Law Scenarios to 2030

Signposting the legal space of the future

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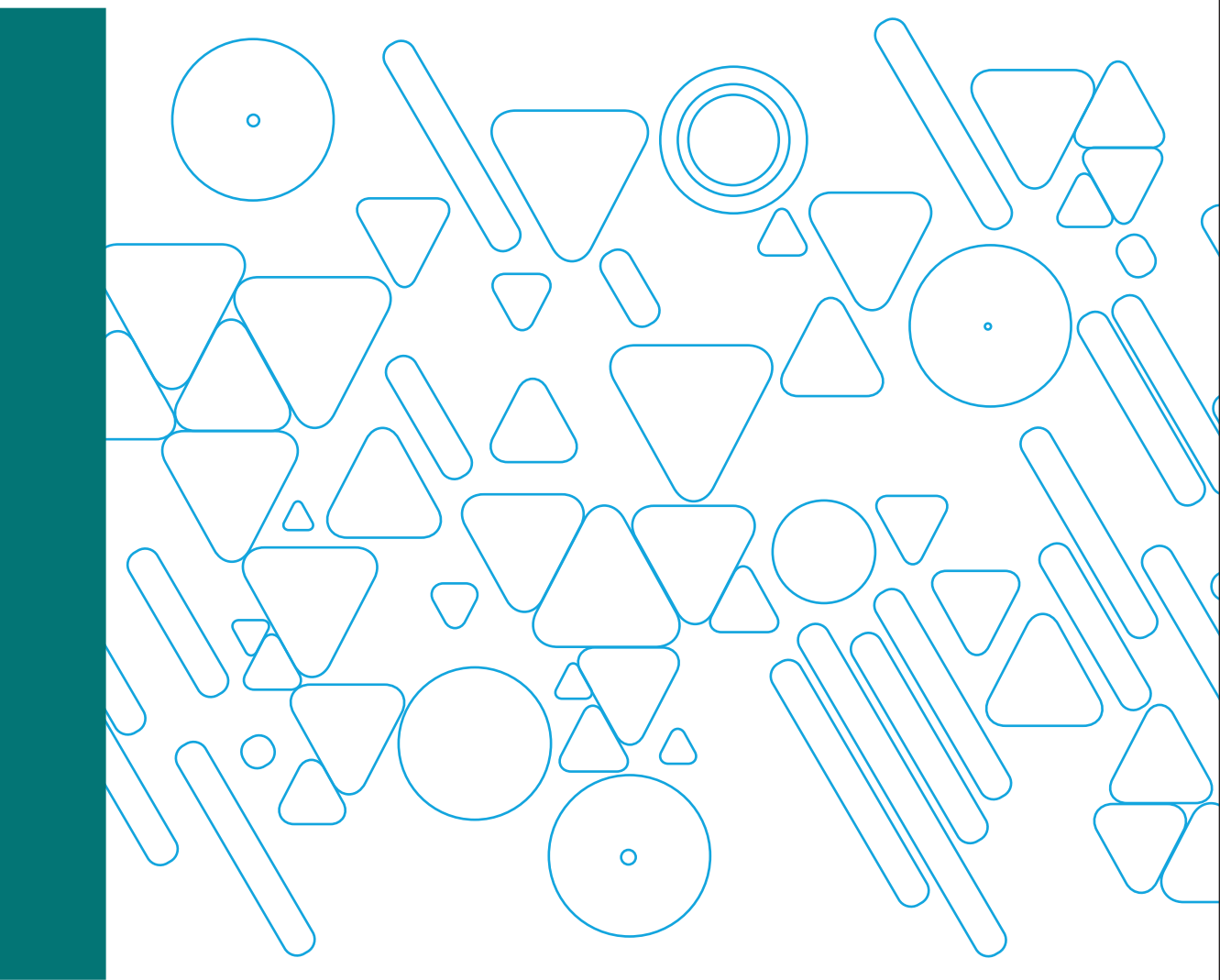


Content

Signposting the legal space of the future

These Law Scenarios to 2030 are part of the Law of the Future Joint Action Programme, which brings together creative thinkers from practice and academia to reflect on alternative futures for law and legal systems.

Law of the Future Joint Action Programme aims to provide actionable recommendations for policy, research and legal education. It is based on the premise that prospective thinking about law is not only desirable, but also required in order to ensure that law and legal systems do not become obsolete, ineffective or unjust.

The Joint Action Programme has four elements:

Feed-Us! Process

Law of the Future Forum & Conference 2011

Law Scenarios to 2030

Law of the Future Monitoring Mechanism

Feed Us! Process

The Feed Us! Process has been developed over 2010/2011, with more to come in the future.

Leading thinkers and doers are asked to write Think Pieces on what they see as the main challenges for law in the next 20 years. The 49 Think Pieces submitted so far are published in **The Law of the Future and the Future of Law** - a 750 pages book published by Torkel Opsahl Academic EPublisher, freely accessible online.

Other experts provided input by way of interviews; they include experts like Francis Fukuyama (Stanford University), Jonathan Koppell (Arizona State University), Parag Khanna (New America Foundation), Peter Rees (Shell), and Louise Arbour (International Crisis Group).

Lastly, 15 Scenario Feedback sessions for different professional and geographical groups where held in various locations, including The Hague, New York, Beijing, Johannesburg and Seville.

Law Scenarios to 2030

The **Law Scenarios to 2030** are based on the input from the Feed Us! Process. They provide three wind tunnels in which ideas and strategies concerning the law of the future can be tested and debated. More on the methodology is set out below and is further elaborated on:

www.lawofthefuture.org

Law of the Future Forum & Conference 2011

The Law of the Future Forum & Conference is where the law of the future community meets. It engages representatives from three groups – government, business and civil society – in a debate based on the **Law Scenarios to 2030**. As outcome, the Forum and Conference produce actionable recommendations for:

Policy: What should be done?

Research: What don't we know?

Legal education: What should be taught?

Law of the Future Monitoring Mechanism

The Law of the Future Monitoring Mechanism, a mechanism to monitor which (aspects of the scenarios) are unfolding or not, will be developed later.

Input 2010

1 August 2010
Think Pieces:
Process of inviting experts to write Think Pieces started

2 August 2010
Young Talent Essay competition:
Young scholars submitted original essays on how the law will look in 2030. Abiola Makinwa won the competition.

20 August 2010
Interview:
Kamiel Mortelmans, Dutch Council of State

25 August 2010
Interview:
Willem Konijnenbelt, Dutch Council of State

3 September 2010
Scenario Building workshop I:
An interactive session to make the step from 'Think Pieces' to 'Law Scenarios to 2030'

22 September 2010
Interview:
Joris Demmink, Secretary-General Dutch Ministry of Justice

18 November 2010
Scenario Building workshop II:
A second, high-level session to refine the basis of the 'Law Scenarios to 2030'





7 January 2011
Interview:
Erik Lagendijk, Executive VP & General Counsel Aegon N.V. and Alexander van Liefland, Head of Legal Aegon N.V.

11 January 2011
Interview:
Louise Arbour, President and CEO of the International Crisis Group

14 January 2011
Scenario Feedback session:
Netherlands Institute of International Relations Clingendael

25 January 2011
Scenario Feedback session:
Organisation for Economic Co-operation and Development

9 February 2011
Interview:
Edward Kleemans, VU University Amsterdam, Faculty of Law

28 February 2011
Scenario Feedback sessions:
Permanent Mission of the Kingdom of the Netherlands to the UN; Canadian Mission to the UN

1 March 2011
Scenario Feedback session:
New York University, School of Law

2 March 2011
Interview:
Fink Haysom, Director of political affairs, United Nations, Office of the Secretary General

7 March 2011
Interview:
Peter Rees, Legal Director, Royal Dutch Shell plc

17 March 2011
Scenario Feedback session:
Pels Rijcken & Droogleever Fortuijn

18 March 2011
Interview:
Peter Wakkie, Former member of the Board of Ahold, Co-founder Spinath & Wakkie

11 April 2011
Scenario Feedback session:
South African Human Rights Commission

19 April 2011
Scenario Feedback session:
Dutch Ministry of Security and Justice, Strategy Department, with students of the MARBLE project led by Jan M. Smits

22 April 2011
Scenario Feedback session:
University of Chicago Beijing Center, Sciences Po and La Trobe University

4 May 2011
Interview:
Parag Khanna, Director Global Governance Initiative, New America Foundation

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

Input 2011

Output

13 May 2011
Interview:
Aryeh Neier, President
of the Open Society Foundations

16 May 2011
Scenario Feedback session:
Foresight Unit, Institute for
Prospective Technological Studies,
European Commission's
Joint Research Centre

18 May 2011
Scenario Feedback session:
Dutch law firms

19 May 2011
Scenario Feedback session:
Aegon N.V.

25 May 2011
Scenario Feedback session:
Directors of legislative departments
of Dutch ministries

25 May 2011
Interview:
Saskia de Lang, Special Representative
for Energy, Dutch Ministry of
Foreign Affairs

26 May 2011
Interview:
Geert Corstens, President of
the Supreme Court of the Netherlands
(Hoge Raad)

2 June 2011
Interview:
Jonathan Koppell, Director Arizona
State University,
School of Public Affairs

23 June 2011
Law of the Future Forum:
Experts from government, business,
civil society and academia meet
to explore and exchange views on
the 'Law Scenarios to 2030'

2030

23-24 June 2011
Law of the Future Conference:
Presentation of the 'Law Scenarios to 2030
Publication: 'The Law of the Future and
the Future of Law'

Why Law Scenarios to 2030?

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

The world is subject to constant change, much of it triggered by the all-encompassing process of globalisation. Globalisation affects societies and, with that, the way in which legal systems function and interact. One of the functions of law is to moderate certain forces of society and to provide levels of predictability and certainty.

That seems more needed than ever now that many of us – citizens, governments, private enterprises alike – are sailing on an ocean that is much bigger and more complex than the large lakes we travelled just a few decades ago. There are more opportunities – you can move from Amsterdam to China in a few microseconds via the Internet – but there are also new risks, complexities, and interdependencies which can knock you off course. In such a world, thinking about the future of law (including, what role it can/should play) and the law of the future (what form it might/should take) is not a luxury – it is a necessity.

That is what these scenarios are for – to help us think, imagine, conceptualise, hand debate in order to make law more than just a reactionary force. Rather, it should be a force that helps shape a better future.

Scope

The Law Scenarios to 2030 are a unique instrument to help the national lawmaker embrace uncertainty and work on preparedness, given the fact that predicting the future is not possible.

In a simplified image, two notions are constructed to provide an analytical framework for discussion and debate. The first is that of the national lawmaker: an imaginary figure that is responsible for organising an effective legal system within a state. The second is that of the global legal environment. This concept refers to the mechanisms underlying authoritative rule-making, rule-enforcement, and dispute resolution beyond national borders. It is the 'what-is-out-there' that the national lawmaker must take into account in order to have the legal system that he wants.

In this global legal environment the process of entanglement of legal systems through globalisation affects the development, implementation, interpretation, supervision and enforcement of rules. It is no longer effective to regulate human behaviour at the national or local level, without regard to other legal systems. When conduct has an international dimension, people and organisations may find themselves subject to conflicting legal systems or may seek to evade particular legal systems. When rules are made at the international level, legitimacy issues at the national level can ensue. Legal systems constantly need to adapt to this changing reality. They accommodate elements of other legal systems through different methods, for example, through harmonisation of legislation, uniform interpretation, and appliction of foreign law by courts. They use formal mechanisms, like treaties and decisions of intergovernmental organisations. Or they use informal mechanisms, like dialogues across borders between judges and parliamentarians, the creation of codes, standards and other 'soft law' instruments. We call this process the internationalisation of law and it takes place at many levels: global, regional, sub-regional, and transnational.

The **Law Scenarios to 2030** are a unique instrument to help the national lawmaker embrace uncertainty and work on preparedness, given the fact that predicting the future is not possible. The imaginary national lawmaker is a crucial figure, but we all know that the national lawmaker is not one figure or entity.

National legal systems do not have one single captain on the bridge. In fact, the whole point of democracy and the balance of power is that that is not so. The lawmaker is, in actual fact, a complex system comprising national ministries, parliamentarians and highest national courts, which work on laws, adjudication and enforcement systems.

From his perspective, the development of the global legal environment is to a large extent an exogenous development over which the national lawmaker can assert little control, but which can affect him and what he wants to achieve greatly.

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

Method

Legal futurists are not widespread among legal scholars and practitioners. Compared with the extensive body of literature on the history of law, there is limited scholarly work on its longer-term future. Some scholars do focus on the future of law, but through very particular prisms, such as how technology will change it. Others address the future of only specific legal areas. Sometimes the future of legal traditions is questioned. On the whole, the limited time horizon of lawyers tends toward use of the most recently adopted law or court decision; they then look back and argue whether that particular law or decision will or will not work. Instead of systematically studying the future and future uncertainties, the lawyer's way of dealing with uncertainties is to act through unadapted and contemporary norms, decisions, and institutions.

In the next section we give a brief analysis of major trends, both societal and legal. The trends are used to derive key uncertainties. The key uncertainties provide the foundations for our three alternative futures or scenarios.

The **Law Scenarios to 2030** allow the imaginary national lawmaker to consider alternative legal futures that have been built based on extensive data and to assess the implications for national strategies. Likewise, the scenarios can be used by a general counsel of an internationally operating corporation, a strategist at an international law firm, or a leader of a civil society organisation.

Justification

To most lawyers and legal scholars asking about the future of law will seem too speculative or not very useful.

First, they may argue that focusing on the global legal environment without providing an in-depth analysis of the extra-legal driving forces would not be sufficiently inclusive. What happens to the global legal environment is a function of technological, societal, economic, political and moral developments. Therefore, why not study our technological, societal, political, economic, or moral futures and then derive the implications for the global legal environment?

A second argument that could be brought forward is that the only thing we know about the future is that it is uncertain. So why study things we cannot know?

A third objection could be that national legislators have always adequately dealt with the future by acting. Hence, why bother about possible futures instead of discussing a desired future?

These are real and good objections, which require a nuanced response. Yes, the global legal environment is obviously not an isolated phenomenon. Economic and political developments, wars, financial crises, climate change, natural disasters and new technological inventions are all driving forces that affect the future of the global legal environment. There are scenarios made by experts for most of these fields which account for these developments. One could attach legal aspects to those scenarios, but that would produce a very fragmented picture that would be of little added value when trying to answer what broader challenges law faces.

While the **Law Scenarios to 2030** take the wider trends and their possible impact on law into account, the focus is on the law itself and legal systems and institutions, rather than on the extra-legal issues. From the Feed Us! Process that underpins these scenarios one can convincingly construct three scenarios. It is obvious that the questions whether (any of) these three scenarios will emerge, also depends on trends in other fields, such as the economy, politics, and technology.

The second objection concerns uncertainty. Yes, the only thing we know about the future is that it is uncertain. But the uncertainty of the future does not hamper systematic scrutiny. We can explore the uncertainties by using scenarios to envisage possible futures. We use scenarios as a tool to deal with uncertainty, rather than as a claim to know the future.

Addressing the third objection, we can say that the ultimate goal could indeed be to help shape a desired future. That is precisely how the scenarios can be used. They can help to design legal strategies that wil allow legal systems to survive in different circumstances. Therefore, we need to confront the desired future with alternative scenarios in order to detect strategic challenges for national legislators.

For a more elaborate explanation on the method of scenario writing, an overview of sources that were used to identify the trends and all the outcomes of the Feed Us! Process, please visit:

www.lawofthefuture.org

Trends

Based on a reading of existing future-oriented analyses in the fields of security, economics, technology and geopolitics, eight broad societal trends are distinguished.

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, within states and between states. In 2030, two-thirds of the world population will be living in cities.

More attention to the environment

The environment will become even more of an important factor in all areas of life: economics, politics, and social interaction. Over the last century, the global average temperature has risen by 1.1 degrees Celsius. Biodiversity is decreasing. There is interdependency relating to environmental issues – solving matters in isolation is not an option.

More scarcity

Growth in population will put greater stress on land, water and fossil energy. By 2015, growth and production of oil and gas will not match the projected rate of demand. 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. More use of complex and high-impact technology: Technology will play an increasingly important role over the next 20 years, providing solutions, yet also creating new problems (digital divide, technology divide, privacy, social media, bio- and nanotechnology).

More security

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 of 2004: (i) economic and social threats, including poverty, infectious disease and environmental degradation; (ii) inter-state conflict; (iii) internal conflict, including civil war, genocide and other large-scale atrocities; (iv) nuclear, radiological, chemical and biological weapons; (v) terrorism; (vi) transnational organised crime. Even wider definitions are possible.

More economic globalisation

All projections concerning international trade and international flow of capital, movement of people/labour, and goods show an increase. So does the projected growth of transnational/global corporations. We have also seen a tremendous growth of regional and sub-regional economic cooperation agreements.

More diffuse power constellations

More divergence of sources of power, at different levels – international, regional, national, local – and between public and private will occur, often resulting in tensions. There will be a multi-polar world, or at least more balance of power on a geopolitical scale.

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.

Two legal trends

The think pieces and other sources indicate many trends with regard to the global legal environment and with regard to specific legal areas. On the surface, the legal trends observed seem to be diverse and they sometimes point in different directions. But if we stick to trends observed at this moment and leave out the speculations concerning the future, there appear to be two major shifts in the global legal environment.

> **"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**

From a predominantly national to a predominantly international legal environment

Globalisation is driving the intertwinement of legal systems. There are more and more challenges where it is felt that international cooperation is necessary. The growth of international trade and transnational corporations goes along with internationalisation of contract law, law of torts, business law (for example, insolvency law), intellectual property law, and tax law. Because national laws are not necessarily harmonised, conflicts and gaps between national laws are increasingly evident. These conflicts exert pressure on governments towards convergence. Besides the growth of international trade and international capital migration, the international flow of humans, technologies, crime, and illicit trade drives national law towards more internationally formulated norms and rules and more international organisations for the creation and enforcement of these norms. 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.

From a predominantly public legal regime to a mixed public-private regime or even predominantly private regime

Both national and international law have firmly rested on public authority in the past. Even though norms are established and enforced differently in different legal systems, state institutions almost everywhere play a major role in these processes. However, some 'think pieces' clearly mark a trend towards rule-making and enforcement by private actors, sometimes even completely outside the scope of law.

These private governance mechanisms appear in different shapes. Standards and rules concerning a company's behaviour or liability are laid down in codes of conduct or standard form contracts. Another facet of this trend is the growing use of alternative dispute resolution mechanisms, instead of the state court system. With the Internet, shaming as a way of enforcement has become a phenomenon. As with the previous trend, it is not evenly spread, nor is it evenly valued.

These major shifts have already changed the global legal environment considerably. They affect the work of many judges, legislators, implementing agencies, ministers, and civil servants. Their impact may be further amplified by the fact that they coincide with the increasing speed of social, political, economic, and technological change. However, we must also realise that these trends are based on an observation of what has happened in the past decades and where we are now. It very much remains to be seen how these trends and shifts will evolve during the next decades. Will their development follow a linear path? Will the growth of international law and international legal institutions continue? Will traditional national and international state-connected institutions remain the primary actors within the global legal environment or will the role of non-state actors continue to grow unabatedly?

Two contingencies

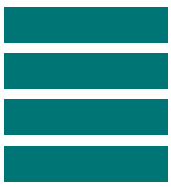
We cannot answer these questions with certainty. However, the fact that we cannot predict the future should not prevent us from systematically exploring it. Instead of dissolving future uncertainties we can also embrace them. Instead of assuming one future, we can explore different futures and assess their implications for our legal strategies.

We do this by reworking the trends listed above into two contingencies:

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 theoretically allow four scenarios, in short catch words:



International – Public
International – Private
National – Public
National – Private

As we opted not to further develop the latter possible scenario – for it is somewhat incoherent and hugely theoretical (more on this at www.lawofthefuture.org) – three plausible scenarios remain.

These can be regarded as wind tunnels of three different global legal environments in which the fictional national lawmaker can test how his legal system holds together and with the help of which he can then develop strategies to address undesirable effects or strengthen desired ones.

Law Scenarios to 2030

We explore each scenario in this section. A picture is given of the global legal environment in 2030, including likely triggers.

Global Constitution

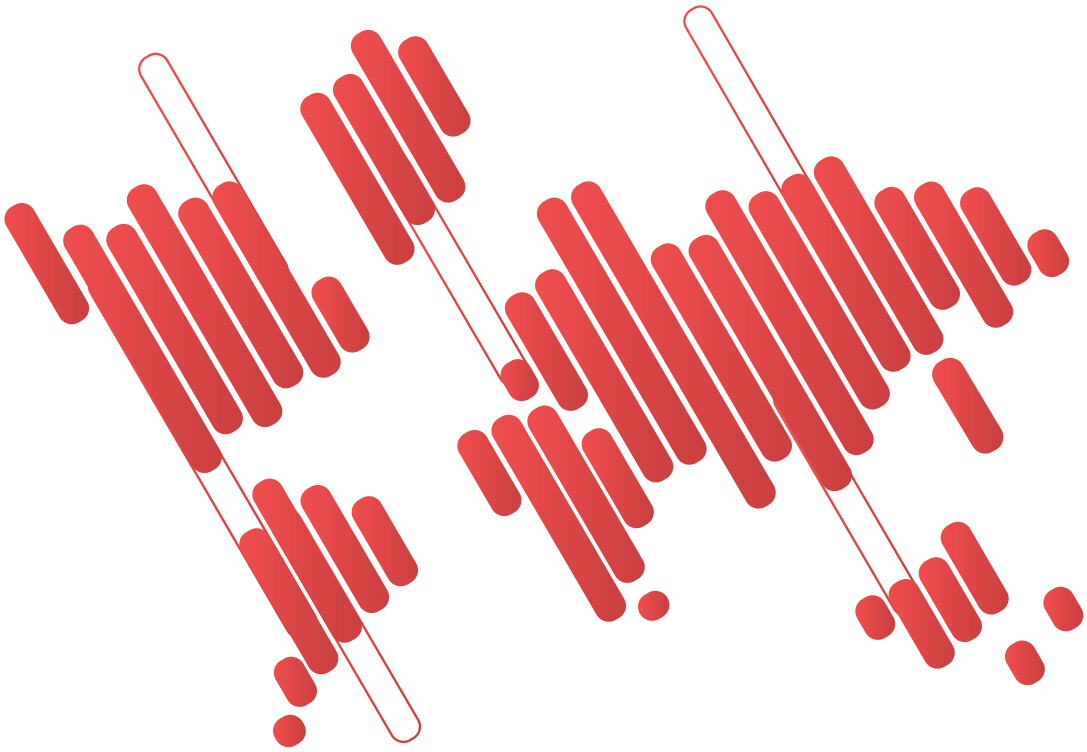
The first question regarding the future global legal environments is whether international rules and institutions further expand or not. If the expansion of international rules and institutions continues, we may expect that the legal order will slowly develop as the European Union has been developing: into a robust legal order of its own, highly integrated with national legal systems.

Legal Borders

If, on the other hand the process of expansion of international rules and institutions reverses, we may expect a thickening of legal borders instead, which will then, almost by definition, be dominated by state-made law (at national or regional level). This world will probably see regional organisations emerging as part of the development of legal borders aimed at warding off the global legal environment.

Legal Internet

But, 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.



Global Constitution

Basic characteristics:

The continued growth of international law and international legal institutions. The rules and institutions have a predominantly public nature.

Global Constitution

What does it look like?

With the state as its firm foundation, a form of global law has gradually emerged, slowly but surely covering all major legal areas on a global scale: global trade, global environment, global migration, global security, global crime, global finance, markets and competition, areas like intellectual property, aspects of labour law and an emerging health law. The massive flow of people has triggered harmonisation in the field of family law and tax law. There has been a general convergence towards the rule of law in its UN shape, so this overarching system largely defines state governance and the fundamental rights. Global law's fundamental rights catalogue does allow a broad margin of appreciation, but human rights courts are gradually filling the margin with their decisions. The principle of legality, stating that all government is bound by law, has also been laid down as the binding principle that underlies the global legal environment. In fact, perhaps ultimately the UN definition of the rule of law is adopted as an underlying principle. Consensus on the principle of legality has united global politics. As such, it surpasses political, national, and regional value conflicts. This principle has become the foundation of the global constitutional order in which the powers of law-making, enforcement, and adjudication are defined and delineated. In retrospect it appeared that the world has developed as the European Union did some decades before.

The legal walls between international law and national law have been broken down. Instead a complex multi-layered system of law has emerged within a global constitutional order. Rules are created by a variety of institutions that operate on a worldwide scale. These institutions have originally been mandated by nation states, but they have gradually obtained a more independent position. What used to be intergovernmental organisations have become more or less separate legal actors that can operate more independently from their constituent states. Besides being multi-layered, the global constitutional order is also fragmented from a sectoral perspective. Central bank presidents create rules on banking, competition regulators and authorities decide on market regulation, and environmental regulators build pollution standards and regulate global trade on carbon dioxide, nitrogen, and so on.

"The push for greater democratisation and accountability at the international level may actually be pushing the rule-making from the public to the private, often less accountable realm..."

Jonathan Koppell
School of Public Affairs,
Arizona State University

These global regulators apply a variety of regulatory models. In some areas the global legal environment decides on the broad parameters of what must be regulated, leaving exact means and methods, including enforcement, up to the regional or national levels. In other areas there will be more control with more precise instructions as to what must be regulated, and in some cases even enforced at the global level. International courts decide not only on conflicts between these regulations, but also on the interpretations of these rules. Global politics takes place within the legal context of the United Nations. These developments have prompted an increased demand for a form of global constitutionalism. There is a constant pressure to develop hierarchy between rules. This may not necessarily take the form of one document or charter, but rather of a series of charters and constitution-like documents in which national legal orders are linked to the global legal order. The global constitutional order that has emerged was 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 Basel Committee and the International Network for Environmental Compliance and Enforcement). These bodies are able to apply serious sanctions if adjudication decisions are not complied with.

In Global Constitution courts become more important. In 2030 the World Conference of Constitutional Courts, comprising all constitutional courts and organised along regional groups, periodically meets to coordinate constitutional practices. It 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.

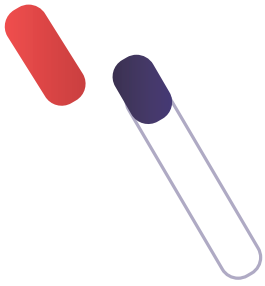
The global constitutional order has not displaced regional and sub-regional organisations. They still link the national with the global level. The global level decides on broader strategies and overarching frameworks, with regional and sub-regional organisations executing downwards to the national level with a certain freedom of choice as to the means used. Regional organisations also harbour places of resistance if the international level is perceived as going too far. The regional or sub-regional organisations are augmented by sectoral legal orders for example, on intellectual property), but those are linked to regionally defined interests with, for example, the Asian Patent Organisation putting forward Asian interests in the World Patent Organisation.

The rules and institutions that make up this global legal environment are quite stable but, at the same time, they are also difficult to make and set up or to change once formalised. Adaptability to unforeseen circumstances is not always easy and at times hugely creative diplomatic solutions are necessary. Coordination on rule-making has become a tremendously important function. Each time a law is proposed, it is put through an elaborate system to ensure that it does not double or contradict existing rules; this is done in most states internally, and at the regional and international level. At the international level, the Sixth Committee of the UN General Assembly has taken up this function. Representations of states to the UN and regional and sub-regional organisations have grown immensely. The Dutch Mission to the United Nations – one of the smaller states - has a little over 100 staff members: representatives from various ministries, parliament, the Council for the Judiciary and other adjudicative bodies, and even from civil society organisations. The EU Mission to the United Nations has a staff of over 500 in New York. The United Nations Secretariat itself will have been radically transformed to even more of a coordinating body than it now is. Peacekeeping missions are now a regional or sub-regional affair. The International Criminal Court in The Hague has also become part of a structure with regional criminal courts exercising initial jurisdiction.

In Global Constitution, constitutional and (global) administrative law have become hugely important fields. Because of the constant questions on areas of competence and jurisdiction adjudication, mechanisms are needed. International courts have gradually built a massive body of case law on the hierarchy between rules and the interpretation of global law.

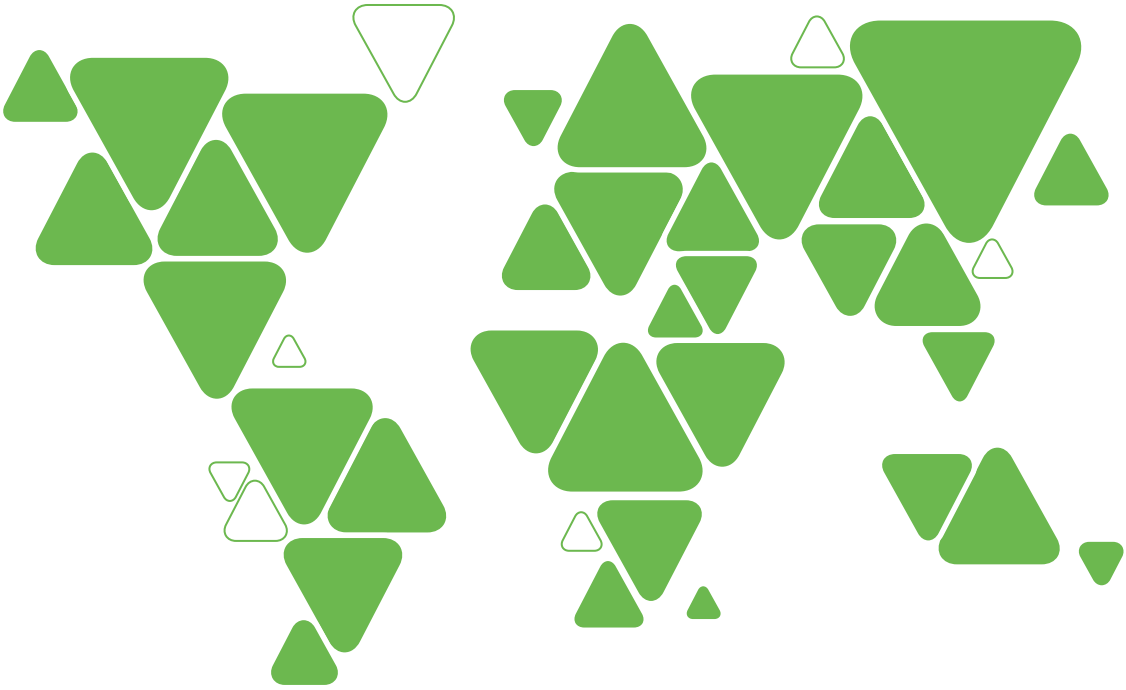
"You must get used to more rule of law confusion!"

Stéphanie Balme
Sciences Po



Triggers

For many, Global Constitution looks like a linear projection of trends we have witnessed in the past decades. Several events and trends may trigger this scenario. If common global challenges become politically acute, we may expect the global legal environment will move towards this direction. For example, climate change, increased scarcity of raw materials, massive deforestation, pollution of the oceans, terrorism, illicit trade and transnational crime – are all problems which may increasingly be politically defined from a global perspective. A second driving force that triggers this scenario is a further development of global markets. Financial markets and trade may herald a further globalisation, not limited to raw materials and goods but also to labour and knowledge. If markets continue to globalise, market regulation will increasingly become global. A third event or trend that may trigger this scenario would be the United Nations (and/or other global legal institutions) increasingly proving to be both effective and legitimate as a global coordinator.



Legal Borders

Basic characteristics:

The process of the expansion of international rules and institutions reverses and legal borders thickens.
Dominated by state-made law borders.
Regional organisations emerge as a key part of developing legal borders.

Legal Borders

What does it look like?

In 2030 legislation at the national level has remained the primary source of rule-making supplemented by a significant increase in regional legislation. National and regional courts interpret these rules and adjudicate conflicts. Global rule-making efforts have greatly diminished and international courts also face pressure to reduce their footprint and the scope of their decisions. International business, which is much more open to international rules, continuously pushes towards internationalisation, but because of political reasons law does not follow this path. Protectionism, legal and real-life borders, and nation states flourish.

The global legal environment is fragmented. Regional and sub-regional organisations are the building blocks of the global legal environment. There are hardly global rules besides some international institutional law that merely creates political fora. Because of the lack of substantial global law, international courts have been pushed to the margin. Markets are regulated on a regional level by groups of nation states, just like banking, intellectual property, consumer rights, the environment, and illicit trade. In Europe, the EU will transform into a 'fortress Europe'. While it 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, the Arab world, and so on). These regional organisations primarily meet within the legal context of the United Regions (which has more or less replaced the United Nations). Although these regions are not completely isolated, the linkages between them are kept to a minimum. Industrial sectors that wish to have something regulated or civil society organisations that tackle so-called 'global issues' like the environment and human rights need to work bottom-up through national and regional structures to achieve result.

The global legal environment, if used, is used via the regional blocks to coordinate at a broad policy level in generally worded agreements which have more the character of memoranda of understanding than of treaties. Implementation and enforcement is reserved for regional, sub-regional, or preferably, the national level.

New and emerging global powers such as China, India, Brazil, Mexico, South Korea, South Africa, Nigeria, Egypt, the Gulf States, their legal histories and economic and political interests have fundamentally changed the nature of the debate in the global environment; there is a lot less talk about 'universality' and universal norms than there once was. In fact, even the EU has split between a group of 15 states that share a more or less similar level of economic development, have similar political systems, and more shared histories, and two other groups: one towards the East and another towards the South. A similar development has occurred in Africa, where the AU has also split into three groups around shared histories, equal levels of economic development, and comparable political systems.

The regional blocks are strongly dominated by national interests. Some, like the EU, are legally well-developed and broad in scope while others are less legally based and more politically organised. Two states, China and the US, operate strongly both as individual states and use regional organisations to protect their interests.

Together with regional legal pluralism, the rule of law has regionally pluralised in this scenario. Comparative lawyers show the many different interpretations of the rule of law. There is little or no agreement at the global level on overarching fundamentals, nor is there much attention for them. In fact, there is full agreement that there are no or very few overarching fundamentals. One consequence of this is a movement towards regional and national interpretations of concepts such as fundamental human rights, separation of religion and state, balance of powers, and the principle of legality that have become highly context-specific. Many Western lawyers of today would call this an erosion of standards.

"...boundaries don't simply join 'and' separate – they join by separating."

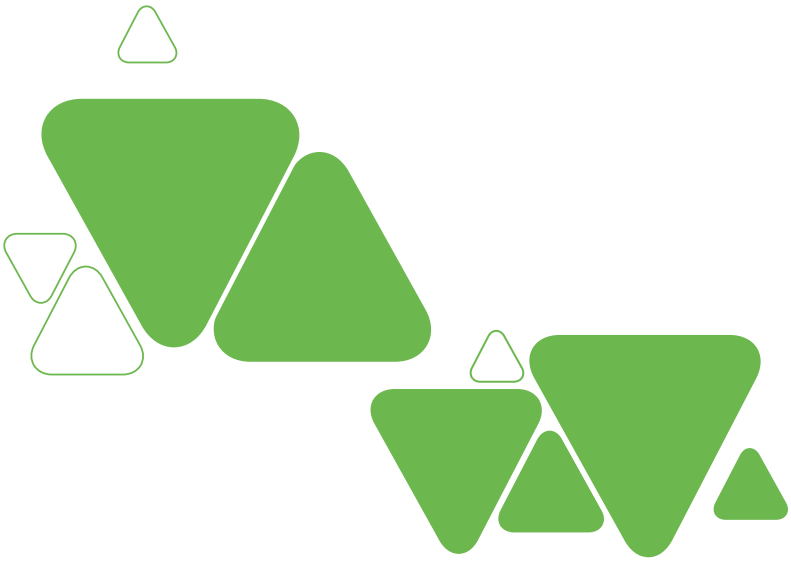
Hans Lindahl
Tilburg School of Humanities,
Tilburg University

In most developed democracies, the budgets of ministries and parliaments have gone up: more people are needed to critically assess what can be done at the national level, what may have to be coordinated at the sub-regional or regional level, and for which areas the global legal environment is needed. These assessments are done continuously, and there is a strong sense that once you internationalise something, you lose it and can never get in back.

The enforcement of the rule of law at the national and, to a degree, at the regional level (it differs per region with, as said, the EU being a well-developed regional legal order and others having a more political character) appears to be easier to monitor because of the state-centred nature of law and law enforcement and the 'closeness' of national systems to international rules. As noted, international courts and other adjudication mechanisms have become relatively less powerful.

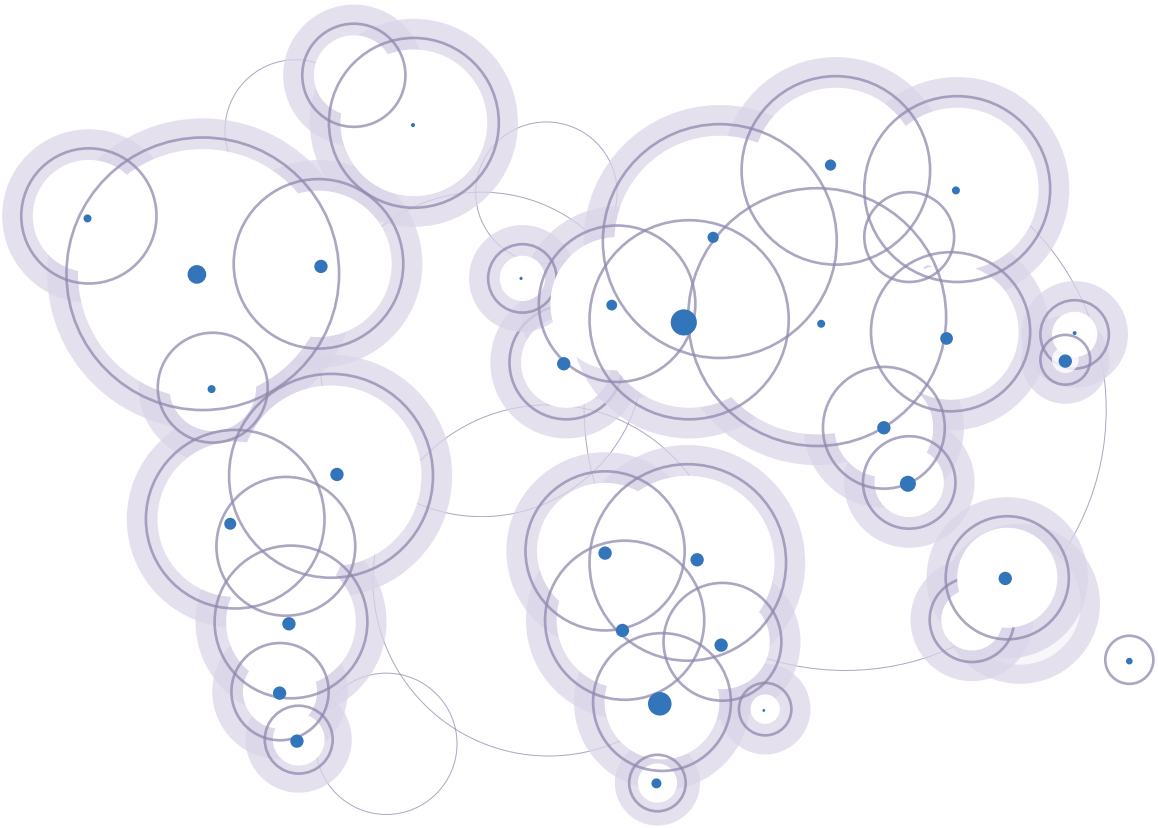
"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state (...)"

Article 2(7) of the UN Charter



Triggers

Several trends and events may trigger this scenario. First, the financial and economic crisis will remain a significant issue on the global agenda. It will feed popular calls for legal borders, especially because international solutions emerge slowly and are seen as dangerous for national interests, viewed as costly, and perceived to be slow and ineffective. Protectionism with regard to global trade may go along with renewed borders to restrict migration. The rise of transnational crime, illicit trade, and global terrorism will also accelerate a popular call for national or regional borders. Security threats, migration, and uncompetitive national economies trigger national sentiments and the need to re-create legal borders to protect both the economy and national security. If states and state-connected public authorities are able to realise the security of their citizens and possessions, public trust in these institutions will rise. A final trigger for this scenario is formed by the rise of more economic and political powers: in this new, multi-polar world, strong actors will be less willing to compromise, prompting others to also stick to national interest positions.



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.

Legal Internet

What does it look like?

In 2030 transnational private institutions have become the main producer of rules. These could be, for example, organisations for certification, standardisation, associations of transnational corporations, and international NGOs. Besides rules, other organising principles have also become more visible. For example, ordering through mobilisation of shame, fear of reputational loss, and mobilisation of voice through loosely organised collectives. Public rules have gradually been replaced by standards in particular sectors to which all interested parties in that sector commit themselves, with monitoring by the parties themselves. Democracy or accountability is less a matter of working through parliaments and more a matter of working though interest groups and loosely organised structures that organise between interest groups. The budgets of governments decrease for the first time since 1945. In relative terms, parliaments lose the most ground; other means of organising accountability are visibly more effective. National ministries and international organisations are finding it more and more difficult to function as connectors, mediators and organisers of voice, and less as implementers and principal holders of power. Failure to adapt means risking insignificance.

The linkages between the private governance mechanisms and regulatory regimes are fragmented. Banking and financial organisations have developed codes of conduct that determine standards for reliability. 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. Conflicts on these issues are dealt with by private tribunals, and private organisations are created to monitor enforcement of these rules. Gradually these private regimes have expanded. 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.

This organisation closely cooperates with national law enforcement organisations. Even though the predominant type of rules in the global legal environment look like soft law, their actual meaning is quite hard. Usually they contain 'hard' enforcement mechanisms. The main mechanisms to regulate across borders are standardisation and harmonisation in production and distribution chains, benchmarks and transparency-enhancing mechanisms such as indexes, and transnational organisations of unions and employers who build social arrangements limited to specific economic sectors. 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 sometimes unstable. On the other hand, the environment does have flexibility and adaptability.

Legal tourism, or rule-tourism, is prevalent in Legal Internet. In essence, clients of justice systems are constantly looking for what works best given their interest, 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, if they are to remain relevant, have the best services to offer. In some areas there is more of a Legal Internet than in others. Especially in the realm of private law, self-regulatory regimes dominate. Contract law (with regard to all kinds of contracts), torts, and intellectual property are now primarily a matter of private systems of norms and institutions for conflict resolution. Constitutional and criminal law are international and connected with nation states. While private tribunals, arbitration, and mediation by global law firms flourishes, public courts only focus on criminal and administrative law.

"We will have a lot less lawyers and more community organisers."
Scenario Feedback session - Dutch law firms

A major rule of law issue in Legal Internet is that it is difficult to tackle its overarching legality and accountability: if rule-making and adjudication is so diffusely organised, how can governance be limited by law and how can public accountability be organised through parliaments?

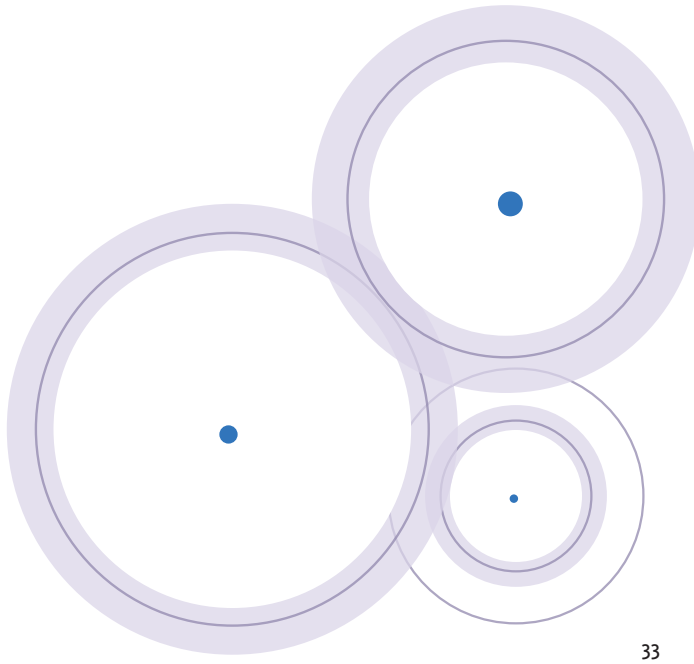
"By 2011, fifty-four of the one hundred strongest economies in the world are multinational companies. And that trend continues."

Jan Eijsbouts
Institute of Corporate Law, Governance and Innovation Policies, Law Faculty of Maastricht University

Triggers

First, an enforcement and norm-setting crisis will push corporations, NGOs and communities towards private regulation. If states and state-connected institutions are not able to enforce international norms, these private actors will develop their own mechanisms for posing and enforcing norms, rules, and standards. For example, if national courts cannot handle the number or the complexity of transnational cases, if national court decisions cannot be enforced or if states or international legal institutions cannot agree on norms, private actors will create their own regimes. A second trigger for Legal Internet occurs when states and state-connected institutions are deemed to be too slow in rule-making or if the rules they make are not deemed to be effective or too rigid. A third trigger is the substantial growth of powerful global private players. Transnational corporations continue to grow and become more powerful, both with regard to posing norms and with regard to enforcement. Global environmental organisations may also become more powerful and together these organisations are increasingly able to pose and enforce norms with regard to pollution and waste. A fourth trigger for this scenario is the legitimacy crisis which confronts many states and state-connected legal institutions throughout the world.

Self-regulatory regimes may be regarded as more legitimate by civil society and global networks of transnational corporations. The final trigger concerns the increased costs of official adjudication and the limited ability to really understand 'foreign' legal systems: these will drive cross-border corporations or citizens to turn to alternative systems of dispute resolution they set up for themselves, either for specific disputes (single-dispute institutions like mediation or ad hoc arbitration) or in a more institutionalised way. For example, a manufacturing company creates its own transnational institute to resolve disputes with consumers, an economic sector agrees on standards and creates its own enforcement mechanism, a transnational religious group uses the religious institutions for family disputes, and transnational unions and cross-border corporations agree on systems of wages and create their own tribunal to resolve disputes among the corporation and individual employers.



Strategic implications

The global legal environment is important for:

- Parliamentarians, 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 organisations, including international courts, which use and apply international law
- Business, especially businesses with a long time horizon for return on investment and high risk factors
- International law firms, which need to know what legal services the future will ask of them
- 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

The scenarios sketched above are possible futures which can be used to assess how existing strategies perform in different global legal environments. They can be used to decide on preparatory measures and they provide intellectual roadmaps to answer the 'what if' questions.

During the Law of the Future Forum and Conference on 23 and 24 June 2011 in the Peace Palace, we will discuss the 'what-ifs'. That debate will not be about finding consensus on what the law of the future will bring. Rather, the scenarios will trigger thoughts and debates to help us be better prepared for possible futures. These thoughts and debates should provide more details about challenges in specific legal disciplines, geographical areas, and about the drivers of change.

In the section below, some first thoughts are provided as to what one might infer from the scenarios, only to illustrate how they can be used and to inspire you on the way to the Forum and Conference where the real debates will take place!

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 only appears to 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 in the end, will be a matter for 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. Building the coalitions suggested by Robert Kagan (2008) may then become the primary rule of law strategy for national legislators.

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, he 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.

Altogether, what might it mean?

We know that national strategies will have to take into account all scenarios because we see elements of all of them unfolding in different ways, in different fields, in different parts of the world. Hopefully, separating out the major trends that emerge from the Feed Us! Process helps visualising and experiencing the forces at place.

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."

On the other hand, 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."

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."

The making of these scenarios would not have been possible without the help, input, encouragement, feedback, criticism, patience, and support of many people and organisations.

The Law of the Future team would like to thank them all deeply. We stand on your shoulders.

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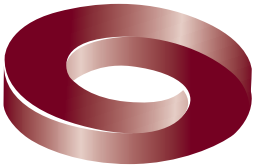

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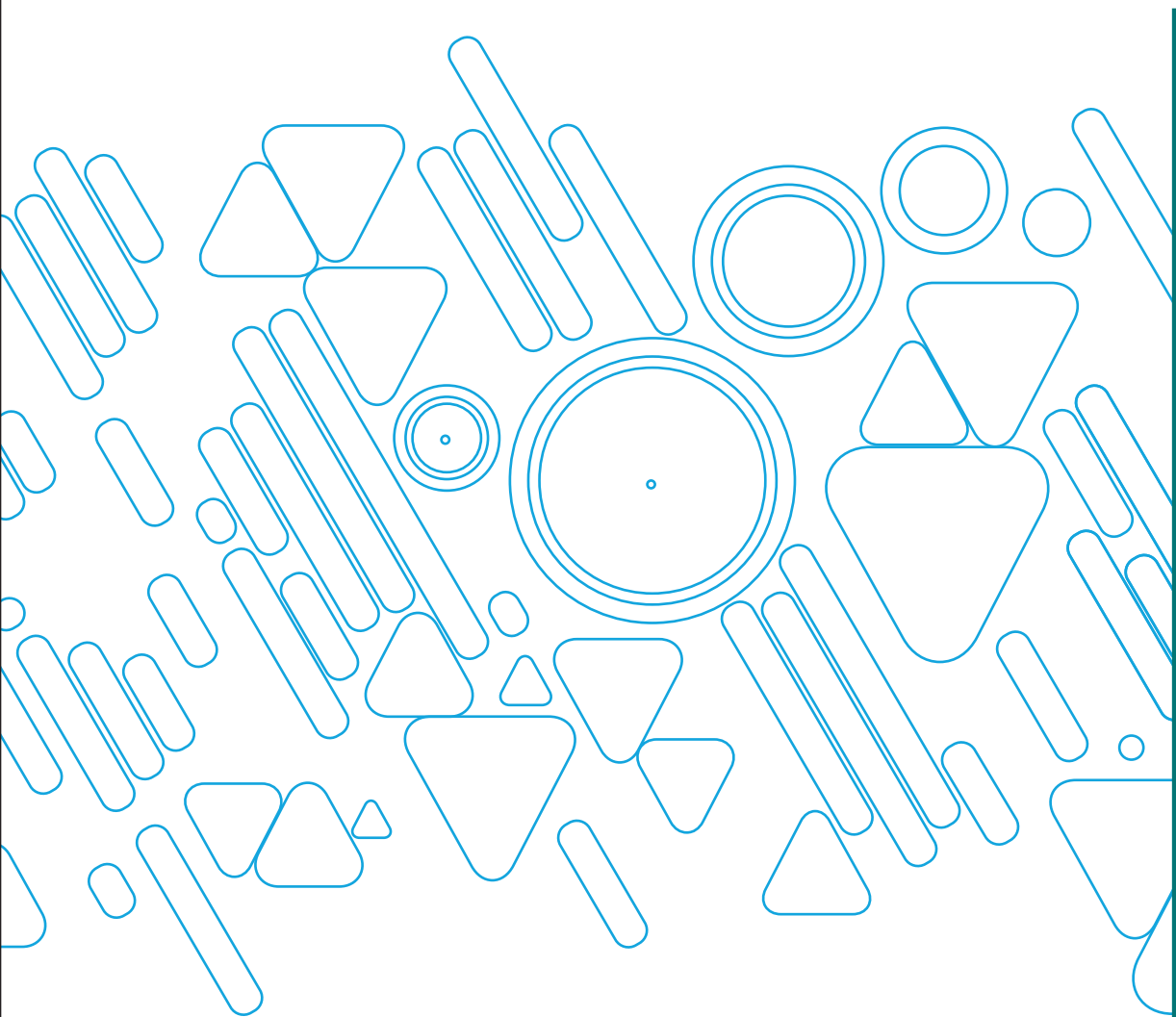

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June 2011

Law of the Future Joint Action Programme

The Law of the Future Joint Action Programme, initiated by HiiL in 2010, joins creative thinkers from academia and practice to reflect on alternative futures for law and legal systems and aims to provide both policy recommendations, research agendas and recommendation for legal training. It is based on the premise that prospective thinking about law is not only desirable but also required in order to ensure that law and legal systems do not become obsolete, ineffective or unjust. The Law of the Future Joint Action Programme is set up as a multi-stakeholder, multi-year process. HiiL actively seeks interaction with relevant and interested parties.

One of the instruments in the Joint Action Programme is scenario building, a common strategy tool in business and academic disciplines such as economy and security studies, but uncommon in the field of law. The Law Scenarios to 2030 help prepare politicians, corporate executives and societal leaders for the legal challenges posed by global developments. The Law Scenarios to 2030 are linked to the Law of the Future Forum and the Law of the Future Monitoring Mechanism.

The Law Scenarios to 2030, one of the first outcomes of the Law of the Future Joint Action Programme, will be exclusively presented at the Law of the Future Conference on 23 & 24 June 2011.

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