

Mr. Chairman,

Mijnheer de voorzitter van het Bestuur van de the *Ius Commune* Onderzoeksschool,

Mijnheer de Wetenschappelijk directeur van de *Ius Commune* Onderzoeksschool,

Geachte collegas van de Nederlandse en Zuid-Afrikaanse Faculteiten,

Dear colleagues from the UK law faculties,

Geachte collegas van de Belgische Rechtsfaculteiten,

Chers collègues des Facultés de droit belges,

Monsieur le Doyen, Monsieur le Vice-Doyen, chers collègues de la Faculté de Droit de Liège,

Dear researchers and scholars,

Ladies and gentlemen,

It gives me great pleasure, as a member of the Liège Law Faculty, to pronounce the closing address of the 2007 *Ius Commune* Congress and I would like to express my gratitude to my Liège colleagues for having entrusted me with this honourable task.

The theme upon which I propose to reflect in my address shall be “*Time and conformity in law*”. In dealing with such an abstract - though fundamental - subject I would like to place ourselves in the spirit of the famous English philosopher John Stuart MILL, who, in his seminal work *On Liberty* published in 1869, described a free society as a group able to serve as a *marketplace of ideas*. To my modest mind, if this is true for a free society in general, it is all the more essential to *academic* debate, and thus to a conference like the one we are currently having and which will close this afternoon.

My reflections on time and law consequently purport to be a modest contribution to this vast marketplace of ideas – of *academic* ideas – marketplace which is made out by all of you, coming from the Netherlands, the United Kingdom, South Africa, this country or from elsewhere.

Let me thus start with proffering some ideas, let me thus take the opportunity to offer you some thoughts, leaving it to the marketplace to ascertain whether they have been meritoriously made.

Time, conformity and law.

In order to present my ideas to you in a “good and orderly method”<sup>1</sup>, as Thomas HOBBS would say, I would like to break down my address into *two main parts*.

The first one will be devoted to the *creation* of time and law ; the second will examine the *regulation* of time and law. So, creation first, regulation thereafter (contrary to the term *creation*, the word *regulation* implies that the object which is to be regulated is *already existing*).

According to the finest French-speaking academic tradition, and taking into account the fundamental interdependence of the notions of time and law, allow me to break up each of these two main parts into two sub-parts, so as to find the following structure :

In the first main part, devoted to the concept of *creation*, I shall start speaking about the creation of *law through time*, before studying the reverse situation, that is the creation of *time through law*, or, to formulate it differently, the attempts legal rules make to create authoritative measurements of time.

In the second main part, devoted to the concept of *regulation*, I shall symmetrically reproduce this structure. I will start by examining the regulation of *law through time*, before, here too, analyzing the reverse constellation, the regulation of *time by law*, that is the attempts legal rules make by to regulate – to re-consider – certain existing moments of time, certain events of the past.

After having provided you with general structure of my address, with the map of our route, let me now commence our walk and enter its first stage, its first main part, which is dedicated to the notion of *creation* and the striking inter-dependence, in this field, of the concepts of time and law.

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<sup>1</sup> Th. HOBBS, *Leviathan*, Chapter 5, paragraph 17.

Let me begin with examining the creation of *law* through *time*. I believe to be safe to state that the creation of law through time, through the lapse of months, years or decades, constitutes, since the beginnings of human civilization, the most powerful – and most natural – way of creating a rule of law, a legal norm. A given human behaviour is followed by a given social reaction ; this phenomenon is repeated, and after a certain *time* and a certain number of occurrences, the behaviour in question is *deemed* to give rise to a precisely determined consequence *in law*.

We are all familiar with this modality of creation of law, modality which is referred to by a very simple, yet profound, word : custom.

Customary rules can rightly be considered as the epitome of creation of law through time. Historically speaking, one of the most fertile areas for this mode of legal creation is *international law*, the *ius gentium*, and I would show a complete lack of scholarly deference if I did not mention in this respect the work of probably the greatest Dutch jurist of all times – although there are some great Dutch jurists sitting in front of me – Hugo GROTIUS, or as you call him in Dutch, Hugo DE GROOT.

Yet, if customary law is the most prominent form through which a sheer lapse of time, the mere flow of life, gives birth to rules of law, it surely is not the only one. It suffices to mention various techniques of *private law*, and, among them, most importantly, the *acquisitive prescription*, or, as it was called in Roman law, the *usucapio*. The basic idea there is that a continuous possession of a good is *in and of itself* sufficient to confer upon its possessor a *title*, a title of law. Here, too, it is the mere course of time which generates, which creates an element relevant *in law*.

Finally, and in order to close this first sub-part devoted to the birth of law through time, one can more generally point to the system of common law, which, though not entirely a system of custom, remains fundamentally built upon the assumption that *time* is a most prominent way to create law.

After having examined the creation of law through time, let me now devote my attention to the *reverse* constellation, that is, to the attempts made by legal rules to create time. At first sight, such a query might seem inchoate, yet I tend to think that we are maybe subject to this impression precisely because the legal rules creating time are of such familiarity to us that we fail to perceive their existence.

The most prominent illustration of the numerous attempts made by legal rules to create time – or more precisely: to create a measurement of time – undoubtedly is our *calendar*. The fact that we are currently living in the year 2007 presupposes a legal rule – a binding provision – which authoritatively states that we currently *are* in that year. The existence of this legal rule is not directly visible to us ; yet it suffices to think of a notary who were to write *today*, in an act an act of mortgage or acquisition, the word 2006 instead of 2007 ; such act would immediately be considered by the legal system as substantially inaccurate and the notary may be held liable for having written it. So, we can clearly see that it is not left to the discretion of every citizen or civil servant to decide which year we are currently living in ; this determination is authoritatively made by a *legal rule*.

The history of mankind is in this respect quite rich in examples where a new calendar comes into force, where thus a new counting of time is created. The most notable of these changes takes place in 1582, when the Gregorian calendar is introduced, replacing the Julian calendar which has been applicable so far. In order to show that this change clearly is an act of *law* it suffices to mention that, in that year 1582, the 4<sup>th</sup> of October, is immediately followed by the 15<sup>th</sup> of October, in order to provide for a smooth operation of the newly created measurement of time.

Slightly more than 200 years later, the French revolutionaries institute another new measurement of time, measurement which is applicable in France from 1789 until 1805, and which will eventually be abolished by Napoleon as of January 1<sup>st</sup>, 1806. Interestingly, the French revolutionary calendar had 12 months, to all of which very fanciful names were given, but in contrast to the Gregorian calendar, all of these months only had 30 days. This fact constrained the revolutionaries to add, at the end of every year, a sort of 13<sup>th</sup> month of 5 or 6 days. Moreover, a new measurement of the time was not only created for the *months* but also for the *day* ; indeed, the division of a day into 24 hours was abolished and replaced by a division into *ten* hours. A revolutionary hour lasted thus about 2 hours and 20 minutes of our modern time.

The ambition to completely re-create time by way of legal rules was also present in the ideas of the political leaders of the *Soviet Union*. Prior to making this development, it might be worth while to point out that the Russian Empire had stuck to the Julian calendar until 1918, which meant that during more than three centuries, two concurrent calendars had been operating in continental Europe : the Gregorian calendar in the Western countries since 1582, and the Julian calendar in the Russian Empire until 1918. Crossing the Austrian-Russian borderline in, say, 1905 consequently meant that you won more than 20 days ; you thus had the unique opportunity to live these days *once again*, a second time. But, after having aligned themselves on the Gregorian calendar in 1918, the Soviet leaders decide in 1929 to realise a much more far-reaching reform : they create a new measurement of time not only for the months but also for the *weeks*. Henceforth, in the Soviet Union, a week represents a period of *five* days ; this measure seems to have been adopted with the intention to crush all forms of religious activities, given the fact that all three great monotheistic religions are based on a week encompassing *seven* days. Eventually, the five-day week is abolished in 1940 and a return to the seven-day week enacted.

Besides the different forms of calendars, conceived of by different lawmakers of different countries, the phenomenon of creating time through rules of law manifests itself also in the elaboration of the *time zones*. Indeed, and to limit ourselves to the example of this country, a unified time zone for Belgium was not introduced before 1892, when a statute voted by the national parliament aligned the time for the entire realm on the Greenwich meridian<sup>2</sup>. Prior to this statute, Liège had a different time than Brussels, and Brussels another than Ghent. Most remarkably though, the 1892 statute *still is in force*, which means that the official legal time in Belgium still is *Greenwich time*, one hour behind Central European Time. Yet, since the Second World War we *do have* in Belgium Central European Time.

This apparent contradiction between the statute and reality is solved by the fact that, since the 1940's, we have been living under a derogatory regime, regime which periodically adds, by Royal decree, one hour in the winter and two hours in the summer<sup>3</sup>. So, if it is legally speaking true that, when crossing the borderline from the Netherlands to Belgium, you do not have to reset your watches, this is only so because of a regularly published Royal decree which perpetuates the regime of exception we are happily living under since the Second World War.

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<sup>2</sup> Statute of April 29, 1892, *Belgian Official Journal*, April 30, 1892.

<sup>3</sup> See for instance the Royal decrees of December 12, 1997 (*Belgian Official Journal*, December 19, 1997) and of December 19, 2001 (*Belgian Official Journal*, December 28, 2001).

Gently walking on the symmetric paths of the Versailles Gardens, I invite you now to cross with me the *main alley*, that is to pass from the first main part of my address to the second.

In this second part, the main concept is not, as it was in the first, *creation*, but *regulation*. In other words, the question is not whether time and law are brought into being, but whether they have an impact on each other while already existing.

You are already familiar with the route of our prospective walk : I shall first examine the influence of *time* on existing rules of *law*, and secondly – and I may say: eventually – analyze the influence *law* purports to exercise on some particular, already existing (that is : already past), moments in time, in other words : on historical events.

Let me start the first sub-part with this seemingly trivial question : what incidence does the mere course of time have on the operation of already existing rules of law ? Or, to use a metaphor, what influence does *aging* have on legal norms ?

In replying to this query, two main schools of thought furnish competing answers. According to the first school, the longer a legal rule is in operation, the more likely it is to be well applied. This intuition was eloquently formulated by François RABELAIS who stated that “Thanks to time all things ripen” (*le temps mûrit toutes les choses*). But, to be honest, this school of thought cannot, in the field of law, point to an abundance of examples.

As one of its rare testimonies, one can mention the fight for independence of the former Portuguese colony of East Timor, fight which eventually led, after decades of Indonesian occupation, to the obtainment of full sovereignty in 2002. Portugal having withdrawn from East Timor in 1975, it took 27 years for that territory to live up to the resolution of the United Nations General Assembly which had recommended its independence since the very days of the Portuguese departure in 1975. The conformity of the East Timor situation with international law – *and here the word conformity makes its appearance* – was thus realized after nearly three decades.

Some other developments in law even require a *longer* period of time to achieve conformity. For instance, the German Constitution of 1949 contained an article 23 which allowed for an enlargement of the territory of the Federal Republic. The rationale of this provision was clear :

allow for the country's possible reunification. More than forty years then passed by before this goal was finally achieved in October 1990, and article 23 could be repealed.

In short, in all these examples of the first school of thought, the concept of time is perceived as a *beneficial* factor for the achievement of conformity. *Le temps mûrit toutes les choses*, you just have to wait, and eventually conformity will exist.

Having described – what we could call – the RABELAIS school of thought, school which affirms that the course of time is beneficial to the attainment of conformity, let me now turn to the competing school, which holds that the passing of time is *all but* beneficial, in other words, is *detrimental* to conformity in law.

The preponderance of this perception among the 21<sup>st</sup> century layers who we all are is obvious : how often do we not say that this or that legal rule has become inefficient, obsolete, that it has become *out of time*. And when we undertake to study, in our respective countries, the frequency with which legal norms are modified, replaced or repealed is ever-accelerating. This finding led some of our Brussels colleagues to the conclusion that we are confronted with a genuine *acceleration of legal time, une accélération du temps juridique*<sup>4</sup>. To put it differently : legal conformity has become an increasingly *perishable* good.

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<sup>4</sup> Ph. GÉRARD, F. OST and M. van de KERCHOVE (dirs.), *L'accélération du temps juridique*, Brussels, Publications des Facultés universitaires Saint-Louis, 2000, 931 pages.

One final chapter remains to be presented to you and that is – after the incidence of time on existing legal norms – the reverse constellation, the influence rules of law exert on existing time, or to be more precise on existing *times*, that is, on *historical events*.

To my mind this point is intellectually particularly stimulating, and that I hope to benefit from your precious reactions later on in the discussion.

The phenomenon I would like to submit to your attention is this : in this beginning of the 21<sup>st</sup> century, we are more and more faced with a technique which consists in the *authoritative statement of historical events by rules of law*. In the French legal literature, these rules are called *memorial laws*, *les lois mémorielles*. Their aim is to *indisputably enact **one*** precise version of historical truth. As a recent testimony of this kind of legislation, I can under more refer you to the French statute of January 29, 2001, enacting that there has been a genocide of the Armenians in 1915<sup>5</sup>. In other words, since the enactment of this statute, the French legal order authoritatively formulates – that is : unilaterally imposes – a single version of historical truth, thereby relegating all competing versions of the same historical event as not conform to French law.

Another example is a even more recent statute of 2005, related to education, in which the French legislator states that in schools the colonial past is to be analyzed in a positive way, taking into due account the beneficial contribution of the French colonists to the development of overseas civilizations<sup>6</sup>.

Sometimes, as an academic, you regret not to be able to submit question to certain persons whose answers would be of paramount value to the debate. And this is precisely the case here : I would have very much enjoyed asking John Stuart MILL whether, according to him, such legislative action is compatible with his theory of the marketplace of ideas, marketplace which – I hasten to add this – he considers to be an essential element of a free society.

Now, you could object me that, as to the Armenian genocide, there is no room for reasonable doubt that these tragic events really took place and that sufficient scientific evidence can be

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<sup>5</sup> Statute n° 2001-70 of January 29, 2001, “relative à la reconnaissance du génocide arménien de 1915”, *French Official Journal*, January 30, 2001.

<sup>6</sup> Articles 1 and 4 of the Statute n° 2005-158 of February 23, 2005, “portant reconnaissance de la Nation envers l’oeuvre des Français outre-mer et les souffrances des rapatriés”, *French Official Journal*, February 24, 2005. – On this statute, see under more G. MANCERON and C. LIAUZU (coord.), *La colonisation, la loi et l’histoire*, Paris, Syllepse, 2006, 184 pages.

proffered in support of this holding. Admittedly. But such objection does assume, without clearly saying it, that the legislator, who is the author of such memorial laws, does use his tremendous power only with the greatest precautions and after most thorough deliberation. Yet, even in a free and democratic society, this basic assumption seems not to be as solidly rooted as might sometimes be thought, and a very recent example does, I think, appropriately evidence this point.

Indeed, the United States Congress is currently considering the vote of a resolution with a similar content than the French genocide statute of 2001. I point you here to the proposed House Resolution n° 106 affirming the existence of an Armenian genocide<sup>7</sup>. Now, if the reasoning of the US House members were exactly and exclusively guided by scientific evidence, there could be no doubt that the resolution will be immediately passed. Yet, very interestingly, its vote is becoming increasingly unlikely, because of the argument – powerfully voiced by the White House – that such vote would be highly detrimental to the bilateral relations with Turkey, a country of considerable strategic value in the Iraq war.

Thus, the question as to whether the resolution should be adopted is not only debated on scientific grounds, the main grounds of debate seem to be of a purely *political* nature, namely : is it *prudent* for the US to adopt such a resolution, given the her strategic interests in Turkey ? In other words, the formal recognition by the US Congress of the Armenian genocide *in 1915* seems above all to depend on the strategic intentions of the US in Turkey *in 2007*. It is obvious that, when rules of law attempt to unilaterally establish one single version of historical truth, these choices ought not to depend on current political ambitions.

In this fourth and last sub-part, I intended to show that legal rules increasingly purport to influence the perception of time, of certain historical events. These attempts generally are, for the legal order in question, of high symbolic value. This explains under more the vigorous Turkish reactions on the French genocide statute of 2001 and Ankara's similar vivacity these days, during the debates of the US Congress on a quasi identical text.

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<sup>7</sup> See : <http://www.govtrack.us/congress/bill.xpd?bill=hr110-106> (visited November 22, 2007).

Please allow me to *conclude*.

The relationships between the concepts of time and law are subtle and, above all, reciprocal.

On the one hand, time is able to *create* a rule of law, and a rule of law is able to create a measurement of time. On the other, time can *regulate* existing laws, and laws endeavour to authoritatively enshrine a preferred perception of past times.

If the notions of time and law are so closely intertwined, the concept of *conformity* must, consequently, be *sensitive* to this interdependence : it is not enough for a given legal rule to conform to a higher ranking rule, it also has to take into account the temporal constraints in which it is enacted. Indeed, no rule of law is able to escape the risk of one day facing repeal, thus, to use a profoundly human word, to die. *The majesty of the realm of law, despite its solemnly affirmed ambition of eternity, is, in last resort, also deemed to perish* : no matter how sovereign a lawmaking body, a state is, its final moment will come, and after it, a new legal order will be established.

Admittedly, the life expectancy of our modern Western legal orders is higher than ever ; but fundamentally, nothing has changed since Thomas HOBBS, in chapter 17 of his *Leviathan*, magnificently stated that the Leviathan – thus the state – forms “a mortal god under the immortal god”. Even the modern state remains mortal, remains *subject to time*.

Mr. Chairman, dear colleagues, ladies and gentlemen, as Oscar WILDE once so exquisitely said, “I can resist everything, except temptation”. And indeed, I *am* tempted to tell you more about the relationships between time and law, to analyse more in depth the numerous intricacies, the slight variations of colour of a picture which my admittedly rough brush was unfortunate enough not to reproduce with sufficient care for detail.

Yet, if I would *love* to continue painting this picture on time, conformity and law before you in full, picture of which the main lines are already prefiguring the finer lines, the nuances and shadows to come, there is, despite my desire, one thing which precludes me from doing so : and that is *time*.

Thank you very much.