
FROM NOSTALGIA TO UTOPIA: A GENEALOGY OF FRENCH CONCEPTIONS OF SUPRANATIONALITY (1848–1948)*

HUGO CANIHAC

CRéSPo-IEE, Saint-Louis University, Brussels

E-mail: hugocanihac@gmail.com

Abstract This essay investigates the intellectual history of one of the purportedly most “revolutionary” concepts of post-1945 international thought—the concept of supranationality. While the literature has generally analyzed the concept as a direct continuation of progressive cosmopolitan ideas, or, to the contrary, as a political watchword formulated after 1945 to promote the European project, this essay highlights other, more ambiguous origins for the concept. It retraces the early uses of the concept in French debates. It argues that the irruption of supranationality in the political and legal vocabulary was far from revolutionary, as is typically claimed—without referring directly to the writings of the great classical philosophers. Rather, the concept drew on earlier discourses whose emergence can be identified in late nineteenth- and early twentieth-century debates, ranging from Catholic thought to international law. To retrace the genealogy of supranationality in the decades preceding the supranational vogue of the 1950s contributes to illuminating the complex intellectual origins of the European Union and of international thought more generally.

Once neglected, the literature about the history of international thought has burgeoned in recent years.¹ This renewed interest has spurred important

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¹ David Armitage, “The Fifty Years’ Rift: Intellectual History and International Relations,” *Modern Intellectual History* 1/1 (2004), 97–109. See, for instance, Glenda Sluga and Patricia Clavin, eds., *Internationalisms: A Twentieth-Century History* (Cambridge, 2017); Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (New York, 2017); Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (New York, 2016); Stephen C. Neff, *Justice among Nations: A*

changes in the way we understand the making of the contemporary international order. The grand narrative about the advance of cosmopolitanism and liberalism has been largely counterbalanced by stories emphasizing alternative concepts of the international. This has provided us with a much more nuanced picture of international thought, leaving ample room for imperialism and conservatism. In this vein, this article is concerned with one of the key concepts of post-1945 international thought. It retraces the history of the much-debated, but rarely studied, concept of *supranationality*, and unravels its complex, and sometimes murky, intellectual trajectory.

The emergence of supranationality is conventionally regarded as a consequence of the Second World War, and of the failure to prevent it. After 1945, new concepts and institutions were needed. The clearest example is provided by European integration. For instance, at The Hague Congress, in 1948, the Charter of Human Rights was said to “involve the establishment of a supra-national institution such as a Supreme Court, a judicial body, superior to the states, to which individuals and communities can appeal.”² When the European Coal and Steel Community (ECSC) was created in 1951, the Treaty of Paris mentioned, for the first time in an official treaty, the “supranational character” of the organization and its employees. It did not, it is true, refer to the kind of judicial organization envisioned in the Hague declaration; instead, it stood for the High Authority, an independent administrative body. Nevertheless, the term was, surprisingly quickly, taken up by legal activists, who transformed it into a very successful legal definition of the European Communities.³ Until now, to say that this law is supranational is to say that it is autonomous, superior to national law, and directly applicable to European citizens. This legal concept of supranationality is in retrospect widely considered to be the main intellectual revolution brought about by European integration—although a “quiet revolution.”⁴ Over time, the term made its way into relatively common political and academic parlance, and even appeared in dictionaries.⁵ Today, it has migrated far beyond debates about the European

History of International Law (Cambridge, MA, 2014); Mark Mazower, *Governing the World: The History of an Idea*, (London, 2013); Nicolas Guilhot, ed., *The Invention of International Relations Theory* (New York, 2011); Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge, 2001).

² Congress of Europe, *Résolution culturelle* (The Hague, 1948), 15.

³ Antoine Vauchez, *Brokering Europe: Euro-lawyers and the Making of a Transnational Polity* (Cambridge, 2015); Julie Bailleux, *Penser l'Europe par le droit: L'invention du droit communautaire en France (1945–1990)* (Paris, 2014).

⁴ Joseph H. H. Weiler, “A Quiet Revolution: The European Court of Justice and Its Interlocutors,” *Comparative Political Studies* 26/4 (1994), 510–34.

⁵ Nestor Schumacher, *Der Wortschatz der europäischen Integration* (Düsseldorf, 1976), 102.

Union; it is used to define the United Nations, the World Trade Organization and similar non-state organizations.

Supranationality thus seems to provide a case of radical conceptual and political innovation. To account for its meteoric success, recent sociohistorical studies have demonstrated that supranationality was a politically motivated watchword of postwar Europe.⁶ The term was used because it was a convenient way to define a *sui generis* type of organization, different from traditional international organizations, and arguably more powerful. But it was mostly an empty signifier. Such an account refreshingly departs from traditional narratives emphasizing, in a sometimes explicitly teleological reading, the proximities between the idea of supranational law and the Enlightenment projects of cosmopolitan law.⁷ However, this kind of sociological history hardly tells us why *this* concept came to be used so widely and so quickly after 1945. While the traditional narrative is one of political change without conceptual innovation, the alternative narrative is one of political change without conceptual continuity. Trying to avoid both pitfalls, it is to a genealogical attempt to uncover the meanings that were successively attached to the term before the supranational vogue of the 1950s that this article is dedicated.

It follows the uses of the word, from its earliest appearance to the immediate postwar Europe. To track these uses, I have explored the catalogues and digitized collections of major libraries and scientific journals.⁸ This review has made it possible to identify moments and places of intense use of the term, on which the investigation has then focused. Such a methodology rests upon the assumption that there is a deep relationship between a word and the concept it expresses. This is not to say, however, that the meaning of “supranationality” is taken to have been fixed since its early days. To the contrary, I am interested in describing a process of conceptual transformation, underlining the uncertainties and contingencies of the current meaning of the concept.⁹ Such a history should also pay careful attention to the cognate terms constituting the semantic field in which the concept was located—such as the

⁶ Bailleux, *Penser l'Europe par le droit*; Bill Davies, *Resisting the European Court of Justice: West Germany's Confrontation with European Law 1949–1979* (Cambridge, 2012).

⁷ E.g. Jürgen Habermas, *The Crisis of the European Union: A Response* (Cambridge, 2012).

⁸ Mainly, the Bibliothèque nationale de France, and its digitalized collection, especially useful for the identification of pre-twentieth century uses (<https://gallica.bnf.fr>); the library of Sciences Po, in Paris; the digitalized books on Google Books; the collections on Jstor and Web of Science.

⁹ Quentin Skinner, “The Sovereign State: A Genealogy,” in Hent Kalmo and Quentin Skinner, eds., *Sovereignty in Fragments* (Cambridge, 2010), 26–46, at 27; Mark Bevir, “What Is Genealogy?,” *Journal of the Philosophy of History* 2/3 (2008), 263–75.

“international,” the “nation,” or, here, the “supra-state.”¹⁰ In this perspective, rather than an exhaustive history of the concept, I will—more modestly—show how, at certain moments, the concept was a point of convergence for different strands of thought and people who appropriated the supranational vocabulary in preference to any other available at the time.

A second limitation of the scope of this article is geographical. I will mainly focus on French debates and uses of the term. Supranationality seems somehow at odds with the prominent role of the nation in French political and legal thought. And yet, perhaps precisely because of this tension, focusing on the French case may be justified by the intensity and significance of the debates that took place there about supranationality after 1945. For in France supranationality was a key concept in two major controversies of the postwar years: decolonization and, above all, European integration. In the late 1940s, supranationality was discussed in relation to the fate of the colonies, and their integration into a “French union” replacing the French Empire.¹¹ In the early 1950s, supranationality became pivotal to the fierce debates about European integration. Because they faced strong opposition from those—on all sides—who criticized the loss of sovereignty it would cause, French advocates of European integration profusely discussed supranationality, and decisively shaped its current meaning. Accordingly, then, a history centered on France is of crucial importance.

However, in order to understand how French uses of the term were shaped, it is necessary to situate the history of these French discussions in their broader context. Indeed, the meaning of the French concept of supranationality was entangled in transnational controversies, in which it has also been forged. Of course, this raises obvious translation issues. But rather than treating these issues as an obstacle, these circulations and translations should be taken seriously as an object of analysis.¹² They usefully remind the historian that conversing across languages creates new genealogies, different from national ones. Then, even though I will also underline specifically French traditions and contexts, it is rather a transnational history of French conceptions of supranationality before European integration that will be undertaken in the following pages.

I will argue that the concept of supranationality was far from revolutionary in French political and legal thought after 1945—without referring directly to

¹⁰ Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (New York, 2004), 87.

¹¹ Frederick Cooper, *Citizenship between Empire and Nation: Remaking France and French Africa, 1945–1960* (Princeton, 2014).

¹² See Einar Wigen, *State of Translation: Turkey in Interlingual Relations* (Ann Arbor, 2018); Margrit Pernau, “Whither Conceptual History? From National to Entangled Histories,” *Contributions to the History of Concepts* 7/1 (2012), 1–11.

the writings of the great classical philosophers. Rather, its emergence can be identified in nineteenth-century Catholic thought. These first uses were critical of modernity and its political consequences; more specifically, they expressed the project of a restored Catholic Europe in an age of nationalism. But, at the turn of the twentieth century, the concept of supranationality, defined as a new type of law, began to be increasingly used in international legal debates, where it was integrated into a distinctly liberal language. These debates, and the new meaning of supranationality they carried, were slowly introduced in French legal thought. There, during the interwar period, the supranational vocabulary was integrated to both conservative and republican languages. These different understandings nevertheless converged in practice for a while, before diverging again. To retrace the history of the concept of supranationality, therefore, shows how, at times, the divide between conservative and liberal international projects has been very blurred indeed.

SUPRANATIONAL NOSTALGIA: THE CATHOLIC ORIGINS OF SUPRANATIONALITY (1848–1900)

It may seem trivial to point out that the appearance of the term “supranational” echoed the success of the principle of nationalities. This principle, according to which state and nation, political authority and community, should coincide, was first asserted as a liberal principle opposed to the order created by the Congress of Vienna (1815), and propelled by the European revolutionary movements of 1848. Paralleling the success of the national rhetoric, the concept of the international, originally coined by Jeremy Bentham, also rapidly came to enjoy great success. The popularity of the Benthamite invention in turn plainly reflected the increasingly national organization of Europe, and the need to organize relations between nations. As was illustrated by the Mazzinian project, nationalism and internationalism were thus thought of as two sides of the same modern, liberal coin.¹³

It is against these currents that the first authors to use the supranational vocabulary reacted. They critically assessed the national fragmentation of Europe, at odds with the two types of organization that had traditionally structured Europe and its political representations: the church and empire. In this sense, supranationality was first connected with nostalgia—the longing for an ancient order destroyed by liberal modernity. Yet it also expressed an alternative project to restore order in nineteenth-century Europe.

¹³ See Mazower, *Governing the World*, chap. 1.

THE CHURCH AND THE EUROPEAN FAMILY

In France as in other European countries, the first uses of the word “supranational” can be traced back to the second half of the nineteenth century.¹⁴ At that time, these uses were related to an ancient organization, the Catholic Church, which was then facing major challenges. The church was at a loss as how to adapt to the new European order, in which most of its secular powers had been dramatically undermined. In the second half of the century, the stance it adopted towards these changes—adaptation or confrontation—was the subject of controversies among Catholics.¹⁵ In particular, a central issue was to reconcile the nation-building processes at work in Europe and the traditional universal, or at least transnational, dimension of Catholic doctrine.¹⁶

It is therefore no accident that the term “supranationality” happened to be discussed in France early on. There, construction of the national idea had been closely intertwined with religion before the Revolution.¹⁷ After 1789, however, a slow and uneven process of secularization of belonging was initiated: in a context of the generalization of universal (male) suffrage, fundamental, common membership was no longer defined as primarily religious or cultural; it was claimed to be political, and based on citizenship.¹⁸ After 1870, this argument was used to strengthen the Third Republic, and to reclaim the German-speaking lost territories of Alsace and Lorraine.¹⁹ By the end of the nineteenth century, it had become common among jurists to regard the state as the “personification” of the nation. Hence, in the republican discourse, nationality was increasingly connected to citizenship, and the nation to the state.

The construction of this link, however, triggered intense controversies throughout the nineteenth century. First of all, because the meanings of citizenship and nationality were not predefined; rather, they were almost constantly debated until the very end of the century, as changes in the rules of

¹⁴ Other similar uses of the term are to be found at the same period in German literature. It seems to have entered English and Italian vocabularies only a few years later.

¹⁵ On the French case see Carol E. Harrison, *Romantic Catholics: France's Postrevolutionary Generation in Search of a Modern Faith* (Ithaca, 2014).

¹⁶ Borja Vilallonga, “The Theoretical Origins of Catholic Nationalism in Nineteenth-Century Europe,” *Modern Intellectual History* 11/2 (2014), 307–31.

¹⁷ David A. Bell, *The Cult of the Nation in France: Inventing Nationalism, 1680–1800* (Cambridge, MA, 2003).

¹⁸ Gérard Noiriel, “Socio-histoire d'un concept: Les usages du mot ‘nationalité’ au XIXe siècle,” *Genèses* 20/1 (1995), 4–23, at 22.

¹⁹ Jeremy Jennings, *Revolution and the Republic: A History of Political Thought in France since the Eighteenth-Century* (Oxford, 2011), 233–34.

naturalization and of political participation illustrate.²⁰ The construction of an “imperial nation-state” also significantly contributed to blurring the link between nationality and citizenship:²¹ in 1791, the revolt of Saint-Domingue had led—for a short while—to the extension of citizenship to freed slaves; but in Algeria, from 1865, “indigenous” were said to be French nationals, without being granted citizenship. On the other hand, until well after the stabilization of the republic, the secularization of belonging promoted by republican citizenship remained challenged in metropolitan France. In particular, many Catholics forcefully opposed the removal of religion from the public domain that it implied, as the “school wars” illustrated.²² In this context, to talk about supranationality not only amounted to questioning the territorial borders of the state. It was, at the same time, part of a more general interrogation about the meaning of nationality and citizenship. It indicated the search for a type of belonging based on not a political, but rather a deeper and older, bond.

The dispute between the French publicist Léonce de la Rallaye, and the Bavarian priest and theologian Ignaz von Doellinger (1799–1890), a leading figure in the Catholic reformist movement, provides a worthy example of how supranationality related to this context. Doellinger was opposed to the rather conservative doctrine then promoted by Pope Pius IX. In 1863, he organized a congress in Munich, in which a more liberal vision of the church was expounded (he later opposed the dogma of papal infallibility proclaimed in 1870 and was eventually excommunicated). The liberal renovation of the church that he supported was based on a new approach to the study of theology: Doellinger contrasted traditional theology, and the dilemmas it was not able to solve for the present, with the merits of a new, more historical and scientific approach burgeoning in Germany.²³ Léonce Roumain de la Rallaye published in 1864 *Le libéralisme jugé par “la Civiltà cattolica”*, in which he reported and freely translated texts from the Roman Jesuit journal *Civiltà cattolica*, criticizing Doellinger and his reformism. He firmly defended traditional theology and church order. Doing so, he observed that traditional theology, “by virtue of its Catholic character, is truly, one cannot but tire of saying it, supranational; it seems destined to unite all peoples, as brothers, in

²⁰ Patrick Weil, *How to Be French: Nationality in the Making since 1789* (Durham, NC, 2008); Pierre Rosanvallon, *Le sacre du citoyen: histoire du suffrage universel en France* (Paris, 2008).

²¹ See Gary Wilder, *The French Imperial Nation-State: Negritude and Colonial Humanism between the Two World Wars* (Chicago, 2005).

²² Yves Déloye, *École et citoyenneté* (Paris, 1994).

²³ Léonce Roumain De La Rallaye, *Le libéralisme jugé par “La Civiltà Cattolica”* (Paris, 1864), 131.

the unity of the same thought under the high direction of the Church.”²⁴ Supranationality, here a property of theology, was defined as an inherent feature of the “Catholic character,” and its aspiration to spiritually reunite the European peoples under the authority of the church. In the context of the time, it was clearly a means of praising and reassessing the Catholic traditional aspiration against liberal views. Supranationality thus began to be used in French debates as a polemic concept against liberal nationalism. It was not, however, an outright opposition to nations and nationalisms; instead, it hinted at a different concept of European nations, as inherently belonging to a higher Christian community.

BETWEEN CHURCH AND EMPIRE

Similar uses were found in the works of other writers, where they gradually took on a more institutional turn.²⁵ For instance, observing the “inanity” of the organization of Europe, another French author, Alexandre Saint-Yves d’Alveydre (1842–1909), endeavored in a series of books published in the early 1880s to develop a “general conception of government.”²⁶ The author, involved in the French counterrevolutionary and antirepublican movement, pleaded for a “serious and scientific policy” whose main merit would be to bring peace to Europe and to restore order among the states “of the same social family, those of Christendom.”²⁷

To achieve this goal, he devised an institutional design inspired by the twin templates of the church and the empire. It was to ancient Rome that the envisioned imperial institutions alluded—while at the same time reviving the ideal, dating back to Charlemagne, of a Europe in which the cooperation of political and religious powers would bring peace.²⁸ His project, labeled “synarchy,” was indeed founded on the submission of power (*potestas*)—an attribute of states—to authority (*auctoritas*)—in the hands of the church.²⁹ In practice, the synarchy would involve the creation of a “Council of European States” which, “after having drafted the European Constitution, the Public Law

²⁴ Roumain de la Rallaye, *Le libéralisme jugé par “la Civiltà cattolica”*, 176. Unless specified otherwise, translations are the author’s.

²⁵ Other examples may be found in Abbé Roca, *La crise fatale et le salut de l’Europe* (Paris, 1885); Anatole Leroy-Beaulieu, *La papauté, le socialisme et la démocratie: Ouvrage suivi de l’encyclique pontificale sur la condition des ouvriers* (Paris, 1892).

²⁶ Alexandre Saint Yves d’Alveydre, *Mission des souverains, par l’un d’eux* (Paris, 1884), 3.

²⁷ *Ibid.*, 7.

²⁸ See Jane Burbank and Frederick Cooper, *Empires in World History: Power and the Politics of Difference* (Princeton, 2010), 80–87.

²⁹ Saint Yves d’Alveydre, *Mission des souverains*, 29.

and the Imperial Code ... would [act as] a supra-national and supra-dynastic Jury of Appeal.”³⁰ All decisions would, however, have to be confirmed and authorized by a council of churches (the plural should be noted, even though the Pope was to preside over this council), submitting political decisions to the moral agreement of religious authorities. This balance was supposed to secure peace in Europe. It was, of course, also a way of reinstalling the church as a powerful temporal institution, and, as the author did not fail to make clear, of safeguarding monarchies against potential revolutions.

In contrast with liberal nationalism, Saint-Yves put forth a more traditional and substantial link between the “family” of European states. Even so, this was not to say that nation building should simply be condemned and rejected by Catholics. Much more, it suggested a unity of a deeper nature between European peoples, which could be superimposed on the different national belongings: the supranational Catholic community of “thought,” a “brotherhood” whose spiritual direction was to be given by the church. Therefore, far from competing, the nation-states and the church were defined as complementary elements of a broader structure—one entrusted with political decision making, while the other would be responsible for the moral and spiritual salvation of Europe. Hence, supranationality was opposed not so much to nationalism as to its liberal version. In this sense, it constituted the international complement of the theory of Catholic nationalism.

These uses of supranationality shared a common premise: opposition to the liberal order, which was considered to be a threat to deeper and more traditional bonds. To combat this threat, it was urged to re-create a kind of European unity much stronger than the concept of international relations between independent national entities could suggest. Supranationality was thus coined in French debates as a reaction to liberal nationalist and internationalist thought, and as a revival of the ancient Catholic ambition for a European family.

THE LAWS OF INTERDEPENDENCE: THE TRANSNATIONAL MAKING OF A LEGAL CONCEPT (1900–1918)

Towards the end of the nineteenth century, the term “supranationality” found new uses. These uses were no longer limited to a nostalgic project that appeared to be increasingly out of touch with the social and political reality of the times. Instead, the term entered the French professional legal vocabulary, where it came to denote a type of law different from traditional international law. This

³⁰ Ibid., 391.

introduction did not extinguish the term's earlier theological uses; actually, it partly continued them. In particular, those who shaped its legal meaning shared with previous users of the term a strong mistrust towards the manner in which international affairs were being administered. Yet it would be incorrect to understand this introduction as a pure repetition of older uses. Evocative of the continuities as well as of the differences, the term was used by the philosopher Théodore Ruysen (1868–1967) in a 1906 article discussing the Augustinian “city of God.”³¹ But far from disregarding the idea of a secular law regulating relations among nations, he was one of the main proponents of the latter. Indeed, he presided over the association *La paix par le droit* (Peace through Law) from 1897 to 1948.³² Secular law no longer was in contradiction with a supranational, spiritual order; on the contrary, law itself was to be defined as the vehicle of supranationality.

What happened during the years leading up to the First World War was in fact an integration of the traditionalist, conservative vocabulary of supranationality within liberal language: the term was redefined to justify a limitation of the powers of sovereign states. Indeed, while the nineteenth century was one of liberalism and relative peace in Europe, its last years also saw state powers reasserted in theory and in practice.³³ To confront the challenges of social transformation brought about by the Industrial Revolution, states were going through a process of bureaucratization, an extension of their hold on society and a strengthening of their coercive capacities.³⁴ After 1871, especially, this was accompanied by the rise of an aggressive, more conservative nationalism in Europe, and by increasing colonial expansion overseas.³⁵

The concept of supranationality was adopted and then circulated in legal circles as an antidote to these trends. This is most visible in two related but distinct fields: protection of free trade, on the one hand, and of peace, on the other. The growing economic relations between European societies encouraged some jurists and legal practitioners to imagine new legal categories designed to insulate international business from the clutches of nation-states. In parallel, others promoted a law whose aim was to curb the

³¹ Théodore Ruysen, “La guerre et le droit,” *Revue de métaphysique et de morale* 14/6 (1906), 796–825, at 807.

³² Rémi Favre, “Un exemple de pacifisme juridique: Théodore Ruysen et le mouvement ‘la paix par le droit’ (1884–1950),” *Vingtième siècle, revue d’histoire* 39/1 (1993), 38–54.

³³ On the general context see Charles Tilly, *Coercion, Capital, and European States, AD 990–1992* (Cambridge, MA, 1992), 96–126; Christophe Charle, *La crise des sociétés impériales* (Paris, 2001).

³⁴ Stefano Bartolini, *Restructuring Europe* (Oxford, 2005), 56–115.

³⁵ Eric J. Hobsbawm, *Nations and Nationalism since 1780* (Cambridge, 1992), 101–30.

free will of bellicose sovereign states, whose rivalry had extended to the world through colonization.

These efforts benefited from a remarkable change in the intellectual context that occurred at the time. In a century of realism and science,³⁶ international law—like academic disciplines more generally—had been professionalizing at a fast pace all over the Western world.³⁷ This professionalization was facilitated by the domination of positivist thought over the discipline: it defined a precise object of international law (existing rules agreed on by independent sovereign states), as well as a specific method allowing its supporters to make a strong scientific claim (neutral analysis).³⁸ Legal positivism, however, faced strong countercurrents that were sweeping across the Western states. They were often related to a new and rapidly growing body of scientific knowledge: the social sciences.³⁹ Political economy, the first attempts to build a political science, and the newcomer, sociology, all claimed to have a say in international matters. They put forward their “realism,” as opposed to positivist law and its reverence for the abstract concept of sovereignty. In particular, they stressed a concept, *interdependence*, that was challenging theories of the sovereign state. This was the interdependence of national economies; this was also the interdependence of military and diplomatic actions, in a context of fast technological progress and worldwide colonial empires; this was finally the interdependence of individuals and societies. Having to face this general interdependence, the independence of sovereign states was put into question.

These currents converged to produce a criticism of traditional concepts of the state as a sovereign, independent entity, and found expression in the term “supranationality.” This was not particularly a French issue⁴⁰—actually, it took some time before French jurists adopted the term, even though I will show in the next section that France was engaging in its own internal debate. Rather, it was discussed almost at the same time in a series of different transnational debates that were slowly introduced in the French context. From this perspective, the legal re-creation of supranationality is most adequately described as a transnational process of intellectual hybridization—not as the linear development of a French tradition.

³⁶ On the cultural and intellectual context see John W. Burrow, *The Crisis of Reason: European Thought, 1848–1914* (New Haven, 2002).

³⁷ Koskenniemi, *The Gentle Civilizer of Nations*; Coates, *Legalist Empire*, 59–85.

³⁸ Neff, *Justice among Nations*, 217–339.

³⁹ Olivier Jouanjan and Elisabeth Zoller, *Le “moment 1900”: Critique sociale et critique sociologique du droit en Europe et aux États-Unis* (Paris, 2015).

⁴⁰ Michael Stolleis, *Public Law in Germany, 1800–1914* (New York, 2001), 419–60.

TRADE AND THE STATE

The origins of the French legal concept of supranationality are partly to be found in German private law. During the last decades of the nineteenth century, the intensification of mobility and trade, brought about by the Industrial Revolution and the golden age of economic liberalism, revealed pressing practical problems.⁴¹ As such, understanding which law would apply in the event of litigation between economic actors became an important issue. For instance, following unsuccessful attempts to harmonize private law since the middle of the century, the International Conference on Private International Law was created in The Hague in 1893. In a liberal vein, its aim was to instill some degree of legal predictability in the realm of private international exchanges.⁴² This question was especially pressing in the German Empire, which was no stronghold of liberalism. At the end of the nineteenth century, the development of state intervention and the codification movement—culminating in the entry into force of the Civil Code (adopted in 1896) and the Commercial Code (adopted in 1897) in 1900—had revealed the danger of a monopolization of private law—largely conceived, after Friedrich Carl von Savigny, as a non- (or even anti-) state law—by the state.⁴³ It aroused the suspicions of many jurists. A theoretical undertaking was thus launched to reassert the possibility of a law free from state control. The vocabulary bears traces of this concern: the German debates developed the concept of a “supra-state” (*überstaatlich*) law.

In 1897, the German professor Ernst Zitelmann (1852–1923) published a treatise on private international law. It mainly dealt with the problem of international litigation in private law. A specialist in civil law, he had discussed as early as 1888 the possibility of a world civil law. In 1897, he sought to analyze the principles of a “uniform” (*einheitlich*) private international law. In order to accomplish this task, he attempted to establish a distinction between, on the one hand, a private international law applied between the different provinces of a single state (*innerstaatliches*)—the problem of which was raised by the existence of different legal norms in the provinces of the Reich⁴⁴—and on the other hand a “supra-state private international law” (*überstaatliches international Privatrecht*). In the first case, conflicts could be resolved by the central authority; in the second case, resolutions would require the states to

⁴¹ T. Iván Berend, *An Economic History of Nineteenth-Century Europe: Diversity and Industrialization* (Cambridge and New York, 2013), 295.

⁴² Neff, *Justice among Nations*, 271.

⁴³ Hans-Peter Haferkamp, “The Science of Private Law and the State in Nineteenth Century Germany,” *American Journal of Comparative Law* 56/3 (2008), 667–89.

⁴⁴ Ernst Zitelman, *Internationales Privatrecht* (Leipzig, 1897), 25.

acknowledge the existence of a law independent of their particular legislation and directly applicable to individuals. However, he observed, only states were subjects of international law: they alone could, as a last resort, decide upon the law applicable to their territories. A private international law prevailing over the will of the states was therefore *conceivable*, but would call for a profound revision of the categories of international law.

This timid thesis met with an important but mixed reception. Positivists, especially, rejected this idea, which in their opinion alluded too much to theories of natural law. Two years later, a young professor of state law at the University of Leipzig, Heinrich Triepel (1866–1946), published a book entitled *International Law and Internal Law*. In 1899 he was adhering to the dominant positivist doctrine. Consistently, he rejected the terminology of “supra-state law”: international law was limited to the law between states.⁴⁵ But, also in 1899, a third thesis was expressed by Franz Kahn (1861–1904), a judge and private professor at Heidelberg. The fact that a practitioner engaged with this question underlines the practical dimension of the issue. After devoting the first chapter of his book to discussing the validity of the term “private international law,” he disputed the existence of a supra-state (*überstaatlich*) positive law able to effectively regulate private international conflicts. On the other hand, however, he supported, against the reasoning of the “rationalists,” the existence of certain minimal and superior rules having precedence over the decisions of “civilized” states.⁴⁶ Supra-state law was thus connected with the old tradition of natural law.

The German controversy was echoed abroad.⁴⁷ In addition to the unparalleled influence of German universities in this period, dialogue between national laws was indeed important, especially between France and Germany⁴⁸—even though it was, of course, often conflictual. This dialogue was made possible by the existence of international institutions, such as the Hague International Conferences on Private Law, shared references to Roman law, or the work of individual brokers. Antoine Pillet (1857–1926), one of the pioneers of international law at the University of Paris, and a member of the Institute of International Law at The Hague, was one of these brokers. Born in the region of Savoie before it was annexed by France in 1860, he held the chair for the

⁴⁵ Heinrich Triepel, *Droit international et droit interne* (Paris, 1920), 24–26.

⁴⁶ Franz Kahn, *Über Inhalt, Nature und Methode des internationalen Privatrecht* (Jena, 1899), 37–39.

⁴⁷ For instance, Ernest G. Lorenzen, “Internationales Privatrecht, by Ernst Zitelmann,” *American Journal of International Law* 9/3 (1915), 767–70.

⁴⁸ Olivier Beaud and Patrick Wachsmann, *La science juridique française et la science juridique allemande de 1870 à 1918* (Strasbourg, 1997).

history of treaties in Paris for almost thirty years. Early on, however, he voiced strong criticisms against the weakness of public international law, unable to secure the “fundamental rights and duties” of states.⁴⁹ Disappointed, he increasingly turned to the then new discipline of private international law. As early as 1903, he echoed the German controversy in his *Principles of Private International Law*. In a long footnote, he described Kahn’s work, and discussed the question of “supranational” law—the term he chose without expressing the slightest hesitation in translating the German *überstaatlich*.⁵⁰ He himself accordingly observed the emergence of a “new law” linked to the development of private international relations. Its function was “to establish the certainty of the law” in private international exchanges by limiting the pretensions of states⁵¹—a theme which, as will be suggested below, would resonate with projects to restore economic liberalism developed from the early years of the twentieth century. More directly, other French jurists versed in German legal debates, especially regarding federalism and its implications, echoed these uses, and thus contributed to introducing this vocabulary to French legal debates.⁵²

PEACE AND THE LAW

Between the beginning of the twentieth century and the end of the First World War, supranational vocabulary was also popularized in another group of legal debates. These uses were increasingly to be found among specialists in the realm of *public* international law. At a time when the distinction between private and public international law was only weakly established, the use of this vocabulary partly continued the reflections undertaken in private international law; nevertheless, the problem of curbing the will of nation-states was here associated with the search for peace. A new type of law, it was thought, would help civilize states—not only overseas colonial territories, but also, and most importantly, Western states themselves. This new type of law would be binding on them, and would grant protection and rights directly to individuals.

Indeed, the increasingly widespread suspicion of the sovereign state and its theory also surfaced in public international law. Like private international law, this area of the law had attracted new attention in previous decades, fostered by the development of new war techniques and the extension of colonial empires. Already in 1851, an international Peace Congress held in London had made the

⁴⁹ Antoine Pillet, *Recherches sur les droits fondamentaux des états* (Paris, 1899).

⁵⁰ Antoine Pillet, *Principes de droit international privé* (Paris, 1903), 59.

⁵¹ *Ibid.*, 15.

⁵² Eg., Raoul De La Grasserie, *Du fédéralisme* (Paris, 1907).

case for a legal codification of diplomatic relations. There had been a Society for Arbitration among Nations since 1889, followed by many gatherings culminating with the Hague conferences of 1899 and 1907. This had been accompanied by a blossoming of international judicial devices, such as the International Court of Arbitration (1899), created after the first conference at The Hague.⁵³ But at the same time, violent confrontations and military conflicts continued to be the rule in many regions of the world. After some initial successes, the limitations of the Court of Arbitration were rapidly plain for all to see. In this context, a collective of international jurists developed a strong criticism of state sovereignty and its consequences for international law and pacifism.

During the first years of the twentieth century, the vocabulary of supranationality came to express these concerns. It was used by a heteroclite collective at the heart of the peace-through-law movement. Some had been pioneers: in the United States, jurists such as James Brown Scott (1866–1943) and Alpheus H. Snow (1859–1920) promoted their ideas through institutions such as the American Society of International Law (1906) or the Carnegie Endowment for International Peace (1910). However, most of these authors were born after 1870: for example, Germany's Walther Schücking (1875–1935), Hans Wehberg (1885–1962) and Erich Kaufmann (1880–1972); Switzerland's Max Huber (1874–1960); and Austria's Alfred Verdross (1890–1980). This collective was by no means a “school” or a homogeneous group of thinkers. Some relied on old concepts of natural law, while others adhered to the rationalist ideal of positivism. Even the terminology was still not fixed: Hans Wehberg evoked a “supranational” law and court as early as 1912,⁵⁴ while the Dutchman Hugo Krabbe, in his book *The Modern Idea of the State* (published in 1915 in Dutch), contrasted international law with a “supernational” law that took precedence over national laws.⁵⁵

However, they shared a number of professional practices, beginning with their commitment to the development of international legal pacifism. Several of them had directly experienced the practice of international law, usually at The Hague.⁵⁶ They generally trusted the strengthening of court powers to create a peaceful world order. From this perspective, they saw the second Hague Conferences in 1907 as a hopeful sign. Initiated to limit the use of force and the proliferation of armaments, it resulted, *inter alia*, in the creation of the International Prize Court (1907).⁵⁷ This court was an arbitral institution handling conflicts over

⁵³ See Mazower, *Governing the World*, chap. 3.

⁵⁴ Hans Wehberg, *The Problem of an International Court of Justice* (Oxford, 1918), 112.

⁵⁵ Hugo Krabbe, *The Modern Idea of the State* (New York and London, 1922), 245.

⁵⁶ Koskenniemi, *The Gentle Civilizer of Nations*, 315.

⁵⁷ Coates, *Legalist Empire*, 88–95.

battlefield captures. In the debates to which it gave rise, it became usual to refer to it as a “supranational court.”⁵⁸ The Austrian pacifist Alfred Fried (1864–1921) echoed the term in 1908 by referring to the “supranational” rather than the international character of the officials of the International Prize Court.⁵⁹ Similarly, the merits and problems of a “supranational” jurisdiction were discussed at length by H. Wehberg as early as 1912.⁶⁰ Even though the creation of the International Prize Court was never actually ratified, these jurists were prone to view it as a sign that the age of international power diplomacy was to succeed the era of supranational courts.

In theoretical terms, this collective contended that state sovereignty could only condemn international law to impotence—and nations to war. Since there was no “lawgiver” in international law, such a theory forced international law to be thought of as a contract between states; however, the very idea of ultimately independent sovereign states prevented any such contract from actually becoming binding.⁶¹ This paradox was forcefully expressed, in 1912, by Alpheus H. Snow—the American jurist specializing in colonial law, who had been involved in the beginnings of the American Political Science Association in 1903 as well as in international legal practice. He published an article in which he attacked the traditional conception of international law.⁶² He wrote that “the term ‘international law’ is self-contradictory and therefore unscientific. That which is international cannot be law; or, what is the same thing, that which is law cannot be international.”⁶³ As long as states are sovereign and independent, international law will in reality enjoy only a theoretical value; what will have real and practical value is only the material force of the states. Hence he pleaded for a more “realistic” concept of law, grounded on a more “scientific” basis.

The argument was not new. Nevertheless, it was original in that the law corresponding to this new reality was termed “supranational,” for “the only adjective which can appropriately be used with ‘law’ to express the idea of a law governing the nations is therefore ‘supranational’ or ‘supernational’.”⁶⁴ As Snow explained in greater length the following year, this more realistic concept

⁵⁸ Klaus Von Lindeiner-Wildau, *La supranationalité en tant que principe de droit* (Leiden, 1970), 18.

⁵⁹ Schumacher, *Der Wortschatz der europäischen Integration*, 98.

⁶⁰ Wehberg, *The Problem of an International Court of Justice*.

⁶¹ Neff, *Justice among Nations*, 266–67.

⁶² Alpheus H. Snow, “The Law of Nations,” *American Journal of International Law* 6/4 (1912), 890–900.

⁶³ *Ibid.*, 892.

⁶⁴ *Ibid.*, 892–93.

was to take into account the new reality revealed by the social sciences. It reflected a fundamental change in international relations: international solidarity, traditionally understood as the mutual relations of independent sovereign states, had received a new meaning. It was, now, to express “an existing unity, federal in type, of the whole body of the peoples and nations of the world.”⁶⁵ Indeed, it was increasingly easy to see that “all the peoples, countries, states, nations and empires of the world are in fact ... united into one great political organization and society.”⁶⁶ In this analysis, individuals were actors in international relations, too: for an individual “may change his citizenship in the city, the state, or the nation; but his citizenship in this great inclusive society which, for want of a better name, we call ‘the society of nations’ is permanent and unchangeable.”⁶⁷ In other words, irrespective of particular nationalities, each individual was a citizen of world society. However, Snow did not trust the “rule of the majority” in international matters. The task of formulating this law was not given to a hypothetical “parliament of man,” but rather to “the publicists, the members of embassies and legations,” and other professional jurists.⁶⁸ The world citizenship he conceived was detached both from nationality and from political participation.

As the case of Snow illustrates, before the First World War, the shortcomings of public international law led several international jurists to criticize its traditional connection with state sovereignty. Yet, during the same period, relatively few French public lawyers used supranational vocabulary, perhaps because of its Catholic and antirepublican undertones in the language of the time. Nevertheless, at the turn of the century, the stage was set for the eventual reception of these ideas. Indeed, the attack against legal positivism was strong in France, too.⁶⁹ It was notably led by Léon Duguit (1859–1928), a professor of administrative and constitutional law aligned with the solidarist movement, in search of a middle way between radical individualism and socialism. Drawing on the work of his colleague at the University of Bordeaux, the sociologist Émile Durkheim, Duguit proposed a revision of legal science on the basis of a “sociological positivism”: in his view, law too was, first of all, a social fact

⁶⁵ Alpheus H. Snow, “International Law and Political Science,” *American Journal of International Law* 7/2 (1913), 315–28, at 316.

⁶⁶ *Ibid.*, 317.

⁶⁷ *Ibid.*, 318.

⁶⁸ Snow, “The Law of Nations,” 898.

⁶⁹ On the context see Jouanjan and Zoller, *Le “moment 1900”*; Guillaume Sacriste, *La république des constitutionnalistes* (Paris, 2011); David Bates, “Political Unity and the Spirit of Law: Juridical Concepts of the State in the Late Third Republic,” *French Historical Studies* 28/1 (2005), 69–101; H. S. Jones, *The French State in Question: Public Law and Political Argument in the Third Republic* (Cambridge and New York, 1993).

produced by society, understood as a network of materially interdependent individuals. During the same period, the conservative Catholic professor Maurice Hauriou (1856–1929) was similarly criticizing positivist legal theory, and searching for an “objective” foundation of law to replace it. He too was keen on taking into account the new social sciences.⁷⁰ Against legal positivism, the theory of Hauriou represented an effort to conceptualize the plurality of the sources of law.⁷¹ He held on to a jusnaturalistic tradition he claimed to revive within a republican institutional framework.⁷² He was thus challenging the nation-state’s monopoly of legal production, too.

While both authors were mainly concerned with internal issues, some individuals contributed to connecting these national debates with the transnational discussion of supranationality. For instance, the solidarist lawyer and politician Léon Bourgeois was a key intermediary in the articulation of French and transnational debates. As a lawyer, he was a convinced promoter of a more “realist” conception of law, and a long-time international legal activist. As a senior politician, several times minister and prime minister, he also had an international profile. He was a French delegate at The Hague in 1899 and 1907, and would preside over the League of Nations, before being awarded the Nobel Prize in peace in 1920. Not only did he advocate, as early as 1909, the creation of a strong international court to enforce peace. He also mobilized lawyers and politicians around his project, and contributed to strengthening transnational connections between legal debates. In 1918, for instance, he created an Association for the League of Nations, gathering many French lawyers, such as Joseph Barthélemy or René Cassin.⁷³ The same year, a similar association was created in Germany—the Deutsche Liga für Völkerbund—by two early users of supranational vocabulary and high-profile pacifists, H. Wehberg and W. Schücking. Those twin association soon became members of an international federation of the associations for the League of Nations, contributing to solidifying transnational arenas and direct channels for the circulation of legal concepts.⁷⁴

⁷⁰ Jean-Michel Blanquer and Marc Milet, *L’invention de l’état: Léon Duguit, Maurice Hauriou et la naissance du droit public moderne* (Paris, 2015), 83–84.

⁷¹ Olivier Beaud, “Hauriou et le droit naturel,” *Revue d’histoire des facultés de droit et de la culture juridique* 6 (1988), 123–38.

⁷² Julien Barroche, “Maurice Hauriou, juriste catholique ou libéral?,” *Revue française d’histoire des idées politiques* 2/28 (2008), 307–35.

⁷³ Jean-Michel Guieu, *Le rameau et le glaive: Les militants français pour la Société des nations* (Paris, 2008), 154.

⁷⁴ Daniel Laqua, “Reconciliation and the Post-war Order: The Place of the Deutsche Liga für Menschenrechte in Interwar Pacifism,” in Laqua, ed., *Internationalism Reconfigured:*

One French member of Bourgeois's association was Georges Scelle (1878–1961). A young professor of public law, he had been involved in transnational legal networks since he had attended the Hague Conference in 1907 (with the Brazilian delegation). It is therefore not too surprising that he knew the article published by A. Snow in 1912. The same year, Scelle translated and published it in the *Revue générale de droit international public*, created in 1894 by A. Pillet and his colleague Paul Faucille.⁷⁵ This, of course, considerably increased the reception of the ideas of the American lawyer among his French colleagues. As we will see now, Scelle himself soon became one of the main advocates of a supranational law in France.

Transnational debates, both private and public, on the future of international law that occurred before the First World War were thus essential to the introduction of supranational vocabulary in France. Rather than as a direct and linear link between conservative nostalgia and legal concepts of supranationality, this introduction of the concept into French law can be analyzed as a process of conceptual hybridization, blending together old and modern elements in the turbulent context of the late nineteenth and early twentieth centuries. In the specific French context, this gave rise to distinctive conceptions of supranationality that were elaborated upon during the interwar years.

JUDEX IMPERATOR! PROFESSING SUPRANATIONALITY (1918–1948)

While the First World War was not the cause of the spread of supranational vocabulary, it nevertheless dramatically intensified it. This was facilitated by the fact that, far from ringing the death knell of the peace-through-law ideal, the war was followed by its “second birth.”⁷⁶ Undoubtedly, the view of international law had changed for many observers. Not only had it plainly failed to prevent war, but the savagery of the war had cast doubt on the civilization of Europeans themselves. It therefore put into question the civilizing role of international law, on which European states had generally sought to ground its legitimacy, and their colonial expansion. In a nutshell, the

Transnational Ideas and Movements between the World Wars (London and New York, 2011), 209–38, at 212.

⁷⁵ Alpheus H. Snow, “Le droit des nations,” *Revue générale de droit international public*, 19 (1912), 309–18.

⁷⁶ Martti Koskenniemi, “Nationalism, Universalism, Empire: International Law in 1871 and 1919,” paper presented at the Whose international Community? Universalism and the Legacies of Empire conference, Columbia University, 2005, 3.

First World War had “brought into question what might be called the antipolitics of international law—that is, its presentation as an objective science or moral code that transcended ideology.”⁷⁷ It had proved neither efficient nor rational.

Yet international lawyers were not ready to give away the scientific claims that constituted the very heart of their professional legitimacy; on the contrary, many attempted to rebuild international law on a new, more scientific basis. The discipline of public international law went through a period of accelerated institutionalization, with the creation of institutions such as the Union juridique internationale (1919), the Institut des hautes études internationales at the University of Paris (1921), the Hague Academy of International Law, in 1923—symbolically located in the “Palace of Peace” completed in 1913—and the Institut universitaire des hautes études internationales in Geneva (1927). The success of supranational vocabulary at this period reflected this professional mobilization to relegitimate international law on new bases—more than the domination of a theoretical school or political ideology.

This was most visible in France. After 1918, the criticism of traditional legal theories, which had begun to circulate before the war, appeared to be more relevant than ever before. There, the war had been presented as a battle “for law”—against a barbarous, lawless Germany—implicitly stressing the weakness of a law that could be disregarded so easily, and had to be defended by such brutal means. This failure prompted two crucial questions: how could the imposition of a binding law be justified anew upon states? Who was to be the author of such a law? Answering both questions, it was believed, would provide the key to replacing the weak prewar international order with a new world order, politically effective because it would be scientifically sound. In this sense, this was a utopian project, rooted in an acute perception of the problems of the existing international order, and aimed at solving them by proposing a global scientific answer.⁷⁸

Such concerns about the law, its legitimacy and its origins received all the more attention as they resonated with some of the most pressing French political issues of the time. In a parliamentary regime experiencing governmental instability, emphasizing the social origin of legal norms first contributed to weakening the doctrine of the sovereignty of the National Assembly, elaborated at the beginning of the Third Republic.⁷⁹ For instance, Duguit forcefully insisted that “it is not the

⁷⁷ Duranti, *The Conservative Human Rights Revolution*, 51.

⁷⁸ In the same direction see Norbert Elias, “Thomas More’s Critique of the State: With Some Thoughts on a Definition of the Concept of Utopia,” in Elias, *Essays I: On the Sociology of Knowledge and the Sciences*, vol. 14 (Dublin, 2009), 212–57.

⁷⁹ Marie-Joëlle Redor, *De l’état légal à l’état de droit: L’évolution des conceptions de la doctrine publiciste française: 1879–1914* (Paris, 1992), 297–347.

positive legislator who makes the legal rule, [the rule] is formed outside [the legislative power] and imposes itself on it.”⁸⁰ To him, one major function of law was, in fact, to protect society from the arbitrary will of the parliamentary state. This reflected the growing popularity of the idea of a constitutional court in the legal profession, now seen as a way to stabilize the regime by limiting “parliamentary absolutism.”⁸¹ Such ideas—at first unambiguously carrying antirepublican undertones—were no longer confined to conservatives nostalgics of the monarchy or the empire: even in the republican left, a general distrust of party politics had developed. For instance, following people such as Durkheim and Duguit, many during the interwar period advocated a corporatist system aimed at complementing parliamentary democracy.⁸² In their view, it would not only empower trade unions and workers, but, more generally, it would also protect individuals from the corrosion of bourgeois egoism and individualism. Starting from very different premises, left and right thus converged to criticize parliamentary politics and its abstract notion of citizenship. Conceptions of a new type of law, emanating from society and channeled through intermediary bodies, were regarded with interest by both sides.

Such ideas also in part resonated with ongoing controversies about nationality. Since 1889, and the reversal of nationality rules to *jus soli*, the prevailing conception of nationality had emphasized “the acquisition of social codes more than origin or birthplace.”⁸³ This “sociological” conception conveniently prevented the “indigenous” from being granted equal rights. But, after 1918, maintaining the subaltern status of colonized peoples, many of whom had paid a heavy toll during the fighting, seemed rather more difficult to justify.⁸⁴ Colonized elites voiced insistent demands for more equality, while the creation of the mandate system of the League of Nations opened a path, however narrow, to international supervision of colonial issues. The legal situation of colonized people in an extremely heterogeneous French Empire was thus the subject of much attention. Of course, complete equality was hardly an option: France still had a duty to “civilize” her colonies, it was argued; moreover, the “neo-traditionalist” mood of the postwar years prevented any wide-ranging extension of suffrage to colonized people—or, for that matter, to

⁸⁰ Cited in Renaud Baumert, *La découverte du juge constitutionnel entre science et politique* (Paris, 2009), 306.

⁸¹ *Ibid.*, 41–3.

⁸² Mike Hawkins, “Corporatism and Third Way Discourses in Inter-war France,” *Journal of Political Ideologies* 7/3 (2002), 301–14.

⁸³ Weil and Porter, *How to Be French*, 53.

⁸⁴ See Alice L. Conklin, *A Mission to Civilize: The Republican Idea of Empire in France and West Africa, 1895–1930* (Stanford, 2001), chap. 5.

women.⁸⁵ The new legal theories, however, could be read as opening up new avenues to solve these issues. They were, indeed, double-edged: they suggested that one could at the same time be excluded from nationality and citizenship, and still, as a member of the wider society or community, contribute to the spontaneous production of legal norms. Rather than complete exclusion, then, they provided for a hierarchy of different types of belonging. The idea of a denationalized and depoliticized citizenship imagined by Snow before the war illustrates this potential. Such hierarchies were in fact echoed in the mandate system created by the League of Nations and, much later, in the idea of a “superposed nationality” developed after the Second World War.⁸⁶

In this context, very different authors embraced supranational vocabulary. Reflecting the French conflation of state and nation, as well as the ambiguities surrounding the definition of nationality and citizenship at the time, it was sometimes as supranational, sometimes as supra-state, that the term was translated and theorized, allowing for a great deal of conceptual ambiguity. The concept was in fact integrated to older academic and political traditions, where its interpretation followed a distinctive path—or rather *two* distinctive paths: one was clearly republican in its articulation of the concept; the other was closer to the older tradition of Catholic supranationality of the nineteenth century. In spite of these differences, both converged to put into question the absolute position of the state in political and legal thought.

So doing, it will be suggested, they crossed paths with other intellectual projects. Some were, during the war, seduced by plans for an imperial Europe dominated by Germany. Others were brought closer to the ideas of a collective of economists, soon to be called “neoliberals,” who rejoined lawyers in their search for a new global legal order able to secure the operation of free markets.

SUPRANATIONAL SOCIETY AND SUPRANATIONAL COMMUNITY

The legal conceptualizations that emerged before the war were received by very different people in France between the wars. The cases of Georges Scelle and Louis Le Fur are exemplary here. Their resemblance, as well as their opposition, has a paradigmatic value in highlighting the stakes and the tensions of the concept of supranational law in France, and, more generally, within the community of international lawyers at the time.

Georges Scelle was a scientific—and political—follower of Léon Duguit, active within the republican reformist left (he was chief of staff of the

⁸⁵ Ibid., 176.

⁸⁶ Cooper, *Citizenship between Empire and Nation*.

minister of labor under the “cartel of the left”).⁸⁷ Early on, he was involved in international pacifist networks, and was a major figure of the Hague Academy of International Law, where he taught several times in the 1930s, before becoming its secretary in 1935. Using his early international experience, from 1919 onward he published many texts on the International Labor Organization (ILO) and the League of Nations, obtaining, for example, a preface by its president, Léon Bourgeois.⁸⁸

In 1932, he published a *Précis de droit des gens* in which he synthesized his ideas on international matters. In line with Duguit,⁸⁹ Scelle claimed the law to be nothing but “a social imperative reflecting a necessity born out of natural solidarity.”⁹⁰ Extending the consequences of this doctrine to international law allowed him to ground international law no longer on the sovereignty of states, but rather on a fact which constituted the starting point of a new approach: international social interdependence. In his *Précis*, Scelle emphasized that “the juxtaposition of political societies is no longer the essential phenomenon: they are superimposed, intertwined, combined, in a shrinking and increasingly feverish world.”⁹¹ Reminiscent of Snow and his universal citizenship, he insisted that, to account for this fact, international lawyers had to move away from state-centered analyses, to concentrate on concrete groups and individuals.

To illustrate how, in practice, social interdependence resulted in the production of legal norms, one of his favorite examples was “social law”—also called “industrial law”—which was codified in France between 1910 and 1926. Far from seeing it only as a product of parliamentary and state action, he stressed the role of trade unions and corporatist bodies in its creation and enforcement: these organizations not only channeled workers’ claims; they also actively contributed to their emergence by creating arenas in which workers became aware of the needs created by the “special solidarity” between them.⁹² Scelle therefore recommended the generalization of such mechanisms to other areas of society, and to the international sphere. His enthusiasm for the ILO during the interwar period was the logical consequence of this corporatist faith.

From this view of law imbued with sociological theory, he drew conclusions very close to the monist theses defended by Hans Kelsen during the same

⁸⁷ Carlos Miguel Herrera, “Un juriste aux prises du social: Sur le projet de Georges Scelle,” *Revue française d’histoire des idées politiques* 21/1 (2005), 113–37, at 113.

⁸⁸ Georges Scelle, *Le pacte des nations et sa liaison avec le Traité de paix* (Paris, 1919).

⁸⁹ Georges Scelle, “La doctrine de Léon Duguit et les fondements du droit des gens,” *Archives de philosophie du droit et de sociologie juridique* 1–2 (1932), 83–119.

⁹⁰ Georges Scelle, *Précis de droit des gens* (Paris, 1932), 2.

⁹¹ *Ibid.*, 8.

⁹² Georges Scelle, *Précis de législation industrielle* (Paris, 1930).

period—although on different bases. The French jurist emphasized that there could no longer be any reason to maintain a dualistic approach to the relationship between international and national law. Both emanating from society, they were said to form a “unified inter-social law” which could even be regarded as “international constitutional law.” From this perspective, the state was found to be enmeshed in a universal law emanating from international society itself, to which, far from totally controlling it, it had to submit: the supranational, or “suprastatal,” legal order.⁹³ The sovereignty of independent nation-states was disregarded as an outdated abstraction in an age of social interdependence. The only legitimate sovereign, on this view, was the law itself.⁹⁴

To this first variety of supranationality answered another, more conservative, conception. It was inspired by Catholic natural law. An interesting case is provided by Scelle’s intellectual and political rival, Louis Le Fur (1870–1943).⁹⁵ He also repeatedly discussed the hypothesis of a “superstate” and a “supranational” organization that would civilize the anarchy of international relations. A specialist of federalism and of German legal thought, Le Fur was also deeply involved in the transnational legal networks of the interwar period. For instance, he, too, assiduously lectured at the Hague Academy (1927, 1932, 1935), while contributing to the work of the Union juridique internationale. Nevertheless, Le Fur seems to differ in every other respect from Scelle. A pious Catholic, he published works on canon law, participated in several publications of Catholic jurists and defended the Pope’s sovereignty over the Papal States.⁹⁶ Politically, the path of Le Fur led him more and more to espouse the opposite viewpoints of Scelle. One of his works, *Just War and Fair Peace* (*Guerre juste et juste paix*), was published in 1920 with a preface by the nationalist writer, Maurice Barrès. Generally speaking, he expressed little sympathy for the republic—he was a royalist—or democracy. After Philippe Pétain came to power, he became more and more explicitly supportive of the new regime.

Le Fur, in the vein of Hauriou, shared the criticism of positivism and of the “obnoxious” theory of sovereignty.⁹⁷ He had written in his thesis, in 1896, that

⁹³ Ibid., 57.

⁹⁴ Ibid., 13.

⁹⁵ A famous controversy opposed them in 1925, when Scelle was appointed to the University of Paris by the minister, while the law faculty had elected Le Fur. In the face of the troubles that resulted, Le Fur was finally given the position. Marc Milet, *La Faculté de droit de Paris face à la vie politique: De l'affaire Scelle à l'affaire Jèze 1925–1936* (Paris, 1996).

⁹⁶ Frédéric Audren, “La belle époque des juristes catholiques,” *Revue française d’histoire des idées politiques* 2/28 (2008), 233–71, at 252.

⁹⁷ Louis Le Fur, *Développement historique du droit international: De l’anarchie internationale à une communauté internationale organisée* (The Hague, 1932), 548.

“the state does not create law; it only acknowledges it.”⁹⁸ Indeed, he did not reject the teaching of the new social sciences. In his own *Précis*, he even wrote that “facts reveal to us, with the law of social solidarity, the close interdependence of men made to live in society.”⁹⁹ Thus “there is a law of groups and even of individuals, which is opposable to that of the state.”¹⁰⁰ In spite of their differences, this observation led Le Fur, like Scelle, to see in corporatism the safest practical way to express this non-state law.¹⁰¹ But, in line with right-wing corporatism—he later was to be appointed by Pétain to the Institute for Social and Corporatist Studies—he did not place his hopes so much in workers’ trade unions as in a more paternalistic type of corporatism, emphasizing tradition as a source of legal norms. At the same time, Le Fur held fast to a jusnaturalistic concept of law: he searched for the foundation of this law not only in society, but also in the “reasonable nature of man” itself. Such a law need not be forged; it has to be discovered.

From these premises, Le Fur developed another conception of supranationality. He attacked Scelle for maintaining the pernicious hope of creating a world-state of unlimited powers. This, he argued, was not only dangerous, it was unrealistic. On the contrary, he suggested, a “supranational organization” would have to rest on a “necessary foundation”: an “almost unanimous recognition of a universal law, [a] ‘religion’ of justice, the only where all men can feel united.”¹⁰² This would have to be complemented by a form of “supra-state” organization, with the (limited) powers necessary to enforce this universal law. Then the law could hope to become “the only sovereign of the world.”¹⁰³ This view was aligned with the traditional Catholic concept of supranationality as a spiritual community, even though it decidedly integrated elements of the contemporary legal debate into this conception.

Two conceptions of supranationality were thus articulated in French legal thought during the interwar period. Theoretically, the conceptions were strikingly at odds. Nonetheless, it would be hasty to conclude that there was a complete opposition between them. In both cases, a new analysis of reality led to a new concept of law.¹⁰⁴ Whether sought in the laws of society or in the natural laws of

⁹⁸ Louis Le Fur, *État fédéral et confédération d'états* (Paris, 1896), 577.

⁹⁹ Louis Le Fur, *Précis de droit international public* (Paris, 1939), 9.

¹⁰⁰ Louis Le Fur, “Fédéralisme et union européenne,” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 11 (1942), 12–23, at 17.

¹⁰¹ David Deroussin, “L'idée corporative saisie par les juristes: De la corporation au pluralisme juridique?”, *Les études sociales* 157–8/1 (2013), 147–85, at 147.

¹⁰² Louis Le Fur, *Races, nationalités et états* (Paris, 1922), 149.

¹⁰³ Le Fur, “Fédéralisme et union européenne,” 23.

¹⁰⁴ See, also, Neff, *Justice among Nations*, 293.

the communities, law was, for these jurists, rooted in the nature of things. It appeared independently of the state, and was isolated from its arbitrary will—that is, the erratic fluctuations of parliaments. Further, this law stood above the states: in the strong version of both theses, the only legitimate sovereign whose power cannot be disputed is neither the state, nor the people, nor the monarch—it is the law itself. In this sense, as the cases of these two otherwise very different authors illustrate, supranationality expressed a shared professional effort to restore belief in the power of courts and the legitimacy of international law, rather than a clear-cut political or theoretical position. And, indeed, up to a certain point, these similarities allowed for a practical convergence of these different theories.

FROM THE LEAGUE OF NATIONS TO EUROPEAN UNIONS

Debates about supranationality were not only theoretical. Both authors were, themselves, engaged in the practice of international law: Le Fur was a member of the Franco-German Arbitration Tribunal in 1920, while Scelle, who remained an adviser to the French delegation to the League of Nations in the 1920s, was also a member of the Commission for the Control of International Labor Conventions from 1922, and a member of the Administrative Tribunal of the International Labor Organization from 1938. Therefore, their theoretical debates were closely intertwined with practical discussions.

In a period replete with plans of international treaties and organizations, the creation of the League of Nations in 1919 appeared to Scelle and Le Fur as a decisive event. We have become accustomed to considering it the archetype of the failed and “idealist” international organization.¹⁰⁵ Moreover, the league disappointed many (American) jurists. Instead of a legalist makeup, the Wilsonian plan put forward a parliamentary organization, in which no court had originally been provided.¹⁰⁶ However, outside the US and if only for a moment, the league was seen by some as the first step towards the supranational legal organization of the world they had been calling for.

Louis Le Fur was, from the beginning, a mild supporter of the league. In fact, he criticized it for lacking the means of enforcing its decisions, and thought it

¹⁰⁵ On this lasting interpretation of pacifist interwar ideas see Ole Waever, “The Speech Act of Realism: The Move That Made IR,” in Nicolas Guilhot, ed., *The Invention of International Relations Theory* (New York, 2011), 97–127. For a recent reappraisal of the League see Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford, 2018).

¹⁰⁶ Stephen Wertheim, “The League That Wasn’t: American Designs for a Legalist–Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920,” *Diplomatic History* 35/5 (2011), 797–836, at 801.

unlikely to effectively change the behavior of states.¹⁰⁷ Yet he was willing to acknowledge it as the first real attempt at creating a limited—and thus legitimate—“super-state,” itself conditioning the achievement of the real “supranational” organization he called for.¹⁰⁸ As for Georges Scelle, he was a very enthusiastic advocate of the league presided over by Bourgeois. In several pamphlets, he explained and defended the League of Nations. Approving, until after the war, the hierarchy created by the mandate system, he above all insisted that the league “tends to replace the present anarchy of sovereign states ... with a *supranational organization* with enough force to oblige them all to bow before the principles of law and *before judges*.”¹⁰⁹ In particular, he placed his hopes in the Permanent Court of International Justice, to be established according to Article 14 of the Covenant of the League of Nations, that began operations in 1922. This court indeed attracted some enthusiasm: it was, for the first time, defined as a real court, not as an arbitration device, with—in theory—binding powers upon states.¹¹⁰ According to Scelle, “the Court of Justice embodies in itself the most tangible hope of peace for the entire international organization. It prepares the advent of the reign of law: *Judex imperator!*”¹¹¹

While such confidence might seem utterly naive in retrospect, it was not isolated at the time. In particular, the legal views of Scelle bore striking similarities to those of another collective that was then gathering, in particular in the former Central European empires (notably Austria and Germany, but France was no exception): early neoliberals. There, facing the rise of communism, the economic crisis and the decay of the European imperial order, a few intellectuals were actively engaging in the search for a new and effective liberal economic order.¹¹² Far from completely rejecting state authority, they thought that the operation of the market could only be secured in a strong state. But, they pointed out, parliamentary democracy was weak and unstable. Rather, strength resided in the ability to “encase” the market in a stable legal framework—an economic constitution, as Franz Böhm was to put

¹⁰⁷ Le Fur, *Développement historique du droit international*, 598.

¹⁰⁸ Louis Le Fur, *Règles générales du droit de la paix* (The Hague, 1935), 236; Koskenniemi, *The Gentle Civilizer of Nations*, 320.

¹⁰⁹ Georges Scelle, *La Société des nations: Sa nécessité, son but, ses origines, son organisation* (Paris, 1925), 4, original emphasis.

¹¹⁰ Michel Marbeau, *La Société des nations: Vers un monde multilatéral: 1919–1946* (Tours, 2017), 133–4.

¹¹¹ Scelle, *La Société des nations*, 23.

¹¹² Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA, 2018); Jurgen Reinhoudt and Serge Audier, *The Walter Lippmann Colloquium: The Birth of Neo-liberalism* (Cham, 2018).

it in Germany. For, as Friedrich Hayek put it, law was a spontaneous, evolutionary social fact, best suited to the regulation of complex interdependencies such as international markets. Here, the proximity with the theory developed by Scelle has been accurately pointed out¹¹³—even though it should not be exaggerated in the light of the rather opposite political engagements they led to.

Neoliberals, too, busied themselves with analysis of the world order. Starting with the observation of the world's growing economic, social and technical interdependence, they made a case for a depoliticized global legal order. Courts would enjoy broad competences and law would, as Hayek put it, “dethrone politics.”¹¹⁴ For that reason, Hayek, like Scelle, was at first enthusiastic about the League of Nations; he would, in the bestselling *Road to Serfdom*, published in 1944, call for a “supernational authority” and constitution.¹¹⁵ Interestingly, in this perspective, a central arena for both neoliberals and supranationalists during the 1930s was the Institute of International Studies where not only Scelle or Wehberg, but also Ludwig von Mises, Wilhelm Röpke or, at times, Hayek lectured. Located in Geneva, near the league's headquarters, it was directed by William Rappard, a key figure in the genesis of neoliberalism, and the director of the Mandates Section in the League Secretariat. He constitutes a clear example of how the search for a new legal order and the search for a new economic order sometimes could overlap in transnational intellectual networks.

However, confidence in the new organization, and in the courts in general, quickly faded as the flaws of the league became blatant even to its most ardent supporters. Louis Le Fur could, in retrospect, describe the League of Nations as “contradictory in itself and doomed to failure”:¹¹⁶ Despite the multiplication of treaties and agreements, nothing had been able to guarantee their enforcement. As Carl Schmitt was to put it, the “Geneva Society has changed nothing in the permanence of the traditional international law according to which sovereign States are the last resort of the international order.”¹¹⁷ This drove Le Fur to favor other projects of union beyond nation-states: in an

¹¹³ Yves Nouvel, “Le droit interindividuel total,” in Apostolidis Charalambos and Hélène Tourard, eds., *Actualité de Georges Scelle* (Dijon, 2013), 121–32.

¹¹⁴ Quoted in Slobodian, *Globalists*, 15.

¹¹⁵ Ibid., 94. Friedrich Hayek, *The Road to Serfdom* (Chicago, 2007), 231.

¹¹⁶ Le Fur, “Fédéralisme et union européenne,” 19.

¹¹⁷ Quotation translated from Carl Schmitt, *La question clé de la Société des nations: Le passage au concept de guerre discriminatoire* (Paris, 2009), 29; in English see Schmitt, “The Turn to the Discriminating Concept of War,” in Schmitt, *Writings on War* (Cambridge, 2011), 30–74. In this essay, he explicitly challenges G. Scelle and his concept of a supranational law.

article published in 1942 in a German journal of international law, he discussed the apparently untimely question of “federalism and the European Union.” Le Fur—who was by then heavily compromised with the new regime of Pétain—claimed the prospects for continental unions of states to be “brighter than ever.”¹¹⁸ This suggests that the old connection between supranationality and empire was not completely lost.¹¹⁹

Even among defenders of the league, the initial optimism was soon to be tainted by pessimistic notes and to lead towards a more limited project. As early as the 1920s, Scelle had increasingly seen the solution to the difficulties of the League of Nations in a federal organization that would start with Europe. In his *Essay on the European Union* of 1931, he wrote that “universal federalism cannot realize a new giant Unitarianism ... The League of Nations will become universal only by regionalization.”¹²⁰ In a sometimes ambiguous way, he continued to defend such ideas during the war.¹²¹ For instance, in a text published in 1942 in a collection directed by one of the Vichy regime’s favorite economists, François Perroux, he still pleaded for European unification along federal lines. But, he claimed, the central obstacle to “supra-state achievements” was the people’s reluctance to accept a government led by a majority of “foreigners.”¹²² In occupied France, such a statement may have seemed rather equivocal.

Plans for a supranational organization of the world under the sovereignty of law were thus increasingly translated into different plans for European organizations during the interwar period. Here again, it is worth noting that neoliberals followed similar lines. For instance, in 1939, Hayek authored a remarkable piece on the “conditions of interstate federalism,” in which he discussed the possibilities and limits of a federal union between free Western states (he actually thought about including the US in his plan).¹²³ This is not to say that all these plans were identical; it is to say that, at some point, different concepts of supranationality converged on the path leading from

¹¹⁸ Le Fur, “Fédéralisme et union européenne,” 21.

¹¹⁹ On the Nazis’ concepts for Europe see recently Johannes Dasinger and Dieter Pohl, eds., *A New Nationalist Europe under Hitler: Concepts of Europe and Transnational Networks in the National Socialist Sphere of Influence, 1933–1945* (New York, 2018); Jürgen Elvert, “The New European Order of National Socialism: Some Remarks on Its Source, Genesis and Nature,” in Dieter Gosewinkel, ed., *Anti-liberal Europe: A Neglected Story of Europeanization* (New York, 2014).

¹²⁰ G. Scelle cited in Jean-Luc Chabot, *Aux origines intellectuelles de l’Union européenne: L’idée d’Europe unie de 1919 à 1939* (Grenoble, 2005), 131.

¹²¹ See Herrera, “Un juriste aux prises du social,” 124–5.

¹²² Georges Scelle, *Le sens international* (Paris, 1942), 53.

¹²³ Republished in Friedrich Hayek, *Individualism and Economic Order* (Chicago, 1958).

world courts back to European unification. There, some of them went along with darker European projects.

CONCLUSION

In this essay, I have traced how the term “supranationality” was used in France before 1945. Far from being an invention of postwar Europe, supranationality already had a long history before then. I have argued that it is as a counterconcept to the then dominant views of the international—and, relatedly, of the nation-state—that this history can be best understood. First used by conservative Catholics towards the end of the nineteenth century, the term was gradually connected to transnational legal debates, imported to France at the beginning of the twentieth century. In these debates, jurists endeavored to redefine traditional international law—experiencing their finest hour during the interwar period, in the debates about international courts and public international law. Then, supranationality came to denote the utopia of a global legal order in which courts, not parliaments, would rule.

Here, I suggested, this utopia partly overlapped with other projects debated at the time. In some cases, as for Le Fur, the imperial dimension of supranationality crudely resurfaced. But in other cases, the supranational legal utopia found unexpected allies. In particular, it strikingly resembled the utopia of a restored liberal economic order, conceptualized by the transnational collective of early neoliberals. Both indeed observed the new interdependence of the world, and pleaded for strong legal institutions providing for a depoliticized government, as they were suspicious of unstable democratic assemblies. While it is not its purpose to fully explore the connections between supranational and neoliberal plans, this article nevertheless suggests the fruitfulness, for understanding twentieth-century international thought, of cutting across national and disciplinary divides to systematically interweave the history of legal and economic utopias.

Finally, this history leads to a hypothesis about the intellectual origins of European integration and the concepts used to define it. It is, for instance, worth noting that Scelle was involved in the work of the Union of European Federalists, and attended the Congress of Europe in 1948. The aforementioned use of the term in the final text of the resolutions adopted at The Hague in 1948 is an illustration of these continuities. More generally, when jurists trained during the interwar period attempted to discern which legal concept could best describe the European projects, it is hardly surprising that they quickly unearthed the old concept that had been so intensively discussed in previous decades. The supranational European federation of the postwar period was part of a *redefinition* of the jurists’ supranational utopia—not of its abandonment.