

# IN A GLOBALIZED WORLD, ARE THERE STILL QUESTIONS FOR PHILOSOPHY OF LAW?

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## 1. TALKING ON GLOBALIZATION IN GRANADA?

Summer has not yet arrived in Granada. It is still spring, the season that precedes summer. However, the end of one season always anticipates the next. That is one of the particularities of seasons: they invade each other. One season has hardly ended when the next one is on its way.

I would like to mention “Daybreak in Summer”, a brief text by Federico García Lorca. Daybreak in summer, that is, that time of day when “the city lazily sheds its veils”, “houses show their faces with empty eyes”, “hazy mists” are glimpsed in the distance, “shadows arise and disappear”, and “rushes, reeds and fragrant grasses bend over the water to kiss the sun reflected in it”. That instant, in short, in which “the Andalusian sun begins to sing the fiery song which all things dread to hear”.

García Lorca also says that Granada is a “paradise closed to many”, because the city loves that which is tiny, domestic. Granada is excessively refined, and its aesthetics are the aesthetics of tiny things.

How, then, can we approach globalization in Granada, a city of “leisure”, “contemplation”, “without thirst for adventure”, as the poet also described it?

Nonetheless, where there is leisure and contemplation, there is also “fantasy”, another word that is difficult to define. It is a capacity to reproduce past and distant things. It is also a faculty for idealizing what is real, that is, to improve them, to make them seem better than they actually are. Furthermore, we should register another fact about the theme of our Conference: for at least 10 years, the “Anales de la Cátedra Francisco Suárez”, under the editorship of Nicolás López Calera, has been delivering volumes on economic mondialization (from the French *mondialisation*) and the political and legal crisis, on law in a cosmopolitan democracy, and on the international economic order and human rights.

We may not know precisely what globalization consists of and what its outcome will be —supposing that such complex processes have an outcome, as such—, it is nonetheless real. However, it is also something that we can idealise. I do not mean idealise in the sense of changing what we call globalization at will. Rather, it is a matter of using our intelligence to raise this process above its own reality itself.

Using one’s intelligence to raise something above reality implies discovering a way to improve something. In this case, it means improving globalization rather than just letting it unfold before our eyes. It means intervening in its development

so that, no matter how disconcerting and uncertain it may be, as many men and women as possible will reap its benefits, worldwide. It should not be advantageous only for the handful of men and women who live in the four or five best areas of the biggest cities in the richest countries on Earth.

I do not wish to appear over-dramatic, but our current global capitalism seems like a huge ocean liner in which a few passengers are comfortably accommodated in first-class cabins, while the majority wrap themselves in their blankets as best they can, either on deck or in the hold. Not to forget those who swim around the ship, desperately trying to climb on board.

As we all know, seen from the left, globalization has gone through three distinct stages: first, it was questioned or directly denied. Next, its existence was acknowledged and the anti-globalization banner was raised against it. Now, while acknowledging that it is an on-going process, we want to make it different by promoting an alter-globalization. It is an entire process that goes from denying globalization, opposing it and trying to think up a “different” globalization, that is, one that would correct certain negative aspects and ensure, as far as possible, better outcomes for the bulk of the world’s population.

## 2. POETS’ SKEPTICISM AND PHILOSOPHERS’ METAPHORS

The first time I came to Granada, when no one had yet heard of globalization, I brought with me “Juan de Mairena”, a splendid book by another poet, Antonio Machado. Mairena, who is none other but Machado himself, on the subject of poets and philosophers, says that the latter are poets who believe in the reality of their poems. Contrary to generally held opinion, he also affirms that “scepticism of poets can act as a stimulus to philosophers, whereas poets can learn the art of metaphor from philosophers”.

Can you perceive a touch of irony towards philosophers in Mairena’s thought? He is saying that poets are sceptical, that is, they do not believe the tale, whereas philosophers are the builders of metaphor, that is, we believe the tale, or at least, we invent tales.

Finally, Juan de Mairena also says, quite rightly, that in the field of political action—which he considers the most superficial and obvious field—only he who places the candle in a current of air can be successful, and not he who expects the air to blow where he has put the candle. Let us suppose that the air, today’s winds, are the winds of globalization, and that philosophy of law is the candle (our candle, at least), should we place the philosophy of law in the centre of globalization, so it will give a bright enough flame? Or should we place the philosophy of law at a certain distance from globalization, even at the risk of making its flame burn so low as to shed almost no light at all?

Philosophy is not the same as politics. To continue with Machado’s image, it would seem that the philosophy of law’s candle should not be where the winds of globalization blow because if it were, its flame and its light would only sway to

uncontrolled gusts of wind. The philosophy of law should be at a certain distance from the globalizing wind because only then can it shed its own light on globalization, however weak that light may be.

Its own light, its feeble light, its infinitesimal light—as tiny as Granada—but its own light, nonetheless. Here, light means to take a look and to examine. To take a look and to examine or, in other words, theory, in the Greek sense of the word. By the way, philosophy and the philosophy of law are not the only disciplines that should look at and examine current globalization. All disciplines should do so. All of them should do so, not just economy, because its hegemony is as impoverishing as any other discipline that intends to explain all human phenomena in terms of its language and analytical categories. Can you believe that a Nobel Prize winner in Economics was completely serious when he said that Americans stopped being adulterers the very day they discovered that it is more expensive to support two women than only one? This piece of nonsense is what I mean by the impoverishment that could be brought about by a purely economic analysis of human behavior and phenomena.

All disciplines should take a look at and examine globalization, and also take a look at each other. It is this collective act of looking (and the lucidity of the governing classes, as well as the speed at which they are capable of introducing supranational norms adapted to demands) that will make the difference between globalization progressing like a rider in control of his steed rather than like a runaway horse whose rider hangs on to the reins and stirrups as best he can.

Globalization raises many issues, but we have nowhere to discuss them. Not only do we have nowhere to discuss globalization issues on a regular basis. We also lack institutions where, once the issues have been discussed, norms can be adopted to regulate globalization. As David Held proposes, in an increasingly global world, we need to “share the planet and humanity”, although we must also “share rules”. However, as yet we have nowhere where these rules can be legitimately adopted.

Whether we like it or not, as Peter Singer argues, “as the world’s nations approach one another to face global issues such as commerce, climate change, justice and poverty, our national leaders need to adopt a perspective that goes beyond national interest. In other words, they need to gain an ethical perspective on globalization”.

Tough issues require equally tough solutions, although it does not follow that simple issues are necessarily simple to solve. Globalization appears to be a complicated, rather than a simple matter. Therefore, it requires an attitude that is alert, even critical. The challenges posed by globalization, like those that are currently being posed by biotechnology, require the preservation and promotion of the main characteristic of any philosophy: a critical attitude.

Philosophy in general, and the philosophy of law, must help us to preserve the notion of the complexity of things. At the very least, they should ensure the survival of a community of hesitant men and women—the philosophers—who take part in the public arena not to reproach others who know nothing—as Socrates

did— but to remind them that nothing is as simple as it seems. Jonathan Franzen, the American novelist, attributed a similar role to literature, and philosophy is also a form of writing. Thus, neither philosophy nor literature would have anything to change. Rather, they would have something to preserve. Above all, they have to preserve a community of readers and writers who admit to each other that nothing in the world seems simple to them, and who state that “understanding and the priorities that govern daily life” are insufficient.

### 3. EVERYTHING IS DEAD? IS IT THE END OF EVERYTHING? IS EVERYTHING POST...?

It is now time to approach the title of my lecture: in a globalized world, are there still questions for philosophy of law?

You who are attending the World Conference today in great numbers may rest assured. I will not answer that question negatively, thus forcing us into early retirement from an activity we enjoy and that allows us to earn our living honestly in the universities in which we work. I say honestly, although I feel haunted by Joan Robinson’s ironic comment to her students at Cambridge after a lifetime dedicated to teaching. “We would like to prove,” she said, “that we earn our living honestly, but I often doubt whether that is true.” This is due to the way our theories and mental constructions constantly fade away. That is another effect of the rapid social, economic, political and institutional transformations of our contemporary world.

I will not add my voice to the mournful choir that recently seems to be interested in decreeing the end or the death of almost everything: the end of history, the end of humankind, the death of God, the end of reason, the death of ideologies, the end of enlightenment, the end of certitudes, the end of modernity, the end of utopias, the end of nostalgia, the end of philosophy and —why not?— the end of the philosophy of law. Too many endings, I think. Too many deaths. Too many funeral processions following urns containing we know not what, or whether their occupants are really dead, only cold, or seized by a sudden attack of catalepsy. A sudden and suspicious attack of catalepsy, we could add, because we cannot rule out that there may be some people who are interested in bringing about such an attack.

The end of modernity is proclaimed every now and then. Then we must face the issue of giving a name to our times. Of course, we come up with the easiest, less eloquent and imaginative name, the poorest one of all. It is also the most successful one —post modernity— the equivalent to admitting that we do not know where we stand, except that it comes after modernity. After modernity? If I remember rightly, the program for modernity consisted of reason and rights. Thus, if it is a matter of reason and rights, it would appear that modernity still has a long way to go. Reason, as the faculty that will allow us to pose and resolve the way we are to live with each other in diversity and build a more decent society

than that which we have achieved so far. Rights, as the individual prerogatives to which all humankind aspires without exception. In other words, rights that are, at the same time, both individual and universal rights that promote what Alain Touraine called “universal individualism”.

It is in these terms that I would raise the issue of the migratory process that characterize our times, for instance. They defy law and the philosophy of law, and they are of a very different nature from the migratory processes occurring at the end of the 19th and beginning of the 20th centuries. As Anthony Giddens postulates, the debate on immigration should be linked to the debate on citizenship. This implies that if immigrants are to enjoy the same rights as local citizens, they should also accept a series of specific duties or obligations.

The end of utopias is also announced all the time, that is, the ability to imagine better worlds than our current world. The end of nostalgia is carelessly added on, i.e. to cease to value good things from the past. I wonder whether we can accept a thing like that so easily and whether we should react against anyone who tells us that we already have the best worlds, that there is no use in looking back or even in imagining something better than what we have already.

Think of Fukuyama’s same thesis on the end of history, although we know that some years later, in another book, he also decreed the end of humankind. Of course, Fukuyama’s thesis says nothing about the end of history as a sudden interruption of human events, or the end of history as a study, reconstruction, interpretation and search for a probable meaning for past events. No. Fukuyama’s thesis, as we all know, is related to the high level of consensus we have attained on the legitimacy of democracy as a form of government, and on how the market economy is more effective for economic growth and people’s prosperity.

Fukuyama’s proposal is that the double triumph of liberalism —on the political plane and in the field of economics— puts a sort of “full stop to the ideological development of humankind”. Humans would have found the “end form of government”, with an inevitable correlate in the economic sphere. Therefore, it means the end of history in the sense of an end of ideologies. Better yet, the end of the clash between different ideologies, since one of them would have taken over the entire field. Currently, no alternative model can really aspire to be accepted and applied on a relevant world scale.

Fukuyama is a conservative author and, at the same time, an enthusiast. He is also an intellectual who knows how to pose questions and he values the doubts about his thesis. Towards the end of his book, he uses a beautiful and thought-provoking image of a caravan of wagons going towards a promised city of democracy and a market economy. He accepts that we cannot know for sure whether the occupants of the wagons, upon arriving in the Promised Land, will not “take in the new landscape at a glance, find it not to their taste, and look forward to another and more distant journey”.

This touch of uncertainty at the end of Fukuyama’s book is not a call to the wagons’ occupants to leave the caravan in which one wagon follows the one before it and to search for a new route, a new destination. Rather, it is a call to stay in

line, even though in the evening, when the travellers stop to rest their horses and gather around the fire, they will hear new stories on each others' lips. These stories will differ from the ones they were told by the occupants of the first wagon, that is, the wagon of those who are in charge, those who decide the caravan's course.

I wonder, then, whether it is not also the role of philosophers, and of philosophers of law, to take their place among the people around the fire to liven their conversation, their queries, and their doubts.

In other words, I wonder whether the philosophy of law in our times could contribute towards weaving new stories that would be listened to by humankind. Although we march in a single direction, we still retain the ability to stop for a moment to think and to converse about our current destination. Dworkin refers to a function similar to the philosophy of law at the end of his book "Law's Empire". Under the title "Law's Dreams", he affirms that philosophers of law are "chain novelists with epics in mind, imagining the work unfolding through volumes it may take generations to write. In that sense each of their dreams is already latent in the present law; each dream might be law's future. But the dreams are competitive, the visions are different, choices must be made". Of course, the choices would not be made by the philosophers of law, but by "statesmen in high judicial and legislative office".

What we need, then, are more stories, not a single story. This is the same as saying that we need many different thoughts, not a single system of thought. We need fantasy and imagination. We need more unease and less submissiveness. We need a philosophy of law that is less self-referring, less introverted, perhaps less incestuous as well. A philosophy of law that will not lose height, but that will know how to come down to the concrete issues facing law and the science of law. A philosophy of law that will learn from other disciplines but that will not embrace them recklessly. An over-estimation of the economic analysis of law, for instance, leads to impoverishment. In the same way, in past decades confiding in social analysis of law alone and in its ability to bring about social change that we thought would be more attractive also led to impoverishment. What we must avoid today —as José Eduardo Faria holds— "is the final triumph of imperialism of economic theory", of the "hegemony of a certain economic radicalism over all other world visions". However, currently, to embrace morals or worse yet, moralists, is also the wrong path to take, and may even constitute a full retreat. What I mean to say is that today we could be blurring the outlines of the specific nature of law, and with it, the role of science and philosophy of law. We may have to have recourse to authors such as Kelsen to remind us of that specific nature.

To call upon Kelsen, for instance —and please forgive me those who would like to add him to the list of the dead that we mentioned earlier— not so that he will pull the basic norm out of his hat again, but so that he will remind us, among other things, that what law has always had in common, from Babylonian times to the current day, is that it consists in a technique that uses norms and other standards to obtain certain desirable social aims that have the particularity of being coercive, that is, that they can be imposed by the legitimate use of socially organized force.

To call upon Kelsen, but also upon Thomasius and Kant —dead as well?— so they will remind us of the distinction between law and morality. Distinction, not division. To distinguish is not the same as to divide. To distinguish is to perceive and evidence the difference between one thing and another —in this case, between law and morality— whereas to divide consists in deliberately putting distance between two things. The science of law, the theory of law, the philosophy of law should collaborate with other disciplines and knowledge. However, to collaborate is not to capitulate. It is not a matter of erecting barriers, or of ignoring boundaries and believing that everything is equal. As Argentinean penologist Eugenio Raúl Zaffaroni writes on Martin Buber's brilliant sentence —human beings are not rational, although they can become so— “when the ought is confused with the is, it detracts from rationalist idealism to the point of becoming radical irrationalism. There can be no worse irrationalism than to take human rationality for granted, with the resulting destruction of any incentive to fight for it, since it is not a fight to attain a natural fact”.

#### 4. MONDIALIZATION, INTERNATIONALIZATION, AND GLOBALIZATION: ARE WE REFERRING TO THE SAME THING?

I am afraid that so far I have only stated the obvious and that some of you may wish to hear no more and leave to have a coffee. However, give me one more opportunity to go back to the title of my lecture.

The title suggests, first of all, that philosophy of law poses questions. This, I imagine, we can all accept quite readily. As far as questions are concerned, philosophy of law is also derived from general philosophy. Whether you look at it as an activity, a discipline or a simple course for our students, philosophy poses questions. Furthermore, as Isaiah Berlin says, philosophy discovers its subject at the moment it identifies the questions for which it becomes a discipline in order to provide an answer. On the other hand, the questions posed by philosophy are strange. They are born of that affective excitement that we call amazement. They are questions that plunge us into a deep perplexity. Questions, says Berlin, for which we do not know where to search for answers.

This characteristic of philosophy —not knowing where to look for the answers— has from ancient times been related to the idea of a journey. Croesus greeted Solon with the words, “We have heard much of thy wisdom and of thy travels through many lands, from love of knowledge and a wish to see the world.” “To know that one is searching”, said Aristotle of philosophy. “Philosophers seek like those who have found nothing, and they find like those who know that they must continue to seek”, thought Saint Augustine. “Knowledge in progress”, held Xavier Zubiri. “To embark upon the unknown”, believed Ortega.

In my opinion, “The Sheltering Sky” is Paul Bowles' best novel. It gave rise to a film that can still be seen on satellite television occasionally. In his novel, Bowles narrates the adventures of a couple who venture into the desert. They

take increasingly dangerous risks and their only aim is to advance, without even thinking of returning to their point of departure. The story allows Bowles to draw a distinction between travellers and tourists.

“Whereas the tourist generally is in a hurry to return home after a few months or weeks”, writes Bowles, “a traveler, who does not belong more to one place than to another, moves slowly from one point of Earth to another”. In other words, a tourist comes and goes, and in going, he is already thinking of the return. By contrast, travelers press forward. They do not retrace their steps. They concentrate on the next stop on the way and, as occurs with the main characters in “The Sheltering Sky”, they put much more into the journey than the time they take to make it.

Tourists not only have a return ticket. They also confirm it from time to time and dream of their return. Travelers, by contrast, embark without a return ticket and they use all of their resources in continuing their journey rather than arranging to return home.

As stated by another contemporary novelist —Paul Auster—, when you see a caravan in the desert, what is interesting is how it moves, not how many camels and camel drivers it has, or even where it is headed. Likewise, when we think and write, what matters is not the finished book, but the writing’s itinerary.

Philosophy, and that region of philosophy we call legal philosophy, is pure movement, and the harbours where it puts in time and again, are never the final destination, but just anchorages where it rests and takes on supplies, then to resume its voyage. As Karl Jaspers says, “philosophy means to go walking. Its questions are more important than its answers, and every answer turns into a new question”.

Whether we like it or not, that is the way things are in this activity that we chose at one point. It consists in always following our path, posing questions. We know that if we discover something, it is so that we may continue searching and not to declare that we have finished our task.

The title of my lecture also includes the most popular word in conferences and seminars today: “globalization”.

I shall not attempt to offer the eleventh definition of “globalization”. Perhaps we have really come to twelve definitions of it, or perhaps we come back again and again to the same confused definition. However, I would like to share some brief distinctions in this respect.

To begin with, as opposed to what happens with old words, “globalization” is a term that implores us to give it a meaning, rather than to give fresh meaning to a word made stale by routine. To give it a meaning, despite the fact that there are thousands of definitions for globalization, so many that such a serious author as Alessandro Baricco opted for an inductive solution. That is, he searched for examples of globalization since, as he says, “there is no definition for stupidity, but there are many instances of it”.

First, if you allow me, I will make a distinction between mondialization, internationalization and globalization. The three terms are often used as synonyms, that is, as though they refer to exactly the same phenomenon.



Mondialization is a process that had to do with discovering and occupying the world, the land we live in. It has a territorial and geographical meaning, although its political and commercial consequences were very important. It is a process that humankind gradually completed. The highlight came with the big 15<sup>th</sup> century discoveries. It is a process that discovers and at the same time erects borders. The main characters are well-known national actors.

Internationalization is a process that comes later, when national states agree to inter and supra national authorities that are invested with some degree of interference in the domestic affairs of each state. It is a predominantly political and juridical process and, as such, it continues to acknowledge the existence of borders. However, it is willing to open them up to the advantage of goals that express and at the same time go beyond the private interests of states and other organizations partaking in the process.

Globalization is a more complex and recent process, and therefore is harder to define. This is partly because it is unfolding before our very eyes; we are actually experiencing it, as so often has been said, with a mixture of fascination and fear. However, somehow it has to do with expanding human aspirations and making them more uniform. It seeks to replace local lexicons with the acceptance of a common, promising destiny that would be supported by a new dramatic interpretation of the world, in which the actors multiply and become diversified to the point of turning the states into one more actor in the play. It is too soon to know whether that play is a comedy, drama or tragedy. Probably globalization, as Guy Sorman has said, is not a process that substitutes local loyalties for planetary loyalties, but rather a process of “expanding” our local loyalties to more planetary loyalties. In other words—coming now from David Held—it would consist in “communities with overlapping destinies”, in which “daily life—work, money, beliefs, commerce, communications, entertainment, finances and the environment will connect us to each other in a way that is ever more intense”.

Thus, globalization, compared to its immediate predecessors—mondialization and internationalization—is a process with broader cultural implications. Where mondialization discovered and placed borders, and internationalization opened up those same borders, globalization is the equivalent of suppressing borders. Little local herds of humans are inserted into a huge planetary herd that suddenly seems to be headed in a single direction. With mondialization, that which is far away simply appears or is shown to us. With internationalization, that which is distant seems closer, whereas with globalization, what was once distant now seems identical. Mondialization was the result of actions; internationalization, and particularly globalization, is the outcome of interactions. These interactions are restricted in the case of internationalization and far broader, more complex and uncontrolled in globalization. It comes to the point where the interactions of globalization now bestow a practical and tangible significance to the hackneyed image of the butterfly that beats its wings in India and causes a storm in the Caribbean.

In the Caribbean? We really do not know. One of the characteristics of globalization, as opposed to universalization, is that it leads to effects that are less

controlled, more unexpected or even unwanted. Globalization is not something that we all do together, not even governments or the big multinational companies. To a certain degree, it is something that happens to us. As Bauman says, no one is actually in control and no one is even in a position to exert control. It is more a matter of effects than of conscious initiatives and planned undertakings.

Octavio Ianni, highlighting globalization's broader cultural nature, writes that "since capitalism developed in Europe, it has always had international, multinational, transnational, and world connotations that developed within the original accumulation of mercantilism, colonialism, imperialism, dependence and inter-dependence. However, it is undeniable that the discovery that the Earth is no longer an astronomic figure, although it is a historic figure, it moves us to new ways of being, thinking and creating fables".

As a process, globalization can sometimes have a contrary effect to what one would expect. By this I mean that sometimes, instead of doing away with localisms, it allows them to stand out all the more clearly. "Globalisation is always accompanied by localization", says Chilean sociologist Jorge Larraín, in such a way that the two phenomena are far from being "mutually excluding". However, problems arise when globalization, due to the fear it produces, exacerbates localisms, particularisms, and outright pernicious nationalisms. I am saying this in Spain, a country that is very dear to me, where nationalisms are so important. Quite frankly, when nationalisms become aggressive, they make me feel embarrassed. Lech Valesa once said that "the cure for nationalism is to travel". "No one is an alien", Bobbio reminds us, citing John Paul II, probably the only thought of that Pope with which Bobbio could agree. Globalization, therefore, while seemingly going in the opposite direction, has the virtue of making the profound diversity of humankind apparent to all. This is an asset. It is an asset, of course, on condition that communities do not entrench themselves in their so-called identities in the name of diversity, resisting dialogue and trust with other communities. It appears to be convenient to go from multiculturalism to interculturalism, from the mere existence of diverse cultures to their coexistence. In other words, we should realize that cultures live with each other and, increasingly, some cultures live among others.

What can I say? To me it seems that the word "identity" is too strong to be applied to a country or a continent. It is strong enough when applied to individuals, since anyone who has a modicum of complexity always has more than a single personality. In fact, taken individually, we are a "trunk full of people", as Antonio Tabucchi says in one of his essays on the work of the Portuguese writer, Fernando Pessoa.

At least for me, an optimistic vision of globalization, then, should lead to an encounter between all cultures and real miscegenation. Not to the hegemony of one culture over the rest, or a better identification of the diverse cultures, but to miscegenation, a crossbreeding, a mixture of all cultures. Naturally, it should lead to the end of all localized fundamentalism. It should go beyond, and put an end to purity. Nevertheless, that statement is merely a wish. Today, no one can assert

for sure whether globalization will end up forcing each culture into a disturbing defensive withdrawal, a happy mixing of all cultures, or the impoverishing hegemony of one culture over all the rest. It could also be that, in the end, we might end up with a little bit of everything at the same time.

Now you can witness how I add my own dead to the list of the deceased that I criticized earlier in my lecture. “The end of local fundamentalisms”, “the end of purities”. However, these are mere wishes that sound to me like good wishes. Diversity, which is a good thing, should not be a shield behind which nations seek shelter to speak in the name of a highly arguable identity. An identity that belongs to them like a hallmark that they are not willing to modify in the slightest. As Claudio Oliva wrote in Valparaiso, we are witnessing a widespread use of public institutions based on the value of individual liberties, democracy, a market economy, and ethic and cultural pluralism. The result is that we not only have a “plural world”, but also “plural societies”.

In Latin America, for instance, we have always been obsessed with finding an identity for ourselves, instead of exploring our diversity. To cite Mexican writer Carlos Fuentes, speaking last year in Chile, “in the very dawn of our Latin American culture, the Peruvian chronicler Garcilaso de la Vega, an Inca who was born of a native mother and a Spanish conquistador, said, “World, there is only one”.

Therefore, I believe that this is not the right time to defend social classes, communities, groups, and identities, but rights. Today is still the time to defend rights.

## 5. COSMOPOLITISM AND FUNDAMENTALISM

The title of my lecture also presupposes that globalization queries the philosophy of law. A substantial part of my exposition should consist in identifying those queries and, as far as possible, in answering them. Nevertheless, I hardly feel able to point to a few of the questions and perhaps to some of the answers. In fact, I have already anticipated more than one question and some of the more reasonable answers.

The next issue is how we should collaborate to prevent globalization from becoming not only a process that is happening as we watch in fear or joy, but also a phenomenon that we should guide in some way. By guide, I mean to regulate. Some goods are of global interest, such as the environment, for instance, but also the financial health of nations, since a crisis in any one nation causes greater or lesser crises in other nations. Peace is a paramount good. How can we preserve these common goods so they will be available to more than just the more powerful nations?

First of all, we should refer to peace, to the relative peace provided by justice. Relative peace is always better than the war of all against all or the principle of might is right. I think we should think of Bobbio and his proposal of institutional pacifism, a pacifism that Bobbio admits to have taken from Kelsen. He developed

it in a conversation on Kelsen's ideas on international law that the master from Turin had with Danilo Zolo in 1977.

In that conversation, Bobbio declared that he owed the idea of the supremacy of international law over domestic or national laws to Kelsen, as well as the expectation—which many may consider a utopia—of forming a sort of federal State of worldwide dimensions. Emulating national states, this federal state might one day manage to monopolize the use of force in an international context.

Bobbio believes that peace, not justice, is the main purpose of law. Only a rapid development of international law can ensure stable and global peace. It is the only way to make supranational legal institutions, rather than mere international institutions, work more effectively. Thus, the philosophy of law, in the words of José Eduardo Faria, must draw our attention to the fact that law is a privileged instrument that can stop the “underlying war of the state of nature and strengthen the civil peace that characterizes the rule of law”.

No one should be surprised that a pacifist like Bobbio should trust what he calls “institutional pacifism” more than other forms of pacifism, particularly “instrumental pacifism” and “ideological pacifism”. To Bobbio, “instrumental pacifism” procures peace through the intervention of means, such as bringing about disarmament or, at least, controls over the production, sale, possession and use of armament. “Ideological pacifism”, on the other hand, is inspired by ethics and religion. It aims to convert humankind to the virtue of peacefulness through a constant invocation of higher values, and by providing people with a moral and civic education.

As for “institutional pacifism”, it is the one that aims at achieving peace through the supranational development of present international institutions. Bobbio, as you know, clarifies that the argument underlying his position is clearly Hobbesian. It is as simple as warning that just as men in a state of nature first had to collectively renounce the individual use of force and then allocate it to a single power holding the monopoly of force—the State—so too states, which today live in a situation of mutual fear, must effect a similar transition. They must, by limiting their sovereignty, constitute supranational organs exercising the same monopoly of force.

We are far from having a world or universal State. We are even at low levels of so-called ideological pacifism, particularly when cities such as New York and Washington are attacked in the name of God—whoever you may construe Him to be—and then the President of the United States retaliates against what he calls the “Axis of Evil”. He declares in front of the television cameras that divine inspiration led him to abandon a bar in Texas some years ago, to stop drinking and to prepare himself to become the next President of his country and the savior of world democracy. I mention this in an aside because divine justifications of this nature, from one side and the other, of deliberate acts of destruction and elimination of human beings, strikes me as the most grotesque, scandalous, and unacceptable aspect of the present world situation.

A present situation that is far removed from a universal State. Far indeed. The tendency in the long run, in the very long run, seems to go in the direction

that Bobbio pointed to with the assistance of Kelsen. That is, to pacifism based on supranational legal institutions and not on arms control or mere moral and religious sermons. A cosmopolitan pacifism, if you will, based on the Kantian idea of cosmopolitan law, according to which all men and women are world citizens. A pacifism that does not replace local loyalties with global loyalties. Rather, it broadens our local loyalties by acknowledging loyalties on a broader, global scale. It is a pacifism that Bobbio believed in with enthusiasm, to the point of adopting John Paul II's thoughts, as we remembered a while ago.

In his conversation with Danilo Zolo, Bobbio states that is not easy to understand how, if the sovereignty of the national Leviathans is suppressed, the despotic sovereignty of the Leviathan will not reappear in the guise of the universal state combining within it the totality of international power, previously diffused and dispersed in thousands of rivulets. And this Leviathan, says Zolo, "would obviously be incarnated in a restricted 'directoire' of economic and military superpowers". In another text of his, Danilo Zolo sustains that the juridical globalism of authors such as Kant, Kelsen and Habermas stems from a "far from innocent" premise, namely, the analogy between a nation-state's domestic "civil society" and the so-called contemporary "global society".

Danilo Zolo's approach is similar to one I heard last year in Chile from Gianni Vattimo, who said the following about the challenge of organizing the use of force legally, whether in a national or an international context: "In a conversation with Charles Taylor in 2001, I was convinced that participation in the European Union was a step towards achieving a more democratic UN. Now, in view of what is happening with Bush, I realize that it might be better, and more realistic, to think of a multi-polar world, for if there is no balance of power, any world order could turn into an authoritarian order".

In the light of these observations, however, I would follow Bobbio's lead and continue to declare myself an "unrepentant cosmopolitan". From my position in the philosophy of law, I would increasingly base my work to promote pacifism on supranational political and juridical institutions. Come what may, as Giddens says, "the clash between cosmopolitanism and fundamentalism is one of the defining characteristics of our time".

In short, philosophy of law could help to prevent a return of international politics to a Hobbesian situation of war of all against all, encouraged by the doctrine of unilateral, preventive war that the United States applied against Iraq. What I suggest is—and in this I follow David Held—"a global security agenda" that will demand three things of governments and international institutions: first, there should be a commitment to international rule of law and the development of multilateral institutions. Second, a sustained effort should be made to generate global forms of political legitimacy for international institutions in charge of security and peace. Thirdly, the issues of justice and ethics posed by the global polarization of wealth need to be more explicitly acknowledged.

The third component of this new global security agenda has to do with a more effective execution of economic, social and cultural rights. If Bobbio was right

when he baptized the present as the “time of rights”, it was only in relation to personal rights and political rights based on the value of liberty, not in relation to economic, social and cultural rights based on the values of equality and solidarity. Decent society is not only a society of freedoms but also one in which the differences in people’s material lives are not too pronounced. In a decent society, people eat three times a day. A decent society is based on a society in which men and women are equal and free. Therefore, how can those who live in extreme poverty find any sense in having and exercising freedoms?

The paradox seems to be this. We could, in the long term, march towards a sort of world state. However, national states, which are essential to the proper realization of economic, social and cultural rights, grant ever more space to capital and to financial and business conglomerates that are moved only by their own interest and profit. They delegate public authority to the private world, which weakens the kinds of rights we have mentioned. As José Eduardo Faria asks in that respect, “How can we mend the state’s leading role to ensure citizen’s participation in the formulation, implementation and execution of macro-economic policy?” In other words, what good can representative democracy do for us today, if key decisions, those that affect people most directly, are made in the centers of economic and financial power and not in the government and the parliament elected by the people? In the words of Martin Hopenhayn, “who can ordinary citizens turn to in order to claim social rights that have been suddenly diminished by a financial event occurring very far away from the country they live in, that seem very diffused, and over which neither they nor their country has any control?” It is not a matter of exaggerating, but Gurutz Jáuregui is on the right track when he writes that “the absence of politics is allowing big multi-national companies to carry out, in practice, a real take-over of power, and real control over the world regardless of politics. Under the veil of supposed economic rationality and in the guise of a non-political nature, they are developing, in practice, a new kind of politics, what we could call *parapolitics*. This activity, generated from above, is allowing multi-national corporations to occupy society’s vital material centers in an imperceptible way, without revolutions, changes of laws or Constitutions and by means of the simple development of everyday life. All of that, while avoiding the political system —government, parliament, public opinion, judges, and so on”.

Aldo Ferrer is right, then, when he reminds us in his “History of Globalization” that “the past is a never-ending source of lessons for understanding the present issues of the internationalization of production and financial globalization. However, the past teaches us little about the worldwide dimension of two issues of key importance: how to approach the issues of poverty and aggression against ecosystems”.

Today, economic, social and cultural rights go against the current. However, they run an even greater risk: that of walking on water or defying the law of gravity. These are expensive rights, no doubt. They are rights that cost money, a lot of money. Nonetheless, that does not give a right to call them “Letters to Santa Claus” as the representative of the government of the United States did before

the United Nations a few years ago. It is not, however, merely a matter of money. It is also a matter of indifference. The indifference of the rich towards the poor and of rich countries towards poor nations. As Ernst Tugendhat wrote, “Indifference is not an illness as obvious as aggressive nationalism. On the contrary, it is a peaceful way of annihilating others”.

## 6. ARE POSITIVISM AND JUSNATURALISM BEING TONED DOWN?

Currently, among all of the things that are becoming, or seem to be going global, is the morality of the more civilized countries also becoming global? Is it the morality that, through its increasing incorporation into law, seems to be playing an important and new role in the identification and the content of what we call the legal system? I do not know whether this is the best way to present it, so let us try another way: are human rights becoming global—all of them? Human rights understood as a set of heterogeneous and important rights in the subjective sense, of values, principles and even simple collective aspirations of humanity as a whole. It would seem to be so and therefore we are faced with the problem of taking this phenomenon seriously. At least, those of us who subscribe to a positivist concept of law must take it seriously.

In other words, take a relationship between law and morality that is not necessary but contingent—as legal positivism asserts—and that suddenly becomes reinforced as a tendency, particularly at the level of constitutional rights in many legal systems. Would it not force us to change our qualification of that relationship as “contingent”, and replace it by the word “necessary”? This may be another key question that globalization puts to the philosophy of law.

Judging by the several recent publications on the issue, legal positivism appears to be dead as well. Dead or, at least, it is experiencing serious difficulties to remain standing. Dead or very ill, because if you read a recent work by Luis Manuel Sánchez Fernández on the issue, all that is left of legal positivism is “irony, fallacy, perversion and enigmas”. In other words, it is the equivalent of being dead. Not dead at the hands of jusnaturalism—its classic rival—but as the consequence of doctrines arising often enough from within legal positivism as such. Or dead at the hands of a new jusnaturalism that, rather elegantly, or perhaps only astutely, prefers not to assume the condition of such. This is because, as Eduardo Barbarosch realized, “the debate between the different meanings of legal positivism carries the implication of an underlying attack by jusnaturalism, in its contemporary form, for the purpose of undermining, once and for all, any position that could invoke a positivist approach to law”.

Legal positivism, then, is dead. It is dead due to doctrines that consider the positivist thesis of the distinction between law and morality, between the law that is and the law that, from any moral point of view, ought to be, to have been a failure. Legal positivism is dead—thereby adding to the list of funerals that we mentioned at the beginning of our lecture— or perhaps terminally ill due to those

who, faced with law's constant incorporation of moral content, prefer to seek refuge in an inclusive legal positivism. Inclusive legal positivism is a name that adds a second, new adjective to the term "positivism".

We should be careful of adjectives, for they often empty the noun they accompany of all content. That is what has happened to the word "democracy", for instance. As Ross warned at one point, democracy loses almost all of its significance when the adjectives "real", "organic", "protected" and "popular" are added to it.

To say "legal positivism" rather than only positivism is correct. Legal positivism is not the same as Comte's positivism, nor is it a derivation of that, or a simple application of philosophical positivism to the field of law. This was very well explained at one point by Antonio Hernández Gil, to whom, if only in passing, I would like to pay homage. However, expressions which add another adjective, such as "inclusive legal positivism" and "soft legal positivism" are due to defensive positions that legal positivism has assumed as a result of the incorporation of moral criteria to law. In fact, this is not a new phenomenon, to which I believe legal positivism is in a position to respond without the need for committing itself to new adjectives such as "soft", "inclusive", "moderate". I say it is not a new phenomenon because forty years ago, when I was a student of law, I suddenly encountered expressions such as "good faith", "good customs", "good family man" and so on in my country's Civil Code, as no doubt happened to you as well.

It would seem that lately positivists have developed the inferiority complex mentioned by Rafael Escudero Alday in his recent and excellent book on the subject. In any case, it would be more appropriate to refer to a bad conscience, particularly when it comes to ideological legal positivism—which practically no positivist has ever accepted—and, of course, to some of the thesis on legal positivism as a theory, to continue in the use of Bobbio's expressions. Notwithstanding, I see no reason for legal positivism to develop a bad conscience or even an inferiority complex, in its methodological version or model. The model asserts that we can identify law—for the purpose of study, not to approve or disapprove it—while abstaining from value judgments stemming from moral convictions. That is the only way to respect law's specificity and, above all, to protect the specificity of morality—whether critical, social or personal—as a point of reference from which to judge the correctness or incorrectness of any particular law. And to justify, in a given case, disobedience to it.

In other words, there are legal reasons to continue to be positivists from the methodological point of view, although there are also powerful moral reasons. The less law and morality are distinguished and the more they are confused, the more difficult jurists' task becomes. That is, it becomes increasingly difficult to describe and also to value current law. As a result, what legal positivism requires of us is not an abdication of values, that is, a surrender of moral values, but rather, an abstention from evaluating. Momentarily, we should put values within parenthesis, so we can identify and describe law as what it actually is. Later, we



can use values to state whether the existing law is also what it ought to be. To put it differently, if the thesis of methodological legal positivism was ever divided into two assertions—one, the distinction between the law that is and the law that ought to be and two, the assertion that jurists should only deal with the law that is—it would mean that only the first assertion should remain.

Abstaining from the evaluation mentioned above refers to the method of knowledge, not to the object to be known. That is, it is a characteristic of the science of law, not of law, because law always evidences itself in many norms, principles and moral values that dominate at any given moment. This characteristic, moreover, does not prevent, but quite the contrary, it makes a moral criticism of any given law much easier. Even Kelsen clearly perceived the latter. And two centuries before him, Kant, when he said that “we should restrict the science of law to make room for morality”.

It is a fact that a growing number of principles, values, criteria, references, and expressions of morality are being incorporated into the constitution and laws. I am thinking of “liberty”, “equality”, “pluralism”, “solidarity”, “dignity”, “non-discrimination” and so on. They need to be given content and to be taken into account by the legal operators who must apply them when the time comes to make new norms for the legal system within the framework of the norms that include terms such as those which are mentioned above. Nonetheless, it is hardly a novelty that making new norms—on the part of legislators, for instance—requires the application of a formal and a material framework and that this normally establishes a norm of a higher category, in this case, the constitution. The constitution, like any higher norm in relation to the lower norm whose production it regulates, establishes not only by whom and how the lower norm can be created (what we call the “formal framework”), but also certain limits to the content that the body that creates the lower norm must respect (what we call the “material framework”). In consequence, it is hardly new that in order to decide upon the existence or validity of a legal norm, we must carefully study its origin or pedigree, and also its content. When a lower norm violates the limits of the content assigned to it by the higher norm, it could be said that the lower norm can be annulled through appeals that can be maintained before the appropriate body.

Thus, the novelty does not consist in the fact that content-related aspects are involved in our technical judgment of the validity or existence of legal rules, but rather in the fact that moral principles, criteria and references increasingly proliferate among such content-related aspects. Without losing their moral character, they become part of law, that is, they become positivized. They also pose a challenge to whoever must interpret and apply them—a judge, for instance—that all legal operators must face when it comes to legal rules: they must establish the field of the possible meanings and the scope of those moral standards and decide which of them seems to be the more appropriate one for the case concerned.

It is true that when it comes to the principles and moral values that a legal operator should apply, the framework of possible interpretations is broader than when it is a matter of interpreting and applying an ordinary legal rule, for instance,

a rule that establishes the time limit for making an appeal. However, in essence, the task is the same: to make law within a formal and material framework that has been established by one or more rules of a higher order. The situation should not vary from a qualitative standpoint, because moral principles, values, and references are presented within that material framework. Those principles, values and references have become part of law, in the sense that they have become incorporated into law by the decision of a higher legal operator, but they do not change the nature of positive law. Nor should it be construed that they dissolve morality into law, and even less that they dissolve law into morality.

What I mean to say is this: the material framework for creating a legal rule may include moral values and principles that have been made positive by law itself and by virtue of deliberate acts on the part of other regulation authorities. However, if those values and principles cause an obligation upon other regulating authorities, it is not due to their moral character, but because they have been incorporated into law and are part of it. Furthermore, the requirement of abstaining from evaluation is not a barrier to identifying specifically moral content within the material framework that must be taken into account in the operations of making, interpreting and applying law, since in that case it is law itself that has established the way things should be, through one of its operators and making use of its own sources.

It is true that by incorporating values and moral principles into law diminishes legal certainty, because they are very broad and relatively vague. Legal certainty is characteristic of law, that is, it is a typically legal value. However, the degree to which legal systems realize such a value (providing that it is data that legal positivism is able to register and explain) does not deny the theory's ability to describe law. As Luis Prieto Sanchís pointed out, the fact that there is room for moral principles and values in the way legal positivism explains the legal phenomenon represents a datum that legal positivism itself can observe without need for correction.

As a result, legal positivism's central thesis still stands: law is different from morality. Any relationship between them is contingent rather than necessary. Law, insofar as it is a specific normative order, does not depend on moral criteria to be identified.

I am not sure whether the example I will now give you is particularly appropriate or even worthy of a plenary session in a world conference on the philosophy of law, but I cannot resist the temptation of making it. If the "Real Madrid" football club were strengthened by two or three top players from the "Barcelona" club to play a friendly international match—a hypothesis that will never occur, as supporters of both teams know very well—the team that went out on the pitch that day would still be "Real Madrid". The two or three temporary players from "Barcelona" would still belong to the Catalonian club, although they would be wearing the Madrid team's white kit and not their own blue and red.

Likewise, I am not sure whether my thoughts on this issue bring me closer to an inclusive or an exclusive legal positivism. All I would like to say is that

it is perfectly possible to remain faithful to the thesis of methodological legal positivism simply because it can provide a better description of reality and the specificity of the cultural phenomenon that we call law. The value of a theory lies with its descriptive ability, and not with how usefully it can solve our practical problems, and even less in its ability to respond to our wishes for a better world. That is why I have never been able to agree with our dear and remembered friend, Albert Calsamiglia. In his article “Post-positivism”, he criticizes legal positivism because “it is curious that when we are most in need of guidance, the positivist theory remains silent”. I would say that legal positivism does not remain silent, although it is also not its place to tell us how to resolve the difficult cases that a judge might face. Theories do not prescribe. They describe. They are only accountable for a poor description, and not for failing to tell us what we expected to hear.

In a certain sense, legal positivism has always been inclusive, since positive law is inclusive. Positive law includes moral values and principles, and legal positivism could be “inclusive” insofar as it explains that fact, but not so far as to give up its core thesis: the distinction between law and morality. That is the fundamental issue of our debate, that is, the distinction and, at the same time, the relationship between law and morality. It is not without reason that Ihering referred to this issue as legal philosophy’s Cape Horn. For those who do not know that southernmost geographical point on our planet, I will explain that the sea is always very rough and stormy at Cape Horn, making navigation difficult and risky. It is very easy to be shipwrecked there, that is, to get lost, to succumb, to have a bad experience during our passage. It is akin to what could happen when we make philosophy, which for some reason has been compared with a journey since ancient times, as we saw earlier in this lecture.

Equally, I am not sure whether currently legal positivism is becoming segmented or refined. Perhaps it is a club in which discussions and divisions among members began some time ago. In any case, internal discussions are good, insofar as they allow legal positivism to polish its arguments without abandoning its core thesis—the differentiation between law and morality— or the thesis of the origin of law in sources of production thus invested by law itself, nor finally, the possibility of objectively identifying both the sources of legal production and the product of putting those sources into action. Or perhaps what is softened and refined is *iusnaturalism*, whose supporters understand, at last, that what they call “natural law” is no more than a set of moral convictions that, to really become law, have to become part of what they call “positive law”, an expression that sounds redundant to a positivist, insofar as “positive” adds nothing to “law”.

“Being a positivist is worth the effort” is the last sentence in a very good work by Liborio Hierro on this subject. A sentence that I share completely, for all the reasons I have given. However, what does he mean here by “effort”? Is it punishment, pain, sorrow, or trouble? No, none of these things. “Effort” here means “worth your while”. That is, legal positivism makes sense and it is worth spending time and effort to explain it to others.

## 7. TO OPERATE IN THE FULL LIGHT, AND NOT WILDLY IN THE DARK

It is time to conclude. Some of the questions that I believe globalization poses to the philosophy of law have appeared during my lecture, probably not in as orderly a manner as I would have liked. The extensive reflection on legal positivism may have been out of proportion, but what can we do: we are prisoners of our obsessions. In this case the difference, and at the same time the relationship, between law and morality. The subject may be for the experts but, since it has to do with people's freedom, it goes far beyond a specialized field.

It is not my intention to be provocative just for the fun of it. However, just as the oldest and most well-established religions currently seem to give way to simpler, more diffuse and light spiritualities—and certainly far less aggressive ones—I wonder whether hard core jusnaturalism is giving way to inclusive legal positivism, which is also less aggressive, and certainly more refined and elegant than traditional jusnaturalism. However, it only barely manages to mask its nostalgia for the latter, and the longing to soften the sort of lack of protection in which methodological legal positivism as such leaves us. It should not be forgotten that philosophy is also a palliative, a support that compensates our unstable environment, a piece of armor with which, as Freud believed, we do not manage to protect ourselves entirely from the arrows of fate.

Whether there are more questions for the philosophy of law or not—and I think there are—it is worth our while to continue to dedicate time to it, just as scientists devote their time to science and artists to art. It is one of those activities, as Kolakowski says, through which humans can come to a sort of agreement with the world, although we know that such an agreement is impossible. In short, it is worth our while to continue making philosophy, and also philosophy of law, for the good reason that Isaiah Berlin gave: because philosophy assists men to operate in the open, and not wildly in the dark.\*

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