

GLOBAL GOVERNANCE AND THE CREATIVE ECONOMY: THE DEVELOPING VERSUS DEVELOPED COUNTRY DICHOTOMY REVISITED

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Abstract

The past century has seen drastic changes, and the pace with which these changes occur still appears to be accelerating. It is not only us as individuals who have difficulties in following these perceptual processes and in finding the appropriate conceptual responses and actions. The international legal and institutional framework put in place by previous generations equally seems no longer to be capable of providing the efficient responses needed to tackle the imminent global challenges and to secure a sustainable development in the future. Put briefly and more generally, the gap between our perceptual processes and the corresponding conceptual responses is widening. As a result, it appears that the perennial paradoxical struggle between continuity and change, which underlies the fundamental problem of preserving the integrity of the law, has reached a new level. As a paradox, it is in view of the absence of a global platform on which a truly global debate on the future of our societies can unfold that we need first to find a commonly shared vocabulary of concepts. Such shared vocabulary helps both to establish a global forum and to frame the debate, because the procedural aspects and the substantive arguments are intrinsically linked. This also means a twofold task, namely to coin new concepts that better encompass our present perceptions, and to abandon those which no longer suit them.

In positive terms, the present article therefore advocates the joint use of the novel concepts of “global governance” and the “creative economy” while, in negative terms, calls for the abandonment of the widely used “developed versus developing country” dichotomy. Global governance and the creative economy are chosen for their special features related to paradoxical modes of thinking, better to encompass change and the accelerating modes of the perception of that change. They both seem to be better suited to the complex realities that we draw up through the perceptions generated by our various sensory instruments. By contrast, the “developed versus developing country” dichotomy serves as an example of the outdated mode of

exclusively binary thinking, both in terms of a statistical and factual analysis as well as in a survey of the most prominent international legal documents. It is argued that this conceptual distinction obstructs the basis for a broader global solidarity, by artificially dividing the world into so-called “developing countries”, on the one hand, and “developed countries”, on the other. In summary, the facts and data underlying both lines of arguments appear to be better suited to our striving for a more unitary and coherent approach to the solution of many urgent global problems. Finally, this line of argument is also supported by a meta-juridical consideration of change, which, ultimately, is believed to support the claim that ‘we all want to live in “developing countries”’.

Key words: Global governance; Creative economy; Change; Sustainable development; International law; United Nations; Institutional reform; Comparative law

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INTRODUCTION

No state is forever strong or forever weak. If those who uphold the law are strong, the state will be strong; if they are weak, the state will be weak.
--Han Fei Tzu¹

The old Latin adage “*ubi societas, ibi ius*” suggests the existence of a close relationship between law and society, and it would be difficult to deny that the two concepts are indeed closely intertwined. In the course of time, we have seen a large number of intermediaries established that are designed to communicate between the two. In today’s world, the most common examples of such intermediaries from the global level down to the local level include international organizations, regional organizations, as well as states, provinces and municipalities and their respective executive organs. These concepts correspond and fit with the predominant legal distinction between international law, on the one hand, and municipal (or domestic) law on the other. In the area of law, the two concepts are also framed in accordance with a separate consideration of public and private law at both the national and the international level. This distinction is mirrored in the distinction between the individual and the collective in the realm of society. In the today’s world, nonetheless, the relationship between law and society has evolved considerably and keeps increasing in complexity. The changes brought about by this evolution mean that the intermediaries no longer seem adequate for establishing a balance between law and society in general, and between the various actors and their interests at the global and the local stage in particular. Put briefly, the current concepts, which were molded into the existing international legal and political institutional framework, no longer seem to fit the present perceptions of reality. This discrepancy is mainly due to the fact that these concepts have been created on the basis of past perceptions. It is also due to the fact that various scientific disciplines have paid greater attention to the manifestations of these concepts than to the cognitive processes preceding

¹ HAN FEI TZU, BASIC WRITINGS 21 (Burton Watson trans., Columbia University Press 1964).

their formulation and eventual realization. For example, it is quite common for high schools to teach history based exclusively on politics, maybe through the rise and fall of empires (e.g. the Roman or the British Empire), or maybe through their dominant figures and dynasties (e.g. the Habsburg family or the *Quing* Dynasty), or maybe through decisive battles and other conflicts. Law schools often follow the same method, and the teaching of history in law is limited to the creation and demise of international organizations (e.g. the League of Nations) or their initial failure (e.g. the International Trade Organization – ITO), or limited to specific key dates, such as the establishment of the United Nations Organization in 1945 or the World Trade Organization (WTO) in 1995, and important stages in their subsequent development. Where other disciplines, such as cultural studies, anthropology, art history, psychology or medicine have adopted a different focus, this is usually limited to their specific field of research or, at best, crossed over to one other discipline. It is less common that their findings are molded into a multidisciplinary framework, let alone that they contribute to the elaboration of a unitary scientific theory.

At present, it is argued here, such a unified theory proves to be necessary in order to disentangle the complexity in the processes underlying the major global problems. This means that there is a great need to reform the present legal framework and to formulate concepts that are based on our present perception and fit for designations of the future. In this regard, the Millennium Development Goals (MDGs) adopted by world leaders in 2000 provide a good example of such conceptual and actual failure.² In spite of the noble and urgent objectives of reducing extreme poverty by 2015, the MDGs are an implicit recognition of the policy failures of the past decades, given that hunger and poverty still strongly prevail in today's world: in 2010 it was estimated that 925 million people were still undernourished.³ There is little hope for improvement in the future, as it is estimated that, even if the MDGs were achieved by 2015 by cutting by half the number of people suffering from hunger, it would still mean that 600 million human beings in what the report calls the "developing countries" were suffering from hunger on a daily basis.⁴ In view of such dim prospects for the future, and even assuming a more positive development, there is thus an urgent need to rethink the current architecture of the existing international legal and political order and to prepare for its fundamental reform. Moreover, it is necessary to rethink the logic underlying the cognitive processes that are causal to the formulation of new concepts and the formation of new conceptions, which eventually become transformed into actions through laws and institutions.

In this regard, there exists already a large number of new concepts that promise to introduce a new cognitive understanding which is capable of inaugurating a fundamental reform debate. However, most of the time these concepts remain fragmented and limited to their context (as do the teaching of history and the

² United Nations Millennium Declaration, G.A. Res A/RES/55/2 (2000), available at <http://www.un.org/millennium/declaration/ares552e.pdf>.

³ UNITED NATIONS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2011 (United Nations 2011) and see UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), HUMAN DEVELOPMENT REPORT 2011 – SUSTAINABILITY AND EQUITY: A BETTER FUTURE FOR ALL (Palgrave Macmillan 2011).

⁴ FOOD AND AGRICULTURAL ORGANIZATION (FAO), THE STATE OF FOOD INSECURITY IN THE WORLD: HOW DOES INTERNATIONAL PRICE VOLATILITY AFFECT DOMESTIC ECONOMIES AND FOOD SECURITY? 4 (FAO 2011), available at <http://www.fao.org/docrep/014/i2330e/i2330e.pdf>.

daily political and legal discourses around the world). Two important and more generic concepts that promise to organize this debate in a more coherent and comprehensive way are the relatively novel concepts of “governance” and the “creative economy”. The first concept is faced with a paradox, which I call the “governance paradox”, whereas the second constitutes one. For these reasons the two concepts are deemed important, for it is through their paradoxical nature that they promise to bring our conception closer to our present perceptions. To this end, the present paper will critically evaluate them for their conceptual ability to account for perceptual changes over the past century. However, this evaluation will first be carried out using a critical analysis of the current dominant conceptual dichotomy of developed and developing countries, which is based on an earlier study of the legal implications of this distinction. In short, the paper tries to evaluate the value of the two concepts based on a critical survey of the widely used distinction between so-called “developed” and “developing” countries, which, however, is considered to be obsolete today and may even have been based on wrong premises in the past. Instead, the paper argues that the more appropriate premise in the world today is therefore that “ultimately, we all want to live in developing countries”.

WE ALL LIVE IN “DEVELOPING COUNTRIES”: THE DEVELOPED/ DEVELOPING COUNTRY DISTINCTION IN LAW REVISITED

If two contrary actions be excited in the same subject, a change must necessarily take place in both, or in one alone, until they cease to be contrary. -- Benedict Spinoza⁵

It is a common and widespread feature in daily transnational discourse, whether this is political, economic, social, environmental, or legal in nature, to divide the world in two, namely the world of “developed countries” on the one hand, and the world of “developing countries” on the other. The frequency of the usage of these two phrases is, for instance, mirrored by the number of hits they generate on a worldwide web search: typed into the *google.com* search engine on May 2, 2012, the search for the concept “developing countries” in the plural in the English language generated a result of a number of about 22,600,000 hits in a fraction of a second, while searches for its counterpart in French (“*pays en voie de développement*”) and in German (“*Entwicklungsländer*”) still generated 8,400,000 and 2,280,000 results respectively. The frequency is supported by a comparison to the allegedly most frequently used English word on the Internet, the article “the”, which, searched only a few minutes later on the same day, generated 25,270,000,000 hits. Similarly, a look at some English speaking media yields, as a result of a search of the term “developing countries” in the world’s major newspapers on Lexis Nexis, more than 3,000 hits and as many as 2,294 when limited to the headlines only. These few statistical data match with my past and present personal experiences in various political and legal discourses as well as normal chitchat held in different societies and contexts around the world. Very often such discourses proved that statistic and economic arguments (such as, notably, the Gross Domestic Product (GDP), defined as the market value of all officially recognized final goods and services produced within a country in a

⁵ BENEDICT SPINOZA, *ETHICS* 230 (W.H. White trans., Wordsworth Classic 2001).

given period) are the decisive factors in determining whether any given country is given the status of developed, developing or even least developed. In this process, it is a frequent phenomenon that such economic considerations are uncritically and without any test being applied transplanted to other areas, such as those of politics, culture, religion, respect for the environment or merely standard or quality of living. Such uncritical transplants often happen in spite of economists searching for other and broader considerations than mere economic ones in their attempts to measure the quality and standard of living.⁶

In the context of human rights discourse, Stephen Toope has also warned about such dangers when he wrote that “Western listeners must be humble, approaching the encounter with neither an accusatory nor condescending predisposition”.⁷ Based on such warnings, I set out to inquire about the reasons for such an uncritical transplant of purely economic criteria into other areas of life, which often appears to produce negative side effects. These negative side effects I call “ignorant arrogance” and “averted responsibility”, in order to describe the behavioral patterns often displayed by representatives of the so-called “developed” countries in the case of the former and by representatives of the so-called “developing” or “least-developed” countries in the case of the latter. In other words, many representatives from developed countries assume that they know and do things better, and therefore play a role of lecturing their counterparts from developing countries, while they miss out on a great opportunity to detect important experiences in these countries which provide important lessons to be learned by themselves. At the same time, since the representatives of the developing countries are being lectured to, and sometimes feel that policies are being imposed on them, apparently self-appointed representatives from presumed developing countries always have a culprit to blame for the suboptimal situation in their country. A related and often-used excuse is a reference to the historical past, which is usually referred to by the concepts of colonialism or imperialism, which itself may be explained by an unfortunate mixture of a sense of superiority with feelings of guilt.

Furthermore, the frequency of the usage of the distinction in daily media and scientific discourse, as well the potentially concrete impact of the distinction on the governance of global affairs, prompted me to research its relevance for and frequency in legal discourse. As a preliminary question I was looking for an authentic legal definition of what may constitute a “developing country”. This proved to be not very revealing as I was unable to find such a definition. In practice, the UN merely compiles a list of the 49 currently least-developed countries (LDCs), which is periodically reviewed and recast based on four main criteria, namely the Gross National Income (GNI) per capita, the human assets index (HAI) (providing information regarding the level of development of human capital), the Economic Vulnerability Index, and the country’s population.⁸ This list, moreover, only

⁶ See JOSEPH E. STIGLITZ, AMARTYA SEN & JEAN-PAUL FITOUSSI, REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS (CMEPSP), available at http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf; and Bruno Frey & Alois Stutzer, *What Can Economists Learn From Happiness Research?*, 40 J. Econ. Lit. 402 (2002).

⁷ Stephen Toope, *Cultural Diversity and Human Rights (F.R. Scott Lecture)*, 42 McGill L. J. 169, 169 (1997) [*Italics added*].

⁸ See Economic and Social Council (ECOSOC), Committee of Development, List of Least Developed Countries, available at http://www.un.org/esa/policy/devplan/profile/ldc_list.pdf.

contains LDCs, but it does not explicitly distinguish “LDCs” from “developing countries”, although in common language the difference between developing and least-developed countries is not clearly defined. The WTO merely leaves it to a country to decide whether it wants to have the status of a developing country in order to benefit from a certain treatment in its favor.⁹ Equally, in the vast pool of UN documents, no definition of “developing country” could be found. Given the absence of a legal definition, I wondered about the context of the use of the concept of “developing country” and the apparent antagonism with developed countries. More precisely, I set out to explore whether the mere transplanting of economic data into other areas of life would also be reflected by the relevant international laws and international organizations. For this reason, I reviewed hundreds of international legal documents searching for the usage of the developed/developing country dichotomy. The results of the research were published in a working paper in 2010.¹⁰ In the concrete steps of my research, I followed the currently dominant partition of legal science into various disciplines, or the competence assumed and executed by the various specialized agencies. Thus the main areas covered were the founding statutes of the principal international organizations established under the United Nations Charter, and the laws and regulations governing human rights, culture, international labor issues, development cooperation, public health and food security, and international trade and finance. Additionally, I also studied some examples from international criminal law and private international law, as well as the statutes of some selected regional organizations. Generally, the findings derived from the analysis can be summarized as follows. First, it can be stated that – in line with the increase in the number of states during the past half century – the usage of the developing/developed country dichotomy has increased during the years following the establishment of the United Nations. Second, the developing/developed country dichotomy is less likely to be found in the founding statutes or constitutions of the many international organizations, or where, in fact, a constitutional conception is stronger. In contrast, subsequent treaties and, especially, policy documents adopted by these organizations make use of the dichotomy more frequently. A third finding is that the dichotomy is also absent from the area of private international law, which, from a constitutional perspective, ought to be included in the framework of an emergent global legal order. In short, the higher the degree of the recognition of the role of private individuals, the lower the frequency (and relevance) of the general categorization of a country as a developing, developed or least developed one. A fourth finding reveals a considerable degree of intra-organizational inconsistency and incoherence, so that it is possible that the same international organization has adopted treaties which make reference to the distinction and other treaties which do not. As a last point, in the use of the dichotomy it is necessary to make a qualitative distinction and to differentiate between general and uncritical references to “developing countries” and references which suggest a more nuanced and contextual approach, such as

⁹ See World Trade Organization (WTO), Development: Definition: Who are the developing countries in the WTO?, available at http://www.wto.org/english/tratop_e/devel_e/d1who_e.htm.

¹⁰ See Rostam J. Neuwirth, *A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy* (European University Institute (EUI), Working Paper LAW No. 2010/20).

those found in the concept of “developing economies” or the phrase “common but differentiated responsibilities and respective capabilities and their social and economic conditions” used in the context of cooperation in environmental matters.¹¹

Preceding and accompanying the research into those international legal instruments was a brief portrait of some factual and statistical contradictions, such as the facts that human rights violations are reported in both categories of countries, that both categories face serious health problems in terms of pandemics or obesity, and that countries in both categories become victims of natural disasters and fail to provide immediate and efficient relief. Moreover, some statistical data, such as those related to public debt, seem openly to contradict the categorization of some countries as developed countries, and the current growth rates in terms of GDP or the number of billionaires that of other countries as developing ones.¹² The research was also guided by a “meta-juridical critique” of the developing/developed country dichotomy and its philosophical and contextual underpinnings.¹³ By meta-juridical critique I refer to possible considerations in legal decision-making which are not strictly legal considerations, in particular in terms of the context.¹⁴ Considering the context, especially the changing nature of time, the distinction appears as a paradox, as it opposes a static (“developed”) term and a dynamic (“developing”) term, which creates an apparent contradiction in terms. Building on prior examples of a more profound interest in cognitive processes and their significance for law,¹⁵ I thus contrasted the developed/developing country dichotomy with the apparent sensation of change as being the only constant in human evolution. In this regard, Isaac Asimov provided the description of change underlying the analysis:

The only constant is change, continuing change, inevitable change, that is the dominant factor in society today. No sensible decision can be made any longer without taking into account not only the world as it is, but the world as it will be.¹⁶

Constant change, an apparent oxymoron, thus provides a description of the background against which the value and legitimacy of the dichotomy was to be established. In other words, the underlying question to be asked was whether the concept of “developed” does not stand in a stark contrast to that of ever constant change, which also prompted Heraclitus to utter the words *panta rei* and to say that no-one can step into the same river twice. In this regard, it is also noteworthy that there is evidence of change accelerating in pace. This was noted by Paul Nora in his

¹¹ UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT (1992), available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163>.

¹² Cf. Rostam J. Neuwirth, *A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy*, *supra* note 10, at 15.

¹³ *Id.*, at 9-12.

¹⁴ See also Elihu Lauterpacht, *The Juridical and the Meta-juridical in International Law* 215, 215 in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI* (Jerzy Makarczyk ed., Kluwer 1996), asking to what extent “a court should be influenced in its judgment by other than strictly legal considerations?”

¹⁵ See, e.g. Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CALIF. L. REV. 89 (1918) and see JEROME FRANK, *LAW AND THE MODERN MIND* (Transaction Publishers 2009) (1930).

¹⁶ Isaac Asimov, *My Own View* 5, 5 in *THE ENCYCLOPEDIA OF SCIENCE FICTION* (Robert Holdstock, ed., Octopus 1978).

essay on the link between memory and history where he used the term “acceleration of history” to describe as “an increasingly rapid slippage of the present into a historical past that is gone for good, a general perception that anything and everything might disappear [...]”.¹⁷ For the purpose of the inquiry into the value of the dichotomy, in particular for the cognitive processes underlying legal reasoning, it matters little whether the change is in fact occurring at an ever faster pace or that that is merely our perception, which has increased throughout the past century.¹⁸ Ultimately, the consideration about the philosophical implications of change for the understanding of the developing/developed country dichotomy was summarized in the statement that, with the premise of constant change, “we all want to live in developing countries”, since nothing that is “developed” at one given moment in time and space can be sure of remaining so in the next moment, unless it continues to develop and therefore remains “developing”. For countries and states, the Chinese philosopher *Han Fei Tzu* (韓非) has aptly summarized this logical conclusion and linked it to the law in the following quote:

No state is forever strong or forever weak. If those who uphold the law are strong, the state will be strong; if they are weak, the state will be weak.¹⁹

Completing the meta-juridical analysis of change and bringing it in closer contact with the law, there follows a brief analysis of some selected constitutional texts, namely the constitutions of the United States (US), India, and the People’s Republic of China (PRC), as well as the failed Treaty Establishing a European Constitution of the European Union (EU). Different as these texts are in terms of history, geography, language and culture, as well as their underlying political systems and wider contexts, they have in common that they all share certain concepts which appear to encompass the inevitable phenomenon of constant change. In the case of the US Constitution, immediate attention falls on the concept of the “pursuit of happiness”. Although this is not enshrined in the Constitution itself but features prominently in the Declaration of Independence of 1776, it is, nonetheless, considered to be a statement of principle through which the US Constitution is to be interpreted. The pursuit of happiness is dynamic and open to change in the sense that it does not stipulate a right to happiness, because even happiness is subject to change, but merely a right to pursue happiness. In this regard, the controversy surrounding the meaning of this phrase, which lies in the question of whether it means that citizens merely have the right to “pursue” happiness or that they also have the right to “obtain” it,²⁰ itself appears flawed, as constant change would imply that, once happiness is obtained, it would usually end immediately.

A similar open formulation is found in the Indian Constitution of 1950, namely in the “Directive Principles of State Policy” laid down in Articles 36-51, which form the so-called “trilogy” or “conscience of the Constitution”, together with

¹⁷ Paul Nora, *Between Memory and History: Les lieux de mémoire*, 26 Representations 7, 15(1989).

¹⁸ See JEAN GEBSER, URSPRUNG UND GEGENWART: ERSTER TEIL 107 (Novalis, 2nd ed. 1999), wondering whether in the past, a year had the same duration as today, and speculating that, most likely, the perception of time was slower then.

¹⁹ HAN FEI TZU, *supra* note 1, at 21.

²⁰ See also Arthur M. Schlesinger, *The Lost Meaning of “The Pursuit of Happiness”*, 21 WILLIAM MARY QUART. 325, 325 (1964).

the fundamental rights and fundamental duties.²¹ The Directive Principles relate to various objectives related to social order and the promotion of welfare, equal justice, the right to work and to education, and the promotion of international peace and stability. These objectives are deemed fundamental to the governance of the country and need to be applied by the State when it is making laws.²² It is probably due to their dynamic nature, in terms of the possible gap between a legal right and the possibility of the actual exercise of that right, that these principles have been exempted from enforcement by the courts.²³ Here too, we thus see more of a right to the pursuit of certain goals than a right to their actual enjoyment.

Chinese philosophy is widely reputed to be strongly concerned with change and its various underlying creative forces, which are also known as *Ying* and *Yang*.²⁴ Other expressions of these concerns can be found in the *Yijing* (“Book of Changes”) and the *Tao Te Ching* (literally meaning “way, virtue and power”).²⁵ As another example, Zhuang-Zi (370-286 BCE) applies the concept of “vital nourishment”, which not only refers to the “constant influx that links life to its source” but also implies a principle of openness to change.²⁶ Against the backdrop of this recognition of change, it is therefore no surprise that the primary legal document, the Constitution of the PRC which was adopted in 1982, also contains some clauses reflecting an openness to change. For instance, the Preamble of the Constitution recalls the history of the Chinese people and the “great and earthshaking historical changes” that took place throughout the twentieth century. The Preamble is equally replete with normative elements that illustrate in manifold ways the striving for development. This striving is expressed, for instance, in the concept of “struggle” (努力 (*Nu Li*)) or 奋斗 (*Fen Dou*), which means “to struggle” or “to work hard”. The struggles are linked to several desired outcomes, such as those of achieving national independence and liberation, democracy and freedom, or socialist modernization and the reunification and unity of the country, to mention but a few. In short, the Constitution, which “defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority”, recognizes the dynamism inherent in nature by virtue of the concept of “struggle” as an expression of various efforts to bring about development as a result of hard work.

Finally, the last example is the European Union’s “basic constitutional charter”, as the European Court of Justice qualified the founding treaties²⁷, or, in effect, its failed Treaty Establishing a Constitution for Europe.²⁸ Regardless of the precise (current) constitutional status of the treaties, the process of European integration pursued in

²¹ See Mahendra P. Singh & Surya Deva, *The Constitution of India: Symbol of Unity in Diversity*, (2005) 53 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 649, 652 (2005).

²² Cf. Article 37 of the Indian Constitution, see the webpage of the Ministry of Law and Justice of the Government of India, <http://lawmin.nic.in/coi/coiason29july08.pdf>.

²³ *Id.*

²⁴ See generally Chung-Ying Cheng, *Interpreting Paradigm of Change in Chinese Philosophy*, 38 J. CHINESE PHILOS. 339 (2011).

²⁵ See, e.g. I GING: DAS BUCH DER WANDLUNGEN (Richard Wilhelm, trans., E. Diederichs 1970) and LAO TZU, TAO TE CHING (Foreign Language Teaching and Research Press 1997).

²⁶ See FRANCOIS JULLIEN, VITAL NOURISHMENT: DEPARTING FROM HAPPINESS 27 (Zone Books 2007).

²⁷ *Parti écologiste “Les Verts” v. European Parliament*, (European Court of Justice, Case 294/83) E.C.R. 1339, at para. 23 (1986).

²⁸ Treaty Establishing a Constitution for Europe, [2004] O.J. C 310/1 (December 16, 2004).

the framework of the European Union (and its predecessors) is replete with dynamic concepts and methods in terms of bringing about a change from the status quo. As dynamic concepts, we can think of the functionalist method of integration, or the theory of economic integration which is often referred to, for its dynamic processes, as the bicycle theory of trade liberalization. In terms of their translation into the constitutional law of the EU, we can first think of the open-ended formulation of the continuing objective of “creating an ever closer union among the peoples of Europe”.²⁹ To create an ever closer union without specifying the final goal or *finalité* of European integration to be achieved clearly reflects the dynamic nature of the idea from which the process of European integration originated.

This brief excursion into some of the governing principles of constitutional law has not only provided further evidence of a legal recognition of perceptual, philosophical, or, in other words, “meta-juridical” considerations of change. The excursion has also confirmed a similar trend in international law, namely that a more “constitutional conception” of law is more likely to exclude the use of the developing/developed country dichotomy. In line with the US Supreme Court’s well-known statement that “[T]he Constitution is made for people of fundamentally differing views”³⁰, the brief survey also suggests that a constitutional approach is more comprehensive and inclusive in terms of emphasizing the complementarity between apparently divergent views rather than stressing their mutual exclusivity. As such, it comes as no surprise that the review of international legal texts also confirmed that the use of the developing/developed country dichotomy is largely absent from the UN Charter (as the constitution of modern international law), the Universal Declaration of Human Rights (UDHR), and various constitutional statutes establishing specialized agencies. Most importantly, it is absent from those areas of international law that have elevated and clearly recognized the legal status of private individuals, such as international criminal law and private international or transnational law. In summary, a critical evaluation of these findings suggests and confirms the need for a more coherent and more consistent global legal order than that which the present international legal system provides. The findings also suggest the need for a re-evaluation of the current perceptual information and its subsequent formulation into concepts used for the process of the transformation of the present international legal system into a truly global legal order.

“GLOBAL GOVERNANCE” AND “CREATIVE ECONOMY”: TWO PARADOXES

One would expect that unless we properly address the questions that lie at the foundation of our legal system, we will generate paradoxes and antinomies. Now that we know more precisely what these puzzles and contradictions are, we should be impelled to attack the

²⁹ Recital 13 of the Preamble and Art. 1 of the Treaty on European Union (TEU) as well as Recital 1 of the Preamble of the Treaty Establishing the European Community (TFEU); see the consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (including the Charter of Fundamental Rights of the European Union (EU Charter)), March 30, 2010, [2010] O.J. C 83/01 [Lisbon Treaty (LT)].

³⁰ *Roe v. Wade*, 410 US 113, 116 (1973).

basic jurisprudential questions with a greater sense of urgency. If we wish to avoid disabling contradictions, we must reach a deeper understanding of the legal premises that guide our thinking.³¹

The past century has thus recorded a perceived acceleration of change, the beginning of which can be symbolically equated with the transition from still photography to the cinematographic film. Cinematography refers to the art and technology which have literally set “pictures in motion” or “moved” them, giving rise to the term “movie”. The perception of motion not only stands in stark contrast to a static application of dichotomous thinking as exemplified in the developing/developed country distinction. It has also affected many other concepts and our general understanding of them. In this respect, the accelerated perception of change also threatens to intensify and aggravate the fundamental problem of law and the normative universe that – to use the words of Robert Cover – we have created based on a world of dual thinking expressed in terms such as “right and wrong, lawful and unlawful, or valid and void”.³² The fundamental problem of law in view of accelerated change was well described in the following paragraph:

The omnipresence of change throughout all human experience thus creates a fundamental problem for law; namely, how can law preserve its integrity over time, while managing to address the newly emerging circumstances that continually arise throughout our history.³³

In view of some of the central features attributed to law, such as, in particular, legal certainty and legal predictability, as well as the dominantly dual conception of legal reasoning, it comes as no surprise that an acceleration of change has a tendency – like the motion picture³⁴ – to blur the lines of distinction and contrast between formerly well-established concepts. With regard to its important role in society, it comes as no surprise that the fundamental problem related to change faced by the law also affects politics and economics as the two central pillars underlying the development of societies. These two pillars therefore face a similar cognitive challenge and need to be included in a debate about the possible features of a future global legal order.

In recent times, two concepts have slowly emerged in the discussion about the reform of the current international legal system and the features of tomorrow’s global legal order. The two concepts are promising in terms of their ability to close the cognitive gap between the changing perceptions and subsequent conceptions of reality before these conceptions become translated into widely accepted concepts. The first concept is “governance”, which, under the term “global governance debate”, is used to frame a debate on how we are currently governed and how we plan to be governed in the future. The meaning of “governance” is currently elusive and was even referred to as a mystery.³⁵ The fact that it is used in a wide range of topical contexts does not make it easier to pin down its precise meaning but, at

³¹ George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1292 (1985).

³² Robert Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) [footnote omitted].

³³ See Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 845 (2006).

³⁴ See also Dirk Baecker, *The Reality of Motion Pictures*, 111 M.L.N. 560 (1996).

³⁵ See also David Kennedy, *The Mystery of Global Governance*, (2008) 34 OHIO N.U.L. REV. 827 (2008).

this stage, speaks for its wide appeal and inclusive nature. What is certain is its etymological origin, which can be traced back to the ancient Greek verb 'κυβερνάω' (*kubernao*), which means "to steer".³⁶ The same verb also provides the root for the concept of cybernetics which was defined by Norbert Wiener as the "general study of communication and the related study of control in both machines and in living beings".³⁷

The important thing about this origin is its dynamic character and its intrinsic relationship with the concept of change. In the area of law and politics, it thus requires an adaptation of the former dominant concepts of "government" and "legislation" into the respective terms "governance" and "regulation". The dynamic character also accounts for another set of qualitative features of "governance", which have been aptly summarized by James N. Rosenau in the following sentence:

To anticipate the prospects for global governance in the decades ahead is to discern powerful tensions, profound contradictions, and perplexing paradoxes.³⁸

One such profound contradiction is found in the tensions created by the parallel existence of the local and the global level – a paradox that has been condensed into the oxymoronic concept of "glocalisation".³⁹ An attempt to overcome the contradiction is found in the concept of multi-level governance, which tries to connect the local and the global levels by various intermediaries, such as regional organizations.⁴⁰ Another paradox that can be described in this context is certainly the one created by the developing/developed country dichotomy. However, the most important paradox of all, at this stage, is what I term the "governance debate paradox", namely the absence of a global platform upon which the deliberations on a future governance model can take place. To visualize the problem one can compare the deliberations held in an assembly to the many individual conversations held by passengers waiting in the waiting hall of a train station or an airport. The latter scenario corresponds well to the current international debate about the reform of the international order, which is characterized by a strong degree of institutional fragmentation and a lack of coherence. Consequently, there is a chicken and egg problem: how is it possible to overcome the current institutional deficiencies using the current institutionally deficient system? This is why it is absolutely accurate for Andrew Halpin and Volker Roeben to have introduced their book on the possible creation of a global legal order with the word "theorising".⁴¹ Thus, we are really only theorizing about the possible features of such an order, and even about a global governance debate, as the latter is still far from having been organized in

³⁶ See JOHN GROVES, A GREEK AND ENGLISH DICTIONARY 62 (J.H. Wilkins 1844).

³⁷ Norbert Wiener, *Cybernetics*, 3 BULLETIN OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES 2, 2 (1950).

³⁸ James N. Rosenau, *Governance in the 21st Century*, 1 GLOBAL GOVERNANCE 13, 13 (1995).

³⁹ See Habibul H. Khondker, *Glocalization as Globalization: Evolution of a Sociological Concept*, 1 BANGLADESH E-JOURNAL OF SOCIOLOGY 1, 4 (2004); see also Rostam J. Neuwirth, *Governing 'Glocalisation': A View from the Macau Special Administrative Region of China*, 3 CITYU L.R. 89 (2011).

⁴⁰ See, e.g. David M., Driesen, *Linkage and Multilevel Governance*, 19 DUKE J. COMP. & INT'L L.389 (2009) and Delia, Rodrigo, Lorenzo Allio & Pedro Andres-Amo, *Multi-Level Regulatory Governance: Policies, Institutions and Tools for Regulatory Quality and Policy Coherence* (OECD Working Papers on Public Governance, Paper No. 13, 2009).

⁴¹ ANDREW HALPIN & VOLKER ROEBEN, *THEORISING THE GLOBAL LEGAL ORDER* (Hart 2009).

a structured way. As a first step towards a more structured debate, Halpin and Roeben propose the development of what they call “a common language for global law”, which they describe as follows:

A prior stage to attaining harmonisation, and possibly more realistic as an immediate goal, is the task of finding a common language in which to discuss greater convergence and to argue over present discord, among the different legal provisions and perspectives found within the societies of the world.⁴²

Evidently this call for a common language is not meant to be taken literally in terms of reducing linguistic diversity to one single language or even a *lingua franca*, but more in terms of a better cognitive coordination and critical exchange and evaluation of information. The internet and modern communication, as well as transport technologies, already contribute greatly to this, but even the isolated debates in the competent international organizations and national assemblies should contribute to it. Leaving the developing/developed country dichotomy out of political and legal discourse, for which I argue throughout this paper, would be an important first step in this direction.

The second concept that appears promising, and not only for a more accurate conception of the complex realities governing the present world order, is the concept of the “creative economy”. Capable of supplementing the governance debate, it marks another important paradox and deals with the old separations of politics from economics,⁴³ or of art from technology⁴⁴ or, as the Romans would have said, of *otium* from *negotium* (i.e. leisure from business);⁴⁵ these concepts, when framed in mere opposition, have in common that they no longer provide an adequate description of world affairs. A general definition of the concept “creative economy” has not yet been accepted, which enhances its chance to take a constructive role in the governance debate. At this point it is merely clear that the concept is largely built on the debate on the cultural economy and the underlying cultural industries, which originally derived from a philosophical debate around the oxymoron “*Kulturindustrie*” (culture industry) led by Max Horkheimer and

⁴² *Id.*, at 6.

⁴³ See also Allyn A. Young, *Economics and War: A Presidential Address*, 16 AM ECON. REV. 1, 7 (1926), describing the paradoxical problem in 1926 by writing that: “The world’s political organization has not kept pace with its economic organization. Increasing interdependence asserts itself in economic life. Raw materials, markets, borrowing and lending, trade routes, prices, monetary and banking policies are things in which the different peoples of the world have a joint as well as a separate interest”.

⁴⁴ Note that as another paradox, etymologically the term “technology” derives from the Greek word *tékhnē* (i.e. art or craft) or “technic”, meaning “pertinent to art or an art”, which refers to the “scientific study of the arts; see THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 906 (Charles T. Onions ed., Clarendon Press, 1966).

⁴⁵ Finally also note that in the so-called “knowledge-based economy” or “experience economy”, in which the distinction between ideas and their expression become blurred, also the distinction between leisure and work is no longer easy to draw; see, e.g. DAVID ROONEY, GREG HEARN & ABRAHAM NINAN, HANDBOOK ON THE KNOWLEDGE ECONOMY (Edward Elgar 2005); see also FRITZ MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES (Princeton University Press 1962); and JOSEPH B. PINE & JAMES H. GILMORE, THE EXPERIENCE ECONOMY: WORK IS THEATRE AND EVERY BUSINESS A STAGE (Harvard Business School Press 1999).

Theodor W. Adorno.⁴⁶ In this regard it began to challenge the distinctions discussed above by deliberately merging the apparently antagonistic concepts of “culture” and “industry” into a single word. The introduction of the concept of the creative economy was more recent, and progressed gradually via the concept of the information economy.⁴⁷ It was also used in a book on business strategies which focused, in particular, on “how people make money from ideas”.⁴⁸ In the realm of policy-making, it has also been used by the United Nations Conference on Trade and Development (UNCTAD) in two *World Creative Economy Reports*, published in 2008 and 2010.⁴⁹ The conclusion reached in the reports was that “the creative industries were among the most dynamic sectors of the world economy and offered new, high growth opportunities for developing countries”.⁵⁰ It is a matter of regret that this conclusion, however, appears to be one-sided, as it seems to follow the developing versus developed country distinction. Therefore, if UNCTAD really wants to make progress in this area, it will have to find further synergies and abandon the distinction altogether. More useful for the present context and for the future agenda is, therefore, the clarification given by the following considerations:

The concept of the “creative economy” is an evolving one that is gaining ground in contemporary thinking about economic development. It entails a shift from the conventional models towards a multidisciplinary model dealing with the interface between economics, culture and technology and centred on the predominance of services and creative content.⁵¹

So far the concept has received little attention in the area of law.⁵² In the area of law, it is important to note that the concept also carries a paradox, which – building on the wider culture and trade debate as well as the equally oxymoronic concept of intellectual property – consists in the apparent contradiction between “artistic creativity” on the one hand, and “economic productivity” on the other. The same line of thought is trivially reflected in the myth of the talented but poor or starving artist (whose artwork is often posthumously sold for millions of dollars). Legally, the same distinction underlying the paradox is found in the area of intellectual property law. Intellectual property rights can be said to form the precondition for

⁴⁶ See THEODOR W. ADORNO, *THE CULTURE INDUSTRY* 98 (Routledge 1991), writing that “The term culture industry was perhaps used for the first time in the book *Dialectic of Enlightenment*, which Horkheimer and I published in Amsterdam in 1947. In our drafts we spoke of ‘mass culture’. We replaced that expression with ‘culture industry’ in order to exclude from the outset the interpretation agreeable to its advocates: that it is a matter of something like a culture that arises spontaneously from the masses themselves, the contemporary form of popular art”.

⁴⁷ See, e.g. SHALINI VENTURELLI, *FROM THE INFORMATION ECONOMY TO THE CREATIVE ECONOMY: MOVING CULTURE TO THE CENTER OF INTERNATIONAL PUBLIC POLICY* (Washington: Center for Arts and Culture, 2001).

⁴⁸ See JOHN HOWKINS, *THE CREATIVE ECONOMY: HOW PEOPLE MAKE MONEY FROM IDEAS* (Penguin 2002).

⁴⁹ See United Nations Conference on Trade and Development (UNCTAD), *World Creative Economy Report 2010: Creative Economy: A Feasible Development Option* (UNCTAD 2010) iii, available at http://www.unctad.org/en/docs/ditctab20103_en.pdf; and see United Nations Conference on Trade and Development (UNCTAD), *World Creative Economy Report 2008: The challenge of assessing the creative economy towards informed policy-making* (UNCTAD 2008) 2-10, available at http://www.unctad.org/en/docs/ditc20082cer_en.pdf.

⁵⁰ *Id.*

⁵¹ See UNCTAD, *World Creative Economy Report 2008*, *supra* note 49, at 3-4.

⁵² *But see* Rostam J. Neuwirth, *(De-)Regulating the Creative Economy*, 1 *CREATIVE AND KNOWLEDGE SOCIETY - INTERNATIONAL SCIENTIFIC JOURNAL* 44 (2011).

linking not only an idea to its expression but also *otium* (or leisure or apparently non-productive artistic or creative efforts) to *negotium* (or business based on economic productivity). In this respect, however, it is strange that, in the late 19th century, the area of intellectual property was split into two separate conventions, namely the Paris Convention for the Protection of Industrial Property of 1883, which deals more with the economic aspects of trademarks and patents, and the Berne Convention for the Protection of Literary and Artistic Works of 1886, dealing with the more creativity-related aspects of copyright.⁵³ We can see from a historical perspective that the concept of the creative economy continues the path begun by intellectual property of combining artistic creativity and economic productivity.

Based on this brief description of the two concepts of “governance” and “creative economy”, it appears that they are better able to explain the phenomena and trends occurring in today’s world and to link our accelerating perceptions to new conceptions. To this end, however, the two concepts must be brought into closer contact, so as to avoid the old and continuing separation between politics and economics. The said separation is still prevalent in institutional terms in the division between the United Nations system on the one hand and the World Trade Organization on the other. It is further aggravated by an intra-organizational fragmentation especially in the context of the UN system and its many specialized agencies.⁵⁴ By linking the governance debate to the concept of the creative economy, several new and unresolved issues will therefore be able to be better addressed. The glue which can bring and hold them together to derive the required synergies may be found in the law.

THE FUTURE AGENDA OF GLOBAL GOVERNANCE AND THE CREATIVE ECONOMY

Conflict is a category of man’s mind, not in itself an element of reality.⁵⁵

The present realities, as we all experience them through our individual perceptual instruments, often seem to conflict with concepts formulated on the basis of past conceptions, which, in turn, were based on even earlier perceptions. The problem underlying this observation may be called “change”, which has been described as the only and inevitable constant in human life (and possibly in other existential forms including machines). Perhaps symbolized by the invention of the cinematograph and the transformation of still photography to motion pictures at the beginning of the twentieth century, the cognitive challenges deriving

⁵³ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 828 U.N.T.S. 306; and the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221; for an explanation of the reasons for the split in two convention, see also Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime* 5-19 (Michigan State University College of Law Legal Studies Research Paper Series, Research Paper No. 02-12, 2012), available at <http://ssrn.com/abstract=578572>.

⁵⁴ See also United Nations High Level Panel on Coherence, *Delivering as one: Report of the High-level Panel on United Nations System-wide Coherence in the Areas of Development, Humanitarian Assistance and the Environment*, G.A. A/61/583 (2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N06/621/41/PDF/N0662141.pdf?OpenElement>.

⁵⁵ See Constantin Virgil Negoita, *Cybernetics and Society*, 11 *Kybernetes* 97, 98 (1982).

from the connection between perceptions and conceptions of reality appear to have intensified, particularly in the sense that the cognitive processes have been accelerating. Our perception that change is accelerating, however, stands in stark contrast to the fundamental role attributed to law and politics, which is that of providing stability and predictability. Given this trend, both law and politics currently threaten to lag behind, and to fail to perform their tasks in the way that is expected by their respective societies. In these times of rapid change and growing global interconnectivity, it is therefore necessary to try to close the gap and to bring the current international legal order in line with the perceptions underlying the present realities.

In this regard, the developing/developed country dichotomy, which strongly dominates many different debates, serves as a good example of such a gap, and highlights the need for a change in our conceptions, not only in legal but also in broader meta-juridical or philosophical terms. It also provides useful insights into the first steps to be taken. The comprehensive study of the use of the dichotomy revealed several interesting insights. First and foremost, it brought to the fore an inherent contradiction between the perception of change as the only constant and the concept of a country being developed (which implies that it no longer needs to be developing further). Because of the accelerating pace of change in the past century, this contradiction is becoming more obvious but also more complex. It becomes more complex in the sense that different degrees of economic development may fit even less well into the categories (and territorial boundaries) created by our dominant conception of states. This element calls for a more constitutional conception of international law, which takes greater notice of, and grants an enhanced legal status to, private individuals (both natural and legal persons). This also derives from a survey of the UN Charter, several constitutional founding statutes of international organizations, and the areas of international criminal law and private international law, which refrain from using the distinction and thereby provide a higher degree of stability and predictability. Nonetheless, these areas need to be coordinated in a closer and more coherent manner. A constitutional understanding is also better able to address dichotomies, even beyond the developing/developed country dichotomy, which are a problem related to the acceleration of our perception of change. A mere binary way of thinking and of categorizing the world into “North and South, East and West”, or the normative universe into “right and wrong, legal and illegal”, no longer fits with the complex situations created by the acceleration of our perception of change, which is blurring formerly well-established lines of distinction and thus posing a serious problem to the law preserving its integrity over time. As a consequence, we can see a large number of apparent contradictions or paradoxes being formulated precisely by our attempts to describe and frame our perceptions more accurately. In this regard, Charles Handy was right to call our time the age of paradox.⁵⁶ This age will thus require a new mode of thinking, transcending the usual binary mode. The concept of the “creative economy” is just one concept that invites us to think in a new way, but it is nonetheless one of the more comprehensive concepts. In concrete steps, it will require concrete regulatory efforts to overcome the territorial mess created by

⁵⁶ CHARLES HANDY, *THE AGE OF PARADOX* (Harvard Business School Press, 1995).

continuing to try to link legal jurisdiction exclusively to the territory of a nation state. This is not only a matter for concern in the realm of intellectual property rights,⁵⁷ but will take on even greater significance in the future debate about social and distributive justice. It will also require a fundamental rethinking of the current regulation of international trade. For instance, the principle of non-discrimination (national treatment and most-favored nation treatment) needs to be read as also referring to private consumers and cannot remain limited (as is the status quo) to the treatment accorded to goods or services with regard to domestic regulatory measures. As another example concerning strengthening the status of private individuals, it will also require a more comprehensive coverage of the world market by competition rules, the violation of which will be punished with the punishment being of benefit to the consumers whose financial interests were hurt.

In this regard, the concept of governance, with its intrinsic dynamism derived from its etymological meaning “to steer”, seems promising. It appears promising in the sense that it will allow change and changes to be encompassed more rapidly but with greater consideration for the system as a whole including the mutual relationship of its numerous single constituents. In this regard, abandoning the static “developed” versus “developing” country terminology, and replacing it by more differentiated theories and methodological approaches, such as the stage theory as a method of scientifically studying “change” in the form of development, is urgently needed.⁵⁸ Already, the 1992 Rio Declaration has set an important precedent, when – in the context of moving sustainable development at the center of concerns – it reminds us that “states have common but differentiated responsibilities”.⁵⁹ Another concrete proposal for the transformation of the current system of government on which the present international legal order is built, is the use of technological means, known from e-government initiatives, to create a worldwide legal database for the instant exchange of and access to national and international laws, which I have elsewhere termed GEOLAW (Glocal Electronically Operated Law Administration Web).⁶⁰ The information contained in the database could provide an important element in, or the foundation for, a commonly shared understanding in the process of formulating more adequate concepts. This, however, is but one first concrete step and many more must follow. The final, but perhaps one of the most important insights that derive from the analysis, is that a shift of our attention is required. This means that, in such dynamic times of perceived accelerated change and growing complexity, it is less a question of which one of two competing principal decisions is ultimately taken or which policies are adopted, but instead a question of *how* the decision or policy, once it has been taken or adopted, will be pursued.

⁵⁷ See Peter K. Yu, *Region Codes and the Territorial Mess*, 30 *CARDOZO ARTS & ENT. L.J.* 187 (2012).

⁵⁸ See, e.g. Roger D. Masters, *Historical Change and Evolutionary Theory: From Hunter-Gatherer Bands to States and Empires*, 26 *POLITICS AND THE LIFE SCIENCES* 46.

⁵⁹ UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, *RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT* (1992), *supra* note 11.

⁶⁰ See Rostam J. Neuwirth, *Governing Glocalisation: ‘Mind the Change’ or ‘Change the Mind’?*, 12 *HOKKAIDO JOURNAL OF NEW GLOBAL LAW AND POLICY* 215, 244-248 (2011) [in Japanese].

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