

Law is more than ever the necessary language of globalization

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In *Le droit sans l'Etat* you were contemplating governance through law independently from the State. Does this “liberal” analysis enable an understanding of globalization as the creation of a legal space without real political convergence? Is the liberal model still a point of convergence within globalization?

Le droit sans l'Etat, which was published in 1985, was not about globalization. The book title aimed at contrasting the governance models of the United States and France. In that book I analyzed the importance of law and lawyers in the United States as a sort of counterpart to the administrative State and senior civil servants in France. For my generation, the book contributed to a more elaborate understanding of American democracy, but it also brought about a powerful reevaluation of law and a revival of political liberalism in France.

From there, I moved on to an analysis of European unification, characterized by the gap between a very sophisticated and integrated legal system and the absence of a State, and even of a European political unity, that is, another illustration of “law without the State”. It is

only thereafter, when globalization became the central phenomenon starting from the nineties, that in the absence of a world State or government, governance through law was seen as the natural instrument to regulate globalization. The phrase “global governance” came to designate this legal and institutional regulation of globalization.

What changed at the turn of the 21st century, which I described in my book *The Shape of the World to Come* published in the US in 2008, is the realization that globalization, then understood as a driver of global harmonization and pacification – remember *The World is Flat*, Tom Friedman’s best-selling book – was also producing fragmentation and conflict, as a result of the rise of China and other emerging powers, as well as the identity-based reactions triggered by globalization around the world. The return of geopolitics, which the September 11, 2001 attacks symbolically inaugurated, marked a paradigm change from the liberal moment of the 80s and 90s, but the discourse about the legal governance of globalization was late in acknowledging it.

Your books of the nineties are grounded on notions, the objectivity of which is being challenged today. Are the concepts used to describe the world at that time still relevant? In particular, can one still use terms such as “democracy”, “human rights” or “freedoms” while alternative models have emerged that negate the meaning that is given to them in the West? Does the language of law promote values that are universal enough to serve as the *lingua franca* of globalization?

You seem to be mixing two things that must be distinguished. The first one is the assault launched in the past several years against the liberal model of the rule of law within Western democracies as well as in the emerging world. Within Western democracies, populist movements are targeting the rule of law, that is the limitation of the popular will or majority rule by fundamental principles. The rule of law is what distinguishes liberal democracies from the “illiberal democracy” – a contradiction in terms – promoted by Victor Orban in Hungary and the current Polish leaders. This attack against liberal democracy took on a new dimension

with the rise of emerging countries, which counter it with their own autocratic governance model with increasing assertiveness. I am, of course, referring here to China, Russia or Turkey. On this issue, the answer to your question is clear: we must defend our democratic model and our values, which are universal because they are anchored in humanism. We must defend them first at home, where they are undermined from within and from the outside, and we must also defend them as much as possible beyond the Western world, whenever fundamental human rights are violated, or worse even. Respect for national sovereignties and cultural relativism has its limits.

However, in this clash of governance models and values – that is the second aspect of your question – law remains more than ever the necessary language of globalization in order to prevent and resolve differences. Finding agreement on shared norms becomes more challenging in this environment, but as state actors generally behave rationally, everyone has an interest in reaching agreement, failing which it is war.

Do the “liberal” values promoted by the globalized rule of law clash with traditional values in the West and beyond?

I distrust overly general phrases such as “liberal values” or “traditional values”. What is clear is that globalization in all its economic, technological, human and cultural dimensions, triggered within Western and non-Western societies a number of identity-based and nationalistic reactions, and a return to religion and what you call “traditional values”. However, one must realize that this recoiling and the rise of religious fundamentalism in the Arabo-Muslim world as well as in the West constitute a huge regression compared to the openness of the decades following World War Two. One must also keep in mind that these “traditionalist” reactions have been almost always instrumentalized, if not orchestrated, by autocrats and other demagogues, be it Poutine’s Russia with the instrumentalization of the orthodox religion, Erdogan’s Turkey with “moderate” Islamism, Modi’s India with anti-muslim hinduism, Poland’s “Law and Justice” and Trump’s America. “Traditional values”, along with induced nostalgia for a long-gone greatness, are thus one of the instruments of the populist and reactionary attacks on liberal democracy and the rule of law, science and progress, and the Enlightenment. This has produced Brexit, the Trump presidency, and the catastrophic outcome of the pandemic in countries governed by populists such as the UK, the US, and Brazil.

Does the use of law as a tool of globalization require a separation of politics and economics in international relations?

The separation of politics and economics within international relations coincided with the first decades of the current wave of globalization, which were characterized by Western economic, political and cultural dominance. During the 90s, marked by the illusion of the “end of history”, of the global triumph of democracy and the market economy, and by technological harmonization, economic relations were somehow depoliticized. Since the paradigm change that I mentioned earlier, that is the return of geopolitics at the forefront of international relations, the separation between economics and politics exists less and less, and we are witnessing the opposite phenomenon, which is the excessive geopoliticization of economic relations, as illustrated by Donald Trump aggressivity mirrored by Xi Jinping’s policies.

Paradoxically, as I was just discussing, this geopoliticization of international economic relations makes regulation through law even more necessary. Let me clarify, however, what I mean by “regulation through law”, as law itself can be instrumentalized to serve geopolitical ends. I am not referring here to the frequent complaints against the extraterritorial application of American law in areas where an international consensus exists, such as the fight against corruption, money-laundering or tax fraud. In a globalized economy, it is quite natural that national or regional legislations have an extraterritorial reach, and that is indeed the case with several bodies of European law. What I find worrying, however, is the arbitrary enforcement of laws for geopolitical ends or as retaliation, and that is this type of instrumentalization of the rule of law that a legal regulation of an increasingly conflictual globalization must prevent through consensual institutions and substantive as well as procedural rules. “Lawfare” represents an emerging threat for globalization.

Can Europe be a global normative power?

I believe so, provided “norm” is understood as “rule” rather than as industrial standards. Since its birth at Maastricht at the beginning of the 90s, the European Union has identified itself as a “global normative power,” and it has indeed become one in a number of key areas such as the regulation of personal data. Yet, this ambition has been hindered by the lack of European political unification, to the extent that global normative influence requires a law unified by EU regulations and enforced by integrated institutions. Thus, Europe’s influence is the strongest in federalized areas, such as international trade, competition law, and monetary policy. Another limitation to Europe’s normative influence is the lack of an enforcement arm, such as the European Commission in respect of competition law or the US Department of justice in

respect of economic crime. The European prosecutor's office is a first step, insufficient still, in that direction.

However, in the conflictual globalization of the 21st century, Europe cannot satisfy itself with being a normative power, even a global one. As early as 2008, on the eve of the global financial crisis, I argued in favor of an ambitious European strategy for globalization in my report on the future of the "Lisbon strategy" – a fiasco – pursuant to a mission entrusted to me by Christine Lagarde and Xavier Bertrand for the French presidency of the EU. Several of our proposals, such as the need for a review of strategic investments at the EU level and a more robust trade policy, are being considered today by the Von der Leyen Commission and echoed by Internal Market Commissioner Thierry Breton. Europe must also become a political and strategic power and strengthen its technological and military capabilities in the years to come.

Let's return to America, to your praise of American democracy in the 80s and to your latest work *Résistances*. What is your assessment of the American democratic resistance to the Trump presidency?

I had the opportunity to denounce a regression of the rule of law in the United States following the September 11, 2001 attacks in a postface to a new edition of *Le droit sans l'Etat* twenty years later. However, the Trump presidency's relentless assault against democracy and the rule of law was of a wholly different nature, which is why its defeat was critical for the United States, for the world, and for liberal democracy.

"Democracy prevailed" as heralded by Joe Biden, in the sense that the popular vote and the electoral system were respected and the antidemocratic candidate, defeated. But it was a close call, and the Trump presidency revealed serious and surprising weaknesses of the rule of law and the balance of powers in United States, in a context, to be sure, where Congress was dominated by a party now only Republican by name, and whose moral bankruptcy is largely responsible for making American democracy look like a banana republic. I have been particularly amazed by the number of breaches of law, ethics and democratic norms that a US president could commit without sanction during his mandate, and by the powerlessness of the rule of law vis-à-vis politics, whenever the majority party in Congress turns away from the spirit of the laws and the values of American democracy to serve only its own short-term interests.

Short of being able to reform the impeachment procedure and the electoral system, the new Democratic majority in Congress will have to work to better regulate and sanction presidential powers, strengthen the independence of the Justice Department, and otherwise prevent in the future a Donald Trump's countless violations of ethics and democratic norms.

That said, despite the faulty abdication of the Republican Congress and the resulting weakening of its “checks and balances,” American democracy has demonstrated its unique resistance capability, thanks to the traditional media, the federal courts, the States and other local governments, civil society, and the “deep state” denounced by Trump, including the military leadership. I am not sure European democracies would have done better faced with a danger that threatens them as well. We must draw all the lessons from the American experience, including January 6, 2021 and its aftermath.

Interview by Joachim-Nicolas Herrera and Vasile Rotaru

