HiiL is an independent research and advisory institute devoted to promoting a deeper understanding and more transparent and effective implementation of justice and the rule of law, worldwide. It pursues this mission in several ways. First, it conducts both fundamental research and empirical evidence-based research. Second, it serves as a knowledge and networking hub for organisations and individuals in both the public and the private sector. And third, it facilitates experimentation and the development of innovative solutions for improving legal systems and resolving conflicts at any level. HiiL aims to achieve solutions that all participants in the process perceive as just. In line with its evidence-based approach, HiiL is non-judgemental with regard to the legal systems it studies.

HiiL works in a joint venture with Tisco at Tilburg University

**www.hiil.org**

# *Law Scenarios to 2030*

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# Content

# *Signposting the legal space of the future*

*This is the 2012 edition of the Law Scenarios to 2030, published as part of HiiL's core mission to innovate justice. The Law Scenarios to 2030 is based on the premise that prospective thinking is not only desirable, but also necessary in order to ensure that laws and legal systems do not become obsolete, ineffective or unjust.*

*The Law Scenarios to 2030 is one of the foresight instruments HiiL uses in its Justice Strategy Advice. It enables national and international lawmakers, ministries, courts, law firms, NGOs and other legal actors to improve and produce long-lived and robust legal strategies.*

## *For more information:*

***www.hiil.org/services/justice-strategy-advice***

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# *Why Law Scenarios to 2030?*

***To help us think, imagine, conceptualise and debate in order to make law more than just a reactive force, but instead a force that helps shape a better future.***

*The world has witnessed dramatic changes since the turn of the century. Who would have imagined the unprecedented global economic volatility of the past several years? Who would have dreamed of the revolutionary spirit now on display in many parts of the world? Who could have drawn the geopolitical map which seems to be emerging with a muddling Europe, a booming Brazil, and China as the world's new economic champion? Who dared to predict the dark sides of globalisation, like terrorism and international organised crime? These dramatic changes have not only influenced the global economy and social and cultural behaviours, they have also had a profound impact on the global legal environment. We have seen the rapid growth of the body of international law and international legal institutions, states affecting each other's laws and system design, and in recent years, the remarkable growth of new transnational regimes based on what is referred to as 'soft law'. Since both the world and the global legal environment are in a state of constant flux, it is easy to think it would be pointless to try to account for future eventualities now. Nevertheless, legal strategies and frameworks can be put together with more foresight than is generally the case. This is the purpose of the Law Scenarios to 2030.*

## *Perspective*

While relatively unknown as a working tool for lawyers and jurists, in the realm of strategy development, scenarios are widely used. Working with scenarios enables us both to allow for uncertainty and account for it. As such, it has great potential to provide a more solid foundation for legal strategies.

*The Law Scenarios to 2030 is not about predictions, rather it is a tool to help the national lawmaker embrace uncertainty and improve preparedness.*

The *Law Scenarios to 2030* takes the perspective of the fictional 'national lawmaker': the figurehead responsible for organising an effective legal system within a state. His task is to create legal strategies and systems that can stand the test of time. In reality, democratic nations do not have a single lawmaker. Ministries, parliaments, courts and, increasingly, private actors, are also part of lawmaking. But having a point of departure for the different future legal strategies is important and that is where the national lawmaker comes in as an analytical tool.

Departing from that perspective, the *Law Scenarios to 2030* describes the global legal environment. This is another construction that refers to the global environment that the national

lawmaker must deal with when he shapes and develops his legal system. To a certain extent, the development of the global legal environment is out of his control. However, he cannot pretend it is not there. And he can certainly devise good strategies to deal with it.

Taking the national lawmaker as the point of departure does not mean that the *Law Scenarios to 2030* is of no value to businesses and civil society. They too are faced with the question of which rules, liabilities and risks are out there. By using the position and perspective of the national lawmaker as a compass, they can also develop strategies for their specific challenges.

The *Law Scenarios to 2030* allows national lawmakers, general counsels of internationally operating corporations, strategists at international law firms, or leaders of civil society organisations to consider alternative legal futures.

These alternate scenarios may vary in probability and none of them are an actual prediction of the future. Rather, they are plausible accounts of possible futures that may not be intuitive or self-evident and that allow strategic thinkers to assess the possible implications for their respective legal strategies.

*For a more elaborate explanation of the method of scenario building and an overview of sources used please visit:*
***www.hiil.org/services/justice-strategy-advice***

### *Nine Global Trends*

Based on existing foresight studies in the fields of security, economics, technology and geopolitics, nine broad interconnected societal trends can be identified.

**Global trend: More people**

The world population is expected to increase from 6.8 billion (2009) to more than 9 billion in 2050. There will be increased migration flows, both within states and between states. In 2030, two-thirds of the world population will live in cities.

## Two broad legal trends

Our research indicates there are two broad legal trends that have the greatest impact on the global legal environment.

### *A growing patchwork of international law, institutions and transnational cooperation*

Globalisation is driving the increased interconnectedness of legal systems. More and more societal challenges require international cooperation. The increase of international trade goes hand in hand with the internationalisation of contract law, torts, business law, intellectual property law, and tax law. Because national laws are not harmonised, conflicts and gaps between national laws are increasingly evident.
These conflicts exert pressure on governments towards convergence and harmonisation.
The international movement of humans, capital technology, and crime drives national law towards more internationally formulated rules and enforcement mechanisms. Although one can describe this as a global trend, it is not happening in the same way, with the same depth, in the same areas across the world. And most importantly, it is not clear whether this trend will continue, slow down, or even reverse.

The internationalisation trend thus requires careful elaboration and nuance. Two important clarifications must be made.

First, legal globalisation does not mean that a coherent corpus of global law is evolving. Legal globalisation is a patchwork both with regard to the legal areas involved and to the extent of internationalisation. For example, most economic cooperation is located on the regional level.

The EU is probably the most far-reaching instance, but other environments, like the North American Free Trade Agreement (NAFTA), the Asia Pacific Economic Cooperation (APEC), the Economic Cooperation Organisation (ECO), and the Common Market for Eastern and Southern Africa (COMESA) also create economic cooperation and laws that support that. There are also examples of even smaller, sub-regional economic cooperation organisations, such as the East African Community (EAC), which falls under COMESA and which explicitly strives for a federal union and a common currency between its members.

There are also differing views of what should be regulated if one regulates economic cooperation. For example, within the context of APEC, soft law has been created on the protection of personal data within transnational corporations and on transparency standards (see www.apec.org). These legal environments for competition law are connected – some loosely, others more explicitly – with the global legal environment on competition law of the WTO. The patchwork pattern of the environment also extends to the legal areas involved.

The growing patchwork of international law and international legal institutions thus demonstrates a variety of shapes. Furthermore, the pace with which this development is unfolding also varies substantially. The pace of the internationalisation of competition law differs from that of criminal law. Whereas competition law is rapidly internationalising, criminal law is still predominantly national in nature. Decisions of regional courts, like the European Court of Human Rights, do sometimes accelerate the process (e.g. the Solduz case in Europe). Some legal areas have a long history of internationalisation, such as sea law, the regulation of air traffic, and humanitarian law. Other legal areas, like family law and civil procedure, lag behind. In short: the trend towards internationalisation of law is diverse.

Second, legal globalisation does not imply voluntarism or a consciously built structure. Instead, incidents, crises, and the continuous manifestation of new problems are the primary drivers of the process. National lawmakers all over the world are continuously confronted with political and legal problems that cannot be dealt with, without the cooperation of other national lawmakers or international bodies like the UN or the IMF. Migration, transnational criminal networks, terrorism, illicit trade, financial markets, and tax tourism by transnational corporations, all force governments to find solutions on a transnational level. The trend towards internationalisation can be best described as 'muddling through'. There is no executive director. Not all actors have access to these processes, which run through many small decisions made by national legal actors (either legislators or courts), regional and international organisations, legal professionals, and informal networks of policy makers and experts.

***Global trend:***
***More attention for the environment***

The environment will become even more of an important factor in all areas of life: economics, politics, and social interaction. Global warming has been recognised as an acute problem, with a noticeable rise in global temperatures and sea levels. Biodiversity is decreasing. Many environmental issues are prime examples of global problems, where interdependency is clear and solving matters in isolation is not an option.

## *The growth of private legal regimes for rule making, enforcement and dispute resolution*

Both national and international law have traditionally firmly rested on public authority. Even though norms are established and enforced differently in different legal systems, state institutions usually play a major role in these processes. Nevertheless, we increasingly see examples of rule making and enforcement by private actors, who sometimes operate largely or entirely outside of the public legal environment.

These private governance mechanisms appear in different shapes. A business sector, sometimes together with NGOs, can set standards, guidelines, or rules concerning governance or liabilities. These standards may concern the environment, health, work conditions, social security or other aspects of corporate social responsibility (CSR). The alcohol industry within the EU has set standards on advertising and sales to minors. The timber industry – with

the Forest Stewardship Council - set standards on sustainable logging and the sale of timber. Accounting standards and other industry-made standards or rules in the financial sector have become more prevalent since the recent global financial crisis. The now somewhat embattled Kimberly Certification process is an interesting example of a joint effort by governments, the business community and civil society to regulate the precious stones industry.

Standards also create interesting forms of enforcement. Transparency International measures corruption perceptions in 183 countries (2011) and the likelihood that large companies in 19 specific sectors use bribes. This information is published on their website. In this case existing standards (here, on corruption) are measured and monitored by an NGO. Sometimes an industry creates a standard contract or agreement. The Model Mine Development Agreement, developed in consultation with mining companies, governments, and civil society within the context of the International Bar Association, is a prime example. An example of a different kind is seen in the leading position taken by Microsoft which, in the course of civil procedures taking place as part of fighting Internet crime, has performed raids – accompanied by United States marshals – on alleged criminals in a scheme to infect computers and steal personal data.

Another facet of this trend is the growing use of alternative dispute resolution mechanisms instead of court systems. The eBay/PayPal resolution centre solves around 60 million disagreements between buyers and sellers every year (in 16 different languages!). An example of a more mixed approach is the OECD Guidelines for Multinational Enterprises. This 'code of responsible business conduct' was adopted by the OECD member states, but was drafted with wide participation of businesses and civil society. In the EU, a Common Frame of Reference for European Private Law was drafted and freely made available on the web. This was not a government initiative; instead it sprang forth from European legal scholars. It has now become a point of reference for legislators and courts in the EU. A final example is privacy, where companies like Google, Apple, Vodafone, and Facebook hold vast amounts of user-data that can be misused. Public regulators have only a limited ability to regulate here, so there is often little choice but to encourage and stimulate self-regulation among these private actors.

This broad trend also requires some elaboration to prevent misunderstanding. First, the rise of private regimes does not mean that these are isolated from legal regimes created by public authorities. Sometimes the creation of transnational law starts as a private initiative and is later adopted by public authorities. Sometimes a legal obligation is created by public authorities that requires (trans)national corporations to develop private regimes. For example, child labour law or an anti-corruption law may force corporations to verify whether their supply chains are free from child labour or corruption. In order to fulfil its obligations, the corporation or an industry then builds its own private regime that regulates its supply chain. Secondly, here too, we see wide diversity. The trend could relate to rules, standards, or guidelines. The term 'soft law' is used loosely and it is important to understand what actually happens; in their actual effect,

guidelines can sometimes be 'hard' as law. Private rule making may or may not include enforcement. The practice varies significantly per industrial sector, per topic, per state and per region. But there is no doubt about the broader trend: the global legal environment contains an increased amount of rules and procedures that do not fall within the classic parameters of public law. Will this trend continue?

## *Present trends, future uncertainties*

History has never been a linear process and there is no reason to believe this will change. Events such as the rise of global terrorism, marked by 9/11, the financial crisis of 2008 and the Arab Spring of 2011 have caused historic shifts in many areas. The 1990's are, in retrospect, seen as the heyday of globalisation, but since the start of the new millennium the darker side of that period has become more evident. And who could have predicted the changes the Arab Spring would bring about?

The point is that even when something is recognised as a strong trend, there is no guarantee that this trend will continue. Nor is it clear what its true impact will be. There is a tendency to extrapolate from what has already occurred and thus see the future as a projection of the past. But this does blind us from considering other plausible options of how future might unfold.

To avoid falling into this trap, we use scenarios to force us to explore what may happen if things develop in a different way than we expect. Scenarios are built by distinguishing what could happen with respect to key uncertainties. Such key uncertainties should represent the factors that are most important for determining the future of the particular object of exploration.

Regarding the *Law Scenarios to 2030*, our research led us to conclude that the dilemmas underlying the two broad trends that have been described are those that bear the most impact on the shape of the global legal environment. The global legal environment's future architecture and dynamics will, first and foremost, be determined by the extent to which laws

and legal systems are internationalised and privatised. But whether these trends will continue in the same direction is uncertain. This justifies our choice of these factors to function as the axes in a matrix which provides the basis for building alternative scenarios. While it may seem odd to first point to something as a clear and important trend and then to describe the same thing as a key uncertainty, this is in fact not surprising at all. This is exactly what scenarios are all about. Once you have identified what factors are most important to determine the future of your object of enquiry, the fact that in respect of the same factors you think you can also see a clear trend, should not lead you to dismiss the underlying uncertainty.

## Two uncertainties

*The fact that we cannot predict the future should not prevent us from systematically exploring it. Instead of dissolving future uncertainties, we can embrace them. Instead of assuming one future, we can explore different futures and assess their implications for our legal strategies of today.*

Will we witness continued internationalisation of rules and institutions or will this trend stagnate or even reverse? Will private governance mechanisms and private legal regimes further expand and become predominant, or will state-connected institutions and legal regimes retain their position?

Taken together, these contingencies allow four scenarios, in short catchwords:

*International – Public (Global Constitution)*
*International – Private (Legal Internet)*
*National – Public (Legal Borders)*
*National – Private (Legal Tribes)*

Regarding the names we have given each of the scenarios, rather than take them for their literal meaning, one ought to bear in mind that they use metaphors meant to convey the central feature of each respective scenarios. Thus, *Global Constitution* does not imply there will actually be a single world constitution, rather that in this scenario the global legal environment; in *Legal Internet*, the name does not mean that this scenarios is about the Internet, rather it implies that that the global legal environment in this world is characterised as a decentralised transnational network involving a big range of actors. Similarly, *Legal Tribes* does not denote a world that is composed of tribes, rather it hints to a reality whereby the global legal environment is composed of many relatively small 'communities', with relatively little contact and coordination and a weaker role for the state.

Scenarios are simplifications – they serve as analytical tools not as precise descriptions of reality – and they are 'what ifs', not predictions. The *Law Scenarios to 2030* present wind tunnels of four different global legal environments – worked out in the extreme – in which the national lawmaker can test how his legal system holds together and with the help of which he can develop strategies to address undesirable effects or strengthen desired ones.

## Law Scenarios to 2030

The scenarios picture possible global legal environments that have emerged in 2030. Each scenario invites us to imagine the global legal environment in 2030, assuming that the key uncertainties unfold in a specific direction. In each scenarios four questions are answered:

## What is the main ordering? Who makes the rules? How are those rules enforced? How are conflicts resolved?

### Global Constitution

If the expansion of international rules and institutions continues, and most of the heavy lifting is done by states and public actors, we may expect that the global legal environment will slowly develop as the European Union has been developing: into a robust legal order of its own that is highly integrated with national legal systems.

### Legal Internet

International rules and institutions can also further expand as part of a process of shifting emphasis from law created and enforced by state-connected institutions to private governance mechanisms and private legal regimes. If they do, the global legal environment will be characterised by a growing body of international rules and institutions with an increasingly public-private or even private nature.

***Continued internationalisation of law***

***Predominantly public legal regime*** ***Mix or private legal regime***

***Reversed internationalisation of law***

### Legal Borders

If the process of expansion of international rules and institutions reverses, we may instead see a thickening of legal borders, which may then be dominated by law created by national and public authorities. This global legal environment would be more fragmented; the international legal level would be less important and would include, at most, the regional level.

### Legal Tribes

There is a theoretical possibility that the process of internationalisation will reverse as private legal and governance regimes grow. The global legal environment will then become dispersed, highly chaotic, and have diminishing importance. Its integration will be regional at most and not particularly law-based. The power of states will diminish and communities will have to depend on local, private legal and governance regimes.


# 2010

## Interviews

**Joris Demmink**, Secretary-General
Dutch Ministry of Justice

**Willem Konijnenbelt** and **Kamiel Mortelmans**,
Dutch Council of State

## Young talent essay competition

Young scholars' essays on
how the law will look in 2030

# 2011

## Interviews

**Louise Arbour**, President and CEO of the International Crisis Group

**Geert Corstens**, President of the Supreme Court of the Netherlands (Hoge Raad)

**Francis Fukuyama,** Center on Democracy, Development, and the Rule of Law, Stanford University

**Fink Haysom**, Director of Political Affairs and

**Linda Taylor,** Director of Legal Affairs,

United Nations, Office of the Secretary General

**Parag Khanna**, Director of the Global Governance Initiative, New America Foundation

**Edward Kleemans**, VU University Amsterdam, Faculty of Law

**Jonathan Koppell**, Director of the School of Public Affairs, Arizona State University

**Erik Lagendijk**, Executive VP & General Counsel and **Alexander van Liefland**, Head of Legal, AEGON N.V.

**Saskia de Lang**, Special Representative for Energy, Dutch Ministry of Foreign Affairs

**Aryeh Neier**, President of the Open Society Foundations

**Peter Rees**, Legal Director of Royal Dutch Shell plc

**Peter Wakkie,** Former member of the Board of Ahold, Co-founder Spinath & Wakkie

## Scenario feedback workshops

AEGON N.V.

Directors of legislative departments of Dutch ministries

Dutch law firms

Dutch Ministry of Security and Justice, Strategy Department, with students of the MARBLE project led by Jan M. Smits

European Data Protection Supervisor

# Timeline

Foresight Unit, Institute for Prospective Technological Studies, European Commission's Joint Research Centre

Netherlands Institute of International Relations Clingendael

New York University, School of Law

Organisation for Economic Co-operation and Development

Pels Rijcken & Droogleever Fortuijn

Permanent Mission of Canada to the UN

Permanent Mission of the Kingdom of the Netherlands to the UN

South African Human Rights Commission

University of Chicago Beijing Center, Sciences Po and La Trobe University

## *Publication Think Pieces*

The Law of the Future and the Future of Law, edited volume, volume 1

## *Law of the Future Conference 2011*

200 experts from government, business, civil society and academia met to explore and exchange views on the *Law Scenarios to 2030*, Peace Palace, The Hague

## *Law of the Future Exploration*

Dutch Ministry of Foreign Affairs

## *Presentation*

The Law of the Future and the Public Interest
IBA Annual Conference, Dubai

# 2012

## *Scenario feedback workshop*

Netherlands School of Public Administration (NSOB)

## *Justice Strategy Exploration*

Tunisian Ministry of Justice

## *Presentation*

Biennial conference of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law: 'Interconnection'
Santiago, Chile

## *Law of the Future Exploration*

Academic and Professional Development Committee & Young Lawyers' Committee,
IBA Annual Conference

The Rule of Law Action Group, IBA Annual Conference

## *HiiL Trend Reports*

Towards Basic Justice Care for Everyone: Challenges and Promising Approaches

Multi-level Rulemaking: Does it work? And how to cope with it?

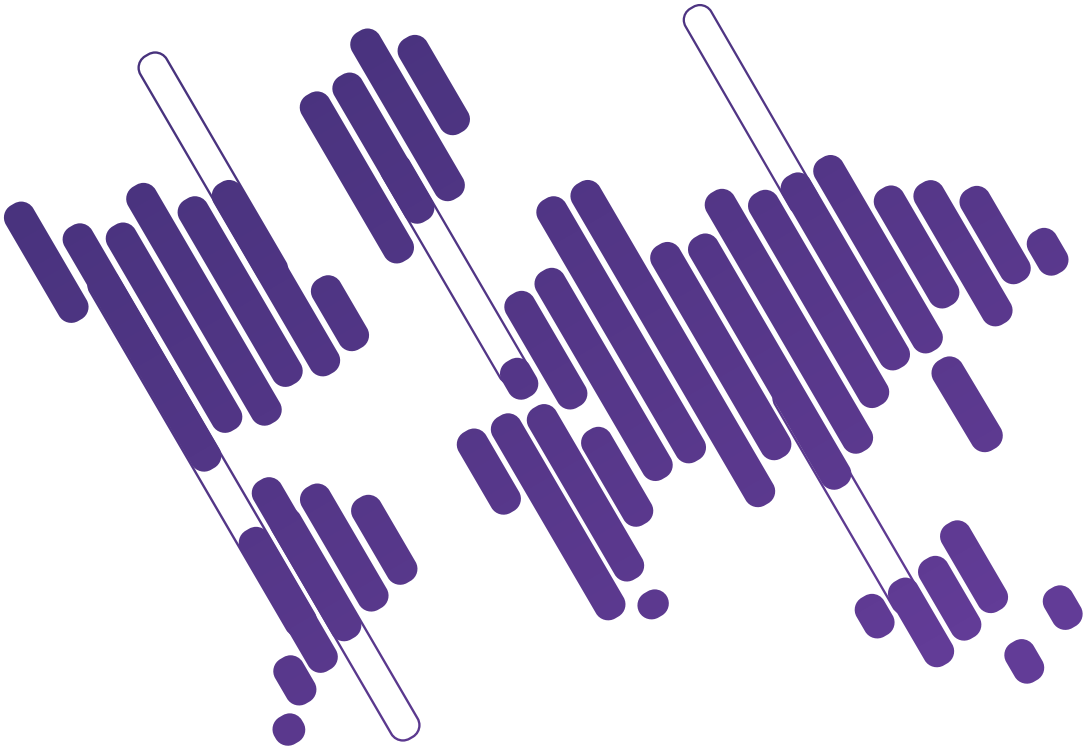
## *Law of the Future Conference 2012*

Multi-level Rulemaking: Does it work? And how to cope with it?

## *Publications Think Pieces*

The Law of the Future and the Future of Law, edited volume, volume 2

Legal and Justice Strategies, edited volume



# Global Constitution


UNITED NATIONS
GLOBAL RESPONSE
HARMONISATION
HIERARCHY
SHARED VALUES
GLOBAL INSTITUTIONS

# Global Constitution

## Basic characteristics:

Continued growth of international law and international legal institutions.

Rules and institutions have a predominantly public nature.

## What does it look like?

### What is the main ordering?

In 2030, a global constitutional order has gradually emerged, slowly but surely covering all major legal areas on a global scale – trade, environment, security, crime, finance, markets and competition, intellectual property, labour, taxation, sports, and health – leaving only a few areas untouched by international rules and procedures. Global law has not been driven by a specific set of values or leading legal systems. Instead, the process of blending has to a large extent been eclectic.

Global competition law and contract law are primarily driven by economic market ideals and 'liberal principles', but global criminal law has become more punitive and strict than what is currently the case in European countries. Consumers are protected by a global system of consumer law that builds on the old European consumer law. It is enforced – mainly via the internet – by a global regulatory agency with offices all over the world. Family law is still fragmented and connected with local, religious, and sometimes national traditions. Systems of mutual recognition enable coordination between these family law systems but child protection and adoption have become global law. The corpus of global law also encompasses basic standards for work conditions, but regulations with regard to labour contracts remain local. Tort law is largely regulated through a global civil code that was adopted in 2028, which provides general parameters from which regional and national systems may not deviate.

In 2030, there are 30 fewer states than in 2012. A number of the 193 UN member states of 2012 have reorganised into different variations of federations, such as the East African Community, composed of six states.

There is a distinctive move towards more prescriptive rules. It is no longer the case that one can do anything that is not regulated; instead an actor must check whether what it wants to do fits the prescribed legal parameters. Constitutional and (global) administrative law have become hugely important fields. There are constant questions on areas of competence and jurisdiction.

Public law has gradually converged towards the rule of law as defined by the UN. This overarching constitutional framework largely defines state governance. The principle of legality – all governments are bound by law – is the broadly accepted principle that underlies the global legal environment. Public law has surpassed

national and regional value conflicts. And the notion of 'law' is public; it derives from a public body (some more democratic than others), be it national, regional or international. The global fundamental rights catalogue allows a broad margin of appreciation, but a global system of human rights adjudication, comprised of a web of international, regional and national courts and other conflict resolution bodies, is gradually filling in the margins with their decisions.

At the top of the global governance pinnacle, two bodies have emerged. In the area of peace and security: the New York based 20-member UN Security Council, with regional Security Councils to support it in Amman, Ethiopia, Johannesburg, Sao Paolo, Yekaterinburg, Jakarta, and Berlin. In the economic area (broadly defined), the 20-member Economic Council, based in Singapore, which emerged from the G-20 in 2017. This council also has regional bodies. The two bodies meet once a year in the Grand Council and have numerous avenues for the exchange of information and coordination.

The global constitutional order is not based on one document or charter, but rather on a series of charters and constitution-like documents, in which international regulators, adjudicators, and courts are defined and connected with each other. It is built upon not only the classical international organisations (the United Nations and its agencies, the World Trade Organisation, the International Monetary Fund), but also upon the institutions that gradually evolved during the 1990s and 2000s, for example, the G-20, the Financial Stability Board, the Basel Committee and the International Network for Environmental Compliance and Enforcement.

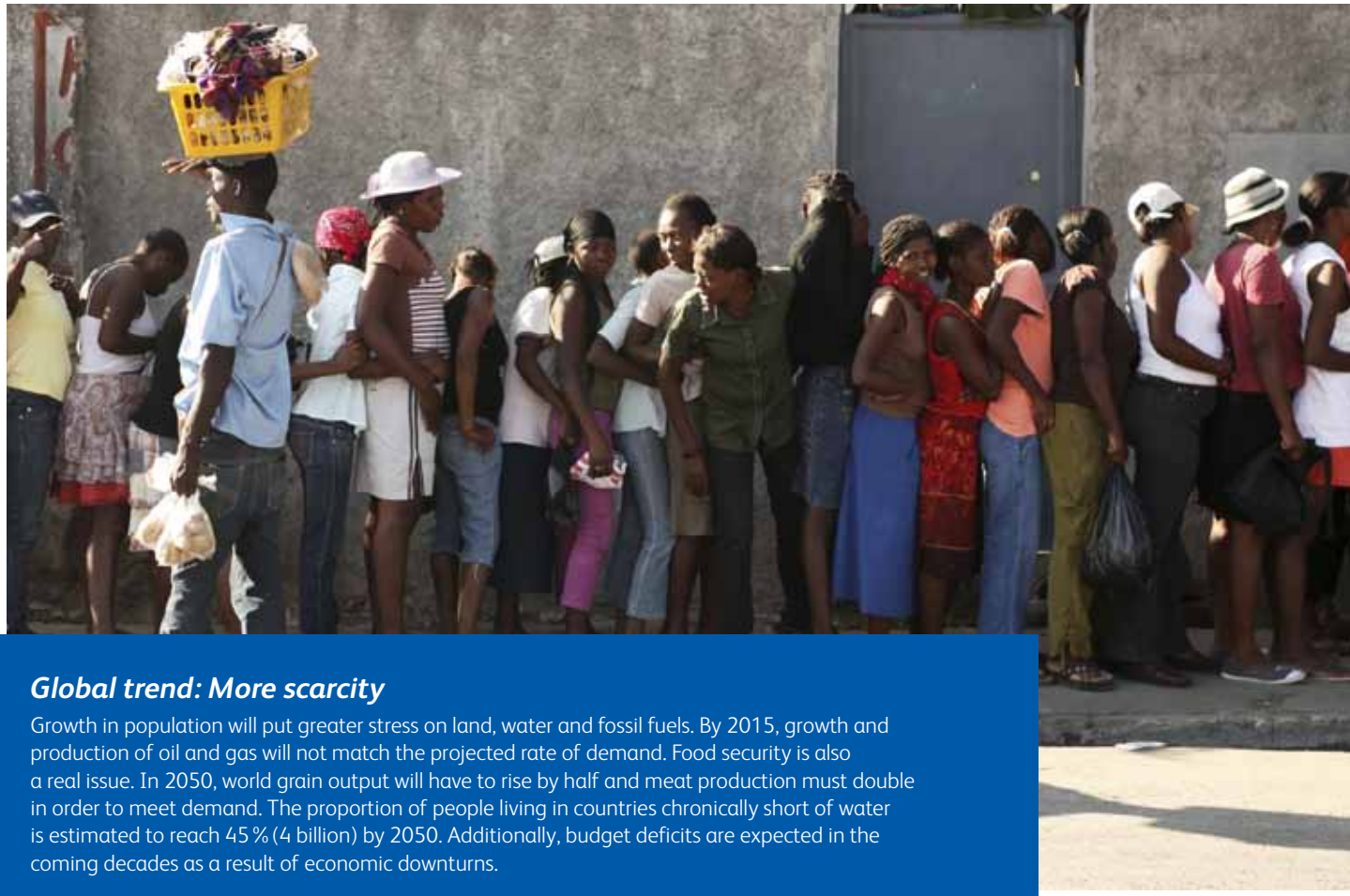
## Who makes the rules?

Rules are created by a variety of institutions: international, regional, sub-regional, and national. This multi-layered system is complex, and at times Byzantine. But one thing is clear: the basis for governance and rules is public. The notion of the state and its sovereignty remains important. But sovereignty has become a multi-layered, dispersed concept.

Rule making is also organised in sectors: the IMF and central banks create rules for banking, competition regulators and financial authorities decide on market regulation, and environmental regulators build pollution standards and regulate global trade on carbon dioxide, and nitrogen. National, regional, and international assemblies convene to ensure acceptable degrees of coherence between the sectors and the various levels. Regional organisations also function as federalist checks against the concentration of power at the global level. The regional or sub-regional organisations are augmented by sector-wide legal orders (for example, on intellectual property) and are linked to regionally defined interests with, for instance, the Asian Patent Organisation, which promotes Asian interests in the World Patent Organisation.

**"Lesson from what is happening in the European Union provides a good basis of learning to enrich the ongoing process of the monetary union negotiations."**

*Musa Sirma,*
*East African Community Minister during the first Norwegian-Africa Business Summit,*
*19 September 2011*



### Global trend: More scarcity

Growth in population will put greater stress on land, water and fossil fuels. By 2015, growth and production of oil and gas will not match the projected rate of demand. Food security is also a real issue. In 2050, world grain output will have to rise by half and meat production must double in order to meet demand. The proportion of people living in countries chronically short of water is estimated to reach 45 % (4 billion) by 2050. Additionally, budget deficits are expected in the coming decades as a result of economic downturns.

A number of significant governance innovations are needed for all this, and also to ensure sufficient legitimacy for rules above the national level. The key words have been 'buy-in' and 'coherency'.

The so-called Hague Model, first developed by the Hague Conference on Private International Law in the area of family law, is one such governance innovation. National focal points, who build practices of international cooperation, are appointed on particular issues, which are later codified at the regional and international levels. It is not a quick process, but it is very effective, and it has been used in many areas by civil servants and judges.

Another innovation – used by the now 90 democratic and developed states of the OECD – are the Inter-Parliamentary Assemblies (IPAs), which select issues that need regulation going beyond the national level and which then

determine at what level legislative processes will be needed and how to ensure systemic coherency. These recommendations are practically binding for the executive. Through the UN (see below), the IPAs periodically coordinate with states that do not participate in IPAs.

International and regional organisations have become the specialists of Mutual Assessment Processes (MAPs). This instrument, developed during the 2008 – 2015 financial crisis by the International Monetary Fund, assesses cross-border effects of national legislation and provides advice on how different national or regional legislative initiatives can reinforce each other. The IPAs regularly request such assessments.

There has also been a proliferation of constitutional courts (more about them later) and they too, have developed an important governance innovation – pioneered by the Venice Commission of the Council of Europe in the first decade of this century, in the form of a bi-annual gathering of the presidents of these courts, supported by a web-based information exchange system. These exchanges – which never concern specific cases – have created sensitivity for the different legal cultures and practices that is beneficial for the precedents these courts create.

The Sixth (legal) Committee of the UN General Assembly has also been innovatively re-designed. It has become the body in which national and regional executives discuss the need for global legislative initiatives. The Sixth Committee has consultative status at the IPAs and vice-versa.

The UN has evolved as the backbone of the global legal order, even though regulations are rarely developed by the UN. The UN primarily acts if inter-systemic coordination is necessary between rules created by specialist regulators and, as mentioned above, if coordination between IPA countries and non-IPA countries is needed. To cope with this increased coordinated activity, the size of the states' missions to the UN has grown exponentially. The EU's Mission to the UN offers jobs to more people than ever before.

A variety of regulatory models are being applied. In some areas the global legal environment determines the broad parameters of what must be regulated, leaving the exact means and methods, including enforcement, to regional

**"The currents of change are transforming our human and physical geography. […] They are driving not just incremental but exponential change. They are deeply connected and increasingly complex. To ensure that our generation and future generations benefit from the opportunities presented by this changing reality and are able to mitigate increased risks, the global community will need to work together in unprecedented way."**

*Ban Ki-moon,*
*"The Secretary-General's Five-Year's Action Agenda", 25 January 2012*

or national authorities. In other areas there are stricter controls with more precise instructions as to what must be regulated, and in some cases specifying the things that must be enforced at the global level. Decision making on these issues is legally operationalised through the concepts of 'subsidiarity' and 'complementarity', coming from the EU and the International Criminal Court (ICC).

The rules and institutions that make up this global legal environment are quite stable but, at the same time, they are also difficult to create, establish and change once formalised. Adapting to unforeseen circumstances is not always easy and, at times, is quite slow and inefficient.

## How are rules enforced?

Enforcement of rules is public in nature, or a clear derivative thereof. As said, in some areas regulations prescribe not only what must be regulated but also at what level it must be enforced. A common feature in the global legal environment is the assemblies of national or regional regulators with enforcement powers. In the yearly Competition Assembly, the competition regulators of the EU, North America, South America, Africa, and Asia meet. Through clever information exchange systems they are able to detect misuse of market position by transnational corporations and, based on their common jurisdictional rules, take the necessary action. There are similar bodies, for example, in the areas of finance, consumer protection, and the carbon trade.

Another model is a clearly defined international enforcer, which, in most cases, has regional divisions. This model is applied in some areas of criminal law: mass atrocity crime, drugs trade, fraud, inappropriate financial dealings, crimes against the environment, and human trafficking. International investigation teams prepare prosecutions that are then brought before international, regional, or national courts. Here too, the complementarity principle applies: international courts only handle cases that cannot be brought before regional or national courts. The ICC may have taken 10 years to finally conclude its first case (Lubanga in 2012), but subsequent trials were concluded much more efficiently. The ICC's 'positive complementarity' approach proved successful in enhancing national capacity thus leading to limited ICC involvement. The significant improvement and mutual understanding in the division of work between the ICC and states in turn has led to far better cooperation from states regarding enforcement.

Most national and regional investigators, prosecutors and regulators have established effective mechanisms through which civil society organisations and other interested parties can report abuses or violation of rules. This means that these bodies are well connected with the communities they serve.

Technological developments have made it possible for enforcement bodies to share information more easily. Criminal records, tax filings, debtor records, and in some instances, even things like employment records can be shared when needed. A system of powerful ombudspersons, first pioneered by the UN in the context of the sanctions regimes of the Security Council, keeps an eye on misuse of information and privacy issues. There is also a general recognition that in some instances privacy must be sacrificed if the rules are to be effectively enforced.

Smart sanctions have become even smarter, also in light of technological developments. On the basis of a binding resolution by the UN or a regional Security Council, individual leaders and violent political movements can be deprived of funding and freedom of movement. In addition, the support that such people or movements have can be undermined through clever communication and outreach techniques.

## How are conflicts resolved?

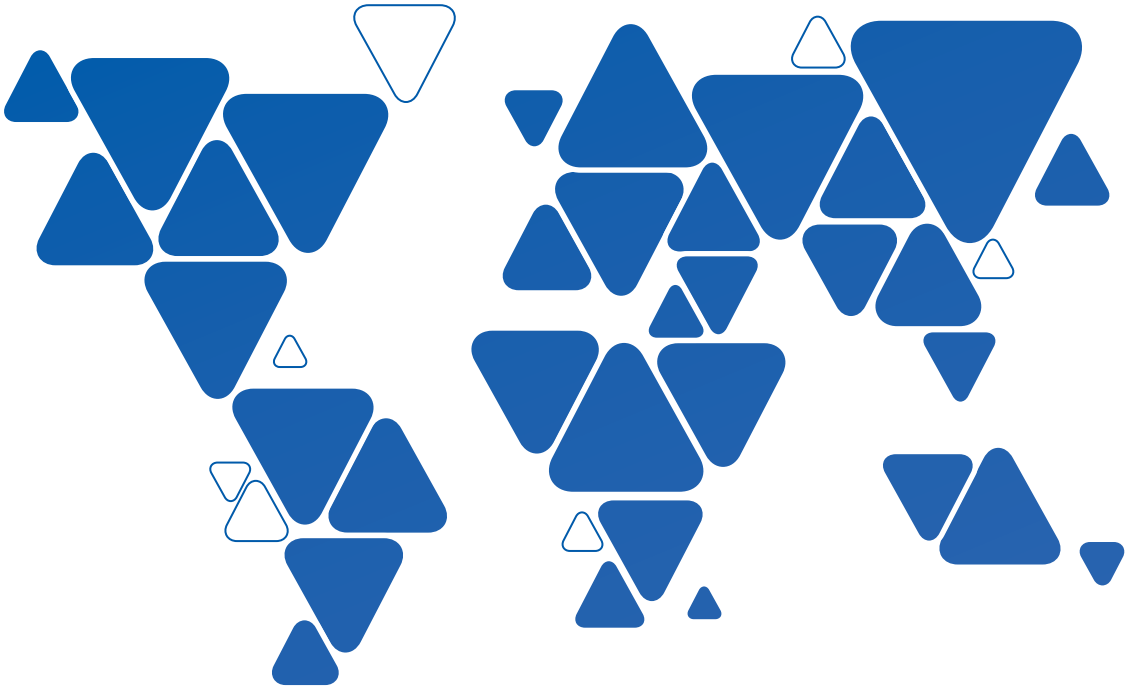
The question of hierarchy has become the first question to ask in any legal problem: which level of the multi-layered system has jurisdiction to resolve the matter? Special jurisdictional courts have been created to deal with these types of questions. These courts are building a new common law with intricate rules and procedures on fair trials. In 2030, the World Conference of Constitutional Courts has its 10th meeting. International courts, such as the International Court of Justice and the International Criminal Court have in a few ground-breaking decisions also spoken out on issues of hierarchy and constitutional order.

Disputes between states or conflicts concerning global peace, security or the economy can be brought before the Security Council or Economic Council, through the relevant regional bodies. The global level is only appropriate if the situation is of 'global seriousness', a quasi-legal notion that has been extensively developed.

## What happened?

Several events in the years between 2011 and 2030 triggered this scenario. First, many challenges became apparent which revealed the global interdependencies. The financial crisis of 2008 is a prime example. Under the direction of the G-20, which slowly transformed into an effective economic and social global governing board, an impressive body of international regulation, aimed at building a more stable economic system was put in place.

This body not only coordinated regulation in the financial/economic area, but it was also able to build a more holistic definition of the notion of 'economy', which now includes the environment, social cohesion, and sustainability. In 2014, the drug wars in Central America and Western Africa intensified and spread. This caused intolerable violence, social deprivation, problems for international shipping and aviation, and a spill-over to more stable and well organised parts of the world. The Organization of American States (OAS) and the African Union (AU) with Economic Community Of West African States (ECOWAS) pushed the issue on the global agenda and a global approach was developed in 2017.
Five years later, by 2022, the situation had markedly increased. The scarcity of water and food was also important driver of change.
It required global policies on water redistribution and agriculture. Here too, the G-20 proved very effective; food security was placed on the agenda in 2011; water security followed in 2014.
The Food and Agriculture Organisation was given a new life; it became a food security watchdog with direct lines to both the UN and regional Security Councils (in cases which involved war), and the Economic Council and its regional bodies.



# Legal Borders


REGIONALISM
NATIONAL
LOCAL
PRIORITIES
LAW
FRICTION
INTERNATIONAL
POWER
PLURALISM
POLITICS
PROTECTOR
STATE

# Legal Borders

## Basic characteristics:

Process of the expansion of international rules and institutions reverses and legal borders thicken. Domination of state-made law borders.
Regional organisations emerge as a key part of developing legal borders.

## What does it look like?

### What is the main ordering?

Legislation at the national level is the primary source of rule making, supplemented by an increase in regional legislation. Regional and sub-regional organisations are now the ultimate defence against what are widely perceived to be out-of-control international institutions and an international environment in which common values are scarce. The international level is for politics, not law.

New global powers such as China, India, Indonesia, Brazil, Mexico, South Korea, South Africa, Nigeria, Egypt, Morocco, and the Gulf States have fundamentally changed the nature of the debate in the global environment; there is a lot less talk about 'universality' than there once was. In fact, most would agree that this does not exist.

With regional legal pluralism, the rule of law has been also regionally pluralised. The few comparative lawyers that exist in academia continuously emphasize the many different interpretations of the rule of law. There is little or no agreement at the global level on overarching fundamentals, nor is much attention paid to this topic. One consequence of this is a movement towards context-specific regional and national interpretations of concepts such as fundamental human rights, separation of church and state, balance of powers, and the principle of legality. Non-democratic states are a force to reckon with: the pressure that existed on them to become more democratic has slowly abated to an almost non-existent level in 2030.

Existing international instruments have slowly eroded and lost significance. In some instances states have withdrawn ratifications, in others they are being minimally interpreted at best, and otherwise completely ignored. International courts – insofar as they are given adequate funding – face strong pressure to reduce their footprint and the scope of their decisions. There has been a slow decline in the quality of these courts; states are not willing to put forward serious candidates for top-jobs. Regional courts – when present – have developed case law to keep international rules out in the interest of the region they belong to. New legal notions to determine whether something should be regionalised or not have been developed, requiring compatibility

with 'inalienable national values' and 'core national legal principles'. They provide a key reference point for all constitutional lawyers, judges, and national lawmakers. Based on these notions a new balance has been struck between international rules and domestic systems. Besides simply not ratifying an international instrument, they offer other ways – less radical – to steer the application of international rules on the national level.

The European Union is now 'fortress Europe' and has split into a loose federation of a Northern European Union (NEU) of 15 Northern European states, and a Mediterranean Union of 17 Southern states. The first is a monetary union, the second is not. While the EU used to negotiate with nation-states outside Europe, it now has its regional counterparts in every part of the world (South and Latin America, the Caribbean, Africa and its sub-regions, Asia and its sub-regions, and the Arab world). Along a similar vein, the African Union has also split, but into three regions: one around South Africa, another around Nigeria, and third around Egypt. Some regional blocks – like the NEU – have a strong legal culture; others do not and are dominated by politics. This often makes legal interaction between the regions difficult.

The informal, flexible approach pioneered by the G-20 during the Great Crisis of 2008 – 2015 has become the norm and the United Nations has adapted to it. At the UN's 80th anniversary Heads of State meeting the organisation was renamed the United Regions, which, supported by a small secretariat, is the main body on all global issues of peace and security. The human rights agenda that the UN once had no longer exists; human rights are now principally national and, in some cases, regional. The development aid agenda suffered the same fate: each region has its own development agenda. On global economic issues, the G-20 still runs the show. It is now linked to the R-5, a loose overarching framework built around the five regional groups that developed within the old UN. The R-5 meets at the highest governmental level each year, with the G-20, which meets more often. Because taxes are levied at the national level, the G-20 calls the real shots.

In 2030, there are 120 states. A number of the 193 states that existed in 2012 have come together in strong federations or unitary states. The key goal is to maintain national and cultural values and to have a stronger position in the larger international environment.

In short, protectionism, 'taking care of your own', and with that, legal and real-life borders are part of life. And, generally, that is not viewed as a bad thing. The global legal environment – where present – is fragmented.

## Who makes the rules?

Rules – generally defined as 'law' – are made mostly at the national level. And rules are seen as important. In established democracies, budgets of parliaments have gone up: most states have enlarged their parliaments and have given parliamentarians additional resources so they can keep international bodies in check. The general public mood about the period between 1960 and 2020 is that it was a time when national executives at both the civil servant and political levels ran wild signing up to international agreements. Most people believe this should never be allowed to happen again.

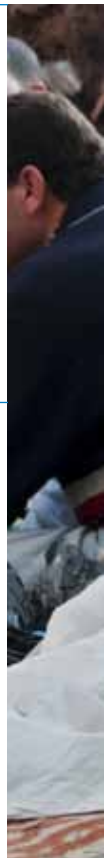
As mentioned above, at the international level, rules in the sense of 'law' are no longer very relevant. Here international governance means non-binding memoranda of understanding, at best; but rarely, if ever, treaties. The previous decade, starting in 2020, has seen a gradual and deliberate process of de-treatying; international negotiations replacing international regimes with political arrangements, if needed, or even terminating them. These processes sometimes worked out peacefully, but some of this legal disentanglement has ended with violence. In many parts of the world the new legal borders reflect real political, cultural, and social borders.

Areas like markets, banking, intellectual property, consumer rights, the environment, taxation, and illicit trade are regulated nationally, and only when essential, on a regional level. For this, special legal notions, like the aforementioned notion of 'inalienable national values' have been developed. Only matters that cannot be handled at the national level are taken up regionally. And parliaments have an important say here. In the Northern European Union, the Regional Committees of national parliaments are amongst the most powerful. They filter out what has to be regulated beyond the national level and determine the way in which this regulation must take place. After this, the NEU Regional Committee Assembly, which meets annually, examines all the proposals from the national Regional Committees and sets the legislative agenda for the next year.

Industrial sectors that wish to have something regulated or civil society organisations that aim to tackle so-called 'global issues' such as the environment and human rights, need to work bottom-up through these national and regional structures to achieve result.

**"Law does not have its full effect unless there is enforcement. That is what the state does better than any other entity."**

*Francis Fukuyama, Center on Democracy, Development, and the Rule of Law, Stanford University. Law of the Future Interview, 10 May 2011*



In most states the room for judges to resort to international rules and create precedents has been greatly reduced, if not removed altogether. It is seen as undemocratic and there is a great trauma of the early years of the millennium, when, for many, judges had too much power. At the international level this is not seen as problematic because international law – as it is construed in 2030 – is not seen as creating enforceable obligations for individual legal subjects. Accordingly, there is no need for international judges to apply the law to individual cases. This does not mean that there is no international adjudication; in private law disputes between two people or companies, voluntary submission to international arbitration occurs regularly. But the decisions are not public, so there is little or no precedent setting.

International business, which is much more open to international rules, continuously pushes towards internationalisation, but because of political reasons the law does not follow this path. The space for a business to regulate itself is limited. Through taxation rules, customs regimes,

### *Global trend: More technology*

Technology will play an increasingly important role over the next 20 years, providing solutions, while also creating new problems and challenges. We will be able to strike at disease at the molecular level and beyond, but we can also affect life itself. Social media, driven by technology, is expected to continue its penetration and to affect the way humans interact in even greater ways than we have seen before. There will be great opportunities for those who can go online and can work with technology. But what about those who cannot?

permits and other mechanisms business has been forced into a national or regional box. The public generally believes that all wealth that is generated must go back to the state or the region. Yet many successful corporations have made their fortunes through legal tourism, taking advantage of the legal differences between states and regions. They are supported by international law firms, which have made huge investments in comparative legal knowledge and have specialised in legal tourism. Sometimes this race to the bottom yields dramatic results. In the environmental realm, it has led to poor states and regions that have become garbage dumps for strong transnational corporations using the legal regime. These transnational corporations and law firms have also discovered the best places to bypass unfavourable consumer law, tax law, and tort law.

In the first two decades of the millennium, experimentation towards more direct democracy with new rule making through social media is widely seen as a failure. It brought chaos and never really lived up to its promise. Instead, social media and revolutions in social science,

psychology and neurology research have made it possible to determine, with much more precision, how a rule can achieve the desired result and whether, once it has been adopted, it is doing so. A rule has become an ongoing social science project: most states have special bureaucracies for this.

## How are rules enforced?

Enforcement is principally a national affair. There are national regulators with enforcement powers in most areas of society: the traditional areas like crime, taxation, competition, and areas like the environment, and financial transactions.

The heyday of international courts, prosecutors, investigators, and regulators is now distant history. There is regional coordination of national enforcement bodies in some areas where that is considered essential, for example serious fraud and transnational violent crime. But there are no enforcement mechanisms above the national level. The maximum model at the international level resembles that of INTERPOL: a small secretariat, or sometimes only a confidential website – through which national authorities can ask each other questions and coordinate. Since there is little or no 'law' at the international level there is only limited coordinated action. And national parliaments keep a keen eye on such coordination; they will not allow it to develop too far beyond their reach. Where international enforcement action is needed, it takes place via political action: sanctions, or, in extreme cases, the threat or use of military force - this is not perceived as a bad thing.

Private regimes sometimes operate as enforcement mechanisms, but the general feeling is that they failed to deliver what they had promised in the first two decades of the millennium. They lacked stability and failed to level the playing field; they were subjected to too much arbitrariness, and, generally were not 'hard' enough to draw clear lines.

## How are conflicts resolved?

Legal disputes between states are resolved through negotiations and mediation. The EU, the Southern American Alliance, and the Northern American Community, whose regional orders have a strong legal foundation, have regional courts for disputes between states and have a standing agreement to use the Permanent Court of Arbitration in The Hague for legal disputes between the regions. Other regions use political mechanisms. Even where there are courts for international disputes, they are rarely used. Arbitration panels and courts for transnational trade and commercial disputes are also seldom used. Other than this, negotiation and mediation are the only options. At the national level, courts are the principal adjudicators, but they have been able to extend their reach, creating more room for more self-help through information technology.

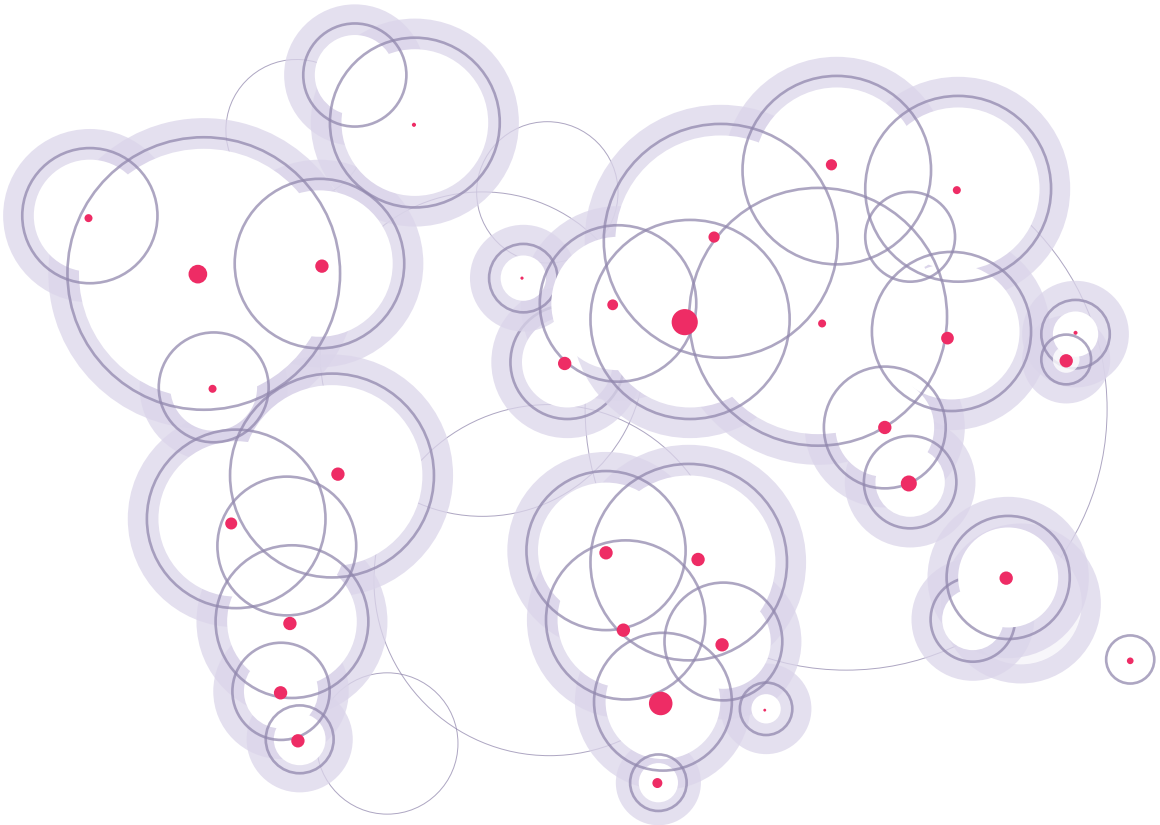
## What happened?

Several trends and events triggered this scenario. It really started with the 9/11 attacks. Initially led by the US, but soon followed by others, a common response was to toughen immigration restrictions, make more extensive use of criminal and administrative law to curb freedoms, and introduce restrictions on the movement of goods and capital. The financial crisis that started in

2008 also contributed significantly. It proved very difficult to resolve it internationally. The G-20 and its network seemed successful at first, but when after 2013 worldwide unemployment (especially for those under 30 years old) was still very high – up to 45% – states slowly abandoned the international law route. It also proved difficult to agree to effective international action regarding transnational crime, elicit trade, cross border fraud and global terrorism. Legal and other borders gradually emerged. Immigration and the international flow of capital were curbed. This was done at the expense of economic growth. The feeling was that it was better to be safe, with most people employed and a lower GDP, than to have high economic growth coupled with insecurity, economic volatility and instability. The rise of more economic and political powers in the course of the 1990s also led to this scenario. In the multi-polar world that resulted, strong actors were less willing to compromise, prompting others to also focus on national interests.

**"Denmark announces decision to reintroduce border controls ahead of Schengen meeting."**

*The Telegraph,*
*11 May 2011*



# Legal Internet


PEOPLE POWER
HORIZONTAL
CIVIL SOCIETY
FRAGMENTATION
NEGOTIATOR STATE
BUSINESS
PRIVATE REGULATION

# Legal Internet

## *Basic characteristics:*

Growth of international rules and institutions, which go hand in hand with a growing dominance of public-private or even private governance mechanisms.

## What does it look like?

### What is the main ordering?

In 2030, rules – in the sense of 'law' – are a lot less important than they were in 2010. In the course of the first decade of the millennium the true potential of information technology and relationships supported by social media became visible. Through cheap laptops, tablets and smart-phones, connected by cloud technology and clever search engines, interaction across borders and access to useful and relevant information became easy for most people. By 2018 this had already radically changed the way people interact on a global scale. By 2030 it is engrained into the global legal environment; almost everyone in the workforce has grown up with the internet and information technology.

New generations have also become acquainted with new ways of rule making, rule-enforcement, and resolving disputes. Reputation, trust, transparency, mobilisation of voice, and demonstrated effectiveness - have become the mechanisms to secure a social and political order. Formal rules and procedures are now considered old-fashioned, too formal, ineffective, and too uniform and inflexible.

Public rules have gradually been replaced or marginalised by standards in particular sectors by which all interested parties in that sector can abide. Monitoring and even enforcement are dealt with by private regimes and mechanisms created by the parties involved. Democracy or accountability is less a matter of working through parliaments and more a matter of working through interest groups and loosely organised structures that operate between interest groups. Self-regulation has become the prime source of legitimacy. Across the globe, government budgets decreased after 2020. In relative terms, parliaments have lost the most ground; other means of organising accountability are visibly more effective. National ministries and international organisations underwent a role change. They have become the intermediaries, mediators and organisers of voice and they lost their functions as implementers and principal holders of power. Those parliaments that failed to adapt ended up becoming insignificant.

The 2025 summit of world leaders that gathered in New York to celebrate the 80th birthday of the United Nations was attended by heads of 228 different states. The last remaining mega

**"The sweep was part of a civil suit brought by Microsoft in its increasingly aggressive campaign to take the lead in combating such crimes, rather than waiting for law enforcement agencies to act."**

*"Microsoft Raids Tackle Internet Crime", New York Times, 26 March 2012*

states – the USA, Russia, China, India, Indonesia, Brazil, Argentina, and the Democratic Republic of Congo, had dissolved into smaller units, very loosely bound together. In line with the new understanding of international governance, this meeting was not limited to state representatives. The leaders of the 100 wealthiest companies, 100 civil society leaders, and the leaders of the most important religious and spiritual groups also attended the summit as full participants. Thanks to smart information technology it was possible to have a meaningful debate in the six months leading up to the final event. The leaders adopted the 2045 Good Governance Pact (GGP), which laid down 15 governance standards that the leaders consider fundamental for good governance, wherever it occurs. Five years afterwards, a dozen measuring tools to assess implementation and compliance with the GGP were fully operational, keeping the leaders focussed on the agreements that were made.

The state as a political unit has not disappeared, but its nature and function have changed considerably. Its public core consists of areas in which it can clearly show effectiveness (this, by the way, also forms the only basis for its ability to tax). This includes safety and security, health (including environmental issues), and aspects of economic policy, but not much else. This also applies to international organisations. Quite a few of the 'old' UN specialised agencies have withered away. The International Telecommunications Union, the World Intellectual Property Organisation, the International Civil Aviation Organisation, the International Maritime Organisation, the Universal Postal Union, and the Food and Agriculture Organisation no longer exist. Expert networks involving businesses, civil society organisations, and states have replaced them.

The flexible governance model that evolved around the G-20 during the Great Crisis of 2008 – 2015 has become the norm. Leaders, be they from government, business, or civil society, meet at regular intervals to set strategic directions on issues, and people and organisations at the operational level work things out and implement. If you have demonstrable added value, you can join the process. If not, you are no longer involved.

The United Nations has largely been reduced to a web-based Internet forum, run by a relatively small secretariat, on which rule making initiatives are collected, published, and on which expert advice can be sought: the UN Rule and Process Forum (UNRPF). But even for this function it faces tough competition from private initiatives claiming to be faster and better facilitators.

Legal tourism, or rule-tourism, is prevalent. Old-fashioned states compete with private regimes to create attractive legal environments for business and wealth. The competitive advantage of public regimes is hardly self-evident. Private rule making, enforcement, and dispute resolution mechanisms are usually flexible

and efficient, whereas public regimes are more bureaucratic and rigid. In essence, clients of justice systems are constantly looking for what works best given their interests, and there are generally many options from which to select. Governmental power structures – legislators, courts and other regulatory bodies – need to constantly adapt to this more competitive environment and have the best services to offer. The global legal environment has the benefits of offering flexibility and adaptability.

Decision making is far more efficient than it was in the year 2000 and both rules and procedures can be adapted to the situation and the problem at hand. On the other hand, the absence of clear, all-encompassing organising principles (like the principle of legality, the UN definition of the rule of law, or state sovereignty) makes the global legal environment complex, often confusing and most of the time unstable. Furthermore, it is difficult to tackle overarching issues of legitimacy, legality and accountability: if rule making and

### *Global trend: More threats*

A broadening of the definition of security is clearly visible. Six clusters of security threats were defined by the UN High Level Panel on Threats, Challenges and Change in 2004: economic and social threats, including poverty, infectious disease and environmental degradation; inter-state conflict; internal conflict, including civil war, genocide and other large-scale atrocities; nuclear, radiological, chemical and biological weapons; terrorism; and transnational organised crime. And this list is not exhaustive.

adjudication is so diffusely organised, how can governance be limited by law and public accountability be organised? The GGP is proving to be of some use in addressing this issue, although the final verdict cannot be pronounced until 2045. From a 'traditional' rule of law perspective all this is seen as highly problematic, but in this world few people care about the rule of law, as such.

## Who makes the rules?

As indicated: rules are less important; effectiveness is what counts. The verb 'to regulate' is rarely used. The art is now known as R&O – Regulate & Organise. In most cases the norms that are adopted at the state or international levels concern principles: agreements on basic requirements to which a particular solution to a societal challenge must comply. In the area of finance, the 'sustainability principle' that emerged after 2015 is one of those key legal norms: it is the legal compass for all the self-regulation that takes place in this field. Almost all states have included this principle in their constitution.

The global legal environment consists of many areas and levels in which rules are made and standards are set. It is not a place of clear structures. Banking and financial organisations have developed standards and codes of conduct that determine standards for reliability and sustainability. The ghost of the 2008-2015 recession and the volatility that caused it are still very much on the minds of the players in this sector. In the area of the environment, we also see a plethora of national, regional, and international initiatives; some entirely private, some with a link to the state. Globally operating companies within the same branch have organised themselves and agreed on consumer rights and liabilities. Unions and global corporations continuously negotiate on collective labour agreements.

The pattern is usually the same: close to a problem or a challenge – be it local or international – a need for regulation emerges. Actors around that problem work to build a coalition to resolve it, using data and information available on the web, and IT-based consultation forums. The principle of subsidiarity – a legal principle originally developed in the context of the EU – is an important feature in all the Regulate & Organise toolkits: organise the solution as close as possible to the place where it arises.

The main mechanisms to regulate across borders are standardisation and harmonisation in production and distribution chains, benchmarks and transparency-enhancing mechanisms such as indexes, as well as transnational organisations of unions and employers who are building social arrangements limited to specific economic sectors.

The adoption of rules is no longer a process in which rules are 'negotiated' and then 'adopted', after which they remain more or less static as they are applied and interpreted. Rules are now adopted and fitted with built-in feedback loops to assess whether they are doing what they should be doing for stakeholders: constant learning and adapting on the go. Revolutions in social science, psychology, and neurology research have made it possible to determine, with much more precision, how a rule can achieve the desired result and whether, once it has been adopted, it is doing what it should. A rule has become an ongoing social science project.

## How are rules enforced?

Most enforcement takes place outside the scope of the state, or at the very least with involvement of powerful private actors concerned. For example, global pharmaceutical corporations have not only adopted rules of conduct with regard to intellectual property, but they have also built an organisation that monitors counterfeit medicines. They closely cooperate with national law enforcement organisations, a trend which is also very visible in the fight against internet crime. Even though the predominant type of rules in the global legal environment looks like 'soft law', their actual meaning is quite 'hard'.

Stock exchanges – of which there are many (national, regional, and international; in different sectors, around issues like the environment) – are an important enforcement tool. Being able to float stocks on most of these exchanges (which are constantly monitored by NGOs), and thus have access to capital, requires compliance with sector standards. Most stock exchanges have enforcement panels to which interested parties can report non-compliance. These panels are able to withdraw registration on the stock exchange – with all the losses for investors that this entails – if serious non-compliance is not addressed.

Surely the state still plays a role in enforcement, and particularly so in the fighting crime. But even in this field, enforcement by the state increasingly depends on the input, resources and cooperation of private actors.

## How are conflicts resolved?

While private tribunals, arbitration, and mediation by global law firms flourish, public courts only focus on core aspects of criminal and constitutional law.

Conflict resolution is mostly a non-state matter. State courts and international courts are deemed to be most effective when they serve as last resort, a final venue, if all else fails. They are cast, quite deliberately, as rigid institutions that cost a lot and leave less room for compromise. There are many examples for alternative private conflict resolution systems. A manufacturing conglomerate creates its own transnational institute to resolve disputes with consumers. Transnational religious groups use the religious institutions for family disputes. Transnational unions and cross-border corporations agree on systems of wages and create their own tribunal to resolve disputes among the corporation and individual employees.

Within the European Union, concerns over access to justice have resulted in the setting up of a permit system: private parties can set up dispute settlement mechanisms but they need to comply with a number of basic requirements relating to access to justice and equality. Civil society organisations and businesses can report non-compliance to the EU Dispute Resolution Agency. Merely 'reporting' is not enough: complainants must present a clear case-file containing well-described violations, with pre-set standards of proof (this is made easy through the Legal Tools system on the Agency's website). Outside the EU, however, the practice of subjecting private tribunals to such requirements is seen as an obsolete trace of the legalistic past, too formalistic and inefficient for the new world that has emerged.

**"It's a new world and people in the institutions need to catch up... We're at a place in time where human beings can collectively leapfrog a system. There's no army in the world that is more powerful than this idea."**

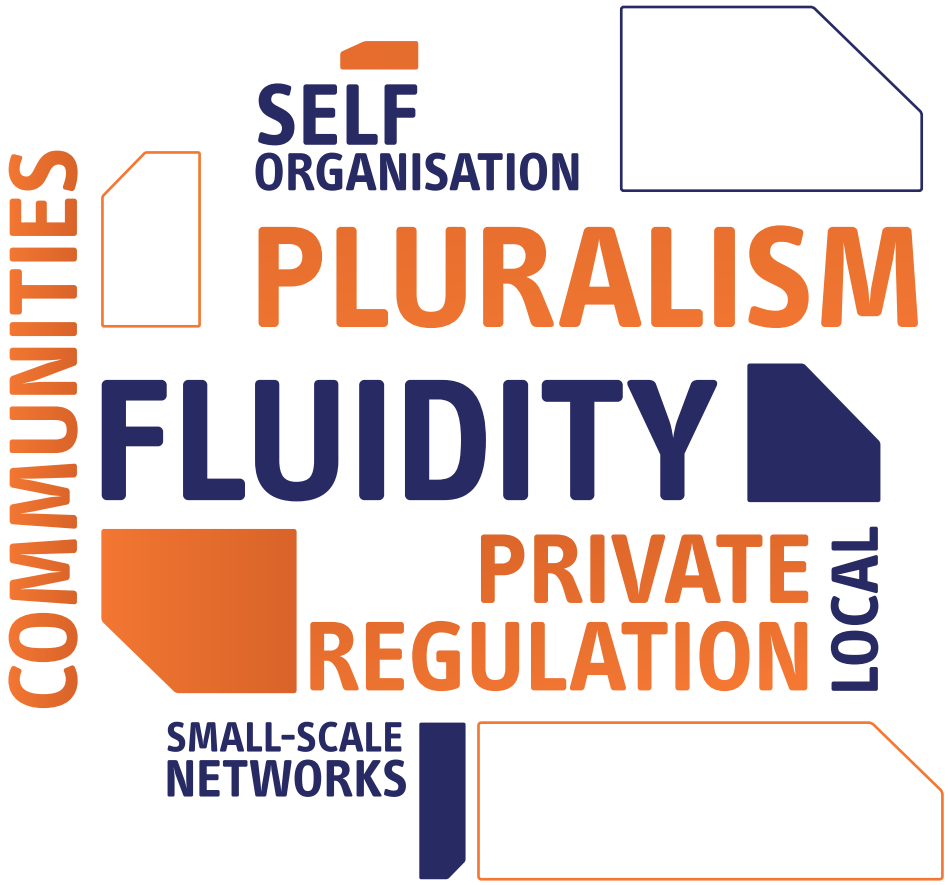
*Jason Russell,*
*Creator of Kony 2012*

## What happened?

The failure of formal inter-governmental organisations to prevent the financial crisis of 2008- 2015 or to quickly recover from it caused a tectonic shift in how international governance is done. The networked G-20 system proved more effective in handling the crisis, but in general the loss of trust in state and state-based institutions had pushed corporations, NGOs and communities away from the state and towards greater involvement in governance and reliance on own resources and solutions. In the aftermath of the financial crisis that erupted in 2008 ended in 2015, non-state actors and governments aligned around a basic 'never again' disposition: we must continue to work together to avoid ending up in the volatility that brought the Asian crisis of the 1990s, the bursting of the internet bubble, and the 2008 melt-down.

The standards that were developed during the difficult years between 2008 and 2015 gained traction through civil society organisations and public private partnerships, and were helped by information technology. Most governments were caught by surprise. Where national courts could not handle the number or the complexity of transnational cases, where national court decisions could not be enforced or where states or international legal institutions could not agree on norms, private actors created their own regimes. The substantial growth of powerful global private players after 2015 also played a role. Transnational corporations and civil society organisations continued to grow and became more powerful, both with regard to creating norms and with regard to enforcement. The legitimacy crisis in which many states found themselves after 2015 was also an important factor. Self-regulatory regimes were widely seen as more legitimate. The trigger was internationalisation itself: the limited ability to really understand 'foreign' legal systems drove cross-border corporations and citizens to turn to alternative systems of dispute resolution, which they set up themselves, either for specific disputes (single-dispute institutions like mediation or ad hoc arbitration) or in a more institutionalised way.

Legal Tribes


SELF
ORGANISATION
COMMUNITIES
PLURALISM
FLUIDITY
PRIVATE
REGULATION
LOCAL
SMALL-SCALE
NETWORKS

# Legal Tribes

## Basic characteristics:

Reversed process of legal internationalisation, which goes along with the growing importance of private legal and governance regimes.

## What does it look like?

### What is the main ordering?

This is, in many ways, the most challenging scenario. It drifts into directions that many would consider hard to imagine and highly undesirable, probably more so than any of the other scenarios. And yet it should be considered because, following the logic of the two main forces at the heart of this scenario, we cannot exclude the possibility of development in this direction. *Legal Tribes* is characterised by a severe loss of relevance of the state combined with a loss of interest in internationalisation. In the most positive variation this world consists of a largely unconnected group of communities that in principal govern themselves and have very little interest in the global legal environment. In a more negative variation it is an environment with many failed states.

Global security is a serious issue and law has been completely abandoned as a way to achieve it. Local security, which is mainly self-organised, is the main basis for ordering.

Whichever of the two variations is present, order is local and mainly privatised. It comes from small-scale networks of corporations, communities and civil society organisations, and is supported, where possible and useful, by small public structures. The state and the international global legal environment have withered away, mainly as a result of the security and economic crises of the first two decades of the millennium. International organisations have lost their relevance and have closed due to lack of interest and funds.

*Legal Tribes* has not been too good to multinational companies either. Seen as remnants of failed internationalisation, to survive they had to change. Many of them have broken into national or regional components; very few have real global coverage; it is simply too risky economically, in terms of manageability, and even security. Civil society is very active, in part driven by technological developments relating to social media. But again, it deals with the local and it operates locally. Wealth, effort, labour, profit are all generated at the local level and flow back to the local level. Security can really only be organised locally; at least then you know who you can trust. The dream of globalisation has been destroyed; the world is no longer seen as flat.

### *Global trend: More globalisation*

While the financial crisis has cast some doubts as to the continuing expansion of an uncontrolled capitalist model, few argue that globalisation will stop. Globalisation is a coin with two sides: it encompasses increased connectedness through internationalisation, as well as forces that counter this trend. Economic interests will continue to drive further transnational activity. At the same time, resistance to globalisation is often also globally connected (e.g the Occupy movement). Next to developments on a global scale, there is a tremendous growth of regional and sub-regional economic cooperation agreements.

In the course of the 2020s, borders re-emerged, albeit without the state as their main guardian. Next to state borders we also see religious borders, borders organised around economic activities, ethnic borders, and political borders. Within these borders self-regulation is the norm. There are big differences in the world in terms of wealth and levels of security. The wealthier communities have the character of gated communities: heavily fortified with private security forces bound by few rules. There is no real sense of universal human rights. Such rights only apply to individuals from one's own community. In the rare instances when human rights are applied to an individual from another community it is only reciprocal in respect of individuals from communities that offer the same protection.

The regional organisations of the world have lost much of their economic *raison d'être*. The successful ones have transformed into security alliances: public-private regional fences within which smaller communities can conduct economic activity on a larger than local scale. Those that were unable to adapt fell apart.

There are few overarching ideas and fundamentals. Legal borders are important, but, as said, they are no longer mostly set up and defended by the state. Communities – states, businesses, or otherwise – that have certain human rights values and rule of law principles at the basis of their governance structures need to defend their turf from intentional or unintentional infringements from other communities.

The main role of the public realm is to deal with the link between the huge variety of private self-regulatory regimes. But with a greatly reduced tax base, resources are limited. There is a high level of pluralism, little coherency, and a significant amount of rule-tourism. More fundamentally, the perspective of people and institutions – public or private – is much more local.

In this scenario rule of law becomes a diffuse and even anachronistic concept. The question of how to secure the rule of law in national, sub-national and regional self-regulatory regimes remains a concern in some areas, while in others the very idea of rule of law as it had emerged in the 19th and 20th century has been completely abandoned, without really being replaced by any other organising principle.

## Who makes the rules?

Nation-states and other public authorities attempt to save what is left of their authority by broadly codifying law in the area of crime, IT infrastructure, health, and, as mentioned earlier, links between private regulatory regimes. Some bordered areas attribute much importance to basic rights and have given the state a role there as well. For the rest, regulating is a private and, mainly local affair.

In some areas of the world, rules are made through well-developed accountability mechanisms. In other areas there is authoritarianism. Some regions have overarching structures to protect against infringement by rules based on different value systems.

In the Northern European Union an association of banks have created and enforced norms with regard to credit facilities. Trade unions and employer organisations agree on Northern European collective employment contracts and social funds. And environmental organisations reach consensus with major corporations on the use of specific filters. But there is no universal way of doing things. The Southern American Alliance and the Southern African Union, for example, do not have such a system. There, these issues are dealt with at the state level, together with business and civil society organisations.

As indicated, legal borders – local or regional – are of tremendous importance. There is little attempt to harmonise. *'When in Rome, do as the Romans do',* is the motto between states and other communities. The global international environment is not one of rules and standards, but of politics. Precedents and standards are local, not international.

## How are rules enforced?

Enforcement is a local and mostly private affair. In the most developed communities the public arena (i.e. the state and, in some areas, regional oganisations) only plays an enforcement role in the area of crime, IT infrastructure, health, and linkages between private regulatory regimes. Again, local is good. In other communities, the public enforcement circle is even smaller. Social control, groups taking justice into their own hands, and militias maintaining order are predominant in many parts of the world, whereas religious or public authorities take up these tasks in other regions. The absence of a state-like structure that provides uniform enforcement is acutely felt in the lives of many.

## How are conflicts resolved?

There are plenty of private dispute settlement mechanisms but because of the continuous need for dispute resolution and legal certainty, national and in some cases regional courts – like in the EU – retain some relevance.

At the global level, dispute resolution is a political matter. The courts, tribunals and panels that were once used are no longer active. The fact that economies have localised more has also reduced the number of potential disputes.

**"We will have a lot less lawyers and more community organisers."**

*Law of the Future Session with Dutch law firms, 18 May 2011*

**"The Big Society is about a huge culture change where people, in their everyday lives, in their homes, in their neighbourhoods, in their workplace don't always turn to officials, local authorities or central government for answers to the problems they face but instead feel both free and powerful enough to help themselves and their own communities."**

*David Cameron,*
*Speech on the Big Society, 19 July 2010*

## What happened?

States and the international organisations did not prove to be effective in restoring stability and economic recovery. The severe budget cuts that were made by governments, in 2013, after the deterioration of the financial crisis of 2008, proved to be the beginning of the end of the state. It was a last 'win or lose' effort by states to deal with massive unemployment, debt levels, and inequalities, but it failed. The result: a complete loss of trust in government and the international system. Conflict was widespread. Health systems broke down. Food was scarce. And in many parts of the world life expectancies decreased.

States and business alike failed to deal with the global crisis and were also seen to be responsible for a number of other issues such as major failure to protect data and massive fraud on a global scale. This has given rise to great suspicion about all things global and international.
The anti-globalisation movement attracted more supporters than ever before. *'Keep it local, keep it private, keep it safe'* became the dominant mentality.

### *Global trend: More diffuse power and more layers of governance*

We are moving towards a multi-polar and multi-layered world. Economic and technological developments are creating a greater divergence of sources of power. This is happening at different levels – international, regional, national, local, as well as at the public and private levels. The financial sector is a case in point: it is governed by a complex web of states, international and regional organisations, networks like the G-20 and the Basel arrangement, the private sector, and civil society organisations.

# Strategic implications

## The global legal environment is important for:

*Parliaments, who make and assess laws.*

*Ministries of justice, the principal guardians of national legal orders.*

*Ministries of foreign affairs, which negotiate international instruments and which shape law in international institutions.*

*Highest national courts, which are the main lynch-pin between national and international law in concrete cases.*

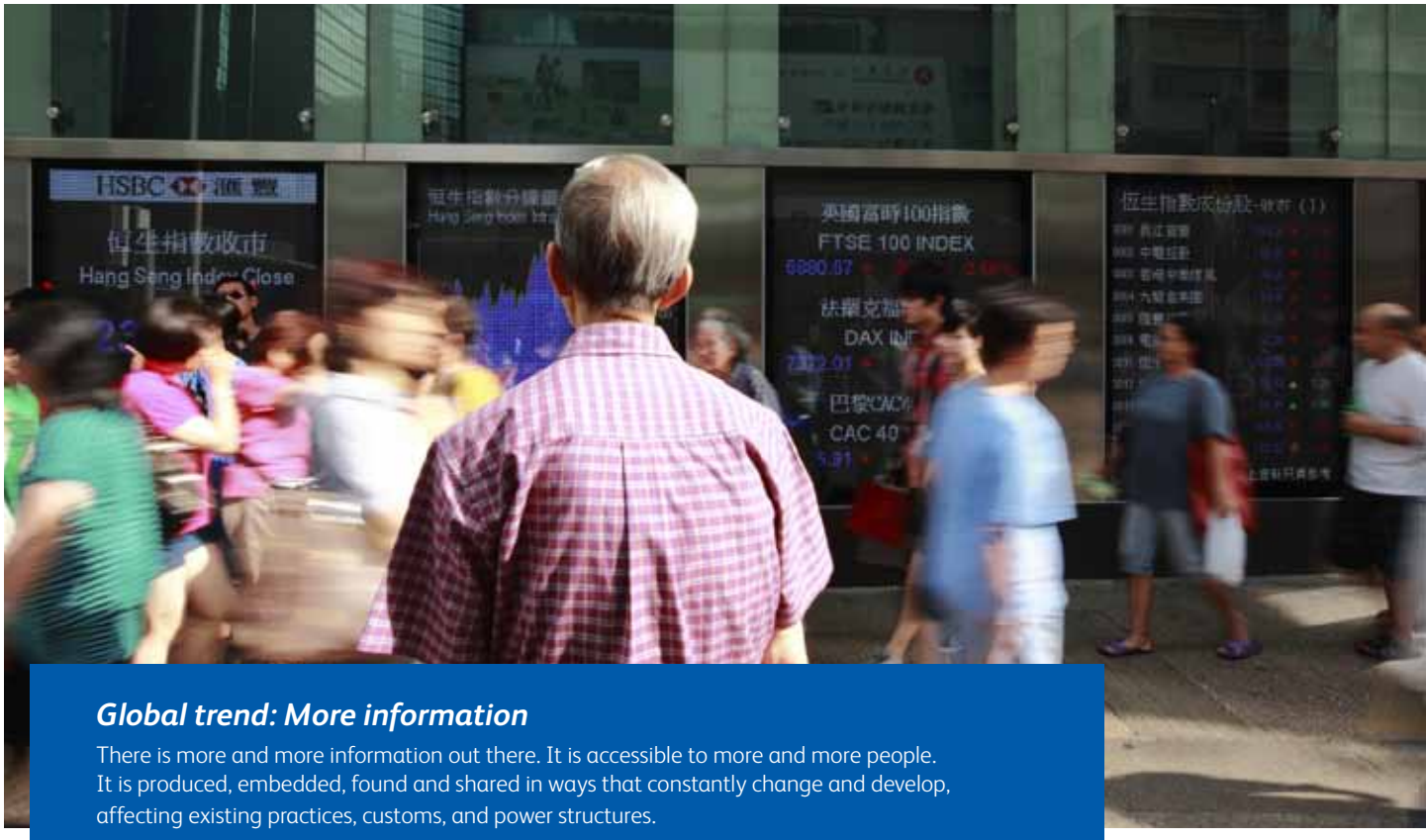
*International and regional organisations, including international and regional courts, which use and apply international and regional law.*

*Business, especially businesses with a long-term horizon for return on investments and high-risk factors.*

*International law firms, which need to know what legal services will be in demand in the future.*

*Non-governmental organisations, which use law to protect and defend certain interests.*

*Universities and other academic institutions, which research, educate and train in the legal field.*




***Global trend: More information***

There is more and more information out there. It is accessible to more and more people. It is produced, embedded, found and shared in ways that constantly change and develop, affecting existing practices, customs, and power structures.

*In the section below, some initial thoughts about what can be inferred from the scenarios are provided to illustrate how they can be used.*

## What if *Global Constitution* unfolds?

An example of a major challenge in this scenario will be to institutionalise the rule of law in the evolving global constitutional order. On the surface this looks easy, because it appears to only be a matter of translating national rule of law mechanisms into a global constitutional order. The international legal community has to develop equivalents of the principle of legality and checks and balances. Another challenge in *Global Constitution* is enforcement and compliance, which will be matters to be dealt with on the national level.

## What if *Legal Borders* unfolds?

An example of a major challenge in this scenario is how to deal with legal pluralism. Instead of international legal mechanisms to coordinate rule making and enforcement, nation-states and regional organisations may have to revert to soft power and international relations. In many states, forming limited-sized coalitions of the like-minded may become the primary rule of law strategy for national lawmakers.

## What if *Legal Internet* unfolds?

An example of a major challenge in this scenario is how to shape the rule of law in the evolving global private regulatory frameworks: how to secure the principle of legality, the universality of norms, democratic accountability, and checks and balances in private regulatory frameworks? Legislators will have to connect with these frameworks in order to secure rule of law mechanisms.

## What if *Legal Tribes* unfolds?

This is probably the most difficult scenario to fully come to terms with. From our current vantage point, it causes resistance in its two most fundamental assumptions: greatly diminished globalisation and a withering state. Both have been with us for more than 300 years. If aspects of this scenario do unfold, deep fundamentals will be questioned: the idea of universality of basic human rights, the idea of the state and its role in society, and the role of religion, to name but a few.

## Altogether, what might it mean?

*After reading the Law Scenarios to 2030 and having participated in the debates, one might overhear a random national lawmaker thinking out loud:*

*"At least in some conceptual form, I should keep my national legal order intact, but much of it will have to fit into some form of international context, which takes into account international law and international private regulation. In the international setting, regional organisations are quite useful: as a bulwark against global law that is too invasive or which runs counter to national interests. I also need to be attentive to the needs of actors in my legal system that operate internationally; they will set up their own rules and adjudication systems if I, as national legislator, cannot provide what is needed. At the same time, private regulation could be a good thing, which gives me the ability to focus on essentials while leaving details to sectors that represent certain interests. Keeping trust in effective government, along with the delivery of justice by the state and international organisations, is essential if we want to avoid the Legal Internet and Legal Tribes scenarios."*

*An official of an international organisation might consider:*

*"I should be prepared for both the Legal Borders and Global Constitution. Many of our strategies are built on Global Constitution. But we must also consider Legal Borders. How can international organisations and international courts simultaneously accommodate both? Legal Internet poses serious difficulties. International organisations and international courts have a public law background, firmly embedded in nation-states and their sovereignty. In Legal Internet, we will have to connect with private governance mechanisms, but their legitimacy and their day-to-day operations differ substantially from what we do. Whatever happens, it would seem sensible to base more of our work on the principles of complementarity or subsidiarity, rather than strive for supranational governance. We could work to strengthen bottom-up mechanisms for harmonisation between national legal orders, for example, by systematically translating the interpretation of international law by national courts. We may also have to connect better with non-state governance mechanisms. Legal Tribes is the nightmare scenario we should avoid. International governance must be effective! "*

*Lastly, a managing partner in a large international law firm might reflect:*

*"Should Legal Internet unfold we may be confronted with some new roles and markets. The demand for legal support will grow, but it will probably not be primarily a demand for litigation. There is likely to be an increasing demand for private rule making and soft law. These codes have to be drafted and we might be key players there with all the necessary expertise. There will probably also be a growing need for private adjudication mechanisms because of the costs, procedures, and lack of expertise of both national and international courts. We might work to establish trusted third parties, which can become accepted substitutes for public courts. We might even be useful in the enforcement sphere. If soft law has been created for banks or publishers and these codes of conduct are not complied with, we could be hired to track these violations and if necessary, bring them to private or public justice."*


***Global trend: More morality***

A final trend, more difficult to capture, is a more visible debate on issues of ethics and morality; on what is 'right' and what is 'wrong'. The long-held belief in the prominence of Western values has come under fire. There are calls for Islamic values, African values, and Asian values, to name a few. So-called market values have also come under scrutiny. The unmistakable trend is towards more diversity in values/morality/ethical norms.

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