A COMPASS OF POSSIBILITIES

MIREILLE DELMAS-MARTY

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GLOBAL GOVERNANCE AND LEGAL HUMANISMS

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FOREWORD

WHAT HAPPENED IN THE LAST TEN YEARS?

If we read once again this concluding lecture of the course that I gave at the Collège de France in 2011, it becomes apparent that, at the time, the scenario was already set. The three concepts upon which the course was structured – *resisting* dehumanization, *responsibilizing* global actors and *anticipating* future risks (see Delmas-Marty 2013b) – are now more than ever fundamental in our societies, characterized by an accelerated globalization. Where does the feeling of having lapsed into a different world come from, then? What happened, what made the air so heavy as to lead us to wonder today if it is still appropriate to use a rational and reassuring tone? Can we truly still claim that legal humanism "is becoming reality"? Between the rage of some and the fear of others, the discourse of reason becomes inaudible and we, dismayed, rediscover Paul Valéry from the 1930s:

> We later civilizations . . . we too know that we are mortal.
> We had long heard tell of whole worlds that had vanished, of empires sunk without a trace, gone down with […] their gods and their laws, their academies and their sciences pure and applied […]. But the disasters that had sent them down were, after all, none of our affair. *Elam*, *Nineveh*, *Babylon* were but beautiful vague names, and the total ruin of those worlds had as little significance for us as their

> very existence […]. And we see now that the abyss of history is deep enough to hold us all (Paul Valéry 1919, p. 321-322; English translation p. 94).

The abyss is surely deep enough to swallow Europe. We knew that the process of integration would be slow (Europe in "small steps") and complex ("multi-speed" Europe), but we also held it to be irreversible. The treaties promised an "ever closer union among the peoples of Europe" and "harmonization of social progress". We also knew democracy to be fragile – the only tragic regime, because it always questions itself anew, as Claude Lefort said – but we thought that the triptych of "democracy/human rights/rule of law" would have resisted, building its strength on the centuries required for its creation.

Instead, only a few years have been sufficient to dismantle it without anybody getting alarmed, except for some "well-intented souls" that keep on pursuing ideals of goodness and beauty, by now discredited in the name of the only objective deemed worthy: efficacy. Only a few years have also been sufficient to discover that the sinking of empires of which Valéry spoke (and that keeps on shaking the earth from one end to the other) is a matter that, by now, concerns all of us. Even the ecosystem can collapse. The "collapsologists" sometimes draw inspiration from the geologists who conceived the Anthropocene (the epoch in which humanity has become the transforming factor of the planet) and sometimes from the political scientists who conceived "idiocracy". Digital networks have erased temporal distances and intermediaries between facts and their interpretation. It could even go so far as to neutralize every form of critical reason: only one truth, mine; only one acceptable identity, mine.

"Uninhibited", and proudly so, the so-called "populist" movements are acquiring power by encouraging retreat to the alleged refuge of the nation-state (*America first*). But retreat is impossible and refuge is an illusion since globalization, and the interdependencies that come with it, are irreversible and booming. Thus, in order to realize the existing divergence

between the simplicity of the demagogic discourses and the complexity of the interactive, evolving, and often contradictory facts, it is interesting to read once again this so-called "concluding" lecture; and, by doing so, to consider it not so much as the closure of a cycle of lectures, but more as the beginning of a new phase, in which it is necessary to renew our approach to globalization.

Because we were caught up in analyzing the underlying legal reasoning, we would never have imagined that the effects would have developed so swiftly, up to take us where we are today, even though we were not very far from here in any event, since we had already identified various warning signs, now more topical than never. Hence, the idea to publish the present text, written in 2011 and later enhanced with some side comments[1], like so many small lighthouses that try to shed some light on what happened.

September 2019

This lecture is the inevitably provisional evaluation of the course that I gave in 2011 and, more generally, of my teaching experience at the Collège de France. The cycle of lectures on the "internationalization of law" began the day after the launch of air strikes in Iraq ordered by George W. Bush, and it ended a week after Bin Laden's execution. Thus, my discourse had to grow an increasingly tragic hue, tainted by a torn legal humanism, a myth starting to show cracks all over.

Having placed my lessons under the auspices of the goddess Astraea – the symbol of hope for the return to justice and peace among the humanists of the turbulent period of the European Renaissance – the choice to dedicate the last year to the topic "Sense and nonsense of legal humanism" was not coincidental. At the very moment when legal humanism is starting – at least partly – to become a reality through the expansion of human rights, the emergence of a humanitarian law and a criminal justice system with a universal vocation, its weaknesses and contradictions are also coming to light.

Weaknesses and contradictions of legal humanism

The opening of national borders to commodities does not prevent the springing of walls designed to block the circulation of human beings. Eu-

rope without frontiers closes like a fortress: it sets up camps for migrants and rediscovers Lombroso[2] to lock up people labelled as "dangerous", regardless of the actual commission of crimes, in the name of a precautionary principle borrowed from hazardous materials regulations (see Delmas-Marty 2010). The right to safety (*sûreté*), renamed "right to security" (*sécurité*), justifies the most serious attacks on freedom, like the unlimited detention of the Guantanamo prisoners – who can be neither judged nor released – legitimizing even torture and inhuman and degrading treatment – as evidenced by the unbearable pictures taken at Abu Ghraïb, depicting prisoners forced to walk on all fours, leashed by laughing guards, and forced to eat by licking from a bowl. Humanitarian interventions turn into security drifts, if not warlike, while justice is taking the worrying form of targeted assassinations decided without trial by Heads of State.

And that's where the humanity that seemed eternal, concluding the hominization process (biological evolution) that lasted millions of years, clearly appears to be a "humanity 'in transit'" instead, in all the senses of this term. While retracing (during the seminar *Hominization, humanization*) about five thousand years of history of humanizations (ethical evolution) – from the great empires now buried under the sands of ancient Mesopotamia up to the futuristic dreams of transhumanists – we observed how ephemeral the passage on earth of every people is, and *a fortiori* of every human being. As Jean Baechler points out (Baechler 2010), the great majority of these passengers of the wind – "*les devenants*" – disappear without a trace: "They are satisfied with having passed through existence", what matters is only "the improbable and extraordinary fortune to have once existed", to have taken part "in the splendor of the real".

But what about humanity as a whole? Most ambitious, transhumanist movements elevate themselves to being the vehicle for the abandonment of the current form of humanity, a transitory, imperfect and, in essence, flawed form. Ironically, during the seminar, Marie-Angèle Hermitte schematically summarised their argument as follows: hominization failed and humanization is a failure. Hominization failed because our species is ex-

tremely imperfect from a biological point of view; and humanization's failure is demonstrated by incessant violence and wars[3]. According to them, it is necessary to try to improve our skills through techniques that will herald the transition to the era of the post-human, even at the risk of wiping out humanity. There is a sort of relentless coherence in this project which, in essence, dehumanizes to "post-humanize", and de-socializes to make independent. However, it collides head-on with the legal humanism inherent to humanity that, as a matter of fact, has gradually emerged throughout history.

This observation may seem paradoxical because, at the very moment when philosophers such as Luc Ferry or Alain Renaut (Ferry, Renaut 1985; Renaut 2008) rediscover the importance of normative provisions (ranging from international human rights law to environmental law), the transhumanists claim to demonstrate the futility of any moral, religious or legal regulation. Since it is focused on post-hominization (in biological terms), transhumanism is uninterested in humanization in the ethical sense: biotechnologies will prevent any dysfunction, and the improvement of the human species will come exactly as that of the bovine species has. In her speech on artificial methods of procreation, Anne Fagot-Largeault highlighted that assisted reproductive technology already treats women as bovines[4]. The digital monitoring systems will further contribute to this formatting of the human species.

Sensory standards and soft totalitarianism

Despite all of the above, in 2011 we were optimistic: we thought we would be able to solve all the problems. Today, we are less certain about it. Some jurists resort to the concept of "sensory standards" (*normes sensorielles*, Thibierge 2018) to identify the norms that manifestly apply, preventing any disobedience. These range from the acoustic signal urging us to fasten the seatbelts to the video-surveillance systems that will enable us, through sophisticated face-recog-

nition systems, to photograph and identify in a matter of seconds a pedestrian crossing the street on a red light, so as to display immediately afterwards his/her large-format picture and name in the surrounding streets, before everyone's eyes. How do we respond to these practices that aim to "shape minds, encourage adherence, enhance at least some sort of submission among the subjects through the imperceptible and constant administration of daily norms" (*ibid.*)? By crossing millions of individual data hoarded by the social networks and the billions of conversations recorded by the intelligence services, even democracies learn to merge societies of a permanent gaze and states of surveillance into what becomes a sort of soft totalitarianism, the more fearsome as it leverages on our endless urge to have access to everything, at any time, without any delay. Responding to narcissistic impulses even stronger than the sex or food drive, we "move from one platform and from one digital device to another like a mouse in a Skinner cage which, by squeezing levers, frantically searches for ever greater stimuli and satisfaction" (Harcourt 2020).

Globalization between humanization and hominization

By resigning ourselves to these transformations, we will run the risk of reducing the human being, turned into an interchangeable entity by that point, to a more homogeneous human species. Instead, it is still possible to preserve the interactions between the processes of hominization and humanization, and thus turn the contradictions of globalization into ambivalences.

Although it does increase the risks of dehumanization, globalization also opens up new perspectives on humanization: not so much through the creation of a global State (which, according to Kant, could lead to the worst possible despotisms) but, on the contrary, by encouraging the diversification of actors to re-balance the powers between States and infra and super-na-

tional communities, as well as between other state and non-state actors, be it economic or scientific or the civil society.

Thus, we discover that ethical values are not universal *a priori*, but can become "universalizable"[5] as international law comes into force at the crossroads of cultures and knowledges: for instance, with international criminal law, international human rights law, global public goods or global common goods.

Finally, we can note that the world order does not present itself as a hierarchical and unified model in which radical universalism is opposed to absolute sovereignty. On the contrary, the interactive and evolutionary practices that develop therein offer the possibility of a pluralistic and reciprocal humanization. Such a process presupposes harmonization without uniformity, by simple rapprochement.

Harmonizing differences

The harmonization process is dealt with in fields other than the strict legal field too. We find it in the works by writer, poet and renowned scholar of Islamic studies Abdewahab Meddeb, who has sought a method to define a "compatibility threshold" that would enable reconciling the "unreconcilable". Such method, "mondiality" (*mondialité*, see Glissant 2005), a recent neologism, differs from uniformity since it recognizes differences and feeds on them, refusing standardization on a single hegemonic model, which was rejected already by Kant in his proposal of a cosmopolitan law at the time of the Enlightenment. Mondiality is at the same time unique – since it is not satisfied with juxtaposing differences and calls for a common ordering – and multiple – because it implies a certain pluralism. On the occasion of collective research on *The paths to a universalizable Ius commune* we discovered that mondiality, a pacific form of globalization, is not distant from "ordered pluralism" (Delmas-Marty 2006), that is, a pluralism that brings together dif-

ferences without eliminating them, harmonizes diversity without destroying it and pluralizes the universal without replacing it with the relative: for there to be common there must remain differences, but they must become compatible.

It is thus remarkable that such an idea of compatibility has drawn the attention of a philosopher like Meddeb, who sees it as the means to "avoid uniformity without falling into the culturalist flaw that devotes an irrational cult to the specific" (Meddeb 2017).

International law, however, does not provide instructions for use, neither in the 1948 "universal" Declaration of Human Rights nor in the UNESCO Universal Declaration on Cultural Diversity adopted in 2001 (recalled by the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005), wherein cultural diversity is declared "common heritage of humanity". The jurist can, however, find some practical applications in the jurisprudence of the European Court of Human Rights, which recognizes that States have – in some fields, such as private life or the freedom of expression – a certain "national margin of appreciation", inserted in 2013 in Protocol No. 15 amending the European Convention on Human Rights. The judges then define the evaluation criteria of a "compatibility threshold".

A law in the making[6]

To illustrate our very general observation, we have identified five concrete examples that show the weaknesses of legal humanism before the challenges of globalization: migrations, social exclusion, environmental damages, the most serious international crimes (such as genocide and violations of human rights) and new technologies. We must now bear in mind that some of the excesses detected in the fields under scrutiny (such as the reinforced control of migration flows, the increase of social exclu-

sion and environmental damage, the incessant commission of international crimes), as much as the ambivalence of new technologies, do stimulate a multitude of proposals and initiatives that tend to reposition the human element at the center of globalization.

We have chosen to investigate some of the processes of this complex creative ferment: the promotion of citizenship on several levels (we are citizens of our own countries but also, for those who live in this part of the planet, European citizens, as well as citizens of the world); the distribution of social and legal responsibility between States and transnational corporations; the reduction of tensions between justice and force in the attempt to build long-lasting peace; the creation of a link between the present and future generations. Lastly, speaking of technological innovations, we have analyzed innovation on a legal level – for example, by defining the right to be forgotten on the Internet, or even the right to silence in terms of the Internet of things.

These proposals or initiatives are often disconnected from each other. If developed jointly, they could instead pave the way, if certainly not for the restoration of the myth of legal humanism, which remains undoubtedly characteristic of its time and place of origin – Renaissance Europe – then at least for the humanization of globalization. As in all utopias, the risk is to sacrifice what "already is" for what is "yet to be", which would mean losing past achievements in the name of an unlikely future. In fact, the processes of humanization can fail at any time – in most cases, justice remains at the service of force – or run aground: for example, the protection of migrant workers is enshrined in a Convention adopted in 1990 that, to date, has not been ratified yet by the countries that are immigration lands.

The risk of social regression, made even more serious by the total market, is not far, as isn't afar the risk of falling behind or being overcome by the fast pace of innovations: no matter how hard we try to innovate legally, Internet law, for example, always lags behind the latest invention.

In other words, when a dynamic conception of law is adopted – in line with the expression "law in the making" –, it is essential not to lose the

achievements of humanization processes, as explained to us with great clarity by Alain Supiot: "The difference between human and non-human beings is a very expensive achievement and should not be abandoned in the name of the protection of new centers of interest"[7]. To contribute to humanization, the law in the making is assigned a triple role: to resist, to responsibilize and to anticipate.

More precisely: *to resist* dehumanization, *to responsibilize* actors who hold global power and *to anticipate* future risks.

CHAPTER I

RESISTING DEHUMANIZATION

Resisting dehumanization is no easy task because, in this field, human creativity is boundless. During the lecture, we asked ourselves the following: "Is inhumanity proper to humanity?". We weren't able to give ourselves an answer, which is certainly unsurprising if we take into account the variety of dehumanizing practices overclouding our research.

The variety of dehumanizing practices

The first to be addressed is the concept of "incomplete human". Leaving aside the discussions and debates of the Renaissance humanists, such as Valladolid's question "Indians: are they human beings?", let us consider directly the 19th century and the allegedly scientific argument, later recalled by the Italian positivist school, according to which some human beings have fallen behind in the evolutionary process. Lombroso, for instance, grounds the atavism of certain forms of criminality on the continuity between animals and humans, thus anticipating the eugenics of the beginning of the 20th century and the figure of the "abnormal type", i.e., a monster described as an incomplete man, a combination between human and non-human that legitimizes – according to him – the use of a series of drastic measures, such as coerced sterilization.

Dehumanization, however, is not limited to this. The 20th century is tragically marked by exclusionary policies implemented by authoritarian regimes. The latter have initially instrumentalized scientific works, to later get around them and, as is well known, to openly promote the exclusion of specific human groups, to the point of genocide. Such discriminatory practices were later qualified, starting with the judgments at the Nuremberg Trials, as "crimes against humanity". This notion later progressively broadened, although it didn't manage to prevent the insurgence, even in the 21st century, of new forms of dehumanization, such as those put in practice by the "Janus Bifrons", two-faced State: one oriented towards security and the other towards liberalism, or even ultra-liberalism. Almost as if globalization replaced the myth of legal humanism with two more myths, which can indeed coexist: *total security* on the one hand and *total market* on the other. In the name of a hypothetical zero risk, the securitarian myth allows to establish the police of suspicion and profiling, as well as predictive justice that replaces responsibility with dangerousness and punishment with neutralization; it arranges the traceability of populations at risk and promotes the concept of "de-radicalization", a very reductive one indeed, to counter the attraction of jihadism.

Sacred furies and radicalization: The three areas of the brain

Recourse to law is often instrumentalized to justify government practices based on fear. Hence the need to renew the method, to include research on behavior (both individual and group behavior, including that of States) that we struggle to explain rationally, such as identity closure or the securitarian drifts. We call these "sacred furies": "furies" because they arise from the archaic drives of fear and survival, "sacred" since these behaviors pertain to the forbidden areas linked to the deep self of every being. To be effective, this renewal must rely on great interdisciplinarity and include, in addition to the humani-

ties (law, history, anthropology, sociology, economy…) also research on cognitive and social neurosciences, in particular the observations on the functional models measured through the magnetic resonance imaging of the human brain. In the face of the persistence of these "sacred furies", we must revert to the Universal Declaration of Human Rights, which establishes that human beings are "endowed with reason and conscience", and draw the necessary conclusions with respect to the latter expression (in terms of moral conscience), which was inserted at the time at the request of the Chinese delegate.

In the Anthropocene era, humankind as such should also be able to significantly affect its own future. Endowed with reason, and in order to understand its crises, it can set into synergic motion all the available knowledge, breaking down the barriers that separate disciplines. Endowed with conscience, it can improve not only its cognitive skills but also the understanding of its own drives – in particular when emotions cause automatic thinking – so as to set up processes of resistance to the temptation of absolutist identities.

We may have overestimated the importance of logical reasoning and underestimated, despite the persistence of the "sacred furies" and other behaviors that elude reason, the relevance of the old cerebral cortex: the characteristic of reptiles and the first mammals that all of us keep within. We have thus forgotten that the evolution of societies, as that of individuals, is neither continuous nor consistent. Indeed, the evolution of the cerebral cortex has brought to a second, more rational system – called "algorithmic", since it relates to logical algorithms; yet, it has not erased the old cortex, which controls the first system, called "heuristic" – i.e., concerning drives and other automatic thinking and acting reflexes. Linked to the emotional context, both individual and social, this latter system is much quicker and, in its own way, more effective. Now, brain imaging shows that the two systems coexist, together with their potential conflicts, in all human beings; it also attests to the presence of a third system,

> called "executive", critical though discontinuous and exercised by the prefrontal cortex. It is undoubtedly possible to improve this control system on a case-by-case basis, yet under the condition that citizens learn to resist automatisms which elude reason when burdened by emotions, and that political executives do not instrumentalize said automatisms, but contribute instead to educating citizens to critical thinking (Houndé 2014).

We are moving from a humanistic anthropology to "a warrior anthropology" characterized by a determinism that renounces free will and makes exclusion the guiding principle of every intervention. This applies to terrorists qualified as "unlawful enemy combatants", therefore outside of the law, since they are neither criminals nor fighters, but it also applies to perpetrators of crimes whose recidivism is feared. We come to the dehumanization of this type of human being, labelled as "dangerous" and apt for elimination, like an aggressive animal. In such a context, the ultra-liberal myth of a self-regulating market may appear less disquieting. Even the latter, however, ends up assimilating human beings to commodities, and workers to resources: the safeguards of labour law appear then as an obstacle to investment – in this regard, suffice it to refer to the recommendations of the World Bank from a couple of years ago. The result is thus the "reification" of the human being.

With the reified human approach, the perspective changes. Some new technologies have been introducing the idea of "fabricated" humans. This is not a matter of destruction, as in the case of genocide, nor of suffering or humiliation, as in torture, but of only a seemingly positive type of fabrication of life. The French criminal code qualifies this as a "crime against the human species" if it is aimed at managing the selection of people and reproductive cloning – given that one day it will be possible – with the objective to deliver a child genetically identical to another person, either alive or deceased. In other words, the attempt is to protect the human species, yet this is done by separating it from humanity.

The irreducible human element

Resisting dehumanization presupposes the possibility to locate human evolution at the crossroads of the two processes of hominization and humanization through criteria that enable us to define what former United Nations Secretary-General, Boutros Boutros-Ghali, called the "irreducible human element".

If we consider the law to be the detector of the prohibitions that could signal this irreductible human element, we are to begin on the one hand with the "absolute" prohibitions, that is to say, the ones characterizing international human rights law, which prohibits States from carrying out inhumane and degrading treatment, such as torture or enslavement; on the other hand, we have the crimes that have no statute of limitations, that is, crimes under international criminal law, which prohibits natural persons – including Heads of State – from committing crimes against humanity and the other international crimes listed under the Statute of the *ad hoc* International Criminal Tribunals and the International Criminal Court (ICC). In addition to the diversity of national laws, this new international law would thus implicitly recognize two principles that I have had the opportunity to highlight during the course: singularity and equal belonging to the human community. These are two universal principles, or at least universalizable, because they originate from our double evolution: hominization and humanization.

Let us consider the first principle: singularity. By declaring equal dignity among all human beings, Art. 1 of the Universal Declaration of Human Rights prohibits depersonalizing or treating a human being as "incomplete", reducing him/her to his/her belonging to a category. The principle of singularity, which is a biological fact and, at the same time, a historical-cultural fact, represents the core of the crimes against humanity: I get killed not because of my deeds, but because I belong to a specific group, be it ethnic, religious or political.

The second principle, inseparable from the first one, i.e., equal belonging of every human being to the human community, consists simulta-

neously of a biological fact – we belong to one species – and a cultural one – that the Universal Declaration of Human Rights addresses in its preamble as the "human family". Darwin too was aware of this dualism when he wrote "As man advances in civilisation […], the simplest reason would tell each individual that he ought to extend his social instincts and sympathies to all members of the same nation […]" (Darwin 1881, pp. 100). He also added: "This point being once reached, there is only an artificial barrier to prevent his sympathies extending to the men of all nations and races" (*ibid.*).

It is precisely this expansion of the perspective of sympathies – to experience emotions for others, followed by empathy (or, as Alain Berthoz states "*sympathy* is to feel emotions for others while remaining oneself […] *Empathy* consists in feeling emotions for others by getting into their skin") (Berthoz 2010) – what expresses the belonging to a single human community, and it is precisely this empathy what is denied to the victims of torture or crimes against humanity.

However, the two principles are not sufficient when we take into consideration the prohibition of eugenic selective breeding or cloning: the true *ratio* behind the criminalization of the offence pertains in the first place to the risk of creating new categories of population and, therefore, new discriminatory treatment, but also – I believe – to questioning the principle of non-determinism.

A third principle, which we might thus call the "principle of non-determinism" brings forth the exceptional relevance, from the biological point of view, of epigenetic variation. This is obviously, as Jean-Pierre Changeux told us, a "necessary principle for the survival of the species" since it nurtures creativity and adaptability (Changeux 2010). At the same time, non-determinism fuels the sense of freedom. Now, this feeling is what defines the human being as such in his/her dignity and what underlies the principle of responsibility. For this reason, we should not separate, contrary to what the French criminal code does, the crime against "humanity" from the crime against the "human species".

To resist dehumanization, the typical offence of "crime against humanity" should thus prohibit not only destruction – genocide, enforced disappearance, murder – but also degrading treatment – enslavement, apartheid, discrimination, and also the incomplete human, the depersonalized human – as well as, lastly, the predetermination of the human being, whether s/he was labelled as "dangerous" as a precaution or created through technological means such as eugenics or cloning.

Clearly, the point is not to criminalize everything. The crime against humanity, the most emblematic one, still remains exceptional. It presupposes the violation of the principles of singularity, equal belonging or non-determinism, and it brings about acts of a "widespread and systematic" nature – as provided for by the Statute of the ICC. Thus, it must be the result of collective action: this is not a crime that can be committed individually. The individual act can be relevant from the perspective of national law, not international law. A State or an organization that intends to commit one of these acts can intervene through a political, religious or criminal group but also, for instance, through a pharmaceutical company. This demonstrates the importance of the process that enables responsibilizing all the holders of global power who can bring about dehumanizing practices.

The rise of the crime of ecocide

From dehumanization, we are reaching denaturation. At the time of the Anthropocene, regardless of the protection of humanity, we are envisaging punishing the various threats to the ecosystem balance that could lead to a complete collapse of our planet. From a philosophical point of view, "ecocide […] is not the ultimate crime in addition to all the others, it is the first one, the transcendent crime that would end the very conditions of habitability on Earth" (Bourg 2016). It pertains to the respect for the "concrete universality of the requirements for life on Earth, that is, the respect for the planetary boundaries" (*ibid.*).

Various pathways are under exploration: to expand upon the provisions already provided for by the Statute of the International Criminal Court, but limited to severe environmental damages committed during armed conflicts, or to provide for an independent crime of attack to the safety of the planet, or ecocide. Symmetrically to genocide, ecocide could be inserted both within the domestic legislation of each State and within international law. It announces a three-folded transformation of criminal law in terms of: a universalized disapproval, yet graduated according to criteria of gravity; an international repression, yet differentiated through diversity criteria; an anticipated responsibility, yet modulated through tolerance criteria (Delmas-Marty 2015; see also Fouchard et al. 2018).

CHAPTER II

RESPONSIBILIZING GLOBAL ACTORS

The role of law is not only to resist but also to responsibilize the global actors (Delmas-Marty, Supiot 2015). What does this formula mean? This means making prohibitions enforceable against the holders of global power on the one hand and, on the other, in case of violations, bringing the perpetrators before a national or international court. While this double objective is clear, the approach to reaching it is less so.

A first obstacle relates to the range of actors who exercise global power in the absence of a global State. We are dealing not only with States and international organizations but also with the variety of actors of the civil society: scientific actors, that is, experts whose knowledge is already global; civil-society actors, such as non-governmental organizations that advocate major reforms and have often represented their starting point too, as in the case of the establishment of the ICC. Last and most importantly, private economic actors, meaning transnational corporations: suffice it to think that two-thirds of the main hundred economic subjects are corporations. Despite this, the ascertainment of their juridical responsibility is essentially still limited to the national level. Therefore, primarily it is necessary to extend the list of legally liable persons on a global scale.

Another obstacle, which also derives from globalization, pertains to the fragility of humanity and its interdependency with non-human living beings.

Under the joint impact of scientific discoveries and technological innovations, and urged by the environmental issue, the law is by now at the forefront of safeguarding not only the current generations but also the future generations, as well as the non-human living beings (animals and nature). Thus, it is necessary to increase our responsibility towards what we might call the "duty to protect" the new centers of interest, neither objects nor subjects, but the living non-human world and the future generations. The point is, therefore, to develop an ambitious program to responsibilize the global actors in order to avoid dehumanization and denaturation.

The extension of the legally liable persons

States and Heads of State

The great *revolution* (Zarka 2018) – the term is not excessive – of the second half of the 20th century is the introduction of State responsibility before international justice in case of human rights violations. While this is only true for some geographical areas because a global Court of human rights does not exist, such jurisdiction represents a true revolution for the regions where it does exist. Another fundamental facet of this revolution is the possibility to invoke the criminal responsibility of Heads of State – not only former Heads of State but also those in charge – in case of commission of crimes against humanity under the jurisdiction of the ICC. Therefore, although we do already have at our disposal new legal instruments, these are still applied only partly, either little or incorrectly, because the political will remains hesitant if not downright resistant. As far as Heads of State are concerned, primarily we should recall the case of Pinochet: in the end, the general was tried in his own country. Milošević, on the other hand, was arrested and brought to international trial, but he died before being sentenced. Saddam Hussein was arrested and sentenced, yet under circumstances that are difficult to define as "fair justice". As for Gaddafi, he was killed extra-judicially, as Osama Bin Laden was. No matter how imperfect, however, the responsibility of States is taking shape on a global scale.

Climate responsibility

This is one of the most recent aspects of the ongoing revolution. By focusing on court cases dealing with the effects of climate change ascribed to States or transnational corporations, the Grantham Institute report estimated their number at over 1.000, of which 654 are in the United States and 230 are distributed over more than 24 countries. Cited in a 2018 publication (Cournil, Varison 2018), the report provides a concrete picture of the new obligations, the breach of which entails State responsibility. These obligations arise first and foremost from the new interpretation of constitutional rights stemming from a series of litigations that have become "emblematic", such as the 2015 Urgenda case in the Netherlands – the first to be initiated –, the Juliana case in the United States and the Klimaatzaak case in Belgium, as well as the legal actions promoted in Switzerland by the Association of Swiss Senior Women for Climate Protection. Independently from the constitutional rights, the human rights field has been involved in this revolution too, for example by the Commission on Human Rights of the Philippines and the Inter-American System for the Protection of Human Rights through indigenous peoples' safeguards. Lastly, the Grantham Institute Report examines the prospects for the evolution of various emerging instruments, such as the *Nationally Determined Contributions* (NDCs or INDCs standing for "Intended Nationally Determined Contributions"), which were invoked before an international judge or on the occasion of domestic disputes (in France but also in the United States). These contributions can now directly bind States.

Transnational corporations

As far as transnational corporations are concerned, the revolution is yet to be completed. Throughout the course, we analyzed several reports demonstrating the involvement of some corporations in the commission

of the most serious international crimes, that is, crimes under the jurisprudence of the ICC. Such involvement can be indirect, when a company furnishes goods and services which contribute to the commission of the crime, or direct, for instance when the company illegally exploits natural resources for its supply chains, causing violent conflicts. For a long time, on the other hand, the recommendations of the World Bank have regarded the respect of human rights as an obstacle to trade – not as a real political will – since the States aim above all to safeguard potential investors, who are the creators of new jobs. However, we can note some early signs of transformation: suffice it to recall the recent appearance of concepts such as "corporate social responsibility" and "shared social responsibility". Still, these terms are ambiguous. "Social responsibility" could be understood as the participation of the greatest possible number of actors in collective decisions: the States, but also the actors of civil society. In this sense, corporate social responsibility enjoys broad consensus, but it also risks appearing as a catalogue of good intentions that serve as an excuse to disengage or avert responsibility from the States. This notion of social responsibility should actually lead to accepting the idea of a full juridical responsibility of corporations, which would in turn entail their opposability and justiciability, exactly as it occurs for States. To effectively fight against the risks of dehumanization, it is necessary to ensure that rights are truly enforceable against transnational corporations. In addition to this, several practices must be improved in terms of transparency, the identification of those who are responsible within a specific group or the responsibility of juridical entities; opposability is indeed directly linked to the matter of justiciability because, to be able to refer to a judge, it is necessary to be able to identify the responsible person and attribute responsibility, even if it is a legal person.

Corporate Duty of Vigilance

Following the 2013 collapse of Rana Plaza, France was the first country to adopt a law on the duty of vigilance for parent and instructing companies, with the objective to reinforce prevention against violations of fundamental rights and the environment related to the activity of multinational corporations. Applicable to all companies with more than 5.000 employees in France and more than 10.000 employees abroad, the law of 27 March 2017 imposes the legal obligation to identify and prevent human rights violations and environmental damages that could derive not only from the business of the parent company but also from its controlled subsidiaries, subcontractors and the suppliers with whom these multinational corporations maintain an established commercial relationship, in France and abroad.

Two years later, on 21 February 2019, a group of NGOs (*Les Amis de la Terre, Sherpa* and their partners) published a disquieting evaluation of the concrete outcomes of this binding measure, still insufficiently and poorly applied. The first vigilance plans to be presented by companies in 2018 were often incomplete; sometimes they were not published at all. The report, therefore, requested companies to comply more adequately with this legal obligation. Out of the 80 vigilance plans analyzed, the majority only partly responded to the requirements of the law, in particular as regards the identification of risks of violation, their mapping and the implementation of measures designed to prevent them. Even more serious is the fact that some companies had not published a vigilance plan, despite the existing legal obligation. Some sectors appear to be particularly at risk from the point of view of human rights violations and environmental damages: these are the extractive industries, arms sector, garment sector, and the agri-food and banking services sectors. Despite all this, however, a project for a UN treaty on business and human rights (2014-2019) shows that steps have been taken towards an effective responsibility.

Much remains also to be done in terms of justiciability. At the international level, the possibility of extending the jurisdiction of the ICC to corporations is under discussion. This topic was actually not dealt with during the Review Conference of the Rome Statute in Kampala; it was discussed by some university professors, gathered by Emmanuel Decaux at the University of Paris II, on the basis of the proposal – advanced by a group of American researchers – to introduce the responsibility of legal persons before the ICC. This could pave the way to justiciability, although the latter would clearly be limited to extreme cases. The less severe cases should be dealt with at the national level. In this case, however, a question arises: should priority be given to carrying out the trial in the country of destination or in the country of establishment of the corporation? Generally, the country of destination does not have the means to conduct investigations, while the country of establishment, despite having them, often does not have the will to proceed. Therefore, many obstacles remain, both political and legal.

In order to overcome them, the currently most widely used solution – which, however, I do not consider to be the most appropriate one – consists in recurring to the universal jurisdiction of some major State, in particular the US. The universal jurisdiction of the US judges, based on a 1789 text revived in the 1980s, that is, the *Alien Tort Statute* (ATS), enables providing civil compensation – we are not within the criminal field – to the victims of international law violations – i.e., an extremely large category – even when these were committed abroad by foreign citizens against other foreign citizens. With a change of the approach of the US jurisprudence, the Supreme Court of the United States seems to exclude universal jurisdiction for legal persons and limit it to natural persons. I'm not sure we should regret this, since I believe that recourse to universal jurisdiction is not a good solution: if monopolized by some countries, it would risk leading to a series of severe and generalized inequalities. Let us imagine the political-legal chaos we would plunge into if a court from any country could rule according to its domestic legislation on the violations under international law, committed in any part of the world.

Instead, an international treaty could be adopted to confer jurisdiction on the country of establishment and to provide for a series of criteria to limit the referral to the country of destination, and to allow the latter to carry out investigations. Yet, we are still far from this. A strong push to move in this direction undoubtedly comes from the pressures of NGOs, citizens and civil society. We can probably make the same considerations regarding the other form that illustrates the process of responsibilization, that is, the extension of the content of liability.

The extension of the content of liability

The responsibility to protect human beings

The point is not only to know *who* is responsible but also *for what*. I intentionally use the expression "responsibility to protect". This concept is recent within international law since it originated as an extension of humanitarian intervention in defence of peoples threatened by crimes such as crimes against humanity and war crimes. This new concept was adopted by the United Nations General Assembly in 2005 and it was used in the context of Libya to legitimate military action, originally disciplined by the clear limitations imposed by the Security Council resolution of February 2011.

In 2005, the States recognized the responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In 2009, i.e., the last time when the UN General Assembly dealt with the issue, the Secretary-General outlined a three-pillar strategy: individual State responsibility; commitment of the international community to assist States to fulfill their duty; and, lastly, responsibility of the international community to use all the appropriate diplomatic, humanitarian and other peaceful means to protect populations, as well as to be prepared to take collective measures. This strategy insisted upon the value of prevention and, in case the latter would not give results, on a "timely and flexible" response designed to meet the specific needs on a case-by-case basis.

While the theoretical construction of the responsibility to protect appears to be solid and logical, the practical methods of its application still show more than a few difficulties. Used in Libya in 2011, the responsibility to protect was later strongly criticized, especially because of the broad interpretation it was subjected to. For this reason, it was not used again in Syria. Thus, its application is not simple at all. Moreover, in most cases, the individual States act for their citizens, without allowing any intervention from the international community. Hence, we could ask ourselves if this concept was a stillborn, especially if we take into consideration, from a formal point of view, the role played by the very structure of the UN and its Security Council. In this regard arises the issue of the right of veto of the Member States of the Council: it is precisely through its use (and especially through the Russian and Chinese veto) that most of the resolutions concerning Syria were blocked in 2012. On the other hand, the abolishment of said right of veto does not seem to be conceivable for the moment. These are, therefore, the practical limits of the responsibility to protect.
Regardless of these, however, the concept, which is grounded on the universal values expressed by the UN, responds to a just idea. Thus, an in-depth reflection is much needed to make the UN institutions more efficient and avoid the excessively frequent situations of institutional paralysis.

Implementation of the responsibility to protect

By breaking a ten-year-long "silence", in 2018 the UN General Assembly opened the first formal debate on the responsibility to protect. In his report, entitled *Responsibility to protect: From early warning to early action*, UN Secretary-General António Guterres suggested a strategy structured upon the following three points: to strengthen existing preventive capacities; to continue to promote accountability for atrocity prevention; to innovate through significantly expanding the involvement of civil society for atrocity prevention.

Once clarified, it would be interesting to apply the concept of "responsibility to protect" to the new centers of interest such as animals, the environment and future generations.

The responsibility to protect animals

In order to reach this point, it is undoubtedly necessary to move from the concept of rights, which implies reciprocity – we speak of "responsible party" and "victim" – to the concept of duty, which binds without reciprocity. This distinction is particularly important when it comes to the protection of animals – of some animals, since the "animal" category is extremely heterogeneous (the point is clearly not to protect bacteria as such). The issue is interesting: in my opinion, acknowledging rights to animals, as some envisage (see the 1978 Universal Declaration of Animal Rights), involves the same – and backwards in a way – risk of dehumanizing as when some human rights are refused to allegedly "incomplete" people. On the other hand, juridical responsibility grounded on the duty to protect animals allows to link hominization and humanization: hominization because animals are inseparable from the survival of humankind; humanization because this duty falls upon humanity since only mankind is capable of awareness and intentionality.

Hence the evolution of the law. The French criminal code added to the crimes against persons and property a new category containing precisely the protection of animals from brutality and cruel acts, which also cover acts of a sexual nature. For instance, a 2007 judgment convicted the owner of a pony for having practiced acts of sodomy on that poor animal, which could not, as the judges said, "exercise any expression of will and was thus transformed into a sexual object". With some considerable foresight, the European Union refers to the welfare requirements of animals as sentient beings (see the Lisbon Treaty). A 2010 directive on the protection of animals used for scientific purposes moves along the same lines. A break from the dualistic conception emerges here, yet the distinction between human and non-human is still preserved: this is what matters.

The responsibility to protect the environment

Second example: the responsibility to protect the environment. This is currently enshrined in many constitutions. In France we find it in the 2005 Environmental Charter. Every person has the duty – the world *duty* rarely appears in texts of a constitutional nature – to contribute to the protection and improvement of the environment. The underlying idea is that of the human being as a temporary dweller on the planet[8]. The legal instruments keep on multiplying, in particular after the Earth Summit held in Rio in 1992 (biodiversity, climate change). Moreover, many other tools also exist: in the case of armed conflict, an intentional attack on the environment can constitute a war crime. An equally new instrument: the concept of "global public goods", which is somewhat a synthesis between economics – these are collective, non-excludable and non-rivalrous goods – politics – they are public goods – and ethics – they are common goods. Applied to climate change, this concept marks an evolution for the need to increase the responsibility of the holders of global power, meaning those directly involved in climate change, that is, States in the first place and, secondly, private corporations.

COP 21: The awakening of the conscience of our community of destiny

COP 21 (21st Conference of the Parties to the 1992 United Nations Framework Convention on Climate Change) is neither a failure nor a success (Torre-Schaub 2017).

First, it represented gaining awareness. The international community acknowledged that its destiny – like that of all the living beings on the planet – heavily depends on human behavior since, in fact, disruption of the climate system is predominantly a human-induced phenomenon.

In addition to this, it also marked a methodological change. The international community realized that it is not sufficient anymore to

conceive new concepts like during the last century, for instance with the "common heritage of humanity", which appeared in the 1960s in relation to oceans, the Moon and other celestial bodies; or the "global public goods" and "global common goods" – concepts borrowed from the theorizing of economists of the 1980s (see the 1987 Report of the United Nations Development Programme) to identify the goods that are both non-excludable (can be used by everybody) and non-rivalrous (their use does not affect the use of others). These terminological innovations were not able to modify the balance of power. Namely, international law remained a quasi-monopoly of States, which defend their national interests and withdraw from treaties when such interests diverge from the global ones: suffice it to recall that Canada withdrew from the Kyoto protocol after being subjected to sanctions for violating its obligations.

Instead of proposing new concepts, the Paris Agreement establishes a process to attempt and preserve the future (and present) of our planet. It should not be interpreted as an isolated document, separated from the movement in which it takes place and without which it would not exist: it pertains to a dynamic process that, as such, must be regularly updated.

Currently, the agreement of 15 December 2015 does not represent a legal tool sufficiently unified and stable so as to produce a coherent set of norms, forms and dogmas. The norms emerge in the greatest disorder and accumulate on all levels (international global or regional, national, infra-national). Combined with a softening of forms in favor of a very complex interactive and dynamic law, the excess of norms contributes to the upheaval of the dogmas that we believed to be eternal, such as the independence of States as absolute sovereigns in their territory. The dismay of the jurists is understandable.

Yet, nonetheless, the Paris Agreement is an extraordinary bet on the future. The dynamic it produces is not always "virtuous", but it invites us to recompose the legal field, and it seeks to build the future

by combining the one and the multiple through a three-step movement: definition of common objectives, differentiation of responsibilities depending on the States and, finally, diversification of the actors with an increase of the strength of non-state actors.

The responsibility to protect future generations

When we come to the third example of what I have called "the new centers of interest", i.e., the future generations, the process becomes even more complex. This formulation is in fact so vague that the legal framework varies according to the distance in time. By "future generations" we mean the generations that are destined not to meet: not our children or grandchildren, but those who will come after them. In this case, there is a duty to protect that binds us without reciprocity but, at the same time, requires us to anticipate future risks.

CHAPTER III

ANTICIPATING FUTURE RISKS

Finally, we have reached the third role of this law in the making to anticipate. Unlike the process of responsibilization, which derives from the concept of responsibility, the process of anticipating originates from what I would call concepts "made dynamic" by the use of adjectives that introduce the idea of future – "future" generations – or the persistence in time – "sustainable" development – "long-lasting" peace. Additionally, other adjectives implicitly recall the idea of time: for instance, when we refer to "universalizable rights" or "globalizable goods", rather than "universal" rights and "global" goods. It is no coincidence that these expressions are recent: they imply the dynamic that underlines the instability of legal systems. They seem to match the transformation of fears, which move from local to global risks, but also from natural to industrial or combined risks. The link is clear: if the human being has contributed to the creation of risks, the human being can, and must, try to prevent them. Aspiring to elaborate a theory of the anticipating processes in legal matters is undoubtedly untimely, yet it is already possible to lay the foundations, to find the instruments: these are first empirical, then axiological, and finally, formal instruments, aiming to adapt legal formalism to the uncertain, if not the unpredictable.

Empirical instruments

Anticipating future risks means combining precaution and action. The term *precaution* has almost become taboo because it relates to the often misinterpreted 'precautionary principle'. It should not be understood as a principle leading to immobilism, but more as a principle inciting the development of research and evaluation methods that presuppose transparency and rigor. It is necessary to transparently define risk indicators and to use them, to rigorously ponder them, since we are moving in the context of a multiple-indicators logic: pondering must not be modified in accordance with the desired outcomes. We know that this principle, which originated within environmental law, was later adjusted to dangerous products.

In a world where the pace of innovations increases the fear of the unpredictable to come, the precautionary principle (Delmas-Marty, 2018) is perceived most of the time as a "spell-casting phrase", designed to avert scientific or technical-scientific uncertainties. Such mistrust, this is a matter of fact, can be explained through the excessive caution of the decision-makers hiding behind the precautionary principle – the meaning of which, however, can not be taken for granted. This principle is unpopular because it bears an unfortunate name, as it is actually a process of anticipation. Such a process keeps on expanding – from the environment to health, from information technologies to biotechnologies – and it progressively hardens – from *soft law* recommendations to *hard law* sanctions. What is this about? Must everything that is technically possible be legally allowed? Or is it necessary, in order to anticipate potential risks, to set some limits on innovation and extend liability law in the name of precaution? Precaution, innovation, responsibility: so many incantatory formulas, at times contradictory, pronounced to ward off the uncertainties of a world where the speed of technological innovations takes aback jurists and policy makers. Thus, liability extends from fault to risk; later, it extends from the prevention of ascertained risk to the precaution before uncertain risk, since the latter could severely and irreversibly affect the survival of humankind, the

safety of the planet and the balance of the biosphere. Before the pace of innovations, it is necessary to anticipate and, at the same time, set limits on innovation; such limits must concern both the drafting of norms and their enforcement.

In terms of norms drafting, the precautionary principle undoubtedly entails the proliferation of norms. An evolution of this kind, which can be observed starting from the 1990s, especially on a national and European level, is not only quantitative – texts and comments increasingly multiply – but also qualitative – the norms are ever more binding. Created to identify anticipatory actions with respect to the state of still unsettled knowledge, the precautionary principle applies in the first place to political governance, to increasingly take on legal value, involving the responsibility of States as much as that of experts and corporations. As for its enforcement, the principle of anticipation of risk entails to a certain extent the transfer of power to the experts, so as to evaluate the uncertainties and likelihood of risk.

To function as a regulator for the search for balance, the precautionary principle presumes a permanent assessment of risk by its severity scale – that is, its likelihood, nature, scope, and degree of irreversibility – but also the assessment of its degree of acceptability – i.e., risk tolerance. By balancing innovation and conservation, we avoid resorting to the binary logic of "all or nothing", which limits the decision to only two possible options: to allow every innovation that is technically possible or to prohibit it when risk appears, no matter how small.

The significance of the precautionary principle changes when it is evoked with reference to the dangerousness referred to the human being instead. Precisely because of the indeterminacy of the latter, evaluation is almost impossible. The indicators according to which human beings are allegedly predetermined to recidivism, for instance, are too uncertain and vague to be scientifically tested. Resorting to precaution in this context is a catastrophe for freedoms. When an *ad hoc* commission issues an opinion on dangerousness, this is, in fact, an unrebuttable presumption. To a certain extent, we are all potentially dangerous and we are equally unable to prove the contra-

ry. If we limit the precautionary principle to the natural or industrial risks, either ascertained or potential, it seems possible to combine it with legal action, yet of a new kind. This wouldn't be a criminal, punitive measure in the classical sense. Nor a civil one, either restorative or regulatory, such as an administrative procedure. Rather, this is a measure that we might call "prospective" instead of retrospective: whether we call it "preventive" or "of preservation", the idea behind this legal action is to express solidarity through space and time.

This raises quite a series of technical issues for the jurist. Future generations, for instance, do not hold legal personality. Who will be the holder of the action? On whom can responsibility be laid and, finally, how can we quantify future injuries and avoid transforming legal action into an oracular action? Some legal techniques do allow the indirect representation of future generations through public prosecutors or non-governmental organizations. More direct techniques exist as well: some countries have instituted an environmental *ombudsman* or an *ombudsman* for future generations (Gaillard 2011, Delmas-Marty 2020).

Representing nature in court

The direct representation process is less common because if we humanize nature, we run the risk of dehumanizing the notion of the human person. Nevertheless, the idea of directly representing nature like "legal persons" are already being represented keeps on progressing, just like, more recently, the idea of representing "future generations". Even if we refuse the anthropomorphism that attributes rights to nature despite the absence of any reciprocity, nothing prevents us from recognizing the duty of human beings towards non-human living beings, be it animals at risk or nature, by managing their representation as victims.

Likewise, in 2017 the New Zealand Parliament recognized through a law river Whanganui as a living and indivisible entity; guardians

were appointed – one representative of the State and the Maori *Iwi* of Whanganui – to defend its interests and legally represent it. The same year, in India, a High Court ordered that the Ganges and its tributary, river Yamuna, be accorded the status of living human entities, and the judges nominated two local personalities to be the "parents" of these ecosystems, with the assignment to protect them. There are also issues related to the attribution of responsibility. These can be answered with the reaffirmation of the principle of solidarity, or with the affirmation – which represents a novelty for the French Constitutional Council – that "the protection of the environment, a common heritage of human beings, represents an objective of constitutional value"[9] such as to justify, in particular, restrictions on the freedom of enterprise. Like the creation of special funds for compensation, this would be a way to express solidarity.

Finally, the assessment of prejudice resupposes the measurement of risk; in this case, it is possible to resort to the acquired skills and their instruments: the scenarios of projection into the future. Since the very notion of risk implies referring to shared values, anticipating also presupposes the use of what I would call "axiological instruments".

Axiological instruments

The axiological instruments imply reference to ethical values that, to be accepted as common, must find a balance between apparently opposing requirements (Delmas-Marty 2011). I will only cite the example of "sustainable development", a currently widely used term, employed to anticipate environmental risks and in particular, but not only, to protect the climate from greenhouse gas emissions. Climate, as previously mentioned, is a public good that can logically be globalized, but from a practical perspective this can happen only if a balance is reached between environmental protection and the maintenance of development acceptable for all countries. It is evi-

dent that the interests of the emerging countries do not coincide with those of the industrialized countries.
The latter aim directly at sustainable development, while developing countries and emerging countries are primarily interested in economic development. From a prospective point of view, sustainable development presupposes that all countries commit to it, but it does not guarantee fair development. Fair development requires, in retrospect, to recognize that industrialized countries have a strong responsibility for the current emissions of greenhouse gases. In other words: anticipating, in this matter, means finding a balance between the past, present and future. It could be said that the same reasoning applies to lasting peace or, again, to "universalizable" human rights. This is a dynamic approach that, therefore, implies a balance that is also evolving; as such, it can cause legal insecurity which specifically results in a transfer of powers – the power of interpretation – to the judge. The latter, in fact, more than the legislator, puts into practice this search for balance between "prospective" and retrospective. Hence the importance of the method of reasoning and the need for instruments to adjust legal formalism not only to the diversity of the present world but also to the uncertainty of the future.

Formal instruments

Legal formalism was illustrated during the seminar *Hominization, humanization* by some scholars, among whom Alain Berthoz. Cognitive sciences demonstrate that the multiplicity of interpretations derives from the abilities of the human brain, which is already equipped with shared mechanisms of representation: the ability to change the point of view includes a set of psychological features, but it rests upon specific brain bases. During the seminar, we mainly focused on this ability, in light of its connection both with hominization and humanization. The Renaissance humanists, to name only them, preferred the form of dialogue to that of treaties. The attempt was to help break out of the binary logic, and to introduce a "logic of gradation" – which I no longer dare to call "logique *floue*" after the misadventures

of having published, with a somewhat provocative title, *Le Flou du droit* (Delmas-Marty 1986), i.e., the works on the topic of the logic of gradation written by a research group jokingly calling themselves *Les fous du flou*[10]. The misinterpretation between ordinary *flou*, synonymous with imprecision, and logical *flou* – which leads to the improvement of the legal norm by adapting it to the complexity of situations, and which allows appreciating the compatibility of behavior with the reference norm by placing the latter on a graduated proximity scale – made me more cautious. This method, far from leading to arbitrariness, forces the judge to clarify the meaning of the reference norm and the criteria for assessing the degree of proximity that guides the final decision, which is of a binary type (compatible or incompatible). By now I prefer to speak of the "logic of gradation" as a means of allowing the safeguarding of margins: national margins in space, but also of margins over time. Here again, humanization is at the crossroads of biological and cultural evolution.

From the point of view of legal techniques, the national margin of appreciation previously mentioned allows variations in terms of space even though, from a temporal point of view, international law invented the technique of common but differentiated responsibilities, which facilitates, especially in the field of climate change, a type of anticipation at different speeds. The schedule is not the same for industrialized, emerging and developing countries. It creates a space – the Kyoto space, as it is sometimes referred to – which is a multi-speed space – a polychronic phenomenon.

This is an answer, in the name of legal formalism, to the question "How to address the synergy between sustainable development and fair development?". The development will be sustainable thanks to the commitment of all countries; at the same time, it can be fair if the agenda allows more time for developing countries. We can also note that the uncertainty of risks does not automatically involve a lack of responsibility. We have the ability to anticipate, but we must not imagine it to be unlimited. In other words, anticipating must not lead to wanting to attribute all the risks to a single responsibility holder.

TO CONCLUDE

Even if the law in the making is characterized by a triple role – to resist, to responsibilize, to anticipate – these functions should not be put all at the same level. Resisting dehumanization recalls the traditional role of law: to establish prohibitions. On the contrary, transforming the concept of "responsibility" into a "dynamic process of responsibilization" and putting into practice anticipation processes entails resorting to what I like to call "the imaginative forces of law", thus coming to identify a dynamic. However, the latter must never lead us to forget the inherently human limitedness, since our cognitive skills are not unlimited. Undoubtedly, they are insufficient. Paul Ricœur argued some years ago: insufficient to be able to truly control the "conflict between the foreseeable and desired effects and the innumerable totality of consequences of the action" (Ricœur 1995, pp. 68-69; English translation p. 31). We are unable to control everything. If law aspired to anticipate all the risks and protect from all the dangers, it would foster a culture of fear, thus also furthering the rise of authoritarian or even totalitarian regimes.

Well, such culture is relatively recent or, in any event, scarcely examined by Western historians, except for Jean Delumeau in his *Histoire de la peur en Occident* (Delumeau 1978). We could ask ourselves if fear became taboo while power was instead undertaking the task to reas-

sure and protect, which, besides, is the title of another work by Jean Delumeau (Delumeau 1989).

By now, fear is not taboo anymore, it has become a form of governance, if not even a governing method. To protect adequately, it is necessary to put on alert. Everywhere, at any time, from nursery school and for life. In other words, the tolerance threshold has weakened. The ideal would be to neutralize all risks to get the illusion of mastering even the unpredictable. The explanation may lie in the fact that unpredictability has increased. However, I put forward this hypothesis with caution. If chance is nothing but the fortuitous coming together of a series of heterogeneous causes, we can assume that technological progress does not so much increase risks as precisely that random component instead. We can assume that technological progress makes progress more unpredictable because we witness the multiplication of interactions among various causes of natural or human origin; all of this is reinforced by the excessive power of technical means. But how do we reinvent new rituals that reassure and restore confidence in a destiny that is not necessarily tragic, then? How do we avoid resorting to the scapegoat mechanism again? In some way, that's the role that was entrusted to the extra-judicial execution of Bin Laden.

We would like to escape the alternative between the dream of the super-human of the post-humanists on the one hand and the nightmare of the catastrophe of the environmental movements on the other. At this point, we cannot but think of the works by Hans Jonas (Jonas 1979, pp. 16, 424; English translation p. 176 and seq.). Scarred by the drifts he associated with what he called "Marxist utopianism in its close alliance with technology", the philosopher will come to oppose the "responsibility principle" to the "principle of hope" of Ernst Bloch. Clearly, his heuristics of fear is not about fear for oneself. By identifying the dangers, Jonas appeals – or intends to do so – to the courage to take responsibility for future generations. In my opinion, however, fear does not replace hope: hope is "ready to seduce", said Plato in *Timaeus,* nevertheless recognizing that it plays a role in the exercise of reason and the search for truth.

Perhaps it will be up to this law in the making – the real object of my research on the internationalization of law – to reconcile the two principles so that fear becomes solidarity in the face of risk and that responsibility does open up to hope.

POST SCRIPTUM

A "COMPASS OF POSSIBILITIES"

If the global community is grounded on anticipating narratives, rather than on the memory of a common past, the disaster-narrative steers energies as much as the programmatic-narrative standardizes societies, be it a narrative of the *Total market*, *Total digital* or the *World-empires*. By opening up to diversity while focusing on the ecological vision of Mother Earth, the emerging global community can instead give life to a more mobilizing and at the same time solidarity-based and pluralist narrative, capable of replacing dehumanizing globalization with appeased *mondialité* (mondiality). Inspired by the "archipelagic" thinking of the Antillean writers (Édouard Glissant and Patrick Chamoiseau), the adventure-narrative of *Mondialité* appears as a politics of solidarities and a poetics of differences. Close to the "ordered pluralism" that recalls the European motto ("United in diversity"), this is the only anticipating narrative that is concerned at the same time with preserving a habitable planet and respecting the rights of the approximately eleven billion human beings expected for the end of the century. It is perhaps the only narrative capable of resisting the World-empires without reaching the already announced collapse. Finally, perhaps it is the only narrative that, with a little luck, can lead us to a global community united in its destiny while remaining open to the plurality of possible worlds.

To illustrate this narrative, we imagined, through the joint endeavour of a jurist and an artist – Antonio Benincà – a "compass of possibilities", conceived as an "object manifesto" (Fig. 1). A Wind Rose (Fig. 2) anchored to the ground, enabling us to detect the winds of globalization: the main winds – security, competition, freedom, and cooperation – and the winds between the winds (*vents d'entre les vents*) – i.e., exclusion, innovation, integration, conservation. Projected towards the sky, the terrestrial Rose becomes an aerial Round, a sort of carousel or great disorder where the opposing winds collide two by two (freedom/security, cooperation/competition, etc.).

Unusual, because it does not have the North magnetic pole, this compass presents a center of attraction where the regulatory principles of our humanities meet. These principles of justice are inspired by a spiral of the humanisms winding up towards the sky, offering a pedestal to the "little innominate breath" (*petit souffle innomé*) that represents the vital impulse of every citizen of the world (Delmas-Marty 2016, p. 127). Symbol of the permanence of Being in evolution, the spiral reactivates the humanism of *relation* of traditional societies (the principles of fraternity and hospitality) without renouncing the humanism of *emancipation* that we inherited from the Age of Enlightenment (equality and dignity). The spiral also embraces the humanism of *interdependence*, born from ecosystems (social and ecological solidarity) and lastly the humanism of *indeterminacy*, which preserves the mystery of the human (responsibility and creativity). The spiral is linked to a plumb line, like the one that the constructors of cathedrals used to immerse in a bucket full of water, the primordial element of life, to find literal and metaphorical rectitude by cushioning the movements resulting from the winds.

If we play the game of analogy between the winds of the world and the winds of the spirit, the lead wire, immersed in an octagonal receptacle of water, evokes a global governance in which – paying homage to Blaise Pascal – justice will be reinforced by legal humanisms and might will be balanced by regulatory principles[11]. This unique compass – which does not have the North magnetic pole – suggests that collapse is not inevitable and

that it is still possible to steer our societies towards governance that stabilizes without immobilizing and pacifies without standardizing.
This 21st century, in which we only talk about the suicide of the West, the disintegration of Europe and the collapse of the planet, is the ultimate time to launch an alert. This is not the reason, however, to give up on hope now. The compass is not just a sculpture and a manifesto, it is also playful: even in a state of emergency, it is vital that joy remains!

Notes

1. These comments are inserted in grey background boxes, separated from the main text.

2. Lombroso, the doctor renowned for his description of the "born delinquent", is one of the leading figures of the 19th century Italian positivist school. His rejection of free will and his deterministic conception of crime, which replaces guilt with dangerousness and punishment with security measures, were later rehabilitated by the securitarian stances, in particular after the 9/11 attacks.

3. Hermitte, M., *Post-humanisation et/ou déshumanisation?*, séminaire *Hominisation, humanisation*, 29 April 2011, video available at: https://www.college-de-france.fr/site/mireille-delmas-marty/seminar-2011-04-29-09h10.htm.

4. Fagot-Largeault, A., *Les nouveaux modes de procréation*, séminaire *Hominisation, humanisation*, 29 April 2011, video available at: https://www.college-de-france.fr/site/mireille-delmas-marty/seminar-2011-04-29-09h05.htm.

5. NdT: *Universalisables* in the original text, we chose to adhere to the term employed by Mireille Delmas-Marty to indicate what can become universal, or more universal, in the future.

6. NdT: "*Un droit en devenir*" in the original text, is a concept developed by Mireille Delmas-Marty to refer to "law that does not yet exist" (*droit qui n'existe pas encore*).

7. Supiot, A., *Table ronde: le droit régulateur des tensions entre hominisation et humanisation?*, séminaire *Hominisation, humanisation*, 29 April 2011, video available at: https://www.college-de-france.fr/site/mireille-delmas-marty/seminar-2011-04-29-12h00.htm.

8. The French expression used by Mireille Delmas-Marty is "l'homme concessionnaire de la planète".

9. Conseil constitutionnel, décision n. 2019-823 QPC du 31 janvier 2020.

10. NdT: The meaning of the pun is lost in the English language.

11. "[…] being unable to cause might to obey justice, men have made it just to obey might. Unable to strengthen justice, they have justified might; so that the just and the strong should unite, and there should be peace, which is the sovereign good" (Pascal 1669; English translation 2007).

AFTERWORD

A Guide to Mireille Delmas-Marty's "Compass"

Diane Marie Amann*

"We mustn't forget however that humans are finite – our cognitive capacities are not infinite"[1]. Loosely translated from the French original, this admonition appears in the last paragraphs of the foregoing essay, which was written toward the end of a half-century-long career. What the essay calls "*la finitude humaine*" arrived for its author, Mireille Delmas-Marty, on 12 February 2022, in a town 250 miles south of the capital where she had entered this world eighty years before. At her death Delmas-Marty was, among many other things, an Emerita Professor of her birth-city's eminent Collège de France de Paris. Upon her passing the head of France's Ministry of Justice expressed great sadness, and yet offered this reassurance: "Her works will remain"[2].

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1 Mireille Delmas-Marty, "Une boussole des possibles: Gouvernance mondiale et humanismes juridiques", in *Une boussole des possibles. Gouvernance mondiale et humanismes juridiques: Leçon de clôture prononcée le 11 mai 2011* [online], Paris: Collège de France, 2020 (generated 28 August 2022). Available on the Internet: http://books.openedition.org/cdf/8988; DOI: https://doi.org/10.4000/books.cdf.8988. In its French original, the sentence was: "Cette dynamique ne doit cependant jamais faire oublier la finitude humaine car nos capacités cognitives ne sont pas illimitées". In this volume's English translation, it reads, referring to the "dynamic" that Delmas-Marty had just posited, "However, the latter must never lead us to forget the inherently human limitedness, since our cognitive skills are not unlimited" (see, in this volume, p. 47).

2 For details on Delmas-Marty's passing, including the quote from *Garde des sceaux*

The editors of this volume, Professors Emanuela Fronza and Chiara Giorgetti, deserve immense credit for helping to assure that this will be so. Their efforts in producing translations of this essay, first in Italian and now in English, will do much to reinforce Delmas-Marty's legacy among non-francophone jurists, academics, and practitioners of law.

My choice of that last word, "law," itself merits remark. Though broad in scope, "law" offers the narrowest net available to capture the many subfields to which Delmas-Marty applied her own cognitive abilities. Within that net will be found criminal law, human rights and humans' duties, liberty/freedoms, climate justice and environmental law, corporate law, migration law, cultural diversity and biodiversity, economic law and political economy, law and empire, public and private international law, regional (dis)integration, law and technology, security governance, peace, prevention and precaution, ethics, legal accountability/responsibility, legal history, logic and empiricism, social-scientific theory, and political-legal philosophy. Delmas-Marty linked up such seemingly disparate disciplines as a matter of course, albeit not via verbose footnotes detailing works of myriad academics; she preferred terse references to thinkers whom she expected her reader already to know, or at least be ready to learn more about. Her analyses moved seamlessly, in time – centuries traversed in a sentence – and in space – the national or infranational level leapt to the regional, transnational, international, supranational, or global level, and then back again.

The instant essay exemplifies that synaptic style and intellectual abundance. It concerns itself *inter alia* with democracy and populism, with enslavement and eugenics, with the anthropomorphism of the so-called Anthropocene era, and with the borders that have rendered migrants unfree while according to markets significant freedom. The essay criticizes certain state-based endeavors – the United States' post-9/11 excesses, for instance, as well as the way France chose to legislate against cloning – and then shifts to the promise of inter-state

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Eric Dupond-Moretti, see "Mireille Delmas-Marty, éminente universitaire et juriste, est morte", *Le Monde*, 13 February 2022, https://www.lemonde.fr/disparitions/article/2022/02/13/mireille-delmas-marty-eminente-universitaire-et-juriste-est-morte_6113501_3382.html.

cooperation as glimpsed in instruments ranging from the Nuremberg Judgment of 1946 to the Paris Climate Accords of 2015. The essay additionally considers the 2005 document in which the United Nations asserted that States, in the first instance, and multilateral institutions, in the second, must shoulder a responsibility to protect populations against atrocities. As the essay acknowledges, early applications of the responsibility-to-protect doctrine prompted worries that it had been "stillborn"[3]. The essay urges the doctrine's extension even so: in Delmas-Marty's imagining, not only present and future generations of humans, but also the environment, animals, and other non-human living things, present and future, must enjoy law's protection.

Such twists and turns in legal reasoning at times may seem disorienting. So too the cited sources for Delmas-Marty's rich analysis. They include a few of her own works, as one would expect in an essay that initially was drafted as the final lecture in the author's nine-year tenure as holder of the Collège de France Chair in *Etudes juridiques comparatives et internationalisation du droit* / Comparative Legal Studies and Internationalization of Law[4]. But more often Delmas-Marty recalled theorists other than herself, many but not all of them French, and many but not all of them lesser known outside continental Europe. The English-speaking reader of course will recognize Charles Darwin, and Columbia Law Professor Bernard Harcourt has a following in the United States[5]. That reader is likely to have little acquaintance with the philosophers Paul Valéry or Paul Ricœur, however, nor many of the other Europeans from whose published works Delmas-Marty drew her

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3 See, in this volume, p. 34.

4 See "Mireille Delmas-Marty: Études juridiques comparatives et internationalisation du droit, Chaire statutaire 2003-2011, Professeur disparu", Collège de France, https://www.college-de-france.fr/chaire/mireille-delmas-marty-etudes-juridiques-comparatives-et-internationalisation-du-droit-chaire-statutaire; Ministère de l'Europe et des Affaires étrangères, "France Diplomacy: Tribute to Mireille Delmas-Marty", 15 February 2022, https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/news/article/tribute-to-mireille-delmas-marty-15-feb-2022 (visited 25 November 2022).

5 See, in this volume, pp. 14 and 24, nn. 11, 17, quoting Harcourt (1963-) and Darwin (1809-1882), respectively.

Fig. 1. Picture of *The Compass of Possibilities* of Antonio Benincà (©2021 Château de Goutelas).

own deep thoughts[6]. Delmas-Marty understood all this, and perhaps that is why her title conjures a "*boussole*," or "compass." In its essence this essay offers an instrument for the disoriented reader to find orientation – to consider all possible directions in the hope of choosing a better path forward. That said, a compass can prove an imperfect tool. It cannot guide without a hand able to hold it steady and a head able to interpret its meaning. It is my privilege in this afterword to try to provide a bit of both.

* * *

My acquaintance with Professor Mireille Delmas-Marty began when a mutual colleague recommended I reach out to her on learning of my own research into global convergences and divergences in criminal procedure. The millennium was about to turn, and Delmas-Marty, then at Université de Paris 1 (Panthéon-Sorbonne), was directing *Corpus Juris*, which aimed to synthesize Europe's diverse criminal justice systems in order to shape a regionwide criminal procedure. (Aspects of this funded project give rise to a few points worth noting: first, that Delmas-Marty attended to law's technicalities even as she imagined transcending them; second, that praxis and theory coexisted throughout her career; and third, that within Europe her renown as a legal expert was of long standing.) I was then a quite-junior law faculty member, untenured and for the most part unpublished. Still, her welcome was warm and immediate[7], and I flew across the Atlantic for a sab-

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6 See, in this volume, pp. 7 and 47, nn. 2, 33, quoting, respectively, Valéry (1871-1945), Ricœur (1913-2005).

7 See Diane Marie Amann, "Harmonic Convergence? Constitutional Criminal Procedure in an International Context", *Indiana Law Journal*, 75, no. 3, 2000, pp. 809-73 (thanking Delmas-Marty and the mutual colleague, University of Vienna Law Professor Frank Hoepfel, in the first footnote, and later discussing Mireille Delmas-Marty (ed.), *Corpus juris: portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne / introducing penal provisions for the purpose of the financial interests of the European Union*, Economica, 1997). Subsequent *Corpus Juris* publications would be co-edited with Utrecht Law Professor John A.E. Vervaele, much later the author of

batical year as a Sorbonne *professeure invitée* in 2001. The terrorist attacks of that September ruptured legal assumptions which many had thought settled, and within this rupture our collaboration found purpose. Others, too, collaborated; Delmas-Marty followed the European tradition of enlisting doctoral students on projects even as she welcomed colleagues from farther afield. Faced with the return of incommunicado detention and makeshift military tribunals, Delmas-Marty thus organized seminars and *grands colloques* in order to think through what in fact were, and what should be, the interrelations of national and international law legal systems.

When opposition to the 2003 invasion of Iraq spurred some US politicians to deride France by renaming a certain side dish "Freedom fries", Delmas-Marty, by then at Collège de France, responded by establishing the *Réseau ID franco-américain*, or French-American Network on Internationalization of Law. (Similar French-Brazilian and French-Chinese networks ensued.) For years our network of academics, judges, ministers, and diplomats from France and the United States met, in Paris or New York, to explore points of commonality and difference in our legal approaches. We addressed a *mélange* of issues: from climate change to copyright to the Convention Against Torture, as well as national, regional, and international jurisprudence on matters as varied as radioactive-waste disposal and remedies for violating condemned prisoners' treaty-based rights. Some topics touched off an inimitable intensity: Where else might one hear US Supreme Court Justice Stephen G. Breyer and former French Minister of Justice Robert Badinter heatedly discuss the death penalty, as I once did? Periodic publications memorialized our work[8].

"Passing of Professor Dr. Mireille Delmas-Marty (1941-2022)", *Association internationale de droit pénal*, https://www.penal.org/de/passing-professor-dr-mireille-delmas-marty-1941-2022 (visited 26 November 2022).

8 E.g., Mireille Delmas-Marty and Stephen Breyer (eds.), *Regards croisés sur l'internationalisation du droit: France-Etats-Unis* (Cross-Cutting Considerations of the Internationalization of Law: France-United States), Paris: Société de législation comparée, 2009. On the US kerfuffle that inspired this decade of network roundtables, see Timothy Bella, "'Freedom never tasted so good': How Walter Jones helped rename french fries over the Iraq War", *Washington Post*, 11 February 2019, https://www.washington-

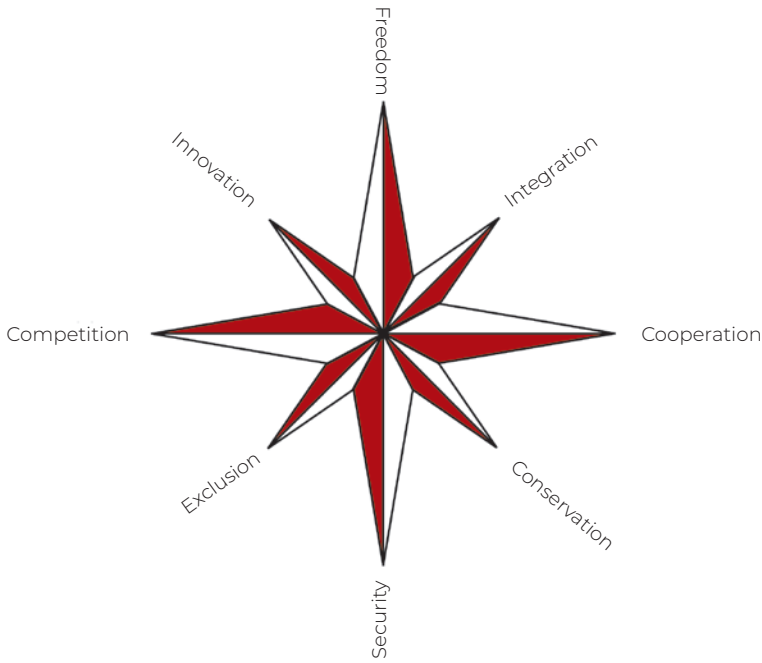

Fig. 2. The Wind Rose of globalization. Schematic representation of the "rose des vents" at the base of the "Boussole des possibles" 'Compass of Possibilities'), an object-manifesto materalialized by Antonio Benincà. It illustrates the "winds of globalization" composed by the main winds: security, competition, freedom and cooperation; and the "winds between the winds" (vents d'entre les vents) resulting from the intersection between the main winds, such as: exclusion, innovation, integration and conservation.

Throughout this period certain themes resurfaced, even captivated. One was "responsibility"; the other, "human" or, sometimes, "humanity." Each theme also infuses the instant essay, and so is explored below.

post.com/nation/2019/02/11/freedom-never-tasted-so-good-how-walter-jones-helped-rename-french-fries-over-iraq-war/. As an example of events outside this network, I am compelled to mention her 10 May 2004 convening at Collège de France of "Crime contre l'humanité, génocide et torture", in which I was honored to lecture jointly with Antonio Cassese, international law professor and President, or chief judge, at international criminal tribunals, on matters related to crimes against humanity, genocide, and torture.

* * *

What is human? Humanity? For Mireille Delmas-Marty, these questions comprised the very seeds of inquiry. "Humanity," she once proposed, "remains a legal concept under construction."[9] In similar vein she started a 1994 article with the claim that "'man is but a recent invention.'"[10] Although that claim was not original – it first was uttered by a Collège de France professor whom English-speaking readers well know, Michel Foucault – Delmas-Marty's article deployed it in a novel way. She observed that "the crime against humanity is an even more recent 'invention': codified as a crime for the first time in 1945 by the Charter of the International Military Tribunal at Nuremberg." In turn, she defined "humanity" as "less 'the human species,' in the sense the term is used by the 'natural' sciences, than the 'human family.'" Delmas-Marty expressly borrowed that final term from the 1948 Universal Declaration of Human Rights, which opens by proclaiming that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Her article proceeded to examine two prohibitions – of the crime against humanity and of torture or cruel or inhuman or degrading treatment – in an effort "to make clear the *irreducible human* that underlies legal practices"[11].

Those ideas resonate in the instant essay. "But what about humanity as a whole?" Delmas-Marty asks[12]. Her answer rejects "transhumanism" and "post-humanism" as distortions, tending toward "dehumanization," a pro-

9 Mireille Delmas-Marty, *Le Relatif et L'Universel*, Paris: Éditions du Seuil, 2004, p. 76. The translations from all original French sources in this paragraph are my own.

10 Mireille Delmas-Marty, "Le crime contre l'humanité, les droits de l'homme, et l'irréductible humain", *Revue de science criminelle et de droit comparé*, no. 3, July-September 1994, pp. 477-90, at p. 477 (quoting Michael Foucault, *Les mot et les choses*, Paris: Gallimard, 1986). Unless otherwise indicated, all quotations of Delmas-Marty's 1994 article appear on page 477.

11 *Id*., p. 478 (emphasis in original).

12 See, in this volume, p. 12.

cess that must be resisted. Indeed, resistance to dehumanization forms the first component of "the triple role" to be played by the "*droit en devenir*," or "law in the making" – evolving law – that this essay posits[13]. The essay refutes notions that any human may be less than another. No human is "incomplete," a "monster" who may be subjected to depersonalization; that is, subjected to harm "not because of my deeds, but because I belong to a specific group"[14]. Here as in the 1994 article, Delmas-Marty's invocation of the Nuremberg precedent occurs within consideration of the "irreducible human": she demands recognition of each human as human, as a "singular" and "equal" member of the human family. The essay declares these principles "universal [...], or at least universalizable" that last phrase an acknowledgment of law's dynamism[15].

Humans are not all that lives on this earth, of course. It is to be shared with animals and other things, living and inanimate, present and future. And yet it is humans who owe a duty to protect all these others – "this duty falls upon humanity since only mankind is capable of awareness and intentionality"[16]. Thus echoing her already-quoted reference to human cognition, Delmas-Marty overtly rebuffed theorists who assert that animals have rights. In exchange, her essay extends humans' responsibility well past their personal behavior: responsibility also encompasses the legal practices that they adopt – national legislation, international courts, and more – and the entities they establish – States and non-state actors, including corporations. Increasing the responsibility of those who act on a global plane looms as a pre-eminent concern, one that may be implemented through legal techniques like the margin of appreciation and through the third component of law's triple role; that is, an axiological, or values-based, recalibration of risk.

It is at this juncture, at its conclusion, that the instant essay admonishes us, its human readers, that our cognitive skills are limited. It then quotes Paul

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13 See, in this volume, p. 16.
14 See, in this volume, p. 23.
15 See, in this volume, p. 23.
16 See, in this volume, p. 35.

Ricœur's depiction of the gulf between the consequences we intend and the likelihood of unintended consequences. Yet for the reader who knows that this is a closing lecture – as its author well knew – the admonition evokes that other Paul, Valéry. Quoting him quite early in her essay, Delmas-Marty wrote: "we too know that we are mortal. […] And we see now that the abyss of history is deep enough to hold us all"[17]. True enough. But we see as well, amid the profusion of ideas this essay provides, an instrument to help guide us as we navigate the shoals of possibility.

17 See, in this volume, p. 7 (quoting, Paul Valéry, *La Crise de l'esprit*. Paris: NRF, 1919, vol. XIII, pp. 321-22).

EPILOGUE

Of compasses, crossings, law and poetry. To Mireille, imaginative force of law

Emanuela Fronza

"Mireille Delmas-Marty. Quelle grande et belle conscience qui s'en va". This is Edgar Morin's tweet on 12 February 2022, the day Mireille Delmas-Marty left us.

It is not easy to continue without her, following the scattered traces she has gifted us. The translation into English of her latest book – she knew about the project and was enthusiastic about it – is one of the initiatives that open this new phase of the journey, with Mireille, though without her[1].

Allowing her thought to circulate, translating it (that is, as per the Latin etymology, "carrying it beyond" her absence), is one of the ways to continue the journey in her company.

And we also continue our journey together by making her thought available[2], in other languages too, to allow others to orient themselves also elsewhere, to trace a path, to explore spaces that have not yet been seen and are still unknown.

The great little book "A compass of possibilities" and the object-manifesto created with Antonio Benincà, now give body and substance to the key di-

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1 Several tributes have been paid to Mireille Delmas-Marty: among these, we can recall the Seminar on 4 July 2022 at the University Paris 1, Patnhéon Sorbonne; the 23 September at the Collège de France "Imaginons" and the 13 October 2022 at the Court of Cassation in Paris.

2 "Qu'on la lise était le plus grand souhait de Mireille Delmas-Marty. Non par narcissisme (elle n'en avait pas une once). Mais par *souci de servir*: elle était simplement consciente de l'importance de son oeuvre et de son utilité pour tenter de relever les défis de notre monde présent et à venir". Cf. Geneviève Giudicelli Delage, "Lire Mireille Delmas-Marty - Avant-propos", *Revue de Sciences Criminelles*, 3, 2022, p. 497.

rection indicated by Mireille Delmas-Marty's thought: there is no dogma, but only dynamic thinking, which knows how to go forward and how to make others go forward.

This dynamism can be perceived at a glance from the titles of her books[3], and is also marked by the choice of entrusting her most recent contribution – on the topic of "accelerated" globalization, its contradictions and transformative power – to a different language, the language of art, as well as to a moving object.

The transformative power also include law and justice since the aim is not to replace one dogma with another (economic growth with degrowth, for instance, or state sovereignty with a global state).

What is necessary instead is to renew our way of thinking through a movement that can be a mirror of complexity. A dynamic thinking that, in order to adjust to the Unpredictable, must accept to remain flexible: a tested and refined method since her first writings, one that involves all rights and addresses the law to overcome its innate rigidities. This is the only approach that can allow us to find new tools suited to the characteristics and challenges posed by globalization. It is necessary to move from the certainties of dogmatic thinking to the ability to mould ourselves into "trembling thinking", a concept dear to Édouard Glissant, the Antillean poet from whom she drew inspiration.

Determination, rigor, the mastery of legal disciplines, courage, and, among other things, poetry and art, made Mireille Delmas-Marty much more than a jurist[4].

Her attention to reality led her to think of the concept of "law in the making": by stabilizing without immobilizing, she invented categories capable of adapting to the events and accompanying them. Mireille is a *Maître à*

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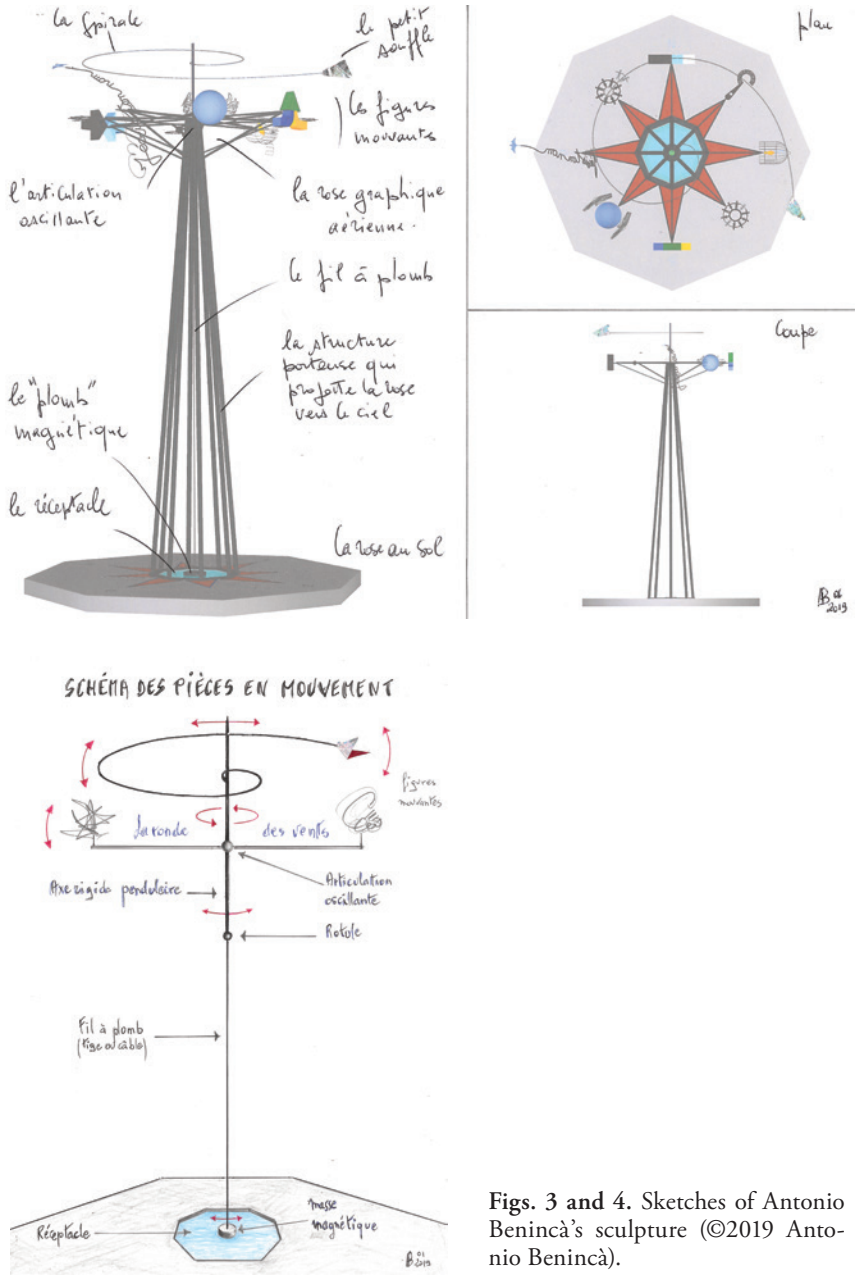
3 Among the many works by the Author, we recall here in particular: *Modèles et mouvements*; *Le flou du droit: Du Code pénal aux droits de l'homme*; *Pour un droit commun*.

4 This is recorded by Juliette Tricot: "Oser, comme elle le dit elle-même, enseigner un savoir qui n'existe pas encore", in "Ouverture - Des mots pour et de Mireille", *Revue de Sciences Criminelles*, Juillet-Septembre 2022, p. 503.



Figs. 3 and 4. Sketches of Antonio Benincà's sculpture (©2019 Antonio Benincà).

penser, a storyteller who narrates the world around us and offers tools capable of opening up our thinking and guiding us.

The path and method that Mireille Delmas-Marty shows us appear even more topical and valuable in a period of great upheavals such as ours. Hence the decision to translate into English this text, which was published in French, and later translated into Italian[5].

To face the crisis, it is not enough to place humanity and its values at the center of the world, as the Universal Declaration of Human Rights attempted to do in 1948. According to Mireille Delmas-Marty, a much more complex operation is needed: identifying common principles and finding the magnetic needle that leads to a humanism, extended to the whole planet, able to stand before the Unpredictable.

A jurist and, from the very beginning, an explorer and a sailor, Mireille Delmas-Marty invited us to think about movement. "By proposing the metaphor of the clouds first, later that of the winds and finally of the compass, I had a fairly simple objective in mind: to escape the confines of a static vision of law". Resolutely turning her back on pessimism, her course was marked by an almost prophetic ability to foresee, even well in advance, the fundamental dynamics that we face today, such as the climate crisis and planetary boundaries, which Mireille evoked already in 1992 in what is undoubtedly one of her masterpieces, *Les grands systèmes de politique criminelle*, translated (also) into Chinese and Persian. Mireille Delmas-Marty, an intellectual and a visionary, was above all (and perhaps precisely for this reason) an extraordinary jurist.

Mireille Delmas-Marty reasoned by problems and not by disciplines. To grasp them and indicate solutions, she invited us to think about interactions, establishing a dialogue between the real and the imaginary, while remaining always attentive both to the practical validity of her ideas and to the suggestive power of their verbalization.

5 Mireille Delmas-Marty, *Una Bussola dei Possibili*, edited by Emanuela Fronza and Carlo Sotis, Bologna: 1088Press, 2021.

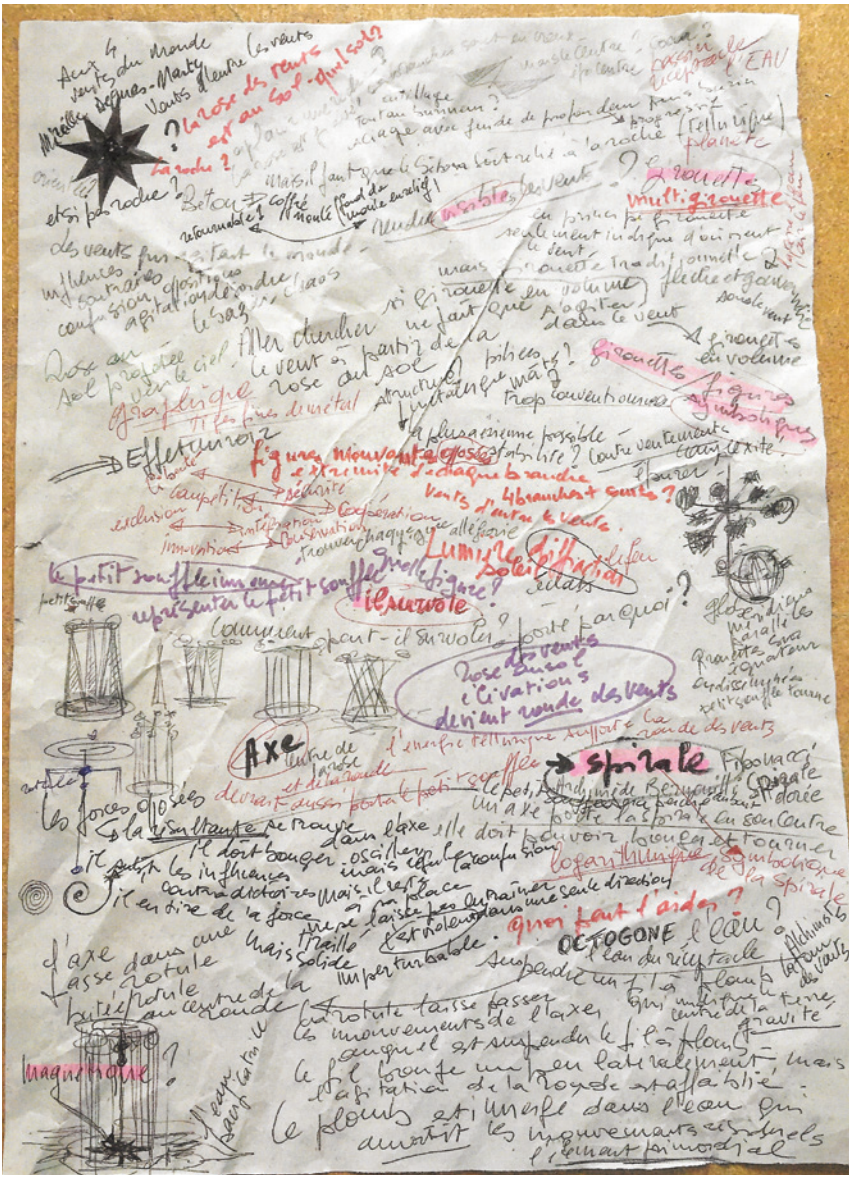


Fig. 5. Drawings and notes of Antonio Benincà during the elaboration of the object-manifesto.

The law in the making becomes a tool for humanizing globalization, so as to contribute to the maintenance of human life, without reducing it to the survival of the human species itself.

The three verbs "to resist", "to responsibilize", and "to anticipate"[6], which also give the title to one of her famous books, are an explicit invitation to this conception. With the accelerated increase of interdependencies that irreversibly come with globalization, static concepts, such as "pillar", "base", "foundation" or "pyramid", risk leading us to collapse because they are unable to rebalance all the forces, even contradictory at times, that globalization sets in motion. In the construction of buildings, as in the elaboration of laws and politics, what is too rigid ends up breaking at the slightest external movement. Flexibility is not a whim, but a requisite for the survival of the structures over time. Trying to harden globalization is an absolute contradiction. What allows us to direct the compass of possibilities in the humanist direction is the presence of common principles and values of reference.

To anticipate risk, but also the current and future needs, not out of pure intellectual exercise, but to contribute concretely to imagining the law that does not yet exist but that could exist. This purpose is possible only by reflecting on dynamics instead of on concepts, on a global scale.

The point is not to halt the expanding globalization, but to *reflect*, through the mirror that law is, on what its directions may be.

Hence the proposal for an unconventional compass for our disoriented world. Mireille Delmas-Marty wants to warn us against a present that requires urgent action[7]. Without fear and without losing hope.

In order not to be overwhelmed by the winds that blow disorderly and from opposing directions, it is necessary to prevent any of them from

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6 See the titles of the chapters 1, 2 and 3 of the present book.

7 The desire to further awaken dynamic thinking is highlighted also by Geneviève Giudicelli Delage, "Lire Mireille Delmas-Marty - Avant-propos", *Revue de Sciences Criminelles*, 3, 2022, p. 498.

forcefully prevailing and it is necessary to direct the compass towards humanism and, in particular, "legal humanism"[8].

Hence the importance of dynamic thinking and of taking up the challenge at all levels, after having set as starting point the interdependence that characterizes our societies.

The strength of her method also consisted in knowing how to overcome the internal and enclosed horizon of the disciplines. We need to shift the point of view: we need another "way of looking" at globalization, a new paradigm. "Now more than ever, we need legal regulation on a global scale: we need a flexible, plural and dynamic law, unstable but stabilized by reference to the different currents of humanism or, more precisely, of humanisms, because harmony, to be acceptable to all, must be inspired by a pluralist vision".

Only this conception allows us to "order the multiple" and perceive complexity. A savage and uniformizing globalization must be contrasted with an interdependent and supportive community, which accepts differences. Without ever denying the present, and also through this great little book, Mireille Delmas-Marty invites jurists to commit to finding ways for a human community of destiny because, by taking up the protection of common goods, the law can become a builder of reality. All her thinking recalls the importance of being jurists of the imagination, trying to find new forms and solutions in the face of complexity and unprecedented challenges, which invoke: a new order, thus one where the proposal is not black or white, but black and white, respecting a pluralism without hegemonic claims, in terms of compatibility and not of standardization. To imagine in order to see what is invisible and to think about what seems to be unthinkable. Thus, the journey of Mireille Delmas-Marty helps us to think about the rights of future generations or about a river as rights holder[9].

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8 Thus Francesco Palazzo, "Il messaggio di Mireille Delmas-Marty", *Rivista Italiana di Diritto e Procedura Penale*, 2022, 1, p. 1.

9 Emanuela Fronza, Carlo Sotis, "Immaginare un nuovo mondo", in Delmas-Marty, *Una Bussola dei Possibili*.

Fig. 6. Photo of Mireille Delmas-Marty (©2021 Simone Pierini).

By using universal symbols as metaphors (wind, clouds, water, fire, compass, plumb line, etc.), she established links with legal thought, thus demonstrating that law can be constantly reinvented. This is how she placed the poetry of Édouard Glissant, with his reflections on *mondialité*[10], at the center of her work. A *Tout Monde* open to diversity and attentive to interdependencies.

Such poetic referencing never prevented her from perceiving and affecting reality. Indeed, this was her strength: blending, combining the *moment technique à l'imagination* (the technical moment with imagination).

The power of her imagination, supported by a solid and rigoros method, allowed her to win several battles and witness the implementation of the reforms she proposed.

Mireille's imagination is fuelled by the conviction that law can only be put at the service of humanity and she put this vision into practice very early, to react to changes within society and forge new tools (as a way of example, one can think of her proposal to create a European Public Prosecutor).

Mireille Delmas-Marty combines utopia, realism and technical ability. If a problem exists, the legal imagination can solve it.

The attention to metaphors, works of art and poetry, testifies to Mireille's extraordinary ability not only to imagine but, even more so, to lead others to imagine. To sail together, in fact, yet by bearing in mind that it takes as much rigor as imagination to allow others to sail and to continue sailing. Metaphors, models, the search for words, and the compass: these are the imaginative forces of law because they pass on know-how; and exactly as in navigation, the passing on of know-how translates into the passing on of a duty to act[11].

Indeed, Mireille was not only a jurist, she is a "jurispoète", as Antonio Benincà likes to call her.

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10 Idea developed by the Author to bridge imperialist universalism and sovereignty (unequal globalization). It is a notion to think about "us" but also about differences. Namely, it avoids the imperialist effects of globalization and it avoids the risks of sovereignty.

11 Thus Carlo Sotis, "Ouverture - Des mots pour et de Mireille", *Revue de Sciences Criminelles*, Juillet-Septembre 2022, p. 505.

It is important to note that she did not use imagination and wonder to escape the present. They were vital to her, the common trait to the jurist and the artist: imagining and wondering to get out of an enclosed field, but also and above all to find collective solutions so that humanity could find its own answers and, thus, not give in to the temptations of violence and hence lead us to collapse.

Mireille is a humanist, in the full sense of the term: she nurtured a form of hope for humanity, a firm renunciation of fatality, yet she was not blind in front of risks and possible dangers. She was aware of the atrocities of which humanity is capable.

The Compass of (future) possibilities is therefore a powerful example of this approach, which creates a relationship between art and law[12].

With the Compass of future Possibilities project – which is still ongoing[13] – Mireille establishes another element of her method and action: resorting to other languages to be able to intervene on globalization and turn it into mondiality (*mondialité*).

To express her thoughts, she relied on a language that is neither logical nor rational. "Words were no longer enough", she said. Not only did the thought become matter, but matter fuelled legal reflection thanks to the exchange with the object-manifesto she conceived with Antonio Benincà. Reflection on universal symbols (which represent pairs of opposing winds: cooperation/competition, integration/exclusion, etc.) also led to rethinking the notions of global governance and to imagining humanism in the form of a spiral.

This is accessible to all, an idea very dear to Mireille, in line with the course she held for many years at the Collège de France (an institution that teaches research to all: without registration, without any prerequisites and without taboos).

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12 Following the well-known model of artistic residencies, she created in 2021 the first legal residencies in Europe (Adamas Residencies).

13 Antonio Benincà is working on a new and bigger version of the "Compass of Possibilities".

Mireille Delmas-Marty was a tenacious sailor and a great interpreter of our time. We need to embrace, through our imagination and the law, both her warning and her invitation to recompose the landscape[14] by allowing the principles of justice and solidarity to guide us.

The message of this book goes far beyond the circle of jurists to address all those who care about the fate of humanity as a whole. This is the spirit of Mireille Delmas-Marty's meditations[15].

"Perhaps it will be up to this law in the making … to reconcile" so that "fear becomes solidarity in the face of risk and that responsibility does open up to hope".

To continue sailing along the route traced by Mireille Delmas-Marty, we must look at the Compass of Possibilities and grasp the emotions and joy of this object-manifesto.

14 Mireille Delmas-Marty insisted upon the jurist as landscape designer.

15 F. Palazzo, "Il messaggio di Mirelle Delmas-Marty per un diritto umano e planetario", in Delmas-Marty, *Una Bussola dei Possibili*, p. 56.

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We hope this work will contribute in keeping Mireille Delmas-Marty's thought alive and relevant.

Emanuela Fronza and Chiara Giorgetti

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Globalization opens up unprecedented opportunities, but it also creates threats not only to human beings but also the entire ecosystem, provoking a sovereigntist withdrawal in a world that is losing its way through powerful, seemingly irreconcilable, winds of globalization: freedom and security, competition and cooperation, exclusion and integration, innovation and preservation. What is the place, then, for a legal humanism within the global governance system?

Mireille Delmas-Marty confronts narrow narratives - disaster-narratives of collapse or programmatic-narratives with the adventure-narrative of *Mondiality*, a community of destiny united in its plurality.

This book proves the striking relevance of her thought in order to face the challenges of our era: health, financial, social and ecological crises, humanitarian disasters and global terrorism. All these complex phenomena reveal that it is illusory to think we are able to act alone: rather, it is necessary to imagine a new path to navigate in globalization and create a politics of solidarity between global actors. Mireille Delmas-Marty proposes new tools for this, and namely A Compass of Possibilities, in order to create a new governance of the world soothed by legal humanisms in movements.

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