Developments

Review Essay: "Lost In Disordered Clouds: Transnational Legal Pluralism and the Regulation of Global Asymmetries" – Mireille Delmas-Marty's *Ordering Pluralism* (2009)

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[Mireille Delmas-Marty: *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World*, Oxford: Hart Publishing (2009), 164 p.]

Abstract

Written in a transitional period between the two World Wars and taking place during the Austro-Hungarian monarchy's last days before World War I, Austrian author Robert Musil's novel, "The Man Without Qualities" considers the societal need of preserving order in times of political disorder by tracing the story of Ulrich, the "man without qualities". Claiming that "if all that high-speed business doesn't suit us, let's do something else!", the novel's main character emphasizes the emerging challenge of social cohesion in times of political transformation: between the collisions of public power and private autonomy; a nation-state past and an international future; and collective action and individual capacity.

A. Introduction

Written in a transitional period between the two World Wars and taking place during the Austro-Hungarian monarchy's last days before World War I, Austrian author Robert Musil's novel, "The Man Without Qualities" considers the societal need of preserving order in times of political disorder by tracing the story of Ulrich, the "man without qualities". Claiming that "if all that high-speed business doesn't suit us, let's do something else!"[1], the novel's main character emphasizes the emerging challenge of social cohesion in times of

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[1] See ROBERT MUSIL, THE MAN WITHOUT QUALITIES *27* (Volume I, Sophie Wilkins trans., 1996).

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political transformation: between the collisions of public power and private autonomy; a nation-state past and an international future; and collective action and individual capacity.[2] Regarding the social impact of certain political complexities of the 21st century such as the constitutional crisis within the European Union (EU)[3], the structural weakness of the United Nations (UN)[4], the asymmetric implementation of the Kyoto Protocol[5], the status quo of the International Criminal Court (ICC)[6], the conflict of laws between human rights and world trade regimes[7], or the privatization of rule-making by transnational corporations[8], Mireille Delmas-Marty's book, *Ordering Pluralism: A Conceptual Framework for*

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[2] See Ulrich's metaphorical analysis of social and political fragmentation on the eve of the First World War, when he concludes that, nevertheless, "(...), zoology teaches that a number of flawed individuals can often add up to a brilliant whole." See MUSIL (note 1), 27; likewise, see the introduction of MIREILLE DELMAS-MARTY, ORDERING PLURALISM: A CONCEPTUAL FRAMEWORK FOR UNDERSTANDING THE TRANSNATIONAL LEGAL WORLD, 14 (2009) [hereinafter DELMAS-MARTY, ORDERING PLURALISM] refers to the same notion of ordering legal and societal fragmentation by stating: "(...) the answer to the challenge of the Great Legal Complexity of the world seems to constitute a sort of bricolage that attempts, through multiple interactions (judicial and normative, spontaneous and imposed, direct and indirect) to link together legal ensembles (national and international) that history has separated and that will not accept hegemonic fusion.".

[3] See, for an overview providing different constitutional conceptions within the EU, FOUR VISIONS OF CONSTITUTIONAL PLURALISM, EUI Law Department Working Paper 2008/2 (Matej Avbelj & Jan Komarek eds., 2008); furthermore Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 EUROPEAN LAW JOURNAL (EUR. L.J.) 262, (2005); see also Neil Walker, *EU Constitutionalism and New Governance*, *in* LAW AND NEW GOVERNANCE IN THE EU AND THE US, 15 (Grainne de Búrca & Joanne Scott eds., 2006).

[4] See Edward C. Luck, *A Council for All Seasons: The Creation of the Security Council and Its Relevance Today*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 61 (Vaughan Lowe ed., 2008); JULIE A. MERTUS, THE UNITED NATIONS AND HUMAN RIGHTS: A GUIDE FOR A NEW ERA (2005); see also DETLEV WOLTER, A UNITED NATIONS FOR THE 21ST CENTURY: FROM REACTION TO PREVENTION. TOWARDS AN EFFECTIVE AND EFFICIENT INTERNATIONAL REGIME FOR CONFLICT PREVENTION AND PEACEBUILDING (2007).

[5] See Harro Van Asselt et al., *Global Climate Change and the Fragmentation of International Law*, 30 LAW & POLICY (LAW & POL'Y) 423, (2008); for an overview on the implementation of the Kyoto-Protcol, see LEGAL ASPECTS OF IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK (David Freestone and Charlotte Streck eds., 2005).

[6] See BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW (2003); also MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL SOCIETY ACHIEVEMENT (2006); for a cosmopolitan perspective on the ICC's evolution, see Antonio Franceschet, *Four Cosmopolitan Projects: The International Criminal Court in Context*, *in* GOVERNANCE, ORDER, AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN REALPOLITIK AND A COSMOPOLITAN COURT, 179 (Steven C. Roach ed., 2009).

[7] See, e.g., ERNST-ULRICH PETERSMANN, HUMAN RIGHTS, CONSTITUTIONAL PLURALISM AND INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY (2010), forthcoming.

[8] For a recent theoretical approximation, see GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); see also Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY (JEPP) 627, (2006); Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONNECTICUT LAW REVIEW (CONN. L. REV.) 1739, (2007).

Understanding the Transnational Legal World, published in 2009 by Hart, can be seen as a theoretical attempt to demystify a (legal) world perceived as being overly disordered by social transformation, fragmented by globalization and (self-)regulated by market integration.[9]

Representing an essayistic (and brief) experiment to engage with the central paradoxes of an emerging process of supranational law-making and its systemic complexities, *Ordering Pluralism* is divided into three parts. Mireille Delmas-Marty, Professor of Comparative Legal Studies and Internationalization of Law at the *Collège de France* in Paris, follows the rationale of refining and situating the disordered levels of pluralism by illuminating, firstly, different processes of trans-systemic political interactions and describing the impossibility of legal isolation in a globalized setting (Part 1). In the second chapter, Delmas-Marty allocates the multiplicity of legal *ensembles*[10] to different regional and global levels for the purpose of extracting distinctive legal preconditions in space and time, which are crucial for *ordering* the *pluralism* (Part 2). Hereafter, the evolutionary description of part 2 is symmetrically mirrored within the third chapter by proposing different variations in the speed of legal transformation in a pluralist conception of transnational law. By referring, firstly, to *Asynchrony*, Delmas-Marty highlights the consequence of the fragmentation of international law and its different legal areas evolving at different speeds, like the conflict between the World Trade Organization (WTO) and the International Labour Organization (ILO) with regard to the implementation of ILO principles. In opposition to classical international law, the *transnational* dimension originates from its understanding as any rule that transcends the scope of traditional concepts of law circumscribed within the limits of a sovereign nation-state – be it by its source, its scope of application, subjects or addressees, including norms drafted by private actors.[11] Moreover, she discusses *Polychrony* as a legal practice allowing sovereign nation-states to incorporate international law in particular areas at different speeds. Finally, by assessing several dimensions of *enhanced cooperation* within the EU, *common but differentiated responsibilities* under the

[9] For structural implications resulting from the formation of new economic systems, see SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION, 2-3 and 28 (1996); see also the categorization of a *new world order* triggered by "the extent and nature of existing government networks, both horizontal and vertical", ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 15 (2004); for the development of cooperation and international regimes *after hegemony,* see ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY, 49-51 (2005).

[10] By using the term "ensemble" instead of "system", DELMAS-MARTY emphasizes its neutrality taking "into account currently forming ensembles that are too changing and unstable to constitute true legal systems". See DELMAS-MARTY (note 2), 17.

[11] See Matthias Mahlmann, *Theorizing Transnational Law – Varieties of Transnational Law and the Universalistic Stance*, 10 GERMAN LAW JOURNAL (GLJ), 1325, 1326 (2009); see, more generally, Regina Kreide and Andreas Niederberger, *Transnationale Verrechtlichung und Entrechtlichung – Eine Einleitung*, *in* TRANSNATIONALE VERRECHTLICHUNG. NATIONALE DEMOKRATIEN IM KONTEXT GLOBALER POLITIK, 14, 24-25 (Regina Kreide and Andreas Niederberger eds., 2008).

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Kyoto-Protocol and *differential treatment* under WTO law, the author proposes an original account of pluralism advocating asymmetric legal integration (Part 3).

As follows from Delmas-Marty's introduction, the aims of the book are to promote a move beyond the evolution of transnationally competing (legal) orders without imposing it, the acceptance of pluralism without giving up the national margins of political assessment, and the synchronization and adaptation of international legal dynamics.[12] In this spirit, she appears to follow Ulrich's metaphorical claim to revise the evolutionary *high-speed* of social development. Despite the dramatic changes in the institutional framework of socio-economic, legal and political action over the last 90 years, the transitional nature of both Ulrich's social environment in the mid-1910s and the transformation of the current legal world as analyzed by Delmas-Marty raises the same set of questions: how to reduce political uncertainty, imprecision, and social instability resulting from "differences in speeds of integration, and producing dysfunctions both between and within legal ensembles, as well as actors"?[13] Further, how might it be possible to moderate the internal transformation of the state order within a functional *meta*-system, in which its transformation is itself constitutive of the new organizing logic?[14]

In light of these preliminary observations, the following review essay intends to critically examine the central theoretical arguments of Mireille Delmas-Marty's *Ordering Pluralism* by linking the proposed context to legal developments concerning the transformation of the international legal order and the socio-legal impact of its emerging pluralism and hierarchical rule-making.[15]

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[12] According to Delmas-Marty, "(...) differing speeds at which legal systems evolve, which destabilize normative time (...) [can] lead to perverse effects when the differences are too great (between global trade law and human rights, for example), (...)", DELMAS-MARTY (note 2), 16.

[13] DELMAS-MARTY (note 2), 14; with regard to the problem of uncertainty in international law, see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARVARD LAW REVIEW (HARV. L. REV.) 1791, 1801 (2009).

[14] See SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES, 229 (2006).

[15] Delmas-Marty uses the term *pluralism* in a highly descriptive manner. Referring to the book's aim, she states that her goal is "not to produce a never-ending description of the legal landscapes encountered, but to put them in order", and, therefore, summarizes the observations of a differentiated *legal landscape* by the term "pluralism": see DELMAS-MARTY (note 2), 1; for Delmas-Marty's distinction of "various pluralisms", see DELMAS-MARTY (note 2), 2; for a very early account on the transnationalization of public and private international law, see PHILIP C. JESSUP, TRANSNATIONAL LAW (Storrs Lectures in Jurisprudence at Yale Law School) (1956); for a recent overview on the status quo of the international debate on transnational legal pluralism, see Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNATIONAL LEGAL THEORY 141, (2010); for another recent historical delineation of *legal pluralism* see Derek McKee, *Review Essay – Emmanuel Melissaris's Ubiquitous Law: Legal Theory and the Space for Legal Pluralism*, 11 GERMAN LAW JOURNAL (GLJ) 574, 575-578 (2010); for an early theoretical account, see Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE, 3 (Gunther Teubner ed., 1997), referring to specific problems challenging traditional legal structures with the complexity of emerging socio-economic processes and new (political) institutions, e.g. the *lex mercatoria*.

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B. Legal synchrony: coordination and harmonization

"(…), and sometimes, looking out the window after a fairly long pause, we find that the landscape has changed. What flies past flies past, it can't be helped, but with all our devotion to our role an uneasy feeling grows on us that we have travelled past our goal or got on a wrong track.
Then one day the violent need is there: Get off the train! Jump clear!
A homesickness, a longing to be stopped, to cease evolving, to stay put, to return to the point before the thrown switch puts us on the wrong track."[16]

As Ulrich identifies the forthcoming metaphorical *wrong track*, Mireille Delmas-Marty herself has perceived the diverging "speeds" of transnational legal developments to be incorporated into a common legal area by progressively adjusting the diversity of legal norms. Since a homogeneous world order appears impossible to her, the *imaginative* forces of law must be called upon to invent a flexible process of harmonization that leaves room for believing that we can agree on – and protect – common values.[17]

By proposing a framework of "pluralist internationalization that favours interactions between different legal systems, or ensembles", Delmas-Marty provides the theoretical foundation for the book's central aim: to renounce "the binary opposition between hierarchical relationships (by subordination of one order to another) and non-hierarchical relationships (by coordination)" in order to consider the process of interaction in a more nuanced fashion.[18] Assuming that multiple interactions ("judicial and normative", "spontaneous and imposed", "direct and indirect") on multiple levels within the global political sphere are contributing to a great societal and functional disorder, Delmas-Marty's *Ordering Pluralism*, therefore, accounts for balanced practices between purely horizontal and purely vertical interactions.

Arguing for an evolutionary adjustment of the *centripetal* and *centrifugal* international regulatory dynamics in the field of climate change caused by the fragmented legal regime of the Kyoto-Protocol, or in the area of counterterrorism and the compliance of the EU with norms of the UN Security Council, Delmas-Marty engages in a theoretical adaptation of dispersed legal norms between her assumed "utopian unity" and "illusion of autonomy". This is undertaken for the benefit of a global order that is neither the fusion of diverse

[16] See MUSIL (note 1), 28.

[17] DELMAS-MARTY (note 2), 17.

[18] *Id.*; see also MIREILLE DELMAS-MARTY, ORDERING PLURALISM (Max Weber Lecture, European University Institute, MWP LS 2009/6), 5 (2009).

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systems of law nor their complete separation.[19] Based on her assumption that neither independent state governments, legislators in sovereign parliaments, nor judges of constitutional courts are able to ignore the existence of other national, regional and international legal orders[20], Delmas-Marty emphasizes that normative asymmetries triggered by different understandings of the concept of law itself, its hierarchy, and the normative values it represents causes inconsistencies within different spheres of laws. Consequently, Delmas-Marty's different processes of legal integration mainly focus on the verticalization of global legal structures in order to counteract the emergence of hegemonic systems of law in an environment of legal pluralism.[21] According to this argument, any overlapping of norms can only lead to ordered pluralism when horizontal processes, counterbalanced by imperative *jus cogens* norms or customs, undergo the development of *verticalization*.

Within this rationale, the process of accommodating diverging legal regimes might be – according to Delmas-Marty – developed through different instruments: Firstly, *coordination through cross-referencing,* which suggests the institutionalization of legal imitations by transplanting foreign norms or making reference to judicial decisions handed down by judges in foreign constitutional and international courts.[22] Referring to the *de facto internormativity* of legal systems, Mireille Delmas-Marty describes the process of cross-referencing as a dynamic of institutionalized imitation between legal ensembles, which can be more or less explicit depending on the cases.[23] It may be seen as a vehicle of legal transnationalization, oscillating between concepts of exclusive territoriality and other systems of rules, particularly those centred in supranational organizations and emergent (private) transnational legal regimes. At the global level, cross-references are increasing as international instruments are growing under the influence of human rights and economic globalization.[24] But taking into account the variety of international norms intervening in

[19] See, for the "utopian unity" and the "illusory autonomy", DELMAS-MARTY, (note 2), 2; for the legal dispute regarding the EU's compliance with UN Security Council Standards, see Joined cases C-402/05P & C-415/05P, *Kadi & Al Barakaat International Foundation v. Council and Commission*, 2008 ECR I-6351.

[20] DELMAS-MARTY (note 2), 19.

[21] See, again, for the development of this argument, DELMAS-MARTY (note 2), 17, referring mainly to the regulatory impact of the US-American government being *hegemonic*.

[22] For the jurisdictional cross-references in the context of the ratification of the Lisbon Treaty and the circular citation of decisions of European Constitutional Courts concerning the compatibility with national constitutional identities, see e.g. the translated decision of the Constitutional Court of the Czech Republic (Ústavní soud eské republiky), November 3rd, 2009, at Nr. 137, available at the Constitutional Court's website: http://www.usoud.cz/file/2506.

[23] DELMAS-MARTY (note 2), 21.

[24] See, in this context, the dissenting opinion of Associate Justice Breyer in the *Medellin* Case, stating that "in a world where commerce, trade and travel have become ever more international", the non-application of the Vienna Convention on Consular Relations would be "a step in the wrong direction", see *Medellín v. Texas*, 552 U.S. 491 (2008), para. 4; see also DELMAS-MARTY (note 2), 19.

different legal conflicts and social disputes (through international agreements, treaties, accords and customs), *cross-referencing* might reveal only very weak integration insofar as it is only a horizontal and non-binding process; in this context, Delmas-Marty refers to the emerging dialogue between judges on the death penalty and increasing interaction between national supreme courts (of Canada, South Africa and the US), regional courts (European and inter-American human rights courts) and World bodies (the International Court of Justice and the Human Rights Committees monitoring state compliance with UN Covenants), but emphasizes the limitations of cross-referencing and its *soft* power accordingly.[25]

Therefore, Delmas-Marty proposes the coordination of different levels *through harmonization* by the approximation of different systems of law. However, in order to not impose a strict conformity of national rules to international standards, harmonization is meant to preserve flexibility by recognizing a "national margin of appreciation" as an element of compatibility. And, as Delmas-Marty argues, this is why harmonization processes are so important for the development of *pluralism*: "they enable the rapprochement of different systems which, without striving for uniformity, may be characterized precisely by its less rigid hierarchy due to the recognition of national margins of appreciation"[26]. Hence, harmonization within such a margin implies the combination of vertical and horizontal processes of integration, but risks arbitrariness at the same time with a transfer of power to judges. For this reason, Delmas-Marty indicates that limiting the risk would require greater transparency in legal reasoning through precise and explicit criteria outlining the width of the margin and its variations.[27]

Since coordination through harmonization might prove to be on a level of complexity that invites excessive arbitrariness, Mireille Delmas-Marty concludes the first part of her "Conceptual Framework for Understanding the Transnational Legal World" by presenting her most ambitious process of legal integration: unification by hybridization.[28] As unification, according to Delmas-Marty, means the transformation of the plural into the single, or the multiple into the one, the creation of identical rules necessitates the separation of unification by *transplantation* from unification by *hybridization*. Transplantation, by extension or exportation of norms from one system to another (as in the area of trade law), only refers to a unilateral process of unification. By contrast,

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[25] See RICHARD J. GOLDSTONE & ADAM M. SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS: THE ARCHITECTURE OF INTERNATIONAL JUSTICE AT HOME AND ABROAD (2009); also, DELMAS-MARTY (note 18), 3.

[26] DELMAS-MARTY (note 2), 37.

[27] See DELMAS-MARTY (note 18), 4.

[28] Parallel to this, hybridization implies the linking of new regulatory instruments, originating from national, regional and global organizations in order to synchronize the different *rhythms* of regulation described above; see, also, DELMAS-MARTY (note 2), 59.

hybridization describes a multilateral process merging legal structures at regional and global levels by integrating different systems, thereby incorporating elements of transnational legal diversity into different systems. According to Delmas-Marty, the creation of new legal procedures in the field of international criminal justice such as increasing judicial powers in the preliminary phase and increasing powers of the victim have revealed the dynamic of hybridization, even if these procedures are not applied globally.[29]

Taking into account the different regulatory settings at the local, regional and international level, Delmas-Marty, therefore, proposes a combination and adaptation of the three coordinating *through*-measures as a compromise to convert legal plurality into ordered pluralism[30]. But in exactly which direction do these processes develop within different environments?

C. Developing *Pluralism*: European and International Lessons

According to the structural design of *Ordering Pluralism*, developing a theoretical *tool box* for the conceptual framework of the transnational legal world requires the description of the predominant conditions of different regulatory levels. Noting the limited scope of harmonizing global legal pluralism through hybridization, Delmas-Marty relates the notion of verticalization and its regulatory *impact* on the cooperative environment between EU institutions and Member States, based on principles such as mutual recognition, subsidiarity, direct effect, or the approximation of national laws through common supranational EU regulation.[31] In this regard, Professor Delmas-Marty describes Europe as "one of the rare regions to have simultaneously moved towards economic (...) and ethical integration"[32], proving the greater capacity of regional levels to order their legal pluralism even if domestic legal systems of the Member States have transferred a large part of their sovereign autonomy to European institutions. Nevertheless, EU nation-states are cautious with regard to a number of (harmonizing) policies furthering Europeanization: the integration of environmental taxes due to fiscal sovereignty, competences in the field of common foreign and security policy, or emerging structures of renewable energy policies. Moreover, the existence of different regulatory cultures within the Member States

[29] See DELMAS-MARTY (note 18), 4-5.

[30] For this purpose, Delmas-Marty highlights that "justice without hierarchy is built by trial and error, a sort of porosity between various ensembles, a co-penetration by capillarity", DELMAS-MARTY (note 2), 27.

[31] *Id.*, 152-153.

[32] *Id.*, 91.

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constitutes an important factor of EU policy fragmentation and implementation inefficiencies.[33]

However, compared to the arrangements of international law, the EU appears to be a homogenous legal order: it composes a coherent set of binding legal treaties, the primacy of EU law, a judicial review provided by the ECJ, and hierarchical competences between courts and cross-references between European and national legislations. Outside the EU's normative order (including the Council of Europe and its judicial review provided by the European Court of Human Rights), the provision of a legal framework accommodating diverging structures through harmonization seems, therefore, only to be possible in the sphere of institutionalized cooperation.

By contrast, the coherence of an ever-growing body of international rules is threatened by the tendency of law, mandated by sovereign states to institutionalize a global balance of powers, to historically differentiate and emancipate itself from politics and economics through an increasing number of specialized international organizations.[34] Accordingly, the pluralism of applicable norms, created not only by state representatives and international organizations, but also by private entities (and particularly by multinational corporations), induces international judicial institutions to comply with an overlap of substantive rules and jurisdictions.[35]

With regard to the international human rights regime, the diversification of human rights conventions after World War II and the increase of political organizations engaged in human rights protection caused specific interferences related to the pluralization of norm-making.[36] According to Delmas-Marty, while there exists a certain legal symmetry between the two main European legal ensembles (the EU treaties and the European Convention on Human Rights, ECHR) in terms of judicial compatibility, the UN human rights conventions reveal fundamental differences between itself and international economic agreements such as the law of the WTO and its Dispute Resolution Body even though the WTO's subject matter —the international regulation of trade—affects human rights and may,

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[33] See Tanja A. Börzel et al., *Obstinate and Inefficient: Why Member States Do Not Comply with European Law*, *in* COMPARATIVE POLITICAL STUDIES (2011), forthcoming, on file with the author.

[34] See Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANSNATIONAL LEGAL THEORY 141, (2010).

[35] See, *supra*, note 12, 1793; see also Stefan Oeter, *Theorising the Global Legal Order – An Institutionalist Perspective*, *in* THEORIZING THE GLOBAL LEGAL ORDER, 61, 68 (Andrew Halpin & Volker Roeben eds., 2009); see, more generally, Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 (2006), finalized by Martti Koskenniemi.

[36] DELMAS-MARTY (note 2), 11-13.

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therefore, illustrate the need for merging regimes in an "ordered pluralism".[37] As Delmas-Marty further points out, such a required equilibrium exists neither in Africa between the Organization for the Harmonization of Business Law in Africa (OHADA) and the African Charter on Human Rights, nor at the global level between the International Covenants on Civil and Political Rights (1966)[38] and international economic agreements.[39] Also, with regard to the institutionalization of judicial assessments concerning the same category of legal instruments, the required legal reciprocity between, for example, MERCOSUR (*Mercado Común del Sur*) and the American Convention on Human Rights (ACHR), is only partially symmetric. Even in North America, the United States, a member of the North American Free Trade Agreement (NAFTA) along with Canada and Mexico, has not ratified the ACHR, legal asymmetry persists.

Even though Delmas-Marty highlights that "justice without hierarchy is built by trial and error, a sort of porosity between various ensembles, a co-penetration by capillarity"[40], the positive indication of legal fragmentation increasing the diversity of legality and the expansion of international law to previously unregulated fields appears to be only one side of the coin.

On the other side, the harmonizing perspective of Mireille Delmas-Marty's *Ordering Pluralism* considers that the diversity of courts and international authorities, of procedural and substantive law, threatens the recognition of the imperative nature of certain norms – particularly in the area of human rights. The author's theoretical design presupposes relationships between non-hierarchical normative ensembles, at whichever level, as a way to fill in discontinuities in the hierarchical chain (for example between the international criminal tribunals and regional human rights instruments) and to allow the institutionalization of legal borrowing or transplants.[41] Therefore, while legal scholars perceive the process of transnationalization as inherent to the functional differentiation of global societal (sub-) systems loosely associated and each with its self-referential rules, procedures, and principles including the emergence of privatized law-making[42], serious

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[37] See Ernst-Ulrich Petersmann, *Human Rights and International Trade Law: Defining and Connecting the two Fields*, *in* HUMAN RIGHTS AND INTERNATIONAL TRADE, 29 (Thomas Cottier et al. eds., 2005); in addition, human rights conventions often leave states a large *national margin of appreciation* with regard to domestic implementation, but provide only minimum standards while WTO regulations may have higher standards of protection.

[38] See International Covenant on Civil and Political Rights, GA Res. 2200A [XX1] of 16 December 1966.

[39] MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (2002), 95-97.

[40] See DELMAS-MARTY (note 2), 27.

[41] See DELMAS-MARTY, ORDERING PLURALISM (note 2), 20; she refers to the concept of *internormativity* mentioned by JEAN CARBONNIER, SOCIOLOGIE DU DROIT, 317 (1978).

[42] For an overview, see the collected essays edited by Gunther Teubner, GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997); see also TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges & Inger-Johanne

doubts are raised as to whether supranational law will be able to achieve the multi-level oscillation of its primary objectives and genuine function of law: dispute avoidance and the stabilization of international relations.[43]

Therefore, Delmas-Marty argues for the legal inclusion of *new* instruments that have appeared in the legal sphere triggering the transformation of state sovereignty and the increase of supranational legal obligations. In particular, concepts arising within the framework of the EU like subsidiarity and proportionality, or the ICC Statute principle of complementarity seem likely – in her opinion – to enable a flexible integration through adjustments and readjustments between national and international levels.[44] Complementarity, for example, might be used as a balancing mechanism in a very flexible way when a third-party state examines the possibility of exercising universal jurisdiction, and should therefore be seen in the light of other mechanisms designed to effect integration more directly, as is the case with functional equivalence and mutual recognition. Without the application of these instruments in the proposed legal framework, Delmas-Marty fears the extension of a multi-speed area becoming *à la carte* in nature, whereby states may opt out of certain obligations easily.

Furthermore, *fine-tuning techniques*, such as the national margin of appreciation and variability indicators would avoid excessive flexibility, which, in the guise of differentiation, could also lead to disintegration.[45]

D. Clouds, Disorder and Transnational Legal Sustainability

Since non-governmental organizations and sets of transnational norms play an ever growing role in international regulation, thereby extending civil society's participatory power and furthering the institutionalization of judicial or quasi-judicial structures beyond the state, the institutional need for theorizing legal pluralism increases accordingly. This is so not only from the perspective of legitimized law-making, but also from the legal functioning of social arrangements and the functionality of dispersed sets of norms causing legal collisions.

Sand & Gunther Teubner eds., 2004); more recently, Jiri Pribán, *Multiple Sovereignty: On Europe's Self-Constitutionalization and Legal Self-Reference*, 23 RATIO JURIS 41, 42 (2010).

[43] Gerhard Hafner, *Risks Ensuing from Fragmentation of International Law*, *in* OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, 55TH Session, 326, 341 (2000); for further arguments see Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS (NYU J INT'L L & POL) 791, (1999); also Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 NYU J INT'L L & POL 679, (1999).

[44] See DELMAS-MARTY (note 2), 157-158.

[45] See DELMAS-MARTY (note 2), 159.

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But Delmas-Marty's approach to describing the development of laws by, with, and beyond the sovereign nation-state by accumulating varied references of global regulative instruments and its different levels of inconsistencies does not – in my opinion – enable *ordering* the *disordered clouds*; rather, it causes confused (hyper-)complexity of legislation and case law within this meta-level assessment, simply because her assumptions are presupposing a legal framework of normative compliance and judicial review whose non-existence within the fragmented transnational sphere is exactly the origin of its disorder.[46]

Furthermore, the evaluative standard remains unclear in the theoretical framework provided by Delmas-Marty. Instead of borrowing conceptual assistance, for example, in recent theories of regime-collisions and conceptions of international conflicts of laws[47], she only imposes the interdependence of normative and judicial interactions, conflicts of laws and collisions of regimes without suggesting a clear methodological framework. Cross-referencing is not the only legitimate means of judicial cooperation requiring a theoretical pillar of normative reasoning. Likewise, the ambiguity of the concept of legal pluralism itself needs to be clarified as to whether the parallel evolution of different sources of law appears to be inevitable in functionally differentiated environments.

Possibly glared by the described disorder of supranational regulation in times of increasing rule-making beyond the nation-state, she seems to evaluate the process of legal globalization simply from the systematic perspective of *hard* ancient-traditional nation state regulation. And for this purpose, she refers to the reassessment of "new instruments" such as mutual recognition and proportionality. But referring mostly to mechanisms related to orders of state-centred top-down hierarchies, Delmas-Marty's undertaking to order the disordered *clouds* lacks a coherent claim of theoretical innovation, a new model of adjusting the different speeds behind the line of state sovereignty and purely international (state) law. The book addresses a large number of very important legal developments and transnational regulatory problems. But it does not meet the book's central objective: to provide a conceptual framework for understanding the transnational legal world. In particular, the suggested legal transplantation of principles such as subsidiarity and (weak) proportionality originating from the unique context of European integration is likely to disappear in the fragmented international framework. At the same time, proposing the concept of *internormativity* for diverging rules of the

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[46] The metaphorical reference of *clouds* is related to the diversity of legal elements shaping the legal ensembles. See DELMAS-MARTY (note 2), 150.

[47] See GUNTHER TEUBNER & ANDREAS FISCHER-LESCANO, REGIME-KOLLISIONEN: ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS (2006); see, also, CONFLICT OF LAWS IN A GLOBALIZED WORLD (Eckhart Gottschal et. al eds., 2007); regarding the role of courts in European legal pluralism, see Miguel Poiares Maduro, *Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE, 356, 357-358 (Jeffrey L. Dunoff & Joel P. Trachtman, eds., 2009); see, furthermore, Maria Rosaria Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue between Democracy and Constitutionalism*, 9 GLOBAL JURIST (FRONTIERS) 1, 5-6 (2009).

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increasing body of international (public and private) regulation is an illusory, oversimplifying or circular understanding of *ordering pluralism*.

Taking into account the transformative power of new legal arrangements in transnational environments and the shifting of public authority, today's inclusion of private, non-governmental actors in the process of decision-making aims for a more fundamental re-conceptualization of law than transplanting Community principles. International law was perceived during Ulrich's time in the 1910s as being only a (social) mechanism that could never aspire to a normative level higher than the state without any intrinsic value. By contrast, transnational legal pluralism refers to a transitional process of heterarchical governance, requiring new theories of procedural law and conflict of laws for the provision of sustainable transnationalisation on the international level.[48]

For, to "get off the train!"[49], as Ulrich says, holding onto the social train of transnational development is no longer possible. Global *speed* is too *high*.

[48] See, for the evolutionary understanding of international law, MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS. THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, 179 (2002).

[49] See MUSIL (note 1), 28.

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