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Post Scriptum to Law Making in a Global World: From Human Rights to a Law of Mankind

*Olivier Moréteau**

The following thoughts, written shortly after one and a half days of brainstorming on “Law Making in a Global World,” are an invitation to move one step further, featuring a utopia that could become the topic of a forthcoming symposium.

A law of mankind? The very idea seems to contradict the pluralistic perspective that emerges from the symposium, especially from the presentations made by Roderick Macdonald and Jacques Vanderlinden. It must be clear to the reader that the author of this Post Scriptum fully endorses a pluralistic legal approach based on the local experience of a community and, to some extent, on the experience and aspirations of individuals, as long as it does not deny or infringe on the public good, the spiritual or philosophical values necessary for the survival of the group. With very rare exceptions, no individual may survive and flourish outside a community.

Several contributors to the symposium made it clear that the local and the individual must not be neglected but promoted and protected against a Western self-proclaimed global law. Here, in a nutshell, are my views on Western ethnocentrism:

1. One must beware not to impose an exogenous Western model to people who live under different customs and a different view of what we call legal order. Let us first check with them to determine whether they really need what may look essential to us.¹

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1. In November 1999, at a one-week seminar sponsored by the United Nations Development Program in the Himalayan Kingdom of Bhutan (one of the very few “third world” countries having escaped Western colonization), I said, in an unpublished opening speech:

I would also like to express my deep admiration for the Bhutan and Bhutanese and your tradition to solve disputes without resorting to the courts and the law. You might have heard that there is a rather recent movement, in Western countries, to promote informal justice, by way of mediation and conciliation. We use the generic term of alternative dispute resolution. We certainly have a lot to learn from you in this respect and it would be very good to invite you in our countries for

2. One should not be fooled into believing that the fact that the most populated nation on earth adopts the Western model of law making, a process brilliantly described by Volker Behr, means the abandonment of a multi-millennial model of authoritarian domination. The Chinese culture deeply rejects and despises the Western model of justice. The present "Westernization" is a makeshift screen; we should rather work at understanding the inner rules of the emerging superpower and the traditions of its people.

I. NEW CHALLENGES

The idea of a law of mankind may be a global reaction to globalization itself, to curb some of its most threatening effects. I am not sure it may cure poverty, the huge problem pointed out by Stathis Banakas, but it may help to not make things worse. It may be a way of resurrecting a law of peoples, without denying what is meant to remain particular and local. The individual and the local would not be denied if the law of mankind was put in the hands of the people rather than large scale supranational organizations.

The Romans already distinguished the *jus civile* (civil law) from a *jus gentium* (a law of the peoples, based on principles recognized by most nations). Grotius later developed the concept of *jus gentium* as an idea of right order to which national states should conform. Unfortunately, the concept of national sovereignty became too strong, hindering the development of international law, both in its public and private dimensions. Some truly universal rules may develop today, under the supervision of the United Nations, the World Trade Organization, and other agencies. Sometimes they twist the neck of national sovereignty, and oftentimes they are curbed by it.

State sovereignty is portrayed as a cumbersome obstacle to the free circulation of wealth, and tireless efforts are made to bypass it. Meanwhile, it is still used as a powerful screen to restrict liability and create immunities.

Not many areas of law managed to develop in a state-detached perspective, ignoring or bypassing sovereignty, at least partly.

seminars on the subject. I do not know whether that could be covered by the UNDP [never again did they invite my contribution] We should not forget this tradition and it is our duty, we foreign experts, to try to understand your culture and legal tradition. If we want to bring you something and help, we may only be efficient if listening to you and understanding your problems and existing solutions.

Olivier Moréteau, Remarks at the Seminar on Commercial Law (Nov. 1999) (on file with author).

International trade law is one, and human rights law another. Historically, human rights have been protected by the courts, first in England and the common law systems, including the United States of America, and they have been proclaimed in a solemn manner in countries where they happened to be endangered, like France at the time of the French Revolution. The *Déclaration des droits de l'homme et du citoyen* (1789) served as a model for the Universal Declaration of Human Rights (1948), made in the context of the United Nations and for the European Convention on Human Rights (1951). It shared a community of inspiration with the U.S. Bill of Rights (1791), another product of the Age of Enlightenment, an age of universalism promoting an intellectual globalization.

The promotion of human rights strives to reconcile mankind with its future after the darkest moments of its history in the twentieth century. It is focused on the present, yet with unclear boundaries as to the future, given the challenges of bioethics. The legal community started giving part of the answer, which is largely in the hands of the courts, whenever it had to solve cutting-edge issues, such as those known under the names of wrongful birth, assisted suicide, and reproductive cloning, to name but a few.

Human rights are expected to take care of challenges addressing our identity as human beings, and in a sense, at least morally, the future of our species is linked to the choices we make or we accept.

The present globalization and development problems create challenges of a planetary dimension. If the global demand for cotton creates incentives to develop huge and ever-expanding farms covering dozens of thousands of acres, threatening the rainforest of Amazonia, the problem is not purely national. True, this may benefit Brazil, at least temporarily. Substantially reducing the rainforest, however, has a planetary impact, which can be assessed in terms of global warming and loss in biological diversity. We know that this is causing a threat to the living conditions of the generations to come, all over the world. Such problems are a new challenge for the lawyers of the twenty-first century. Lawyers are called to define the borderline of what is permitted or prohibited. We lawyers are doing a much better job these days in terms of protecting human rights (yet regrettably obliterating human duties and obligations), but in what measure do we contribute to the protection of the planet and the future of our species as a whole?

We have to think of the future of mankind in a comprehensive or global way. Human rights must not be rejected but projected in the vision of a future under threat, precisely because of the freedom and activity of the human beings that we want to protect.

Human greed, appetite for power or domination, generates prosperity when controlled by the law. The problem is that the multiplicity of legal systems, each overprotective of national sovereignty, no longer afford the necessary protection. Polluted clouds ignore state borders, the future of all human beings is linked to the protection of biodiversity, under threat in many different parts of the world.

In this context, when it is, as we know, about five minutes to midnight, may we remain content to see the most talented and futuristic lawyers spend their energy on projects such as preparing codes, consolidations, or restatements of the law for regional associations of countries or "modernizing" the legal systems of "emerging" countries? Sure, this is a legitimate and useful task in a present-world perspective, but such efforts may look pathetic from the point of view of future generations, where much more urgent needs remain unattended.

II. NEW PERSPECTIVES

The challenge of our days is planetary. Our activity, geared to the satisfaction of instant appetites or needs, jeopardizes the ability of our planet to sustain the generations to come. Mankind as a whole is today under threat. In this context, is it too much to suggest that at least a handful of creative lawyers (to start with) should try to work out solutions, looking at things in a radically new perspective?

The purpose of this note is to start drawing what this perspective may be. It is based on ideas that are in the air, but may be too slow in reaching the busy lawyer's mind.

In a non-global context, the Western concept of individual ownership may have been a way to favor small to large scale economic development while protecting individual interests, as limited as they may be. The Western concept of sovereignty may have done the same, yet at the price of countless wars, today largely eliminated from the Western world but exported to many other places. Nowadays, resources to be owned are more limited than before, and global warming cannot be solved at the level of independent sovereign states. Private ownership and national sovereignty have lost their paradigmatic value. This does not mean that they are bound to disappear, but rather that new models have to emerge.

In the nineteenth century already, James Lorimer suggested that between the human being as an individual and mankind as a

whole, there may be little room, if any, for sovereignty.² Human rights are at one end of the spectrum, and mankind is at the other end. But who does think, in legal terms, about this other end? This is the new perspective to be drawn.

Human rights focus on the rights of the individual, regardless of race, sex, age, etc. The problems generated by the present globalization call for another perspective, to be combined, of course, with the individual-based human rights perspective. We have to promote the other end of the spectrum and look at mankind in general. Taking the double focus of the individual (human rights) and mankind as a whole (rights of mankind), some of the traditional concepts fabricated or shared by the lawyers, philosophers, and politicians appear like obstacles rather than facilitators.

Casting a universal outlook on the legal world is nothing new. It was in the air at the dawn of comparative studies, when pioneers like Lambert and Saleilles convened, in Paris, the first worldwide congress of comparative law in 1900. The focus on mankind brings an additional dimension. The word "mankind" carries with it not only our present but our past and future experience as a species presently dominating the world. The future is not the most common perspective that we lawyers like to adopt. We rather move backwards in our attempts to satisfy present needs, our eyes being turned to the past and checking glimpses of the future in little side mirrors. The present symposium gave ample evidence that lawyers generally find it safer to have a conservative attitude.

A conservative attitude? All the better, since our concern here is to preserve the chances for future generations to develop in a livable world. Let us see what suitable conservative techniques the lawyer's toolbox has to offer.

In an ever-changing world, where judges contribute at least as much as legislators to the creation of the law, flexible standards may be more effective than rigid rules. True, the rules are stable, predictable, and may be adapted if needed. However, standards are flexible by nature, easy to phrase, and understandable even by non-lawyers. They adjust to new social, technical, and economical contexts. They promote fair and homogeneous judgment favoring diversity rather than grey minimal uniformity.³

2. James Lorimer, 2 *INSTITUTES OF THE LAW OF NATIONS* 131, 137 (1883) (describing human beings as citizens of the world).

3. Olivier Moréteau, *Le Standard et la Diversité*, in *LAW AND HUMAN DIVERSITY* 71-90 (Mauro Bussani & Michele Graziadei eds., 2005).

III. BACK TO STANDARDS

I see at least two traditional standards that may become the pillars of a law of mankind. One is inherited from the civil law, the other from the common law. And both may be compatible with non-Western cultures, a point to be investigated with the most open and humble attitude.

The first one is the antiquated *bonus pater familias* (good family father), inherited from Roman law and phrased or rephrased in various languages in a multitude of civil codes. It may sound shockingly sexist, unless we substitute "parent" for "father." Traditionally, it is applied wherever someone is entrusted with the property of another. Such property is to be managed and used in such a way as not to prevent its transmission to and use by future generations. A bold move here may be the imposition of a duty, not only to those who possess for the benefit of others, but to owners themselves. To every right, there is a corresponding duty. After all, even when we own, do we not have a duty to mankind to ensure that what is not renewable will not be disposed of in a final way?

Can we imagine a more fertile standard for protecting nonrenewable resources and the fragile equilibrium of our environment? The standard points to the relative character of individual ownership: The law gives the owner extended prerogatives but may request the owner to comply with at least limited duties, owed not to anyone in particular (though this should not be excluded, wherever appropriate) but to generations to come. Thomas Jefferson wrote, in a letter to James Madison, "that the earth belongs in usufruct to the living."⁴ What we believe we own, we actually borrow from future generations or hold as trustees for society at large.⁵

For many reasons, since the Latin language has no generic word to define parents, one may substitute the feminine *mater familias*. Mothers do a better job in terms of preservation, which makes the adjective "good" redundant. The reference to family is to be maintained, creating a nexus. A duty must be owed to someone. Mankind is our extended family, and after all, again to

4. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), reprinted in THE WRITINGS OF THOMAS JEFFERSON (H.A. Washington ed., 1861), available at <http://yamaguchy.netfirms.com/jefferson/earthbelong.html>.

5. This echoes the concept of *trusteeship* as elaborated by Gandhi, who studied jurisprudence and read Snell's *Principles of Equity* (still a major source book on equity in English law). See V.T. Patil & I.A. Lokapur, *Gandhi's Concept of Trusteeship: An Analysis*, in STUDIES ON GANDHI 99 (V.T. Patil ed., 1983).

justify the feminine, do we not refer to Gaia as Mother Earth? We honor our parents or ancestry in taking care of our offspring: this may reconcile the Western world with non-Western traditions.

IV. ABUSE OF RIGHT AND REASONABLENESS

Abuse of right may be introduced as a companion concept, a central one in a law of mankind. This is a widespread rule, developed in countless jurisdictions, preventing owners from exerting their otherwise legitimate right in a way that brings them no profit but the mischievous satisfaction of causing harm to their neighbors.⁶ It may be extended to prevent any abuse of a right that would harm future generations, such as accumulating dangerous substances that may pollute water or cause harmful contamination in the years or decades to come.

Abuse of right also connects to a second standard. The standard of the reasonable man, today the reasonable person, serves to define duties owed to persons to whom we are not connected by contract or agreement. It was magnificently stated in 1932 by a famous English judge, Lord Atkin, in the celebrated *Donoghue v. Stevenson* case:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁷

William Twining once pointed to the usefulness of this standard in a global context.⁸ This is indeed a very powerful one,

6. For a recent view showing that this doctrine, born in the context of civil law jurisdictions, is not unknown in the common law, see Elspeth Reid, *The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction*, ELECTRONIC JOURNAL OF COMPARATIVE LAW (Oct. 2004), available at <http://www.ejcl.org/>. See also P. Catala & T. Weir, *Delict and Torts: A Study in Parallel, Part II*, 38 TUL. L. REV. 221, 237 (1964).

7. [1932] A.C. 562, at 580 (H.L.) (appeal taken from Scot.) (U.K.).

8. William Twining & David Miers, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* 54–55 (3d ed. 1991).

enabling one to assess the extent of liability in a typical neighboring context (e.g., when I live at some upper floor in a multi-story building, I must reasonably anticipate that if I leave my bathtub unattended with faucets fully open, an inundation may occur, likely to cause harm to the residents below), as well as in an international pollution case (e.g., if my company allows some toxic substance to spill into the river, I may reasonably anticipate that it may contaminate the water and cause damage to cultures and fisheries downstream, some of which may be located beyond a state border).

In the law of mankind, ownership and liability may not be without limits. However, these limits should not be affected by borders of so-called sovereign entities. They are based on reasonable anticipation. True, judges are not experts to be expected to assess in every given case to what extent conduct or omission may affect the welfare of future generations. They have to rely on scientific evidence. In case of doubt as to the existence of irreversible harm, they must apply the precautionary principle.

A lot would already be achieved if polluters, developers, and other predators were to pay in situations where the danger is obvious. Such situations are innumerable today, and we become increasingly aware of the toll we are imposing on future generations.

The law of mankind reminds us that to every single right, there is a corresponding duty, a perspective also worth remembering in the context of human rights.

V. BACK TO CITIZENS

Another big tool of the law of mankind, this time a procedural one, is the development of class actions, allowing individual citizens to pool their claims and operate as a powerful lever, in situations where politicians do not dare to act. Once big transnational class actions emerge, a heavy pressure will be applied to the presently untouchable multinational companies, especially if courts do apply the above-mentioned standards. This may be even more effective than the creation of a new international body to protect the environment, as advocated by President Chirac of France.⁹ The two may actually combine. The law of mankind may develop top down

9. His speech of February 2, 2007, coincided with the meeting in Paris of the Intergovernmental Panel on Climate Change, which produced an authoritative report on global warming, concluding that it is unequivocal and very likely caused by human activity, and will continue for centuries. *See* Intergovernmental Panel on Climate Change, <http://www.ipcc.ch/> (last visited May 21, 2007).

and bottom up, but it is safer to put it in the hands of the citizens and the judge, to prevent the blocking effect of the antiquated and devastating concept of sovereignty and the denial of local perspectives. Universality must be reconciled with diversity.

Let us get used to these new perspectives and draw them more precisely. Is this unrealistic? The law, like the world, needs a zest of utopia to move on. The problems are real, and it takes vision to face them in a realistic manner. Human rights are to be completed by a law of mankind. It must be the duty of future-oriented and open-minded lawyers and thinkers of all nations to map this new dimension of the law and to work at making it effective.

