Effectiveness and European Union Law from a Societal Perspective

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Law in general has a strong societal ambition: there is indeed a hope, as much as a belief, in the capacity of law to transform social situations by its very existence[1]. As Jacques Commaille indicates from the outset in the *Dictionnaire de la culture juridique* [*Dictionary of Legal Culture*], nothing is therefore more, "at the heart of the relationship between law and society than the question of effectiveness"[2]. And indeed, Jean Carbonnier had already focus on the fact that "the rule is a sociological phenomenon from *before* its application and independently of it"[3]. From this point of view, effectiveness is achieved by the rule. As the choice of a concept of law determines the object of analysis of the legal scholar (and identically for any scholars who looks at the law[4]), the choice of a concept of effectivity also determines what he observes. It all depends on what is identified as the effect of the law, that is to say, it all depends on what that one chooses to look at.

The analysis of societal effectiveness[5] allows us to consider the fact that the law is always the expression of a certain way of seeing the world, and it is this way of seeing the world that the law embodies. The analysis of effectiveness from a societal perspective implies to look at everything that, in the society, seems to be attributable to the existence of a legal norm. This way of viewing effectiveness means thinking the social and the legal in a kind of *continuum*[6]. This *continuum* can be looked at very strictly, by observing the degree of realization or use of the rules laid down by the law. But it can be looked at more broadly. It is immediately apparent that European Union law, no more than any other law, cannot be reduced to a juxtaposition of

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[1] See Pierre Lascoumes, "Effectivité" [*Effectiveness*], *in* André-Jean Arnaud (eds), *Dictionnaire encyclopédique de théorie et de sociologie du droit* [*Encyclopedic Dictionary of Legal Theory and Sociology*], also called *Dictionnaire d'Eguilles*, L.G.D.J., Paris, 1993, p. 219.

[2] Jacques Commaille, "Effectivité" [*Effectiveness*], *in* Denis Alland and Stéphane Rials (eds), *Dictionnaire de la culture juridique* [*Dictionary of Legal Culture*], PUF, Quadrige, 2007, p. 583.

[3] Jean Carbonnier, "Effectivité et ineffectivité de la règle droit" *[Effectiveness and Inefectiveness of the Legal Rule*], *L'Année sociologique*, 1957-1958, reprinted in *Flexible Droit. Pour une sociologie du droit sans rigueur* [*Flexibility of Law. For a Rigourousless Sociology of Law*], L.G .D.J., Paris, 1969, p. 147. I emphasize.

[4] For example, anthropologists may sometimes consider that there is law only where rules are written.

[5] The term "societal" is preferred to that of "social", insofar as it does not immediately carry with it a particular ideology in relation to a certain teleology. "Societal" also makes possible not to make *a priori* choice between *all the elements* which can be regarded as relating to the various aspects of the social life of the individuals in that they constitute an organized society (elements given by dictionaries as the English *Oxford Dictionary* or the French *Larousse*).

[6] Jacques Commaille, *op. cit*.

legal statements, which one could analyze in and in a so-called neutral way, in order to "show" to all that it is correct or incorrect to attribute to the European Union Law positive or negative effects. To the analyse of these statements (norms of the Treaties, normative acts of the institutions, decisions of the Court of Justice and those of national judges when applying the European Union law), it is necessary to add, and in some cases to substitute, the reality of the legal relationships established within the European social space, and to identify both their origin and their consequences. The empirical reality of European Union law is certainly partly to be found in the formal legal statements and their interpretation, but they are also, or even more so, to be found in other or implicit statements, often not said[7] , which are revealed by a more empirical and societal analysis of legal relations.

It is a question of looking at a relation, a relationship, an assemblage, mirrors where the legal norms and the societal life of the individuals are understood. It is a question of putting the law in relation with almost everything. For the most part, therefore, it is a question of discovering what the formally legal statements do not say themselves. The philosopher Merleau-Ponty formulated it by saying that "a society is not the temple of value-idols that figure on the front of its monuments or in its constitutional scrolls; the value of a society is the value it places upon man's relation to man"[8].

In any good book tracing the history of European construction, the very success of the institution's creation is attributed to men whose political will was unfailing. In any good book that attempts to present the European Union Law, the constant reference to the judgments of the Court of Justice illustrates, if it were necessary, its role as the lawbuilder[9]. In all these works, considerations of politics, law or economics are mixed, without however that the approach is systematic: elements are chosen here and there, which do not seem to reflect, voluntarily, any way of the world that would come out of the dogmas displayed by the founders and formalized by the political declarations of the different European institutions since the beginning. And above all, after these few considerations, the technical analysis - supposedly neutral - of the rules takes over, completely separated from any reflection that would not be exclusively technical. Through the rules, nothing would be said other than what its statement seems to say. Now, this "anthropological law" seems to remain a vulgar law, to which learned legal scholars prefer a more sophisticated law, displaying values whose quality of "alibi" can be questioned. However, European Union law is, like any other law, a manifestation, not to say a symptom[10], of a certain relationship of society to law and to a certain way of interpreting the world. As Alain Supiot believes, "the study of law is a way of knowing to what men dream of at a given moment"[11]. In this sense, European Union law is itself the bearer of the effectiveness of this

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[7] See below the idea of "shameful law".

[8] Maurice Merleau-Ponty, "Préface", *Humanisme et terreur. Essai sur le problème communiste* [*Humanism and Terrorism: An Essay on the Communist Problem*], 1947, p. X. Translated in English by John O'Neill, Beacon Press: Boston, 1969, p. XIV.

[9] See recently Tommaso Pavone, *The Ghostwriters. Lawyers and the Politics behind the Judicial Construction of Europe,* Cambridge University Press, 2022.

[10] The term is used here in the sense of psychoanalysis: "The symptom is a suffering that satisfies. There is there something tied up, which makes difficult the treatment of the symptom because the subject, whatever he says about it, holds on to it", Pierre Lafrenière, Introduction à "Jean-Pierre Klotz : Comment se sert-on du symptôme dans la psychanalyse *?*" [Introducing *of Jean-Pierre Klotz: How is the symptom used in psychoanalysis?*], *Le pont freudien* website, http://pontfreudien.org/content/jean-pierre-klotz-comment-se-sert-du-sympt%C3%B4me-dans-la-psychanalyse. See for a psychoanalytical introduction to the symptom, Sigmund Freud, *Civilization and Its Discontents* (1929), translated from the German by James Strachey, on line : http://www.stephenhicks.org/wp-content/uploads/2015/10/FreudS-CIVILIZATION-AND-ITS-DISCONTENTS-text-final.pdf.

[11] Alain Supiot, "La fonction anthropologique du droit" [*The Anthropological Function of Law. A conversation with Alain Supiot*], *Esprit*, 2001, p. 157.

relationship. It is a law that fulfills, like the others, an anthropological function. It is therefore not only the effectiveness of European Union law itself that is at stake, but also what is effective with and through European Union law. In other words, what is effective with and through European Union law can be seen by making connections between the legal mechanisms, taken one by one or in their assemblage, and the surrounding societal reality, as observed and as analyzed also in convincing and heuristic essays that are not necessarily of legal nature.

It is an understatement to say that the effectiveness of European Union law has so far been little considered from this point of view by legal scholars, when its contentious and institutional approach produces tens of thousands of pages each year. However, especially in the legal analyses of these reports, the nature and content of which have long been revealed by various authors[12], everything happens, as if this were not the case. It is undoubtedly a shortcoming of the law that it unfolds in different aspects, the links between which are sometimes difficult to establish. Is there not, and has there not been historically, a gap, in many parts of the world, between the teaching of law and its reality over the territory? For example, American universities teach federal law, but not the law of the federated states in which they are located; African universities mostly teach only the recent law produced by political institutions, outside of any reality of the tangible survival of legal customs, just as Indian universities do.

It is not very difficult, however, to see that the history of practices in the nineteenth and twentieth centuries, and so for the contemporary analysis of law - and particularly of European Union law - have finalized an older way of thinking, which consists in passing off as inevitable the economic prescriptions of the dominant actors and their "agents"[13]. The effectiveness of European Union law is a conformity to practices that have been set up as norms, implying that the autonomy of the law vis-à-vis these practices is minimized. European Union law is resolutely displayed as one of the expressions of a certain economic logic established in relation to the market between different dominant operators.

An empirical analysis of European Union law reveals a societal and political face that cannot be ignored if one wants to understand what is happening in contemporary Europe: an instrumental conception of law at work is unfolding without real measure (I), while the autonomy of law, through the effect of a - selective - tropism in favor of technique and science, is almost completely undermined (II). These observations, already made and analyzed so many times with regard to the law of the modern era, can again be made with regard to the European Union law. It seems, however, that legal scholars have come to terms with this.

Part 1. European Union Law: the Effectiveness of an Instrumental Conception of Law

There has been a clear progression of interest in the question of the effectiveness of norms over the last thirty years[14], an interest for understanding the effectiveness of norms outside the formal

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[12] See Karl Polanyi, *The Great Transformation: the political and economic origins of our time*, Farrar & Rinehart, 1944; Michel Foucault, *Naissance de la biopolitique, Cours au collège de France*, *1978-1979* [*Birth of biopolitics*], Seuil, Gallimard, 2004, English translation by Grahal Burchell published in 2008 published by Palgrave MacMillan; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, Routledge, 1995.

[13] The letter sent by Mario Draghi and Jean-Claude Trichet in August 2011 to Silvio Berlusconi, then Italian Prime minister, could symbolize this (letter revealed in the September 29, 2011 edition of *Corriere della sera*).

[14] See for example, Stéphane Bollée, Yves-Marie Laithier, Cécile Pérès (eds.), *L'efficacité économique en droit* [*Economic Efficiency in Law*], Economica, 2010, Olivera Boskovic (ed.), *L'efficacité du droit de l'environnement*

implementation of legal mechanisms. The analysis of the *effectiveness-matchingness* has undeniably earned its stripes of seriousness in the scientific community and it appears much more often in the discourse of legal scholars, thanks to the fact that it has responded, for the last forty years, to an explicit goal of the legal ruler. The institutionalization of *impact studies* of legal measures has encouraged legal scholars to take an interest in this question and to take it into account in their analyses of norms. The development of legislative and regulatory experimentation responds to the same goal of developing norms based on an analysis of their observed or supposed social results. The principle of effectiveness, with which the Court of Justice of the European Union is familiar - because it has made it an important concept within the framework of the principle of the primacy of Union law - is also particularly tinged with the principle of efficacity[15].

The increase in interest in the efficiency and effectiveness of norms corresponds, however, to the ideological ascendancy of a certain way of considering rationality, which is very perceptible in the development and evolution of European Union law and its frameworks. In 1985, the Swiss scholar Luzius Mader, in his thesis on *Legislative Evaluation*, already pointed out two important trends, the permanence of which is important to note: "the one that tends to base the legitimacy of legislative and administrative decisions on the result (success, efficiency, etc.), and the one that seeks to legitimize state action through recourse to science"[16]. The societal analysis of European Union law clearly confirms these two trends. The first is that European Union law is emblematic of a certain relationship to the aims and purposes of law. The introduction of the logic of *effectiveness-matchingness* in the analysis of legal rules was done in relation to the political-managerial-economic logic that presides over this approach by the legislative ruler, and progressively subjected the legal scholars, with their full consent, to a practice of validation of this logic. In order not to be considered "out of the game" of contemporary law, legal scholars have limited their critical view of legal mechanisms, confining it to an appreciation of the gap between the legal mechanisms and their effectiveness, and leaving aside almost all questions related to the societal effects of legal rules and their combination. In the report *Du standard technique à la norme juridique: impacts et enjeux* [*From Technical Standards to Legal Rules: Impacts and Issues*], submitted to the French Ministry of Justice in 1995, for the *Law and Justice Research Agency*[17], Danièle Bourcier and Véronique Tauzia emphasized "the strengthening of the instrumental aspect of the law", "with the development of technologies and the globalization of exchanges". This remark was not new[18], but it either went unnoticed or was simply ignored. And in the meantime, it has become

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: mise en oeuvre et sanctions [*The Effectiveness of Environmental Law: Implementation and Sanction*], Dalloz, 2010; Marthe Fatin-Rouge Stéfanini, Laurence Gay, Ariane Vidal-Naquet (eds.), *L'efficacité de la norme juridique : nouveau vecteur de légitimité ?* [*The Effectiveness of the Legal Norm: a New Vector of Legitimacy?*], Bruylant, Bruxelles, 2012, Pierre-Emmanuel Moyse (ed.), *Quelle performance ? De l'efficacité sociale à l'entreprise citoyenne* [*Which Performance? From Social Efficiency to Corporate Citizenship*], Thémis, Montréal, Canada, 2013; Petra Hammje, Laetitia Janicot, Sophie Nadal (eds), *L'efficacité de l'acte normatif : nouvelle norme, nouvelles normativités* [*The Effectiveness of the Legal Rule: New Norms, New Normativities*], Lextenso éditions/LEJEP, 2013; Delphine Dero-Bugny, Aurore Laget-Annamayer (eds), *L'évaluation en droit public* [*Evaluation in Public Law*], LGDJ-Lextenso, 2015.

[15] See *Commission vs France*, 21 September 1989, case 68/88 (on effectiveness), 19 June 1990, *Factortame*, case 213/89, and 19 November 1991, *Francovitch*, cases C-6/90 and C-9/90 (on effectiveness) and, recently, 11 November 2015, *Klausner Holz*, case C-505/14, on the primacy of the European provisions on state aid over the respect of *res judicata*, and which makes effectiveness a grid for reading effectiveness.

[16] Luzius Mader, *L'évaluation législative. Pour une analyse empirique des effets de la législation* [*Ruling Evaluation . For an Empirical Analysis of the Effects of Legislation*], Payot, 1985, p.113.

[17] Report reproduced at: http://www.reds.msh-paris.fr/communication/textes/normtech.htm.

[18] See, for example, Laurence Ross, "The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway", *Journal of Legal Studies, University of Chicago Law School*, 1975, no° 2,

stronger. A specific rationality has permanently embedded the institutions (1), and the sources of its legitimacy must be clearly revealed (2).

1. Rationality at Work in European Union Law: Law as an Instrument

According to the observation made in a European law handbook, "the strength of European law is largely due to its capacity to multiply the means in sort the institutions and the litigants can ensure respect for the principle of primacy"[19]. And indeed, according to the European Commission's own terms concerning States' failures to comply with Union law by virtue of article 258 of the Treaty on the Functioning of the European Union, we can read that these decisions "concern all the Member States and most of the policies of the European Union and are aimed at ensuring that European law is applied throughout Europe, in the interests of citizens and businesses". According to the principle of primacy, the effective application of European Union law is therefore a priority of this law. Legality tends to be "taken into account only in the context of the apprehension of the effectiveness that would be attached to it"[20]. A new stage is reached when the idea that practice should be the basis for the legitimacy of the law gradually takes hold. This means that the law can only prescribe behaviors that are already at work, and thus "take note" of what is happening. According to Jacques Commaille, law and public action are then justified "only by their results"[21].

Institutions rule by goals and thus develop a "logic of externalization of the process of regulatory elaboration outside the classical political bodies"[22], which also has the effect of transforming the legal instruments. Through the application of the practice-based legal rule-making technique, effectiveness is measured by itself, from itself. At the same time, legal analyses are very often limited to this executive function. As Jérôme Porta has noted, "the adoption of a norm makes it possible to substitute, for the future, for the discussion of the purposes of an act or consequences, a legal evaluation in terms of the norm that founds it. This denying translates into the affirmation of a neutrality of the realization of the norm with regard to the deliberation on the appropriateness of the legal action, which is referred to politics"[23]. This is exactly how the concept of governance came to be used to translate a factual situation: "a horizontal treatment of conflicts according to an agenda and according to principles defined and accepted between member states. A form of governmentality that finds in itself and in its concrete functioning the justifying reasons for its existence (efficiency, performance)"[24]. But, beyond the institutional aspect, it is the whole philosophy of law that is affected.

Martin Killias, "La ceinture de sécurité : une étude sur l'effet des lois et des sanctions" [*Seatbelts: a Study on the Effect of Laws and Penalties*], *Déviance et Société*, 1985, no° 1, pp. 31-46, authors quoted by Pierre Lascoumes, *op. cit.*

[19] Jean-Sylvestre Bergé and Sophie Robin-Olivier, *Droit européen* [*European Law*], PUF, coll. Thémis, 2nd ed., pp. 494-495.

[20] Delphine Dogot and Arnaud Van Waeyenberge, "L'Union Européenne, laboratoire du 'droit global'"[*The European Union, Laboratory for "Global Law"*], *in* Jean-Yves Chérot and Benoît Frydman, *La science du droit dans la globalisation* [*Legal studies in Globalization*], Bruylant, 2012, p. 258. Emphasis added.

[21] Jacques Commaille, *op. cit.,* p. 584.

[22] Delphine Dogot and Arnaud Van Waeyenberg*, op. cit.,* p.256.

[23] Jérome Porta, "A propos du jugement d'efficacité dans le droit de l'Union Européenne" [*About the Efficiency Judgment in the European Union Law*], *in* Petra Hammje, Laetitia Janicot, Sophie Nadal, (eds), *op.cit.*, p. 254.

[24] Jean-Jacques Sueur, "Droit constitutionnel global ou droit global des constitutions ? Eléments d'analyse" [*Global Constitutional Law or Global Law of Constitutions? Elements of Analysis*], *in* Alexis Le Quinio (ed.), *Les réactions constitutionnelles à la globalisation* [*Constitutional Responses to Globalization*], Bruylant, 2016, p. 36. The concept of governance has been much analyzed in its shortcomings. See, in particular, for its depth thinking on

In European Union law, the logic between objectives, means and effects has been inverted to some extent. A reading of the draft Treaty establishing a Constitution for Europe makes this inversion perfectly clear: Article I-3§3 states that "*The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress* (...)". Consequently, what "founds" the sustainable development of Europe is indeed "economic growth and price stability", while "full employment" and "social progress" depend on it, but are not founding elements[25]. This arrangement reflected a new rationality, since "an objective presupposes that certain concrete measures will be taken to achieve it", whereas an effect, such as full employment is included in the new formulation (taken up in this sense by the Lisbon Treaty), "will always be secondary, of the order of the consequence, of the result"[26]. There has been much discussion of §2 of Article I-3 of the draft European Constitution, which included among the goals of the Union the "internal market where competition is free and undistorted"[27], but the wording of §3, by its seemingly innocuous nature, reflects a much more profound change, which is still present in §3 of Article 3 of the *Treaty on European Union* resulting from the Lisbon Treaty. This is obviously done by introducing the new "objectives" of the Union, the "highly competitive social market economy" and "price stability", while the establishment of the internal market remains at the forefront of Article 3.

It is thus and increasingly a question of the law as a technical means of achieving a precise and determined objective. Only that which is considered to be part of a cost-benefit calculation process is considered. This logic is more or less the same for economic operators and for all operators, groups or individuals who make "militant" uses of the law[28], considering it as much as an obstacle as a weapon that could be turned against the law itself, in short, by "using" the law[29].

If the cost-benefit calculation is presented in the guise of rationality, this rationality must certainly be questioned much more often. What does "rationality" mean when the legal rules can be applied independently of considerations relating to their resonance with social justice, as the all too famous *Viking* and *Laval* cases have reminded us[30]? Is it therefore a matter of using one's reason by simply dismissing social law? As Alain Supiot's rather incriminating but illuminating 2010 plea shows, the EU Court of Justice has turned away from the objective of "equalization in progress" and "is now working to allow companies located in countries with low wages and low social protection to make full use of this 'comparative advantage'"[31]. And to cite several rulings of the period, which exempt these companies from compliance with collective agreements (CJEU December 18, 2007, case C-341, *Laval* and December 3, 2008,

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the issue, Alain Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance*, Oxford/Portland OR, Bloomsbury Publishing, 2017.

[25] See Eric Mollet, "Le projet de Constitution Européenne à la lumière de Foucault" [*The European Constitution Project in the Light of Foucaul*t], *Labyrinthe*, no. 22, pp. 112-113.

[26] *Ibid.*, p. 114.

[27] See on this issue, Christian Joerges, "La Constitution économique européenne en processus et en procès" [*The European Economic Constitution in Process and in Trial*], *R.I.D.E.*, 2006, no. 3 p. 245.

[28] Liora Israël, *L'arme du droit* [*Speaking Law to Power*], P.F.N.S.P., 2009.

[29] It is probably not insignificant to note that two major observers of contemporary legal thinking have, in the space of a year, each published a work using this utilitarian vocabulary: Jacques Commaille, *A quoi nous sert le droit ? [What is the Useness of the Law?*], Gallimard, Folio - Essais, 2015, and François Ost, *A quoi sert le droit ?* [*What is the Law For?],* Bruylant, 2016.

[30] CJEU 11 December 2007, case C-438/05, *Viking*, CJEU 18 December 2007, case C-341/05, *Laval.*

[31] Alain Supiot, "L'actualité européenne de la justice sociale" [*The News of Social Justice*], *Quart Monde*, n° 214 (see the website: https://www.revue-quartmonde.org/4725?lang=fr).

case C-346/06, *Rüffert*) or laws indexing wages to the cost of living (CJEU June 19, 2008, case C-319/06, *Commission v. Grand Duchy of Luxembourg*), disregard the presumptions of employment laid down by the laws of the foreign countries in which they operate (CJEU June 15, 2006, case C-255/04, *Commission v. France*), condemn the measures enabling host countries to effectively monitor compliance with the rights of the workers employed by these companies (CJEU 19 June 2008, case C-319/06, *Commission v. Grand Duchy of Luxembourg*), affirmed that the use of flags of convenience falls under the principle of freedom of establishment (CJEU 11 December 2007, aff. C-438/05, *Viking*), prohibit in principle strikes against relocations (same case), or state that the objectives of protecting the purchasing power of workers and social peace do not constitute a public policy reason to justify an infringement of the freedom to provide services (CJEU 19 June 2008, Case C-319/06, *Commission v. Grand Duchy of Luxembourg*). The wording of the *Viking* judgment is revealing of the rationality of the law that the Court applies. Formally, certain rights, notably social rights, are recognized, but their application is subsidiary to the main logic, i.e. the rationality at work in European Union law: "it is sufficient to point out that, even if, in the areas which fall outside the scope of the Community's competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, *the Member States must nevertheless comply with Community law* (...). Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC"[32].

In other words, one should ask oneself whether the wishes of Friedrich Von Hayek, as formulated in Volume 2 of *Law, Legislation and Liberty*, whose subtitle, *The Mirage of Social Justice*, leaves no doubt about his intentions, would not have been largely fulfilled: "Thus in the market order each is made by the visible gain to himself to serve needs which to him are invisible, and in order to do so to avail himself of to him unknown particular circumstances which put him in the position to satisfy these needs at as small a cost as possible in terms of other things which it is possible to produce instead"[33]. The least cost is the logic supported today by European Union law, the instrumental character of which is no longer in doubt, and which is moreover increasingly assumed by the principal "consumers" of law in contemporary Europe and in the world considered on the scale of commercial and financial exchanges: there is thus, for example, talk of "strategies of legal instrumentalization"[34]. It is important to point out that there has been and still is a significant gap between the analysis of "traditional" legal scholars and jurists who have developed a "voluntarist" analysis of the law in the service of an economistic vision of society: the latter have thus developed a very important intellectual corpus[35], which is widely deployed outside law schools[36], and which has remained rather ignored by the former for a long time. The "junction" that tends to take place between the two

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[32] CJEU 11 décembre 2007, case C-438/05, *Viking*, §40 et 41. Emphasis added.

[33] Friedrich Von Hayek, *Law, Legislation and Liberty*. Volume 2, *The Mirage of Social Justice,* Rouledge, 1976, p. 116.

[34] See e.g.,. Viviane de Beaufort and *al.*, *Stratégies d'instrumentalisation juridique et concurrence* [*Strategies of Legal Instrumentalization and Competition*], Bruxelles, Larcier, 2013.

[35] A part of this corpus is referenced on the website of the *Centre de Droit Européen et d'Economie* [*European Center for Law and Economics*] at *Essec Business School*: http://cede.essec.edu/droit-management-strategies

[36] Historically, in France, Lawyers come from Universities, and "professor" is a title given for "full professor" by and only by and for Universities. But, in recent years, in France, we have witnessed the 'self-creation' of a new category of "Professors", those of the "Grandes Ecoles" and business schools, for whom an association was created, the *Association of Law Professors of the Grandes Ecoles* (unspite they had not been given the title by the University). As it was created in this area, tha association became then the *French Association of Law and Management* in May 2016.

bodies of law does not seem to involve a critical attitude on the part of the former, but rather a gradual absorption of the new rationality of a law that has now been reduced to its executive function[37].

2. The Ineffectiveness of the Known Classical Springs of the Legal Domination in the Framework of European Union Law

The jurisprudence of constitutional courts can, one of whose vocations is to uphold constitutionally recognized rights, can be put forward, although less frequently in recent years: they sometimes take advantage of cases to "restore" rights, possibly against Europe, in the name of a *constitutional identity* that needs to be protected[38]. A closer look at the legal reality of Europe, however, invites more caution: what do these decisions represent in the face of the torrent of decisions delivered by these courts validating all the instrumentalizing practices of the law and alienating it to considerations linked to a certain conception of the market and the economy? While it is possible to cite some welcome decisions from the Court of Justice of the European Union[39], they are more like alibis intended to validate all the other decisions.

A look at the strategies of the various actors provides particular information on the way in which the law can now be represented and developed. The phenomenon of law shopping, for example, made particularly visible in the *Doing Business* reports produced by the World Bank, reflects a certain "normative Darwinism"[40]. If an optimistic reading of *laissez-faire* suggests that the formation of law by a natural-economic selection will lead to better legislation, it is undoubtedly to better regulation considered in commercial terms that it leads, all other considerations being second-rate. The European Union law under construction is intended to be the expression of competition, but it produces conflicts of legitimacy for which it does not provide any pacifying key: for example, the diversity within the European space of social protection regimes, of unemployment, disability and retirement schemes, of fiscal and social contributions, inevitably leads to situations of social inequality being highlighted without providing acceptable means of resolution[41]. It is certainly difficult to say what the future holds for a situation that appears

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[37] As illustrated, for example, by the initiative to rank legal journals carried out by the *Association of Law Professors of the Grandes Ecoles*, which was widely reported in the "traditional" (university) press. See e.g. *La semaine juridique, ed. Générale*, January 18, 2016, n° 3.

[38] See for an overview, Laurence Burgorgue-Larsen (ed.), *L'identité constitutionnelle saisie par les juges en Europe* [*The Constitutional Identity Viewed by the Judges in Europe*], Pédone, 2011.

[39] See e.g. CJEU, March 3, 2011, *AG2R Prévoyance v/Beaudout Père et Fils SARL*, case C437/09, validating the famous migration clauses based on the principle of solidarity (but otherwise condemned by the Constitutional Council in the name of contractual freedom, Decision No. 2013-672 DC of June 13, 2013, *Loi relative à la sécurisation de l'emploi* [*Rule for securing employment*].

[40] See on this subject Alain Supiot, "Le droit du travail bradé sur le marché des normes" [*Labour Law Sold Off on the Rules Market], Droit Social*, 2005, no. 12, p. 1087 and following, and my analysis of this text compared to the text of Hugues Bouthinon-Dumas ("Existe-t-il un marché des systèmes juridiques ?" [*Is There a Market for Legal Systems*?], *in* Ruth Sefton-Green (ed), *La concurrence normative. Mythes et réalités* [*Normative Competition. Myths and Realities*], published by the *Société de législation comparée*, 2014), Lauréline Fontaine, "Analyser le droit: pourquoi faire? Quelques réflexions autour de deux contributions et de l'actualité en droit du travail" [*Analyzing the Law: Why Do It? Some Reflections on Two Contributions and on Current Events in Labor Law*] published at www.ledroitdelafontaine.fr: http://www.ledroitdelafontaine.fr/analyser-le-droit-pourquoi-faire/. See also Mireille Delmas-Marty, *Aux quatre vents du monde. Petit guide de navigation sur l'océan de la mondialisation* [*To the World's Four Winds. A Short Guide to Navigating the Ocean of Globalization*], Seuil, 2016.

[41] See e.g., Philippe Hamman, "Des usages sociaux de la loi au miroir des relations de travail transfrontalières en Europe" [*Social Uses of the Law in the Mirror of Cross-Border Labour Relations in Europe*], *Le Portique*, 15, 2005, p. 1.

to be a transition to a system that has never yet reached maturity, but, as Boaventura de Sousa Santos points out "The creation of the normative and institutional conditions for the functioning of the "market-friendly" model implies such a normative and institutional destruction that it is possible that it undermines not only the accumulation strategies of the State, but also its hegemony and its strategies of confidence"[42]. Analyzing the European Constitution project in the light of Michel Foucault's writings, Eric Mollet considers that "we are seeing the construction of the new form of governmentality identified by Foucault, based on a new regime of truth" as a principle of self-limitation of government[43]. This self-limitation as a principle of government manifests itself through the adoption of a set of rules that favor the autonomous regulation of the main actors involved. On the basis of a dogma that has been reaffirmed several times since the dissenting opinion of Justice Holmes in the famous *Lochner* decision of the Supreme Court of the United States in 1905, to continue to hold up the idea of "economic neutrality", both in the constitutions of European countries and in the European Union, despite the framework of a market economy[44], would seem, therefore, rather a falsification of the reality at work in the European normative and social space. For there is indeed a way of, through a set of rules, the application of rules and the production of rules, considering the relationship between law and the economy and society, that implies economy cannot be considered as "neutral".

This "hidden" lack of neutrality in major legal studies has an impact on the way in which political and legal legitimacy is represented in the European space. The political theory that "publicly" supports the law, namely liberal (or even social democracy), as affirmed in several European constitutions[45], should not be able to cope with the fact that the power of legal initiative seems to be located most often outside the public space of administrative and political institutions. As a "title" to make law, legitimacy is a set of ideas that all contribute to the way in which the title to make law is accepted. In other words, legal domination is in some way shared in the social space, according to the modalities of the places and times considered. Each society gives itself a concept of legal domination that serves to validate or invalidate, to accept or not to accept, the title of the person or persons who make the rules. There are therefore several ways of thinking about this concept[46] : either in an accumulative way (legitimacy is conferred by the fact that society accepts the title of the person or persons who make the law), or in a theoretical and prescriptive way (the title is attributed according to precise and predefined modalities, as is the case in the theory of contemporary democracy, which bases the title notably on election). To put it another way, and taking up the distinction introduced by Max Weber, there is traditional historical legal domination and rational legal domination[47]. The title of legal domination on which European Union law rests, envisaged as an instance of market execution (a principle that is applied progressively and without discontinuity), turns out to have

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[42] Boaventura de Sousa Santos, *op. cit*., p. 307.

[43] Eric Mollet, *op. cit.,* p. 117. He refers to Foucault's course de 1978-1979 au Collège de France, *Naissance de la biopolitique* [*Birth of biopolitics*], *op.cit.*, p. 21.

[44] See the dissent here : https://en.wikisource.org/wiki/Lochner_v._New_York/Dissent_Holmes.

[45] E.g., Article 1 of the French Constitution: "France is an indivisible, secular, democratic and social Republic", Article 1 of the Spanish Constitution: "1. Spain is a social and democratic state governed by the rule of law", or Article 20 of the German Constitution: (1) The Federal Republic of Germany is a democratic and social federal state".

[46] On the different ways of thinking about the relationship between law and legitimacy, see Lauréline Fontaine (ed.), *Droit et légitimité* [*Law and Legitimacy*], Bruylant, coll. Droit et Justice, 2009.

[47] I leave aside here the third type of authority (i.e. legal domination) introduced by Max Weber, the charismatic one, which is both occasional and provisional because it is linked to an exceptional fact or personality. Max Weber, *Die drei reinen Typen der legitimen Herrschaft* [*The Three Types of Legitimate Rule*]*, Preussische Jahrbücher* 187, 1-2, 1922, English translation by Hans Gerth, *erkeley Publications in Society and Institutions* 4(1): 1-11, 1958.

been continuously integrated into the social space, creating, in fact, as is the nature of traditional legal domination. One can read here and there that the now "classical" categories of legal domination are inapplicable to the contemporary period, and there is even sometimes talk of the "anachronism of classical theories"[48]. It seems to me, however, that to speak of anachronism is out of step with the reality of an effective traditional legal domination. On the other hand, it is quite possible to speak of the ineffectiveness of the theoretical and prescriptive mechanisms of modern legitimacy, which form the basis of rational legal domination. The springs of legitimacy of the present system do not correspond with the prescriptions of the theory of democracy. Now, in the same way that Michel Foucault looked for the springs of contemporary liberalism, in its so-called neoliberal version since the 18th century, Boaventura de Sousa Santos also finds a kind of original vice in the system of thought that is set up at the origins of liberalism: "Reduced to the public space, the democratic ideal was neutralized or severely limited in its emancipatory potential (...); the conversion of the public space into the exclusive site of law and politics performs a fundamental legitimizing function by concealing the fact that the law and politics of the capitalist state could only function as part of a more general juridical and political configuration in which other, different forms of law and politics were included"[49]. If it is not a question here of entering into the reflection on the fact that the theoretical possibility that this way of conceiving law has its origin precisely in the political and theoretical changes that began in the eighteenth century[50], it is at least *a question of noting that the reality of the conception of law, economy and politics does not provide an official credo that is still perfectly avowed and subject to the assent of all*. A kind of fable is produced, instead, which says of contemporary European democracy that it is a place of transparency and participation.

According to the concept coined by the legal anthropologist Michel Alliot, based on the observation of complex systems of rules, particularly those resulting from African colonization, European Union law is perhaps the effect of a logic of "shameful law", which we do not want to admit to ourselves as it is. In *Un passeur entre les mondes*[51], the book dedicated to him, he indicates that the shameful law is that which is "on the fringe of official law: a law that is not spoken of because it does not correspond to the ideals that one wishes to put forward. It corresponds to much deeper aspirations; one must distinguish (...) the *said belonging* from the *silent belonging*, whatever the society"[52]. Applied to the European Union law, the so-called belonging would be precisely the idea of elective and popular democracy evolving according to the principles of transparency and participation, while the silent belonging would be a dependence to the principles conveyed by the main actors of the world economic market. In view of the increasingly explicit and numerous statements and writings of the various actors at work in the making of the European legal space, it is nevertheless possible that the law is less shameful and hidden than voluntarily omitted and not seen for what it is. It is perhaps not the law that is shameful today, but the way in which the law is viewed.

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[48] Mattei Dogan, "La légitimité politique : nouveauté des critères, anachronisme des théories classiques" [*Political Legitimacy: New Criteria, Anachronism of Classical Theories], Revue internationale des sciences sociales*, 2010, n°2, p. 160.

[49] Boaventura de Sousa Santos*, op. cit.,* p. 482. Emphasis added.

[50] I refer again and in particular to the authors cited in note 12, Karl Polanyi, Michel Foucault and Boaventura de Sousa Santos.

[51] Michel Alliot, "Récit de quelques passages" [*Narrative of Some Handovers*], *in* Etienne and Jacqueline Le Roy, Haoua Lamine, Christoph Eberhard (eds), *Un passeur entre les mondes* [*A Passer-by Between Worlds],* Publications de la Sorbonne, 2000, pp. 31 and following.

[52] Ibid. p. 44. Emphasis added. This concept of *Shameful law*, taken up in particular by Antoine Garapon, has also been interpreted conversely as the official law whose ineffectiveness can be almost total, following Gilda Nicolau, "La prophétie du Non-droit" [*The Prophecy of the Lawless*], *in* Raymond verdier (ed.), *Jean Carbonnier. L'homme et l'œuvre* [*Jean Carbonnier. The Man and his Work*], Presses Universitaires de Paris Ouest, 2012, p. 377, Published on Openedition Books in 2014: http://books.openedition.org/pupo/2666.

Part 2. European Union Law: the Effectiveness of an Autonomous Law Undermined in its Foundations

Does the attraction for the effectiveness and efficiency of law mark a rather radical distancing of law from society? The advent of the end of law of "state" origin marks for its followers the true taking of power by society over law, the outcome of a logic that began in the 18th century. This thesis must be seriously questioned, and this cannot be done without also questioning the relationship that, through law, society has with technique, technology and science (1). The result, or rather, it has occurred, simultaneously, a de-legitimation of the law as an autonomous and creative source of impulse and social regulation (2).

1. The Status of Technology and Science at Work in European Union Law

The ambition to base a social order on science is not unique to contemporary society: this ideal has been found in many thinkers since the 18th century. But, as Boaventura de Sousa Santos recently pointed out, "the promise of the domination of nature and its use for the common benefit of humanity led to the excessive and reckless exploitation of natural resources, to ecological catastrophe, to the nuclear threat, to the destruction of the ozone layer and to the emergence of biotechnology, genetic engineering and, consequently, to the conversion of the human body into the ultimate commodity"[53]. If we remember that law is an anthropological reality, "the conversion of the human body into the ultimate commodity" is likely to mean a dilution of the legal and political operation in their marketable character, whose properties would be determined by science, which is the characteristic of the notion of *legal engineering*. Law, and at the same time politics, tend to be based entirely in the direct relation that is established between technical knowledge and the rule in such a way that "law" is produced: the absolute and incontestable character that is put forward in relation to physical and scientific laws avoids, when it is reintegrated into the legal space, its politicization and its lot of discussions, reflections and, by the same token, decisions, necessarily and always arbitrary. The stakes of the law are shifted from the political, and also philosophical, field to that of science, in which, strictly speaking, there are no more "subjects" but only "objects"... of science. The "technicization of law" has the effect of dissolving the subject, and therefore speech, and therefore discussion.

In the European Union law, the rise in power of the tool of *standardization* is a manifestation of the displacement of the law's interest in subjects towards objects, without a voice of their own. With standardization, born of a grouping of industrialists at first, and then in a way become institutional[54], the effectiveness becomes conformity of the law to technical principles, precepts and rules. At the end of the 1980s, in a work devoted to "Law in Contact with Technological

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[53] Boaventura de Sousa Santos, *op.cit.*, p. 10.

[54] See the histories of *AFNOR*, the French Standards Organization (Franck Cochoy, "De l''AFNOR' à 'NF'. Ou la progressive marchandisation de la normalisation industrielle" [*From 'AFNOR' to 'NF'. The Progressive Commodification of Industrial Standardization]*, Réseaux, 2000, no.102, pp. 65 and following), and of *ISO*, the International Organization for Standardization (Willy Kuert, "La Fondation de l'ISO. Tout va dans le bon sens !" [The ISO Foundation. Everything is Going in the Right Direction!], in *L'histoire d'une amitié partagée. Souvenirs à propos des cinquante premières années de l'ISO* [*The Story of a Shared Friendship.* Recollections on the first 50 years of ISO,] ISO Publications, 1997, pp. 13 and following, available at: http://www.iso.org/iso/fr/2012_friendship_among_equals.pdf).

Innovation"[55], Michel Miaille noted that "the question of the 'doubling' of legal rules by technical norms has been raised and the role of experts has long been analyzed"[56], but, he continued, in line with François Ewald's thesis on the *Welfare State*[57], we should ask ourselves whether the "rules of judicial decision-making" have not changed, that is, "the system of propositions from which the legal rule is assessed"[58], a regime of truth or veridiction as Michel Foucault might have said[59]. The European Union has for many years integrated technical standards into Union law, defining them and determining the modalities of their integration, with the famous "New Approach directives"[60]. All the countries of the European Union have done the same, and the legal rules are now essentially "referenced" to the technical specifications contained in the standards, which are thus given legal status. On its website, *ISO*, the *International Standards Organization*, refers to a standard as a document "that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context"[61]. The use of the principle of systematicity deserves to be emphasized because it brings with it a sort of inevitability that will also bring with it, along with juridicality, i.e. the obligation. The obligation that thus tends to result from the technical nature of a question is symptomatic of the contemporary relationship of man and society to their environment and its organization.

Indeed, standards and the effectiveness of technical standards are an instrument for the economic goal that is simultaneously pursued by the law: With International Standards, it's "Better Business, better regulation, better products and services"[62]. On the principles of standards development, ISO emphasizes four points, the first of which is that ISO standards "respond to a need in the market"[63]. Technical standardization is therefore, and always will be, an economic issue[64]. Therefore, it can be said on its website that "ISO standards are developed with the involvement of governments worldwide, ensuring the needs of policy makers are taken into account", and that "As the benefits of using standards to support public policies have become more widely recognized, many major economies of the world have developed policies

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[55] Michel Miaille, "Quel contrôle démocratique ?" [*Which democratic control?*], in Centre de Recherches Critiques sur le Droit, *Le droit au contact de l'innovation technologique. Colloque de Saint-Etienne* [*The Law in Contact with Technological Innovation. Colloquium of Saint-Etienne*], 1987*,* Université Jean Monnet, 1987.
[56] *Ibid,* p. 33.
[57] François Ewald, *The Birth of Solidarity. History of the French Welfare State,* Duke University Press, May 2020, edited by Melinda Cooper and translated by Timothy Scott Johnson (first published in French in 1986, *Histoire de L'Etat-Providence*, Paris, Grasset.
[58] Michel Miaille, *op. cit.,* p.33.
[59] Michel Foucault, *Naissance de la biopolitique* [*Birth of biopolitics*], *op. cit*, and *Sécurité, territoire, population, Cours au Collège de France, 1977-1978* [Security, Territory, Population. ectures at the College De France, 1977–78], Seuil, Gallimard, 2004. *English translation edited by* M. Senellart and al. (eds.), Palgrave Macmillan, 2009. Since 1985, observers have not failed to be astonished by the reversal of François Ewald's position, from post-Marxism to liberalism, whose common point, however, can easily be found in the philosophy of the least, or even of the no State. In this spirit, see the recent book edited by Daniel Zamora, Critiquer Foucault. Les années 1980 et la tentation néolibérale [*Criticize Foucault. The 1980s and the Neoliberal Temptation*], ed. Aden, 2016. Communities of view between *Liberalism/Capitalism* and *Communism* are more and more regularly put forward, including by jurists (see e.g. Boaventura de Sousa Santos, *op. cit*., or Alain Supiot, *La gouvernance par les nombres* [Governance by Numbers], *op. cit.)*
[60] See e. g. Directive 83/189/EEC of 28 March 1989.
[61] Site ISO : https://www.iso.org/sites/directives/current/part2/index.xhtml.
[62] *Ibid.*
[63] The three other principles are that they are "based on global expert opinion", "developed through a multi-stakeholder process", and "are based on consensus".
[64] ISO website: "For small to medium sized enterprises (SMEs), standards can help to: Build customer confidence that your products are safe and reliable, Meet regulation requirements, at a lower cost, Reduce costs across all aspects of your business, Gain market access across the world"

to actively encourage their use"[65]. For companies, the ISO website states that standards "are strategic tools for lowering costs, increasing productivity and reducing waste and errors. They open up new markets, establish a level playing field for developing countries and facilitate free and fair trade around the world"[66]. In line with this spirit, the Council of the European Union, in its resolution of 7 May 1985 *on the new approach to technical harmonization and standardization*, states that the recasting of technical harmonization aims at "putting an end to technical barriers to the free movement of goods"[67]. Technical standardization would thus be "an indicator of international economic competition", of which the institutional architecture AFNOR (France) - CEN (Europe) - ISO (International) would be one of the expressions"[68].

Competition would therefore only appear to be effective if it is based on technical and scientific prescriptions. However, the valorization of the primacy of scientific and technical statements mechanically entails the devaluation of legal statements that would meet non-technical-scientific criteria. It would thus become essential to determine according to which criteria a statement can be considered as scientific or technical. But it seems that the relationship of man to technique is not so absolute: if it has changed, it carries with it a conception of man that, by a selective bias, attributes a status of quasi-truth to certain prescriptions only. Not all scientific statements are given the same value that would merit legal validation. For example, the works of the human and social sciences, even if they are concordant and respond to proven scientific protocols, do not have, in the space of law and specifically of the European Union law, the status of statements that would merit the alienation of the law from them, except perhaps, but this is variable, when these works deal with dozens of figures[69]. Jacques Ellul thought that if Marx had delivered one of the strongest analyses of his time by illuminating the respective places of law and economy in capitalist societies, this analysis was partly obsolete in the twentieth century, since technique and the prescriptions of technique had even dictated their "law" to those of the market[70]. It is not at all insignificant to remember that Jacques Ellul, known above all beyond the frontiers of law, was precisely a jurist, a historian of law. "The technical phenomenon, he said, is the main preoccupation of our time; in every field men seek to find the most efficient method"[71]. And, Jacques Ellul also noted, "In principle the 'technical culture' cannot think in terms of general problems or reflect upon them. It cannot even think about itself"[72]. And indeed, not only can technical culture not, by itself, think what it implies in societal terms, but the technical culture of one system of law that implements this culture, is just as incapable of doing so in principle. This is because, without a doubt, contrary perhaps to

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[65] *Ibid.*
[66] *Ibid.*
[67] Resolution 85/C 136/01.
[68] John Ktechell, Strategic adviser at the CEN (*Comité Européen de Normalisation* [*European Committee for Standardization*]), "De nouveaux enjeux pour la normalisation européenne ?" [*New Challenges for European Standardization?*], *Table ronde, Les enjeux de la normalisation technique, Atelier PUCA* [*Roundtable, The Challenges of Technical Standardization*], 3rd seminary, 22 October 2012 (http://www.urbanismepuca.gouv.fr/IMG/pdf/Rapport_Normalisation_oct2012.pdf).
[69] And yet this is still often insufficient, as illustrated by Thomas Piketty's best-selling book, *Le capital au XXIè siècle* [*Capital in the Twenty-First Century*], Seuil, 2013 (English translation by Arthur Goldhammer, Belknap Press, 2014), crammed with figures, diagrams and other synthetic tables. At least the book full of figures has allowed him to make some figures.
[70] See Jacques Ellul's trilogy on technology, *La Technique ou l'Enjeu du siècle* (1954) [*The technological Society*], English translation by John Wilkinson, Vintage books, 1964; *Le Système technicien* (1977) [*The Technological System*], English translation by Joachim Neugroschel, The Continuum Publishing Corporation, 1980; *Le bluff technologique* (1988) [*The Technological Bluff*], English translation by Geoffrey W. Bromley, Grand Rapids, MI: Eerdmans, 1989
[71] Jacques Ellul, *The Technological Society, op. cit*., p. 21.
[72] Jacques Ellul, *The Technological Bluff*, *op. cit*., p. 221.

what Jacques Ellul thought, the sole considerations of technique are not sufficient to understand the way in which law is conceived and deployed in contemporary Europe. There is no doubt that complete submission to science would imply a mechanistic vision of society in which law would no longer have a place, but it so happens that choices remain, notably that of submitting law to principles reflected outside it.

2. The Mechanical - but Selective – De-legitimization of Law and Politics Autonomy

A reading of legal and non-legal documents, at the national, European and global levels, makes it possible to establish a "positive" relationship between technical standards and society: it would be "trust", "trust in the future", "sustainable trust", an "economy of trust", trust associated with "health" and "security", trust also "in governance", and "in leadership", as well as "in innovation", and finally "integrated trust", "trusting partners" but also "individual trust"[73].

However, "technical standards" are displayed as those of private institutions or operators, whereas legal rules are displayed primarily as those of public institutions. And, in the logic of standardization, the former are more worthy of "trust" than the latter. The director of AFNOR, the French standards institute, wrote in 2015 that "voluntary standards are in fact co-constructed by the professionals themselves, whether they are public or private. They identify good practices, methodologies and terminologies based on the principle of universality and interoperability. They constitute a *common language* and provide a guarantee of quality, security and performance in the service of everyone's interests"[74]. In its 2015 Annual activity report, AFNOR notes that 90% of voluntary standards today are of European or international origin[75].

Pushing the logic at work far does not only mean a correlative distrust of public institutions, but, according to a quasi-Marxist principle, doing *without these institutions altogether*. First, it is a matter of private operators investing public institutions, under the guise of the application of democratic logic, with, for example, the institutionalization of lobbying, whose effects on democratic logic are now well known[76]. Then, it is a matter of doing without these institutions, as the "blockchain" technology illustrates very well. This is what we can read about this technology, which the law should be at the service of[77]: "The second essential character of blockchain technology is that, for its architects, it can do without institutions and public bodies: indeed, the system is based on trust. It is about users trusting without a trusted third party. This is made possible by the blockchain community. When an exchange or transaction is made by a user, it is grouped with other transactions in a "block". Governance is the result of a regulatory system without rules that are the direct and supposedly consensual emanation of the governed community. And the article drives the point home: "this is the strength of such a system, which

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[73] All these terms are found in a single document, the *ISO 2008 Annual Report* (available on the ISO website, *op. cit.*), and overly reflect what is read elsewhere in the "private" and "public" literature, including the european institutions one.

[74] Olivier Peyrat (Managing Director of AFNOR at the time of the article), *La norme au secours du dérèglement climatique* [*The Standard to the Rescue of Climate Change*], 3 December 2015, *Le Monde.fr*. Emphasis added.

[75] http://groupe.afnor.org/pdf-portail/rapport-annuel-2015.pdf

[76] See in particular Sylvain Laurens, *Les courtiers du capitalisme, Milieux d'affaires et bureaucrates à Bruxelles* [*The Brokers of Capitalism, Business Circles and Bureaucrats in Brussels*], Agone, 2015.

[77] Website "Le droit de la blockchain"[*Blockchain Law*], article by Pierre Caisey, "Le droit au service de la technologie" [*Law in the Service of Technology*], http://www.droit-blockchain.fr/

goes beyond individualities by relying on *a technology that creates a social link* in order to trust a social body, and not a central authority or a trusted third party (...)"[78].

The worldview at work is presented as such: "In a world whose loss of bearings is often deplored and where confidence in technology has never been so strong, it can only be noted that blockchain would probably have struggled to arrive at a more opportune time". Regarding a judgment of the Court of Justice of the European Union of October 15, 2015, *Balazs* (case C-251/14), "the sometimes complex articulation that technical standards and 'classical' rules can have" is underlined[79], which highlights the fact that the disputed standard was "adopted by a national standards body on the basis of a standard drafted by CEN, outside of any real democratic control", and "allowed the applicant in the main proceedings to be sanctioned even though this Hungarian standard was only available in English and was thus potentially incomprehensible for the litigant". And the author of the commentary underlines that if technical standards "allow the European market to continue its integration in an efficient manner", they "raise questions as to the respect of the principles of legal certainty and transparency".

It has become almost a repeated refrain to note this, as well as to remember that the intellectual and media interrogations on the existence or not of Europe (because it would have no political reality), seem to ignore the legal reality of Europe, due to the effect of the legal accumulation that has taken place, to the point of making a complete "system". The European Union has developed a supranational legal system in such a way as to create an internal market in which the four freedoms of movement flourish, without practically ever provoking a political debate on these issues. The construction of European Union law has thus for a long time taken place outside of public political debate, the latter being rendered unnecessary by the mechanical application of technical and scientific prescriptions. The now famous philosophy of "TINA" (*There Is No Alternative*) is the perfect symptom of this evolution, which ranks political events as disturbances to the serene application of rules defined elsewhere. "Modernity, says Boaventura de Sousa Santos, conceived of law as a second-order (and probably provisional) principle of social organization in relation to science, and once it was subjected to the capitalist state, law itself became a first-order scientific artifact. From that moment on, the automatic utopianism of technology developed at the same time as the utopianism of legal engineering, and, in fact, the two processes have been fed by each other ever since"[80].

This is how the "selection" can easily take place between the different statements, according to a specific rationality, which makes it possible, for example, to understand how, logically, the European Commission can say, based on an opinion of the European *Food Safety Authority*[81], that "Endocrine disruptors can (...) be treated like most [chemical] substances that are of concern to human health and the environment", even though it would seem that many studies would illustrate the contrary. It is a truism, but unfortunately without consequence, that behind scientific choices, a very commercial logic remains. By the effect of a certain way of seeing the relationship between society, politics and law, fed by decades of literature on this subject, from

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[78] I underline. The author adds, "The libertarian philosophy of the early days of the internet seems to be resurrected with blockchain, with one goal: to go even further in deconcentration and disintermediation.

[79] See Laura Marcus, "Libre circulation des marchandises et normes techniques : quelles conséquences juridiques dégagées par la CJUE ?" [*Free Movement of Goods and Technical Standards: the Legal Consequences Identified by the CJEU*], *Actualité juridique du 3 novembre 2015*, www.ceje.ch .

[80] Boaventura de Sousa Santos, *op. cit.*, p. 95.

[81] *Scientific Opinion on the hazard assessment of endocrine disruptors: Scientific criteria for identification of endocrine disruptors and appropriateness of existing test methods for assessing effects mediated by these substances on human health and the environment*, 10.2903/j.efsa.2013.3132

the physiocrats to Bruno Leoni or Friedrich Von Hayek, the spontaneous "rules" of the market, which are essentially only the practices of the dominant economic operators, tinged with theorization, have been assimilated to incontestable scientific rules, for which the "truth" of technical norms is always only an instrument to be discarded for the same reasons. According to Michel Foucault, there was a moment in history, in the eighteenth century, when the market was constituted "as a space of truth": "And this is not simply, not so much because we have entered the age of a market economy - this is both true, but it says nothing precisely -, not because people wanted to make the rational theory of the market - this is what they did, but it was not enough"[82].

What we need to note first of all is not the "less" State or the transformations of the ways of action of the State, but its organization, mainly through law, as best illustrated today by the European Union law, in the service of a particular conception of society driven by the economy: deregulation, as it is called, is not a weakening of legal rules, but the mobilization of the forces of law around the realization of an identifiable ideology, which the Court of Justice of the Union itself has identified perfectly well, placing its judgments almost always at the service of this ideology. It should also be possible to say that this relationship does not, however, have such an inevitable character that it would force the disappearance of legal institutions in order to deprive the market of its best instrument. But everything happens as if there were nothing we can do about it, starting, moreover, by pretending not to see anything.

[82] Michel Foucault, *The Birth of Biopolitics*, *op. cit.,* pp. 33 and following.