14. Further terrains for subversive comparison: the field of global governance and the public/private divide

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1. SUBVERSIVE COMPARISON AND DOMESTIC LAW

When used in an essentially domestic context by legal scholars, the practice of comparative law as a subversive discipline serves to induce a de-centering of legal thought.¹ Purportedly ‘natural’ legal concepts (frequently in the field of ‘private’ law) which are believed to provide the pre-political constitution of civil society in liberal democracies (such as property, privacy, contract ...), are thereby shown up to be culture-dependant constructs. The demonstration encompasses those principles which actually constitute the architecture of law as a system (distinctions between public and private law, law and politics, law and religion ...), and indeed the very methods which structure legal reasoning (codification or case-law; attention to texts or facts; deduction or induction). How indeed can such concepts, principles or methods be natural and thereby unchallengeable, if other traditions or communities manage perfectly well without them? This essentially epistemological question in turn paves the way for a more political critique: however immemorial their history may be made to appear, these constructs are in fact harnessed to a variety of ideological ends – unsurprisingly, when they are particularly embedded, those of the established legal order. This is why their purported naturality is bolstered by myths such as the ‘purity’ of the classical Roman origins of law,² the immutability of code,³ or the evolutionism of the common law,⁴ and so on.

2. BEYOND THE DOMESTIC SCENE

On the non-domestic scene, subversive comparison has largely been designed to counter-act the belief in an ancestral common core of legal categories spanning the Western legal tradition and frequently represented as springing from the shared legacy of Roman law in


the form of a latent *ius commune*. In such a context, and although the history of legal change undeniably shows up interesting patterns of mutual borrowing, reciprocal irritation or colonial exportation of legal arrangements, the search for commonalities among legal rules or pragmatic solutions evidencing a shared legal heritage generally presupposes an essentially technical, if not anemic, view of the law, in which its political dimension tends to be down-played, and epistemological and cultural differences ignored. The most convincing explanation for this turn to the comfort of technique is supplied by David Kennedy, who sees an effect here of post-war trauma. Be that as it may, this approach is generally driven by an agenda for the transnational unification of the law, which subversive comparatists tend to combat as being undesirable (as eradicating cultural diversity and therefore suppressing the Other), unrealistic (if unaccompanied by a common court), necessarily biased in favor of one or other legal mindset (although whether the codes or the case-law prevails is another matter), obscurantist (in that it is necessarily turned towards the past and gives little thought to the dynamics of social evolution) or megalomaniac (hiding an expansionist worldview behind the language of economic efficiency), and in all events a fallacy (given the lack of underlying commensurability between the legal cultures involved). In the context of the European Union, persuasive (albeit unintended) support for the thesis that the unification project is driven by a struggle for academic and political influence lies in the appearance of a ‘draft academic common frame of reference’ soon after the demise of the civil code project which it clearly reincarnates, followed now by a battle within the (previously homogeneous) group of academics involved in the crusade for a common law of Europe, of which the stakes now appear to be the location of a future European law Institute – no doubt along with the composition of the board of governors and the additional windfall of funding by the European Union.

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3. THE ‘NEW UNIVERSALS’ IN GLOBAL GOVERNANCE

A third, more recent challenge for subversive comparative law has emerged in the field of global governance.\textsuperscript{10} It will once again require unbundling a discourse that claims that a form of ‘translocal knowledge’ can spring from comparison. Such knowledge is used by both public international institutions and by private transnational economic actors to bolster conclusions about the new needs of developing countries in a globalizing environment and the tools which are adequate to respond to them. Once again, a given legal content is made to appear ‘natural’ through its universality. The rhetorical mechanism already at work to ensure that institutional arrangements go unchallenged in a domestic context or to evidence a shared cultural heritage in a quasi-federal environment, serves to provide the apparently consensual foundations of a worldwide legal order. Paradoxically, the ‘cultural’ objection, according to which law is too embedded in social, political and economic conditions and so much connected to a specific legal mindset, which may be sufficient to dismantle many of the claims of naturality or commonality in other instances, may be less persuasive here. This is partly because the areas of law involved here are largely influenced by new technological expertise (including global finance, economic calculus), while, as Teubner points out,\textsuperscript{11} arguments based on the weight of tradition have lesser import. It is also due to the fact that the rhetoric itself tends to appeal to underlying or transcendent principles which are supposedly so fundamental as to be pre- or post-cultural. Hence the idea that among the ‘mysteries of global governance’ we can count the revival of ‘universals’ purporting to be foundational concepts in the new legal order.

4. THE ‘RETURN TO THE HUMAN’

Two recent trends may provide a particularly powerful impetus for the development of such ‘new universals’ in the global arena. One is the ‘return to the human’ in other disciplines. It is no novelty that legal methods and paradigms are influenced by, or interact with, trends in other areas of research, from anthropology to artificial intelligence. Recently, it has been said that human nature has been making a comeback: ‘a new window has been opened onto the broader human story which suggests that cultural differences many not run quite so deep after all’.\textsuperscript{12} Evidence of shared patterns in the structure of human intelligence or behavior may then serve to emphasize the necessary similarity of social arrangements, including law. It is quite clear that, in the latter field, the absolutism of European human rights fits into this picture. Of course, this is in no way to decry the

\textsuperscript{10} ‘Global governance’ is to a large extent still unchartered territory, although a common feature of work in this area is to emphasize its complexity. It can be thought of here as all the mechanisms, public or private, formal or informal, which induce some form of discipline on the part of both institutional and private actors in the pursuit of their own political and economic goals.

\textsuperscript{11} Teubner, ‘Good Faith in British Law’, cited above.

enormous benefits that human rights have brought as a source of political subversion, as has always been the case. But the spillover on a methodological and epistemological level means that the belief in a profound unity of human nature is likely to de-emphasize cultural diversity and smooth over difference.  

5. BENCHMARKING AS COMPARISON

A second evolution pointing in the same direction is the generalized use of benchmarking and numeric calculus of performance by world institutional actors, which appear also to be serving as an ersatz form of comparison. Whatever its virtues elsewhere, the impact of the ‘dismal science’ in the global field has been to create the illusion that immaterial qualities may be reduced to figures, indicators or statistics and measured against each other. Bruno Latour’s concept of ‘centers of calculation’ has been aptly used to describe the role played by standardized measuring procedures in the implementation of the World Bank’s development policy in Africa. 

6. THE MYTH OF A GLOBAL LEGAL GRAMMAR FOR THE PURPOSES OF GLOBAL GOVERNANCE

The combined effect of these apparently heterogeneous developments in the field of law, when applied to the global arena, has been to foster the idea that there exists at the least a global legal language based on economic models, and perhaps even a deeper knowledge of a legal kind that is somehow linked to the essence of human nature. Both encourage the idea that tools of global governance can thrive upon a consensus as to the needs of humanity as it is today. Constructs purporting to be of universal value, such as the rule of law, or constitutionalism, or due process, or human dignity are touted as being foundational to a new world order. However well-meaning the effort, and indeed however important such values have proved to be in various contexts, subversive comparison must ask to what extent these ‘new universals’ are projections or offshoots of cultural representations of law, and how far they are instrumentalized, say by international financial

13 Perhaps the most profound implication of this reorientation toward human universals has to [do] with what we will now make of the universal itself. Finding something common across many cultures, scholars in previous generations used to presume to have something “true,” in a mysterious sense, since people assumed to be impossibly far removed from each other arrived independently at the same conclusion. (Peter Struck, cited above)

institutions, to ensure political sway to a given economic world-view. A case in point is the rule of law itself, as promoted by the Washington consensus.\(^{15}\)

7. CHARTERING THE FIELD OF GLOBAL GOVERNANCE

The aim of this chapter is merely to emphasize the need to charter the field of global governance in terms of subversive comparison, to the extent that many of the threads which interact to compose it rest on essentialist or unifying claims. The example cited above of the rule of law serves as a cautionary tale in respect of these new universals. Following the pattern observed both in the domestic and European context, the appeal to common practice and ideals tends to make these claims appear entrenched and apparently unchallenged; they are often borrowed from the domestic sphere and then legitimized by consensus in various supra-national fora. Without attempting to be in any way exhaustive, this paper will now illustrate this process with an example based on the distinction between the public and the private spheres in international law, which shows that such consensus may serve to shield a governance vacuum, favoring if not an established order as such, at least those actors, whether institutional/states or private/corporations, whose interests are best served by keeping regulation at bay.\(^{16}\) Thus, neo-liberalism requires and induces ‘désordre public’ or private-interest-driven public policy\(^{17}\) – in fact a scheme of governance that is a far cry from its liberal predecessor; but its basic tenets are made to appear to fit into a spontaneous continuum, leading as if quite naturally to the neutralization of those checks, balances and other mechanisms of self-restraint, which, in the liberal model, subordinate private interests to those of the polity.

\(^{15}\) Once an instrument of colonial expansion in the common law world, it has served more recently to promote the Washington Consensus, for example through the World Bank’s agenda in the field of economic development. This does not of course invalidate the real services rendered by the concept of rule of law in the institution of democracy. However, as a concept it translates cross-culturally with considerable difficulty – the separation of powers, for instance, or the subordination of the Crown to ordinary courts, are clearly relative arrangements even within the confines of the Western legal tradition.

\(^{16}\) See Backer, Larry Catà, ‘Multinational Corporations as Objects and Sources of Transnational Regulation’. ILSA Journal of International & Comparative Law 14.1 (2008): 26, ‘contract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated become the regulator’.

8. THE PUBLIC/PRIVATE DISTINCTION

While the politics of this distinction have long since been subjected to critical legal scrutiny in the domestic field, at least in the US, the ‘private history’ of international law has only recently been subjected to as keen an analysis. Alex Mills has shown up the ‘confluence’ of public and private international law, the distinction between the two being a projection of its domestic counterpart, a myth developed to serve the needs of a vested political worldview. In the area of global governance, the ‘black holes’ in which such interests thrive are maintained by the strategic use of the dividing line, which is alternatively asserted in the name of the Westphalian or liberal vision of ‘public’ or ‘private’ international law, or allowed to be crossed in order to promote the smooth running of global trade, as the case may be. Indeed, quite remarkably, this representation of the world appears to have survived both the demise of the liberal state in the domestic sphere and the decline of the classical model in international relations – it is thus apparently unaffected by the transformation of the nature and function of private law, the profound changes induced by globalization in the structure of the international legal order, and, more generally, the tectonic upheavals within the theory of law and sovereignty and the reality of cross-border trade and investment. The result appears to be that, given a little help from the courts, private economic power is free from constraint, while states are held to their commitments towards private actors under mechanisms of private law.

9. UNCONTROVERSIAL ASSUMPTIONS?

Take several uncontroversial or at least judicially approved assumptions, each the direct consequence of the Westphalian model (which provides the theoretical framework for the traditional model of public international law) and of the liberal ideal of law and its

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22 A similar hiatus can be observed at the substantive law level, where academic representations of general contract law (including the traditional construction and ambit of freedom of contract) do not seem to have integrated the transformations induced, in particular, by the ‘competitive contract model’ which now inspires contract law in the European Union. Thus, on ‘the forgotten issues in the codification projects on European contract law’, including the draft academic frame of reference, see Micklitz, cited above, at 3.
relationship to market (which structures classical private international law). Thus, it is said, public international law does not apply to private actors; it follows that there is no corporate social responsibility under international law. Indeed, private economic actors are empowered to design their own normative space in the name of ‘party autonomy’ by opting out of state regulation in the transnational arena. While these two supposedly universal assumptions combine to ensure that the global economy can continue to develop without constraint (whether from public international law or mandatory public law), a third implies that distressed sovereign debt can be sold on private equity markets and the debtor subjected to the harsh economics of private law. In each case, the architecture is portrayed as resulting directly from foundational principles or legal logic and pass as widely shared if not universal. The public/private divide is maintained or crossed according to the interests involved. However, as a matter for prospective research, recent trends seem to indicate that the relegation of ethical or non-state sources outside the legal sphere may paradoxically lead to the emergence of a harder form of constraint on private activity than more traditional forms of public regulation.

10. PRIVATE CORPORATE ACTORS AND PUBLIC INTERNATIONAL LAW

The assertion according to which public international law concerns only state or public actors is to be found in the *Kiobel v Royal Dutch Shell* case (September 2010, CA 2nd Circuit), where it acts to shield corporate actors (specifically multinationals) if not from all forms of liability for harm caused by industrial activity overseas, at least from the exercise of subject-matter jurisdiction by US federal courts for human rights violations in the course of such activities; such jurisdiction may often be the sole effective recourse of local populations suffering massive personal injury, torture or environmental damage. Revived after nearly two centuries to become a key element in international human rights protection in the American courts, the Alien Tort Statute 1789 provides that federal courts have jurisdiction over tort claims brought by foreigners (aliens) for the violation of the ‘law of nations’. It was first re-used in a series of kidnapping and torture cases involving human rights violations by individuals, officials of foreign states acting ‘under the color of the law’. The success of these actions provided hope for victims of equally violent corporate conduct, often linked to the implementation of industrial projects (pipelines, gas exploration) in developing countries. Reparation for this kind of harm had hitherto been unable to overcome the hurdle of *forum non conveniens* which deprived victims of jurisdictional mobility, thereby holding them hostage to the prisoner’s dilemma which

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23 456 F.Supp.2d 457. Since the writing of this chapter, the Supreme Court has granted certiorari in the *Kiobel* case, and a decision is expected before June 2012. Meanwhile, three other federal appellate courts have judged, contrary to the *Kiobel* Court, in favor of the justiciability of corporate defendants under the Alien Torts Statute (see for the DC Circuit, *Doe v Exxon Mobil Corp.* (No. 09–7125), 8th July 2011; 7th Circuit, *Flomo et al. v Firestone Natural Rubber Co*., 7th U.S. Circuit Court of Appeals, No. 10–03675; 9th Circuit *Sarei Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (en banc).


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17. REGULATORY LIFT-OFF

However, in reality, jurisdictional mobility through choice of forum means that private actors are empowered to opt out of mandatory rules and design the normative regime to which they are subject. The frontiers crossed through party choice are not only jurisdictional but also disciplinary, in the sense that they are the dividing line which separate the public sphere (regulation) from the private (market): by choosing a more permissive forum, private actors privatize the applicable law. Within the changed normative, political and economic environment, party autonomy has evidently ceased to imply subordination of private actors to state authority, but actually reverses this relationship. Today, parties are empowered to attain ‘regulatory lift-off’ because the liberal state has renounced the means to ensure the primacy of its own – or another’s – public policy regulation over ‘private legislation’. By allowing parties to cross jurisdictional barriers unhindered, through the liberalization of state control at the enforcement stage, the principle of free choice generates a competitive market for legal products and judicial services; it can no longer be represented as a carefully monitored concession of the liberal sovereign state. Philosphically, the shift from obligation to empowerment can be described in Foucauldian terms as a move to a neo-liberal model of private governance.

18. ‘SEMI-MANDATORY’ RULES

Thus, the liberalization of the requirements for recognition and enforcement of foreign judgments and arbitral awards has allowed economic actors to escape from the internationally mandatory provisions which would otherwise have been applicable before their ‘natural forum’. Once that forum has been ousted, those provisions become ‘semimandatory’ because their authority becomes uncertain. The only obvious way of ensuring that law retains its authority when parties have the license to cross barriers is to make the ‘second look’ effective at the enforcement stage. Such safeguards are however

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51 This has been made possible within the European Union, where Member States have the obligation to refuse recognition to arbitral awards given in violation of European competition and consumer law. Thus, judgments handed down by the courts of Member States, presumably more likely to conform to those standards in the first place, may also be subjected to scrutiny under European values at the recognition and enforcement stage, unless of course the _exequatur_ procedure
rarely implemented in the global sphere, where competition for the arbitration and jurisdictional services industry ensures that the trend will be towards an ever more liberal stance. Although the notorious Lloyd’s litigation does not involve activity in developing countries, it concerns investor-corporate actor litigation and may therefore serve as an illustration of the way in which, by careful drafting (of its general undertaking), in addition to clever structuring of the corporate entity and effective political lobbying, a private actor may create a personalized, no-law zone. Moreover, the global industry for judicial services will ensure that such a zone remains free from interference.

is abolished. However, outside a federal or quasi-federal context, there is no guarantee that forum mandatory policies will be taken into account at the enforcement stage. In the absence of any requirement as to the law applied by the foreign judge or arbitrator, public policy is the only remaining tool and is not necessarily well adapted to this task as it may not allow for a functionalist analysis of the objectives and the necessary scope of the mandatory rules of the forum. Failing a rehabilitation of the status of mandatory provisions, however, the imbalance created by the excessive empowerment of private actors through the autonomy principle could only be remedied by disallowing party choice in fields where another court cannot be trusted to implement the protection of the interests involved.

In the Lloyd’s cases, new American investing capital which had been channeled unawares into asbestos risk syndicates and then called upon to ‘pay now sue later’ found itself unable to invoke the protection of the Securities Exchange Act 1934 to paralyze Lloyd’s (unlimited) claim. The presence of a choice of forum clause in their contract in favor of English court or arbitration, accompanied by the choice of English law – deemed to provide guarantees equivalent to those of federal legislation – sufficed to divest the investors of their personal fortunes and deprive them by the same token of any recourse to protective overriding rules. Thus, the federal courts having determined they had no jurisdiction by reason of the choice of forum clause, the English court proceeded to rule under English law – which contained the Lloyd’s Act, of which the effect was to exempt Lloyd’s from the Misrepresentation Act. Lloyd’s claim was judged to be legitimate under the terms of the contract, despite the obvious lack of transparency. Once back before federal court, the English judgment was subsequently considered to conform to relevant standards of due process and thus the investors were unable to resist enforcement (no further second look). Mechanisms of contract law thus allow the designing of a private transnational governance regime to a large extent immune from interference from public regulation.

Moreover, that regime may be upheld through privatized judicial weapons. The idea that (certain) commercial courts participate in a global market for judicial services, extending the offer for private services that already exists in the form of international commercial arbitration, was first formulated as a normative proposal based on the observation that the American market for corporate charters integrates the quality of jurisdictional or after-sales services provided within the jurisdiction whose charter is chosen. It was suggested that high-achieving courts might make their services available to parties worldwide, in exchange for fees, generating the overall benefits of regulatory competition for countries with less efficient judicial systems. Although the normative dimension of the proposal runs rapidly into deep waters, it may nevertheless be wondered how far we really are today from the existence of a global judicial market, at least in the field of ‘international’ transactions, through the liberalization of choice of forum clauses and the (largely) free movement of judgments. Moreover, to the extent that courts act as umpires of private interests rather than as guardians of public policies (other than that of upholding a liberal order based on contract), they are actually playing the arbitration game. The latter observation is particularly relevant in cases where private actors appear to be able to use the courts not only to settle disputes ‘as between themselves’, if necessary by excluding societal concerns through contract, but to obtain unilaterally various
19. FOREIGN SOVEREIGN DEBT AND PRIVATE LAW

On the other hand, whereas international law will not apply to corporate actors, such actors may use private law against (developing and highly impoverished) states. Sovereign debt can be traded on global equity markets and enforced under private law mechanisms. Thus, the public/private divide can be crossed, in the other direction, in the case of ‘distressed sovereign debt’, as an effect of the globalization of private equity. At the outset, was the inducing and re-cycling by multinational corporate actors of sovereign loans backed by local production? Thus, during the 1970s, multinationals – for example, oil companies operating in Africa – devised a system that created huge profits from production-backed loans to developing countries, which were often in need of liquidities. The proceeds of local production were lent back through corporate screen lenders to the developing country at artificially high interest rates, ultimately generating more loans and worsening debt, and increasing the likelihood of sovereign default. At that point, of course, traditional debt collection structures were made available both by the International Monetary Fund and the World Bank. However, the arrival on the scene of a new category of private actors has complicated the picture, by-passing these institutional mechanisms and vying for a (lion’s) share of the profits.

20. VULTURE FUNDS

Typically, ‘vulture funds’ – a particular variety of hedge funds, not unusually incorporated in tax havens – purchase ‘sovereign distressed debts’ of a highly impoverished country for a reduced price; these are bonds corresponding to loans on which the borrowing sovereign has defaulted, which can be bought at far less than their face value on the secondary market. The vulture funds then invest in extensive litigation in national courts, for the full value of the claims – typically, the full nominal amount with the unpaid interest. Recently, growing awareness of the extent of the harm done to the distressed sovereign borrower has prompted into action legislators and courts of developed countries where enforcement is sought – such as the 2010 Debt Relief (Developing Countries) Act in the UK, or the refusal to enforce a foreign judgment obtained against the defaulting country – but unilateral measures cannot of course solve a global problem and the forms of injunctive relief designed to paralyze press coverage of high-profile corporate responsibility cases – which in many instances remains the only tool available to small actors otherwise deprived of any realistic access to courts. Public attention was thus drawn to the development of privatized judicial weapons in the Trasfigura case (unpublished), where the Guardian newspaper had been made subject to a ‘gagging order’ accompanied by a ‘super-injunction’. Information on this case is available on the Guardian’s website.

55 This may in turn be the main source of revenue of specialized law firms.
56 The Act was passed on 8th April 2010. Cf. the Democrat ‘Stop Vultures’ proposal in the US Congress, 2009.
57 See such refusal of enforcement by British courts: [2010] EWCA Civ 41.
interests involved are too complex to ensure cooperative regulation. Against such a backdrop, vulture funds use two types of tactics.

20.1 Garnishing Royalties

The first tactic is to collect on the debt, not by suing the foreign sovereign borrower or attempting international enforcement of a judgment, but by attaching or garnishing the royalties of the foreign oil companies. A good illustration of the process can be found in the notorious Af-Cap cases, in which a vulture fund sued the Congo, as well as an American oil company (CMS Nomeco). The Congo had defaulted on a loan agreement in which it had explicitly waived its right to claim foreign sovereign immunity either from suit or from attachment or execution of its property. Initially, the lender bank (or an assignee) had obtained a judgment against the Congo in London, but when the Congo did not pay any of the payments ordered, it turned to the United States and obtained a writ of garnishment in Texas against a group of Texas oil companies who had oil-drilling operations located off the Congolese Coast. However, the writs of garnishment were dissolved in federal court and the case dismissed on the basis of foreign sovereign immunity. At this point, however, the vulture fund Af-Cap purchased the loan at a 'bargain basement' price and then obtained garnishment of the royalties and taxes owed to the Congo.

20.2. Hold-out Game

Any feeling of poetic justice is, however, short-lived. The vulture funds may equally play a non-cooperative hold-out game during the restructuring negotiations for distressed debt. Here they will rely on the pari passu clause written into the loan contract. Thus in Elliott v Peru, a vulture fund which had acquired debt issuing from a 1983 loan on which Peru had defaulted, after refusing to participate in an Exchange agreement involving other creditors, obtained first, a decision against Peru from the Court of Appeals of the Second Circuit, striking down the champerty defense raised by the sovereign, and then the ex parte order from the Court of Appeals of Brussels to block a large payment by Peru, under the Exchange agreement, on its loan bonds to European holders via Euroclear. The ground was that the pari passu clause – which was made to work somewhat like a most favored

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59 On this litigation, see Report of the UN Human Rights Council, cited above.
61 On the champerty issue, the Court of Appeals held that §489 of the New York Judiciary Law is not violated when ‘the accused party’s “primary goal” is found to be satisfaction of a valid debt and its intent is only to sue absent full performance’. On 22 June 2000, the Court for the Southern District of New York finally ordered judgment in favor of Elliott for the sum of US$55 660 831.56 (not including costs and expenses incurred in litigation).
creditor clause – gave the holders of the 1983 debt the right to participate pro rata in Peru’s payments to other foreign creditors. Since then, vulture investors have repeatedly used this strategy.

21. REMEDY IN PRIVATE LAW?

It is not clear however, that the *pari passu* does anything more than ensure that the creditor’s loan will not be subordinated to the claims of other creditors in the event of the borrower’s bankruptcy; it does not mean that the solvent borrower must make *pro rata* payments to all its creditors. Beyond the legal mechanics of the clause, its economics are also hotly debated, while there is political disagreement on the adequacy of sovereign insolvency proceedings. At the same time, it may be wondered why other mechanisms of private law, such as ‘*le retrait litigieux*’, are not brought to bear so as to disincentivize hedge funds from making a profit from the purchase of low-cost sovereign debt. While it is clear that bailing out distressed debtors will always create a moral hazard problem, it seems even more wrong to encourage parasitic speculation and legal services at the expense of more constructive efforts to implement development policy.

22. A NEW VIEW? THE CHANGING STATUS OF SOFT-LAW

Neither international public law nor state law fully regulate the activity of private actors in the global economy, while private law may be used against states. Is there any other potential source of constraint on the development of harmful effects within the global economy? Various forms of transnational practice, including ethical codes of conduct, might be considered serious candidates for this function. These may be ‘public’ products of international organizations such as the UN Global Compact, or ‘private’ sources, such as the work of ethics or compliance departments within private corporate groups. However, their status as ‘soft-law’ before the national courts makes them fragile. Firstly, they are largely disqualified from governing private international contracts before national courts – except when they are allowed to prevail indirectly through the recognition of arbitral awards and thereby constitute an expression of party autonomy. Secondly, in the

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62 In *Elliott v Peru* the fund relied on the 1983 debt contract’s *pari passu* clause, which provided, ‘The obligations of the Guarantor hereunder do rank and will rank at least pari passu in priority of payment with all other External Indebtedness of the Guarantor, and interest thereon’. The Court of Appeals in Brussels considered that Peru was trying to use Euroclear to violate the principle of equal treatment of creditors, derived from the *pari passu* clause.

63 Of course, given that sovereign borrowers do not go into bankruptcy, the real meaning of the clause remains uncertain: see International Finance Seminar, Hal Scott and Howell Jackson, ‘Should we be Worried about Elliott?’ Harvard Law School May 2002.

64 Thus, the EC ‘Rome I’ Regulation no 593/2008 – after considerable debate on this point, inspired in part by the more flexible model of the Convention of Mexico, and while allowing freedom of choice of ‘law’ under article 3 – does not qualify as such any non-state body of law.
field of transnational environmental harm, or the other categories of tort involving the physical and moral integrity of local communities such as those discussed above, the value of soft-law is similarly dependent upon the room left for non-state norms by the applicable state law, which may or may not provide a framework in which it may be given effect indirectly.

23. CHALLENGES TO THE CLASSICAL MODEL

However, this is no doubt the area in which there have been the most significant challenges to the classical model in recent litigation before the state courts, since various mechanisms have indeed developed within the comparative state law of obligations which allow the violation of non-state norms to trigger liability under state law. Thus, non-compliance with a voluntary corporate undertaking has been seen to give rise to liability in tort, or even criminal liability, or liability under consumer or competition law. The first instance is illustrated by the Erika case, where a massive oil-spill from a tanker belonging to the Total group, carrying crude-oil, leaked off the coast of France causing considerable damage to the environment, to the value of property (public and private), to the tourist industry and to the livelihood of local fishermen.\(^{65}\) The 500-page judgment of the Paris Court of Appeals is remarkable for the recognition of environmental harm as reparable harm and for the new illustration of the readiness of French courts to impose criminal liability on corporations.\(^{66}\) The tanker proved to be tragically unseaworthy, but before launching it had been approved by Total under a vetting process that the group had put into place on a voluntary basis, no doubt with the idea that it would thereby show that it had applied appropriate diligence in preventing environmental pollution. Interestingly, far from sheltering Total from liability, non-compliance with its own vetting process – in not providing the required result – was considered by the court as characterizing a fault under French criminal law. A second instance is the Nike case, where various declarations by Nike were considered as constituting misleading advertising for Californian consumers, after staving off a First Amendment defense.\(^{67}\) Mechanisms of state law have thereby provided a legal sanction to private norm production.\(^{68}\)


\(^{68}\) More generally, on the desirable use of co-regulation through tort law as regulatory strategy (in cyberspace), see Stalla-Bourdillon, Sophie, Responsabilité civile et stratégie de regulation. Essai sur la responsabilité civile des prestataires intermédiaires de services en ligne. EUI, Doctorate, 2010.
24. FURTHER CONCEPTUALIZATION: SUBVERSIVE COMPARATISM AND THE DEFINITION OF LAW

Gunter Teubner has, however, theorized these changes further by identifying in the combination of public and private codes of conduct, a new form of global constitutionalism. Resulting from the social tensions produced by the harmful effects of global economic activity (such as those discussed above as candidates for court remedies under the Alien Tort Statute), this double source of soft-law presents the characteristic functions of a traditional nation-state constitution (fundamental norms and mechanisms of self-restraint), and a similar reflexive (social) linkage to the community of actors in which they develop, while governing under one umbrella decisions which are either juridical or economic. Following this analysis, soft-law, that is, norms produced outside the institutional framework of the nation-state, is paradoxically becoming a greater source of coercion than hard-law produced within that structure, which has very relative significance in a global environment. To a certain extent, then, the divide has effectively been crossed once more, but this time to the benefit of global governance. Therefore, the real question that subversive comparison raises at this point relates the very definition of law in this renewed cultural, political and economic context: do ethics and practice, long relegated to the insignificant, non-legal, field of moral conscience or mere fact, now accede to this status?