legal environment towards 2030. For those who do not know: scenarios are neither predictions on what the future will look like nor images of desirable futures. Quite the contrary: they are wind tunnels in which strategies can be tested for robustness, in a variety of winds.

By publishing these scenarios, we hoped to provoke more future-oriented thinking about legal systems. Rather than moving along law-by-law, court-case by court-case, election-by-election, we hoped we could stimulate a longer, more strategic approach to how we might want our legal systems to change.

At the time of publication of the scenarios, at least two beliefs seemed persistent. Despite the economic and financial crises triggered by the bankruptcy of Lehman Brothers in 2007 and the many crises that Europe has encountered since, the debate on the European Union ('EU') was first guided by a belief in multilateral and supranational legal and governance regimes. Even at the time of writing in 2018, this belief seems unshakeable. For example, the European Commission in 2017 published a white paper on the future of Europe. Whereas our scenarios have been developed in order to prepare for an uncertain global legal environment, the European Commission presented five scenarios as policy options. These policy options are presented as neutral, but the descriptions of the scenarios implicitly assume that European solutions for problems are better than national

* **Stavros Zouridis** is Professor of Public Administration at the Tilburg School of Governance (Tilburg University). **Sam Muller** is Director of The Hague Institute for the Internationalisation of Law ('HiiL'). **Peter Polakovic** is Research Assistant at HiiL.

1 Sam Muller *et al.* (eds.), *The Law of the Future and the Future of Law*, Torkel Opsahl Academic EPublisher ('TOAEP'), Oslo, 2011.

ones. For example, in describing the pros and cons of the scenario 'Those who want more do more', the European Commission argues that the gap between public expectations and actual governance performance starts to close in the countries that want and choose to do more. Hence, the assumption is that European solutions are intrinsically more effective than national solutions. When our scenarios were published, there was a widespread idea that globalisation creates new transnational problems that, in turn, require legal and governance solutions that transcend national boundaries. Even in 2018, politicians who question the inevitability of such a progression are usually referred to as populists. The banking and fiscal crises spurred a second belief at the start of this decade – next to the necessity of international governance and law, these crises allegedly proved that private legal and governance mechanisms of self-regulation do not work. Self-regulation and private governance regimes were increasingly questioned, fuelled by financial crises and industrial scandals (such as the emissions scandal in the EU). In turn, we observed a strong demand for international public governance regimes.

Our scenarios opened up alternative futures for the global legal and governance environment. Some seven years after we first published the *Law of the Future Scenarios*, we have decided to produce an update herein. We seek here to answer the questions: Which scenarios seem to evolve? What trends can be observed in the global legal and governance environment? A framework for such an update has been provided by the EU-funded FLAGSHIP project. Using the European Commission's White Paper as a point of departure, we have been able to re-think both the trends and the scenarios, and use the scenarios as a wind tunnel to test the robustness of the legal and governance strategies of the European Commission. The chapters in this volume reflect on the trends that underlie the *Law of the Future Scenarios*, and serve as a third building block for testing the robustness of the EU's legal and governance strategies.

In this introduction, we summarize the subsequent chapters and use insights borne thereof to conduct such testing. This chapter starts with a brief explanation of the *Law of the Future Scenarios* and a recapitulation of the EU's legal and governance strategies (section 1.1). Next, we briefly summarize the key insights of the papers (section 1.2). Finally, we explore the implications of testing the robustness of the EU's legal and governance strategies (section 1.3).

1.1. The Law of the Future Scenarios and the EU's Legal and Governance Strategies

1.1.1. The Law of the Future Scenarios

Scenarios are used in contexts in which uncertainty is ubiquitous. The *Law of the Future Scenarios* focus on the global legal and governance environment in which authoritative rule-making, rule-enforcement, and processes of dispute resolution take place. Conceptually, the global legal environment does not imply that rules are made that span the entire globe or that these rules are globally enforced. In our definition, the global legal environment refers to a multi-layered phenomenon including all mechanisms of authoritative rule-making, rule-enforcement, and dispute resolution that transcend national borders. It emerges out of the actions of both public and private legal actors, the ideas and research of legal scholars, and the initiatives and actions of international institutions. Even though national legislators' behaviour affects the global legal and governance environment, it emerges to a large extent without being directed. There is no Chief Executive Officer. Basically, we therefore assume that the future of the global legal and governance environment is uncertain. We need scenarios to deal with the future uncertainties.

The research that led to the *Law of the Future Scenarios* started with mapping major trends in the global legal and governance environment. The outcomes were published in two extensive volumes that include contributions from a substantial number of legal scholars and lawyers from different disciplines and different parts of the world.[2]

From these papers and a number of workshops we held in different parts of the world, we distilled two major trends – the internationalisation of law and the growth of private governance regimes. These trends are not new and have extensively been mapped elsewhere.[3] Both will be briefly explained hereinafter.

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2 *Ibid*. And Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker (eds.): *The Law of the Future and the Future of Law: Volume II*, TOAEP, The Hague, 2012.

3 For example, Jan Klabbers and Mortimer Sellers (eds.), *The Internationalization of Law and Legal Education*, Springer, London, 2009; Michael Joachim Bonell, "The CISG, European Contract Law and the Development of a World Contract Law", in *American Journal of Comparative Law*, 2008, vol. 56, no. 1, p. 3 on law beyond the state.

First, a growing patchwork of international law, international institutions, and transnational co-operation is observed. Growing international trade has gone along with the internationalisation of contract law, torts, business law, and intellectual property law. Since national laws are not harmonised, conflicts and gaps between national laws are increasingly revealed. These conflicts exert pressure on governments to harmonise their legislation and their legal systems. The internationalisation of law thus refers to growing interdependencies and interchange between national legal systems and the accommodation of national legal systems to these interdependencies and interchange. Internationalisation is a global trend but it is not happening in the same way, with the same depth, and in the same areas across the world. Two important clarifications must be made. First, legal globalisation and the rise of global governance do not mean that a coherent corpus of law is evolving that spans the whole globe. Legal globalisation and the globalisation of governance refer to a patchwork both with regard to the legal and governance areas involved and to the extent of internationalisation. For example, the legal globalisation of trade law mainly occurs on the regional level. The EU is probably the most far-reaching instance. Different legal areas also seem to evolve at a different pace. For example, the internationalisation of trade law seems to move faster than the internationalisation of criminal procedure. The internationalisation of law and governance neither implies voluntarism nor a consciously-built body of global law. Instead, incidents, crises, and the continuous manifestation of new problems are the primary drivers of the process.

The growth of private governance regimes for rule-making, rule-enforcement, and dispute resolution indicate a second major trend. Both national and international law have, for many years, firmly rested on public authority and state institutions. Nevertheless, new private regimes seem to be booming. These private regimes appear in different shapes. A business sector, sometimes together with non-governmental organisations ('NGOs'), can set standards, guidelines, or rules concerning governance or liabilities. For example, the Brewers of Europe have enacted the *Responsible Commercial Communications Guidelines for the Brewing Industry*.[4] The timber industry – with the Forest Stewardship Council – produced

[4] The Brewers of Europe, *Responsible Commercial Communications: Guidelines for the Brewing Industry*, 2012.

standards on sustainable logging and the sale of timber.[5] Sometimes an industry creates a standard contract or agreement. The Model Mine Development Agreement, developed in consultation with mining companies, governments, and civil society within the context of the International Bar Association, is a prime example.[6] Another facet of this trend is the growing use of alternative dispute resolution mechanisms instead of court systems. The eBay/PayPal resolution centre solves around 60 million disagreements between buyers and sellers every year. In the EU, a Common Frame of Reference for European Private Law was drafted and freely made available on the Internet.[7] This was not a government initiative; instead it sprang forth from European legal scholars. It has now become a point of reference for legislators and courts in the EU.

The trend towards privatisation of law also requires some elaboration to prevent misunderstanding. First, the rise of private regimes does not mean that these are isolated from legal regimes created by public authorities. For example, private initiatives may spark off public regulation. Secondly, here too, we see wide diversity. Private regimes may refer to rules, standards or guidelines but may also refer to authoritative mechanisms of dispute resolution. The term 'soft law' may be used, but in their actual effect, guidelines can sometimes be as 'hard' as law. Whereas a large-scale business organisation may not be touched by an administrative fine of several million Euros, it may fear not having access to a stock exchange due to non-compliance with the code of conduct regarding child labour.

There is no reason to assume that these trends will continue in the same direction and at the same pace. Moreover, there are several clues that they may also reverse. For example, both within the EU and in other parts of the world, national borders, national identity, and national interests are being re-discovered. The Brexit referendum and its aftermath, the growth of nationalist political parties in many European countries, the election of president Trump and his agenda of putting America first, and the growing self-consciousness of the Russian state indicate that national borders have

5 Forest Stewardship Council, *Forest Management Standards*, 2010.

6 Mining Law Committee of the International Bar Association, *Model Mining Development Agreement Project*, available on the project web site, last accessed 9 March 2017.

7 Study Group on a European Civil Code and the Research Group on EC Private Law, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference*.

not become obsolete. Both the internationalisation and the privatisation of law and governance should therefore be regarded as uncertainties or contingencies for the future global legal and governance environment. Will we witness continued internationalisation of rules and institutions or will this trend reverse? Both futures are possible. International trade, communication, travel, migration, and such phenomena that transcend national borders will generate international interdependencies that in turn require law and governance. Simultaneously, we observe a renaissance of national interest and national borders. Whether internationalisation of law and governance will continue in the next decades remains to be seen. The same applies to the privatisation of law and governance. Will private governance mechanisms and private legal regimes further expand and become dominant, or will state-connected institutions and legal regimes retain their position? Currently, there is no decisive trend that indicates either one of these futures. Instead, both futures can already be observed in their embryonic stages. If the two trends are regarded as uncertainties or contingencies, they point at four possible future scenarios.

Taken together, these contingencies conceptually allow four different scenarios (see Table 1 below).

	Growth of private governance regimes	Reversed growth private governance regimes
Internationalisation of law	Legal Internet	Global Constitution
Reversed internationalisation of law	Legal Tribes	Legal Borders

Table 1. Global legal and governance scenarios.

These scenarios picture possible global legal and governance environments that may emerge in the next decades.[8] Regarding the names we have given each of the scenarios, rather than taking them for their literal meaning, one ought to bear in mind that they refer to metaphors meant to convey the central feature of each scenario. Thus, 'Global Constitution' does not imply there will actually be a single world constitution, but rather, that in this scenario the global legal environment will increasingly resemble an international constitutional order. In 'Legal Internet', the name does not mean that this scenario is about the Internet. Instead, it implies that the global legal environment in this world is characterised by a decentralized transnational network involving a big range of actors in which co-ordination, governance, rule-making and so on are not regulated from the top. Similarly, 'Legal Tribes' does not denote a world that is composed of tribes, rather, it hints to a reality whereby the global legal environment is composed of many relatively small 'communities' with relatively little contact and co-ordination, and a weaker role for the state. Finally, 'Legal Borders' does not imply that legal walls will be built between national legal systems, but instead emphasises the increased importance or renaissance of national and regional sovereignty.

These scenarios reveal quite different possible futures for 2030. In the 'Global Constitution' scenario, an international constitutional order would have emerged during the next decades, slowly but surely covering all major legal areas on a global scale – trade, environment, security, crime, finance, markets and competition, intellectual property, labour, taxation, and health – leaving only a few areas untouched by international rules and procedures. Global law would not be driven by a specific set of values or leading legal systems. Instead, the process of blending would, to a large extent, be eclectic. Whereas global competition law and contract law would be primarily fuelled by free market ideals, global criminal law would be led by retaliatory principles. It would therefore become more punitive and strict than European countries are used to. The principle of legality – all governments are bound by law – would be the broadly accepted principle underlying the global legal environment. The global constitutional order would not be based on one document or charter, but rather on a series of charters and constitution-like documents, in which international regulators,

[8] See also Sam Muller *et al.*, *Law Scenarios to 2030*, HiiL, 2012.

adjudicators, and courts would be defined and connected with each other. This multi-layered system would be complex, and at times Byzantine. The rules and institutions that make up this global legal environment would be difficult to change once formalised. The enforcement of rules would be public in nature, or a clear derivative thereof.

In the 'Legal Borders' scenario, national and regional legislation would become the primary source of rule-making in 2030. Regional and sub-regional organisations would be the ultimate defence against what would widely be perceived as out-of-control international institutions and an international environment in which common values would be scarce. The international level would be for politics, not law. There would be a lot less talk about universality than there once was. In fact, most would agree that there is no universality. With regional legal pluralism, the rule of law would also be regionally pluralised. As a consequence, context-specific regional and national interpretations of concepts such as fundamental human rights, separation of church and state, balance of powers, and the principle of legality would prevail. The international institutions that were developed at the end of the twentieth century would slowly erode and lose their significance. In some instances, states would withdraw ratifications, in others they would be being minimally interpreted at best, and otherwise completely ignored. International courts – insofar as they are given adequate funding – would face strong pressure to reduce their footprint and the scope of their decisions. Enforcement would also be a national affair. In some areas, such as environmental law, enforcement would be loosely co-ordinated on a regional level to prevent natural disasters.

In the 'Legal Internet' scenario, rules – in the sense that lawyers are used to – would be a lot less important in 2030. New generations would have become acquainted with new ways of rule-making, law enforcement, and resolving disputes. Reputation, trust, transparency, mobilisation of voice, and demonstrated effectiveness would be the new mechanisms to secure a social and political order. Formal rules and procedures would be considered old-fashioned, too formal, ineffective, too uniform, and too inflexible. Public rules would gradually be replaced or marginalised by standards developed by private actors. Monitoring and even enforcement would be dealt with by private regimes and mechanisms created by the parties involved. Democracy or accountability would be less a matter of working through parliaments and more a matter of working through interest groups

and loosely organised structures that operate between interest groups. Self-regulation would be the prime source of legitimacy. Private rule-making, enforcement, and dispute resolution mechanisms would usually be flexible and efficient, whereas public regimes would be more bureaucratic and rigid. The absence of clear, all-encompassing organising principles, like the principle of legality, the United Nations ('UN') definition of the rule of law, or state sovereignty, would make the global legal environment complex, often confusing and largely unstable.

Finally, in the 'Legal Tribes' scenario, the global legal environment would witness a severe loss of relevance of the state combined with a loss of interest in internationalisation. In this scenario, by 2030, the global legal environment would consist of a largely unconnected group of communities that govern themselves. In many ways states would become failed states. Global security would be a serious issue and law would have been completely abandoned as a way to achieve it. Local security, which would be mainly self-organised, would be the main basis for ordering. Besides, order would be local and mainly privatised, maintained through a small-scale networks of security corporations, communities and civil society organisations, and supported, where possible and useful, by small public structures. The state and the international global legal environment would wither away. International organisations would lose their relevance and close due to lack of interest, funds, effectiveness, and legitimacy. Next to state borders, the global legal environment would also witness religious borders, borders organised around economic activities, ethnic borders, and political borders. The old regional organisations would lose much of their economic *raison d'être*. The successful ones would transform into security alliances: public-private regional fences within which smaller communities could conduct economic activity on a larger than local scale. The main role of the public realm would be to deal with the link between the huge variety of private, self-regulatory regimes. But with a greatly reduced tax base, resources would be limited. As a leading principle, the rule of law would have become an anachronistic concept. Enforcement would be a local and mostly private affair. Social control, groups taking justice into their own hands, and militias maintaining order would be predominant in many parts of the world, whereas religious or public authorities would take up these tasks in other regions.

1.1.2. The EU's Legal and Governance Strategies

As indicated above, these scenarios were first presented in 2011 as a means to provoke a future-oriented debate on law and governance built on uncertainty and analysis instead of ideology and policy. One would expect public institutions to adopt a learning behaviour that accords with the adage, once bitten, twice shy. Thus, we would anticipate that the European debate on the future of law and governance would have become more open for the scenarios after a series of events that shook previously unshakeable beliefs. The migration crisis, the continuing Euro crisis, Brexit and more generally the dramatically declining political support for international, multilateral, and supranational institutions compels European institutions to get involved in some serious double-loop learning.[9] Double-loop learning requires questioning fundamental assumptions in order to align them with the societal and political environment. Is it truly natural for law and governance to increasingly shift towards transnational institutions? Is the internationalisation of law and governance necessarily a linear and inevitable historical process? Should governments not also take into account the possibility that this process could reverse, and be strategically prepared for that eventuality?

Double-loop learning is both difficult and rare in public organisations and institutions. The European Commission can hardly be seen as an exception in this respect. Its recently published 'White Paper on the Future of Europe' demonstrates the difficulty in questioning the very foundations on which it is built.[10] In its White Paper, the European Commission does question its role and position, but even the most minimal scenario imaginable by the European Commission – the 'Nothing but the single market' scenario – entails more European Union. The EU would then focus on 'deepening certain key aspects of the single market'. We would argue that major shifts in the global legal and governance environment, as depicted in our scenarios, require a fundamental re-thinking of these foundations and strategies. Instead of double-loop reflection in the realm of legal and governance

[9] Chris Argyris, *On Organizational Learning*, Blackwell Publishers, Oxford, 1993.

[10] European Commission, *White Paper on the Future of Europe: Reflections and scenarios for the EU27 by 2025*, COM (2017) 2025, 1 March 2017 (http://www.legal-tools.org/doc/b2888a/).

strategies, we observe that the European Commission does not move beyond single-loop learning and stricter enforcement of existing strategies.

For example, in March 2014, the European Commission decided to adopt a new, proactive rule of law policy. In its communication, the European Commission presented a new EU framework to strengthen the rule of law.[11] In its rule of law strategy presented by the European Commission in March 2015, the Commission concludes that the current EU legal framework is not adequate for addressing internal, systemic threats to the rule of law and more generally EU values. This conclusion is drawn after some rule of law-related crises. Former EU Justice Commissioner Reding mentioned some concrete examples of these crises in a speech given on 4 September 2013,[12] including the French government's attempt in 2010 to implement a collective deportation policy aimed at EU citizens of Romani ethnicity, the Hungarian government's attempt to implement an early mandatory retirement policy for the judiciary and the non-compliance of the Romanian government with judgments of the national constitutional court in 2012. The rule of law strategy emphasises that the EU legal framework is no longer adequate due to non-compliance by governments. Double-loop learning would imply a reflection on whether the legal framework still matches with the European social and political context and, if not, what changes should be implemented. Instead, the European Commission decides to focus only on a stricter enforcement of the framework, including penalties. It does not ask a number of questions, such as whether the thick approach of the rule of law[13] still builds on the social conventions and generalized morality in Europe, or whether this approach to the rule of law produces adverse and politically-undesirable effects. The same applies to the external legal strategy of the European Commission. With regard to its external policies and global legal strategies, Article 3(5) (previously Article

[11] European Commission Communication, *A New EU Framework to Strengthen the Rule of Law*, COM (2014) 158 Final, 11 March 2014 (http://www.legal-tools.org/doc/7f7703/).

[12] Dimitry Kochenov and Laurent Pech, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction*, Robert Schuman Centre for Advanced Studies, Research Paper No. 2015/24, 2015.

[13] See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, 2004.

2(5)) of the Treaty on European Union ('TEU') provides some strict guidelines. It stipulates:[14]

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

The external rule of law approach includes both formal and substantive versions and it appears as thick as the internal rule of law approach (see, for instance, Articles 21 and 23 of the TEU). The same principles should be taken into account in the relations between the EU and its neighbours (see Article 8 of the TEU). Second, with regard to the global legal environment TEU also explicitly addresses the ideals to be strived for. Article 21(1) of the TEU reads:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
>
> The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

The framework of the UN appears to be the EU's most desired framework for multilateral co-operation. Global economic integration and global harmonisation of the rule of law and human rights are also explicitly stated in Article 21 of the TEU to be the goals of the external (including

[14] Treaty on European Union, 7 February 1992, 92/C 191/01 (http://www.legal-tools.org/doc/806147/).

international) policies of the EU. For example, the external policies should be directed towards promoting an international system based on stronger multilateral co-operation and good global governance, as set out in Article 21(2)(h) of the TEU. In its Stockholm programme, the European Council reaffirms the importance of promoting fundamental rights both within and outside the EU. The Council argues that the 'values of the Union should be promoted and strict compliance with and development of international law should be respected'.[15] The programme also defines the key partners of the EU, in particular:

- Candidate countries and countries with an EU membership perspective, for which the main objective would be to assist them in transposing the *acquis*;
- European neighbourhood countries, and other key partners with whom the EU should co-operate on all issues in the area of freedom, security and justice;
- European Economic Area/Schengen states which have a close relationship with the Union;
- The United States ('US'), the Russian Federation and other strategic partners with which the EU should co-operate on all issues in the area of freedom, security and justice;
- Other countries or regions of priority, in terms of their contribution to EU strategic or geographical priorities; and
- International organisations such as the UN and the Council of Europe with whom the EU needs to continue to work and within which the EU should co-ordinate its position.

With regard to international organisations, the Council reaffirms the UN as the foundation for global governance in its Stockholm programme:

> The UN remains the most important international organisation for the Union. The Lisbon Treaty creates the basis for more coherent and efficient Union participation in the work of the UN and other international organisations.
>
> The Union should continue to promote European and international standards and the ratification of international

[15] European Council, *The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens*, 2010/C 115/01, 4 May 2010 (http://www.legal-tools.org/doc/c6ada7/).

> conventions, in particular those developed under the auspices of the UN and the Council of Europe.

Strengthening the UN is also a cornerstone of the European Security and Defence Policy. The EU appears to prefer a multilateral global order in which the UN is positioned at the top. In its policies, the European Council also chooses to co-operate with regional organisations (such as the African Union and the Association of Southeast Asian Nations) and global players like the US and China.

In this recapitulation of the EU's legal and governance strategies, we observe a strong reliance on the 'Global Constitution' scenario. The analysis of the rule of law strategies of the European Commission and the EU clearly indicates that there is a European desire for a global constitution. The strategies thus anticipate on a 'Global Constitution' scenario in which multilateral public authorities dominate as the entities that create and uphold law and settle transnational disputes. These public authorities should be governed by 'thicker' rule of law principles. Other scenarios are not included or taken into account in the legal strategies of the European Commission and the EU which makes them vulnerable to changes in the global legal environment.

Second, it seems plausible that, if other scenarios occur, they will severely impede the effectiveness and tenability of the current rule of law strategy. Both movements along the axis (more privatisation and less internationalisation) will render these strategies void. In case of further privatisation, the rule of law strategy may actually still be pursued, but it would be overtaken by private mechanisms that better regulate and enforce law, and perhaps even the rule of law. Whether rule of law principles are included in private legal and governance mechanisms does not seem to matter because the legal strategies of the European Commission only aim at public authorities, hence the 'Global Constitution' scenario. In case of reversed internationalisation, the legal strategy would anticipate only a limited extent of grassroots rule of law development.

Third, the existing legal strategies do not seem very flexible in the sense that it is possible to switch to alternative strategies in case other scenarios evolve. Because of the narrow focus on 'Global Constitution' and the inflexibility of that scenario, the lead time for any other scenario may be quite long. Whereas the rule of law strategy of the European

Commission and the EU seems to be evidence-based, it hardly appears to be future-proof.

1.2. The Global Legal and Governance Environment: Trends and Uncertainties

1.2.1. Ambiguity and Uncertainty are Here to Stay

This volume reflects on the robustness of the European legal and governance strategies as sketched above. It aims at capturing some of the major trends and hiccups in the global legal and governance environment, and it thus provides building blocks for future-proof legal and governance strategies. With the scenarios in mind, we asked a number of great minds to reflect on topical developments and the future of law and governance. The papers in this volume point towards a growing ambiguity and uncertainty of the global legal environment.

The demolition of the Berlin wall in 1989 heralded a new era and infused the world with the promise of a new world order. Politics would transform into regulatory governance, political controversies would transform into management issues, global markets would accelerate the wealth of nations, and if borders would not dissolve completely, they would at least become permeable. The ideology of globalisation and the spirit of cosmopolitanism seized the world and became the roadmaps towards global prosperity, freedom, and welfare.

Globalisation also affected the global legal and governance environment. In general, because of globalisation, the rule of law would become one of the cornerstones of governments all over the world. For a long time, many indications supported these hypotheses. Both the rule of law in its 'thin' meaning (that is, the principle of lawfulness or legality) and in its 'thick' meaning (including democracy and fundamental rights) spread across the globe. For example, for many years, Freedom House demonstrated a global tendency towards freedom and the world witnessed a significant improvement in economic growth.

In 2007, the first cracks were observed in this ongoing process. The adoption of democracy, freedom, and rule of law in the world stagnated according to some indicators. But there were more signals that the promise of 1989 would not be fulfilled, at least not in the short-run. First, the dark sides of globalisation increasingly revealed themselves and dominated the public and political agenda. Globalisation goes along with increasing

prosperity and increased living standards, but also with dramatic growth of transnational crime, illicit trade, terrorism, global inequality, and uncontrolled migration. Second, the financial and economic crises triggered in 2008 demonstrated that global interdependencies could also cause major economic damage. Third, a new geo-political power balance seemed to evolve partly because of the economic rise of some countries and the simultaneous economic stagnation in the Western world. Naim observes a major power shift from previously strong formal institutions such as governments, international organisations, and global corporations, to the grassroots level and small-business entrepreneurs.[16] Kagan has observed a power shift from the US and Europe to a more balanced global constellation.[17] Whereas Europe was forced to focus on its internal crises, new global powers such as China and Russia entered the global law and governance arena.

The self-evident and sometimes even complacent belief in a global diffusion of the rule of law as interpreted by the EU has become inappropriate and unproductive. Contrary to some expectations, the world does not automatically appear to move towards Western interpretations of the rule of law. The self-evidence of a global linear historical process towards modernity as experienced in Europe is fundamentally contested by Comaroff and Comaroff.[18] Their argument is as follows:

> Contrary to the received Euromodernist narrative of the past two centuries – which has the global south tracking behind the curve of Universal History, always in deficit, always playing catch-up – there is good reason to think the opposite: that, given the unpredictable, under-determined dialectic of capitalism-and-modernity in the here and now, it is the south that often is the first to feel the effects of world-historical forces, the south in which radically new assemblages of capital and labor are taking shape, thus to prefigure the future of the global north.

[16] Moises Naim, *The End of Power: From Boardrooms to Battlefields and Churches to States, Why Being In Charge Isn't What It Used to Be*, Basic Books, New York, 2013.

[17] Robert Kagan, *The Return of History and the End of Dreams*, Alfred A. Knopf, New York, 2008.

[18] Jean Comaroff and John L. Comaroff, *Theory From the South: Or, How Euro-America is Evolving Toward Africa*, Routledge, London, 2012, p. 12.

Instead of a diffusion of belief systems and legal and governance institutions from Europe to the rest of the world, we may well witness the opposite. For example, the adverse effects of extreme neo-liberalism first emerged in Africa, Asia and Latin America in the 1990s, and the financial and economic crises in Europe and the US followed a decade later. Whereas other parts of the world have developed institutions to correct these effects, Europe is still in the process of developing these solutions. Comaroff and Comaroff argue that Europe has adopted some African belief systems to deal with these effects.[19] For example, African theories on participatory democracy, leadership, community, and accountability increasingly gain ground in Europe.

European and international institutions as well as national governments have developed responses to the crises that embody some of these major global changes. New transnational legal and governance institutions have been set up to cope with some of the dark sides of globalisation and some of the global economic and financial interdependencies. For example, treaties on cybercrime have been agreed upon, financial stability programmes have been erected, and new European instruments have been developed, such as the European arrest warrant. Existing global institutions have strengthened their positions and have been reformed to meet the demands of the new global balance of power. Last, but certainly not least, many private legal and governance mechanisms have evolved. Institutional adaptation has taken place not only on the transnational and international level. For example, a quest for new legal borders also reappeared as a response to the new global challenges.

Both the rapid succession of global crises and the urgent crisis response strategies demonstrate that the global legal environment has become both highly ambiguous and uncertain. The ambiguity arises from the many directions towards which these trends point at. Newly set up transnational and international legal institutions go along with new national legal borders, public attempts to respond to global challenges go along with rising private legal and governance mechanisms, and the rule of law both in its 'thin' meaning and in its 'thick' meaning has lost its self-evidence outside a small community of lawyers. The global legal environment has also become difficult to predict, with uncertainty characterising this environment

[19] *Ibid*.

due to the rapid pace of change. Economic, political, and social drivers of the global legal environment seem to change with ever-increasing pace – yesterday's coalitions may become tomorrow's enemies. Nobody can predict what the global legal and governance environment will look like in ten, twenty or thirty years. Of course, the community of lawyers may keep on believing in its scholastic rule of law interpretations and a predominantly public, multilateral, and supranational global legal environment. This belief system, however, will not be a sound basis for the strategies pursued by national and international law-makers in an increasingly ambiguous and uncertain global legal and governance environment. Thorough and continuous analysis and monitoring of the global legal and governance environment seems to be the only viable alternative to predictions and ideologies.

1.2.2. Shockproof Law and Governance in a Volatile World Order: Some Building Blocks

The chapters in this volume offer some building blocks for an assessment of the global legal and governance environment. As Joerges argues, transnational governance has too long been regarded as a technical matter. Instead of an emphasis on the regulation of global trade, he suggests a focus on the legitimacy of transnational governance. Borrowing from Karl Polanyi who stressed the social, cultural, and political embeddedness of trade and markets, Joerges argues that this basic notion may have been overlooked in previous trade agreements such as the General Agreement on Tariffs and Trade and those of the World Trade Organization. If the opposition and protests against the Transatlantic Trade and Investment Partnership ('TTIP') and the EU-Canada Comprehensive Economic and Trade Agreement ('CETA') are again neglected, the legitimacy impasse will continue and worsen. For a way out, Joerges reverts to a framework suggested by Rodrik. The globalisation trilemma hypothesis argues that it is impossible to simultaneously pursue trade globalisation, national autonomy, and democracy. Pursuing trade globalisation and national autonomy requires national governments to become technocratic and hence it will come at the cost of democracy. More democracy and trade globalisation require that transnational democratic legal and governance regimes are developed and that means that national autonomy has to be given up. Finally, combining national autonomy and democracy will negatively affect the level of trade globalisation. After an extensive analysis of the TTIP process, Joerges concludes that, given the current context, it would be wise to choose democracy

and more national autonomy. Joerges accepts the limitations on further expansion of trade globalisation inherently connected with choosing for national autonomy and democracy.

In their paper, Renda and Cafaggi focus on transnational private regulation ('TPR'). They demonstrate the enormous variety of TPR schemes that have evolved during the past decades. TPR schemes nowadays include the involvement of private actors in the agenda-setting phase of policy-makers, often alongside the implementation and enforcement of private rules. TPR schemes may also involve private transnational standards that complement public regulation. These schemes may be governed by experts, firms, NGOs or epistemic communities and global governance increasingly depends on TPR in order to meet the global challenges. Whereas TPR schemes are considered highly legitimate by the private actors involved, Renda and Cafaggi emphasise that they still experience a number of problems and challenges in the 'delivery' phase of their rules. In particular, compliance-monitoring and -enforcement need to be strengthened in order to make TPR schemes work better. Connecting public regulation with the TPR schemes may be useful to both accommodate better compliance monitoring and enforcement and achieve a better alignment of private benefits and social goals. According to Renda and Cafaggi, the "key opportunity is fully integrating TPR in international regulatory co-operation schemes aimed at tackling the most important societal problems". Further integration of public and private regulatory schemes may also prevent lock-in effects and self-indulgence in the evaluation of private regulatory bodies.

As argued above, the global legal and governance environment both displays uncertainty with regard to its future and ambiguity with regard to its current state. Williams provides an assessment of the current state of global governance. Based on his analysis that order and justice are conceptually closely connected, he argues that the international order urgently needs more justice. Williams distinguishes three conditions for a just international order. First, a just international order requires peace. However important, peace is not enough to achieve justice. Both adequate representation of individual and collective interests and the creation of "genuine opportunities for the development of states, communities, and individuals" are necessary to transform negative peace into positive peace. The absence of representation and equal opportunities on the global scale will produce

an international order that is inherently unstable because it will lack legitimacy. Williams calls upon the UN to address this multi-faceted challenge:

> It is the UN, through the Security Council, that has the primary responsibility for maintaining international peace and security, and in so doing, preventing the eruption of deadly conflict which undermines both order and justice. It is the UN, furthermore, that provides all states with a representative forum, and through its institutional machinery can ensure that their interests are taken into account. *And it is the UN*, finally, which provides normative leadership, by advancing aims such as human rights, gender equality and sustainable development, through the work of its agencies, funds and programs, the policies agreed on by its members, and the public pronouncements of its leaders.

In order to play its necessary role to achieve a just international order, the UN should further reform. Representation can be improved in the Security Council and in the judicial institutions. Creating opportunity, the third pillar of a just international order, requires more than the UN. It should also include states and non-state actors.

An analysis of the current global legal and governance environment and its future runs the risk of a Western bias. A number of papers therefore focus on the global legal and governance environment from a non-Western perspective. The need for such a perspective is very much underscored by Mishina's paper on the Russian legal environment. Her analysis of legislative development in Russia clearly demonstrates that the Russian government is moving away from the principles and the global legal environment envisioned by Western governments. The government openly defies rulings of the European Court of Human Rights and increasingly criminalises the undesired use of political freedoms. According to Mishina, these legislative developments indicate further escalation of authoritarianism in Russia and even possible transformation into totalitarianism. These developments will dramatically affect the global legal and governance environment. Contrary to the just international order as portrayed by Williams with peace as a cornerstone, according to Mishina, Russia may be preparing for 'Cold War II'.

Russia's direct move away from the global legal environment, as envisioned by Europe and the US, and sketched by Mishina, points at erosion of the very foundations. With his analysis of the constitutionalisation process in Brazil, Neves indicates an opposite trend though it should be

interpreted cautiously. On the surface, the gradual constitutionalisation of Brazil and its connectivity with the predominantly Inter-American legal institutions can be interpreted as a move towards global constitutionalism. Looking at the constitution and court decisions does not suffice to truly understand what is happening in Brazil. Underneath the legal and constitutional developments, Neves observes "a flaw in our capacity to implement liberal values". Obviously, the gradual constitutionalisation of Brazil should be understood as a long-term development that took place during the twentieth century. It would be too simplistic to interpret this process as the gradual adoption of Western constitutional conceptions by Brazil. Neves argues that a trans-constitutionalism would be a more appropriate concept to understand what happened:

> Trans-constitutionalism means that two or more legal orders or organisations, whether of the same kind or different kinds, engage simultaneously in the same constitutional case or problem.

Instead of the one-sided adoption of Inter-American and hence Western legal and governance conceptions, an interplay of legal conceptions is taking place. The relationship between the Inter-American human rights system, as introduced by the American Convention on Human Rights, and national Brazilian law provides an example of trans-constitutionalism. Neves mentions some cases in which the Brazilian constitution collides with the Inter-American legal regime. He concludes that the concept of trans-constitutionalism "offers a higher potential for effective constitutionalisation of several legal orders under different cultural contexts than models of cosmopolitan constitutionalism of Eurocentric or Western-centric base, which are not able to learn from the other".

In his paper, Ginsburg mentions Brazil as an example of constitutional flexibility. The constitution provided mandatory review after a trial period in order to test its workability. In a referendum five years after the adoption of the constitution, the Brazilian people decided on whether to retain presidentialism or adopt parliamentarism. Even though the voters decided to maintain presidentialism, this is clearly an example of constitutional flexibility. With an ever more volatile global legal environment, legal and governance orders urgently need flexible regimes. Ginsburg suggests at least three existing mechanisms of constitutional adjustment. First, constitutions can be amended. If amendment is allowed, constitutions usually include specific procedures and requirement for constitutional amendment.

A second mechanism for constitutional adjustment is interpretation. Ginsburg observes a global rise of constitutional review and supreme courts around the world "exercising powers that would have been unthinkable just a few decades ago". Constitutions can also be replaced. As Ginsburg argues "most constitutions die at a relatively young age". These mechanisms for constitutional adjustment provide some clues for a global legal environment that has to deal with increased volatility. Ginsburg therefore suggests an iterative global legal environment. Transitional, interim, or temporary deals for problems of international co-operation that have been broken down into "discrete component parts" may be useful solutions for the current impasse. The rigidity of treaty regimes may be softened with mandatory reviews such as the Brazilian referendum. Mandatory reviews oblige the states and other parties to renew their commitment and to bargain again for a better deal. Paradoxically, these flexibility mechanisms may provide for some stability of the global legal environment in a volatile world.

After these country perspectives from Russia and Brazil, the volume concludes with three papers that focus on specific substantive legal and governance challenges. In his contribution on transnational and international crime, Reichel addresses some trends and challenges in the global legal environment concerning these crimes. Whereas international crime refers to "acts that threaten the world order and security", the concept of transnational crime is used "for crimes that affect the interests of more than one state and are committed for personal gain and profit". The most common transnational crimes are the provision of illicit goods or service and the infiltration of business or government. Reichel's assessment of the current institutions to deal with these crimes is mixed. The International Criminal Court ('ICC') suggests that "there is considerable room for improvement". Instead of a global move away from the ICC, according to Reichel, it is more likely that the ICC will undergo some reforms – "especially in terms of having clearer and more realistic goals". With regard to transnational crime, Reichel sketches a more positive picture. He demonstrates that a variety of international instruments including bilateral and multilateral agreements have been set up to effectively deal with transnational crime:

> Problems do remain, however, and they are not insignificant. Issues or sovereignty are often raised, the ability (financial, technical, political and so on) of some countries to abide by agreements is difficult, human rights and privacy issues can

> be challenging to reconcile, and competition among agencies/organisations presents barriers.

Reichel illustrates these challenges and problems with the example of human trafficking. What about the future of strategies to combat transnational crime? Reichel observes three developments. First, emerging crimes such as wildlife and forest crime as well as cybercrime will draw attention. Second, the gender bias will be corrected. More attention will be paid to women both as offenders and victims. Third, civil society and business will be included to a greater degree in strategies to combat transnational crimes:

> The role of governments and supra-national organisations is not expected to diminish, but we are likely to see an increased role for non-governmental organisations ('NGOs'), non-profit groups, and private companies (for example, ships increasingly use private security forces as they travel through areas at high risk for sea piracy).

Brammertz and Hughes paint an optimistic picture of international crime based on their experiences:

> Over these last two decades, international criminal justice has shown that it can achieve important results in practice. Hundreds of individuals have been tried and convicted for war crimes, crimes against humanity and genocide, including 80 by the ICTY to-date and 62 by the International Criminal Tribunal for Rwanda. Those brought to trial include senior political leaders like Charles Taylor (President of Liberia), Jean Kambanda (Prime Minister of Rwanda), Hissène Habré (President of Chad), Nikola Šainović (Deputy Prime Minister of Yugoslavia), Radovan Karadžić (President of the *Republika Srpska*) and Nuon Chea (Prime Minister of Cambodia).

Yet, at the same time, Brammertz and Hughes observe an increasing resistance to accountability. They also acknowledge that repeated attempts to establish justice processes for the most serious current conflicts have failed. As well as in the past international justice has to face the "critical challenge of obtaining state co-operation".

The increased role of national courts should be regarded as an opportunity to improve global justice. The future may also benefit from some lessons drawn by these experienced practitioners. Brammertz and Hughes suggest three key lessons. First, "the willingness of affected states to co-operate with justice mechanisms must be seen as decisive to the success of

accountability processes and a key factor to influence. In other words, international justice requires diplomatic influence and persuasion to succeed". Second, "strategic pragmatism is often a necessary tool in pursuing accountability. Comprehensive justice must remain the ultimate goal. But because what is achievable will vary over time, an incremental approach may often be required". Finally, "affected states are more likely to agree to co-operate with justice mechanisms when the full spectrum of diplomatic tools is engaged and justice is linked to other desirable outcomes". Taken together, it is uncertain whether the experience with international criminal law of the past decades marks the end of its beginning or the beginning of its end. As can be expected from practitioners, they conclude that the risk of ineffective justice is critical but manageable. If the room for improvement signalled by Reichel is effectively dealt with, we may well have witnessed the end of the beginning of international criminal law.

This volume concludes with a contribution that may provide a glimpse as to the future of the global legal environment. As climate change has rapidly become a global problem that affects all parts of the world, albeit in different ways, the sense of urgency that global solutions are necessary has grown. In his contribution, Lefeber shows that global legal and governance solutions are possible even despite the trends indicated in the previous papers in this volume. Even though the New Global Climate Constitution has yet to prove itself, and the new US presidency has to commit itself to its development, this global regime demonstrates some lessons and conditions for global legal and governance regimes. As Lefeber argues, a global problem must be felt in all parts of the world and the problem definition must be supported by experts and science. Lefeber demonstrates that the "deadlock could only be overcome after science demonstrated that the dangerous anthropogenic interference with the climate system could only be avoided if all countries would contribute to mitigation". Second, the process in which the global regime is developed has to be "inclusive in terms of participation in the efforts to mitigate climate change and, therefore, potentially more effective in achieving the objective". Third, the process should not only include states and public authorities but also business and NGOs. Lefeber concludes that the "New Global Climate Constitution may have created the momentum for the emerging public-private partnerships and private-sector initiatives that contribute to mitigation, adaptation and acceptance of climate change, including the mobilization of financial

resources". Finally, the global regime has to be backed by national legal institutions:

> Since the beginning of this century, there has been a proliferation of climate change related cases in courts around the world. Many of these cases have been initiated by civil society.

The combination of scientific evidence of the global problem, the inclusiveness of the regime, and the support system of business, NGOs and national courts may provide some clues for a future global legal and governance environment that works even in an uncertain and volatile world.

1.3. Conclusions and Implications for European Legal Strategies

The ambiguity and uncertainty in the global legal and governance environment may be unprecedented, at least in recent history, but these characteristics are here to stay. It has become dangerous to rely on a stable legal and governance strategy in the volatile global legal and governance environment. Strategies that do not build in uncertainty will become obsolete in no time, with any single strategy certain to fail. Legal and governance strategies have to be plural to survive the ambiguous context in which they are implemented. As demonstrated, the legal strategies of the EU and the European Commission do not sufficiently address the demands of the current global legal environment. The 'thick' conception of the rule of law included in both the European treaties and the policies of the European Commission, as well as the self-evident nature of multilateral public legal and governance regimes, shows that these strategies are built on the assumption that the 'Global Constitution' scenario will evolve. It is thus possible that the European legal and governance strategies lack the flexibility and plurality necessary to survive a volatile and ambiguous global legal and governance environment.

With the chapters in this volume, we have aimed at making sense of the current global legal and governance environment. Even though the topics and the assessment of the current situation differ substantially, there are some general observations and common threads. A first commonality in the chapters is the acknowledgement that neither internationalisation nor public authority, the cornerstones of the 'Global Constitution' scenario, can be relied upon. In our scenarios we presented internationalisation and privatisation of global legal and governance regimes as key uncertainties. Both trends could further mature but also reverse. It appears that most of the

authors in this volume observe a tendency to re-discover and re-install national borders while privatisation of law and governance is stronger than ever before. A second commonality in the chapters is the acknowledgement that the only global legal and governance mechanisms that work are those that are perceived as both inclusive and just. The regimes that work should encourage participation and equity of interests. Third, the global legal and governance regimes that work have to connect public and private transnational regulatory schemes. Transnational and global governance will only be effective and legitimate if it is built on public-private partnerships that combine the strengths of public authorities (particularly enforcement) and business, NGOs and local communities (particularly legitimacy and embeddedness).

These lessons and observations suggest that only a new generation of European legal and governance strategies will survive the future global legal and governance environment. Such strategies should first build on a combination of selective internationalisation of law and governance. While the existing strategies build on the assumption that the global legal and governance environment will evolve according to the 'Global Constitution' scenario, a new generation of European legal strategies has to include both the 'Legal Borders' and 'Legal Internet' scenarios. Internationalisation of law and governance is only appropriate if the problem is transnational and all partners on all levels – both public and private – are strongly committed.

Second, commitment on the national level requires participation and equity instead of a naïve belief that the European or Western models are superior to the interests of other parts of the world. Only legal and governance institutions that are globally perceived as inclusive and just will be legitimate and effective. For example, transnational institutions that are not perceived as such cannot rely on compliance and backing by national courts.

Finally, European legal and governance strategies should build on public-private partnerships. Transnational private regimes have become mature and urgently need connectivity with public regimes. Business, NGOs, communities, and other private parties have demonstrated the ability to set standards and develop dispute resolution regimes that work. In order to sustain such transnational private regimes, and to utilise their strengths, they should be included in the European legal and governance strategies.

A European legal and governance strategy built upon these principles will prove to be robust and increase the probability of surviving different global legal and governance environments. Instead of assuming that the world will evolve to a 'Global Constitution' scenario, such a strategy also takes into account the possibilities that the global legal and governance environment evolves according to the 'Legal Borders' and 'Legal Internet' scenarios. As Joerges demonstrates in this volume by using Rodrik's globalisation trilemma, the suggested legal and governance strategy mixes a choice of both strengthening democracy and national autonomy. Assuming that this trilemma is inevitable, a choice of a new generation of European legal and governance strategies also means a choice of less globalisation. Whether the disadvantages of less globalisation outweigh the advantages of a better aligned European legal and governance strategy is a political matter that we gladly leave to those elected to make this choice.