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LEGAL MODELS OF FLOW AND CONTROL IN QUESTION[1y2]

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The geophysical displacement of goods and of persons raises many questions for the law.

These are often difficult questions. There are two reasons for this.

First, it can be said that the law involves creating stasis. It approaches all kinds of realities by endeavouring to squeeze them into legal categories to which distinct and, if possible, predictable legal regimes are then assigned. There is nothing trivial about such an approach. Creating stasis from movement is no mean feat.

Second, the law never develops just one point of view on the things it tackles. It is not a monolithic, universal and permanent discipline. It varies from one area to the next, and from one place or epoch to the next. And the focus of this essay exacerbates this composite and evolving state for one well-established reason: the celebrated theory that tells us that movement is relative. Depending on one's perspective, it can be described in totally different ways (for an outreach presentation of this theory, see: TOLMAN, 2010). And

so it is difficult to talk about it univocally.

This produces a whole series of difficulties that legal scholars must face each time they endeavour to use the tools of their discipline to tackle a situation in movement and its control.

It is the ambition of this article to analyse different difficulties:

1. the challenging legal spatialisation of flow;
2. the difficulties of distinguishing between different spaces of flow;
3. the difficulties of addressing the modalities of movement in legal terms;
4. the difficulties of addressing the lack of movement in legal terms;
5. difficulty of legally defining control;
6. the law and the illusion of control.

1 THE CHALLENGING LEGAL SPATIALISATION OF FLOW

The term "legal space of flow" is not common among legal scholars. It merits a preliminary explanation here (1.1). We will then consider the difficulties for the law of defining three types of spaces of flow: national (1.2), international (1.3) and European (1.4).

1.1 WHAT IS A LEGAL SPACE OF FLOW?

What is meant by the legal spatialisation of flow? It simply means defining a legal space of flow.

This task is less straightforward than it may appear at first.

We are not talking about the largely established practice

of determining in legal terms all or some of the elements of a situation of movement in a given area, whether locally, nationally or internationally.

Rather we are talking about ensuring that the legal space espouses the – necessarily dynamic – forms of the situation in movement.

Let's look at two examples to better understand this concept of the legal spatialisation of flow: one on a local and one on an international scale.

On the scale of a town or city, urban space can be represented by a map of the circulation of persons and goods (the same could apply on a much larger scale, whether intercity, regional, national or international). This task is generally accomplished through public policies focused on mobility. The stated aim is to improve circulation so that each of us can move around in more optimal conditions. These policies are of keen interest to the law. Administrative law, particularly in relation to urban planning, provides the essential legal frameworks with which to structure this circulation.

This type of spatialisation does not only relate to the urban world for inter-urban connections. It can also affect rural and even isolated areas. This can be seen in the remarkable case of ski lifts installed when creating or extending winter resorts.

These working assumptions point to the fact that movement is legally spatialised.

It is structured in relation to a space. This space represents a conceptual and functional unit. Identifying it enables all of the potentially applicable legal rules to converge towards a single phenomenon: movement within that space.

In a more micro-legal context, we can find another example of the legal spatialisation of flow in an international environment.

Let's consider how a transatlantic flight between Nice and New York is organised. Imagine a legal scholar who sets about trying to identify all of the legal rules put in place to allow this flight to operate. These rules may be State rules, inter-state, regional (European) or even private (transnational). They may fall under public law or private law, binding or simply complementary, etc.

How can we form a picture of this burgeoning and heterogeneous set of rules that apply to movement?

The response is to be sought in the legal spatialisation of flow. A transatlantic flight gives rise to a normative space formed by combining all of the rules that govern that particular situation in movement. This space is highly constructed and entirely thought out and organised for one sole purpose: the movement of the aeroplane from Nice to New York.

Can this analytical framework provided to us by legal spaces of flow be applied to the three major legal environments that are national, international and European spaces?

This approach to legal constructs at different levels, adopted and theorised by the author in previous research (BERGÉ; HELLERINGER, 2017), may prove useful.

The law offers a multitude of implementation contexts and it is important to develop multiple perspectives of how the law operates depending on the level in question.

1.2 DEFINING A NATIONAL SPACE OF FLOW

Two questions need to be asked here: is it possible to speak of "space" in a national context, and how is it to be approached as a space of flow?

In the language of the law, the term "national space" is rarely used.

Far more common is the term "national territory", one of the three components of the State. In modern law, the notion of territory is intimately linked to that of the State. Together with a population and political authority, it is one of the three primary components (1933 Montevideo Convention). This territory is said to comprise different "geographic spaces": terrestrial, aerial and maritime. Its main function is to delimit the scope of validity of the State's legal order. The territory is what establishes territorial sovereignty, the application of laws therein and the spatial competence of State authorities, particularly the jurisdictions called upon to serve justice in the name of that territory's people. The territory can also be the subject of disputes and fuel opposing interests which international public law tries to settle (see in particular: KOHEN; HÉBIÉ, 2018).

This results in confusion between space and territory. In its national dimension, they are one and the same insofar as lawmakers do not generally see the point in attributing a specific meaning to national space.

Is it common to refer to national space, i.e. national territory, as a space of flow?

Let's approach this question from the perspective of public freedoms, in particular the right to come and go as one pleases.

In France, this right is not expressly stipulated in any text of constitutional value (even though it did feature in the drafts (the "April Declaration") for the Preamble to the 1946 Constitution), and it was 1979 (in a case on motorway tolls) before the Constitutional Council issued a judgement on this question for the first time.

This is not an absolute freedom, and the essence of the judges' work related to the control of breaches thereof. But cases in which encroachments on the freedom of movement (such as house arrest) are deemed excessive are few and far between.

A similar situation can be observed in several countries

studied as part of this research, where internal movement can take on a very significant dimension (Brazil, Canada and the United States). The books, collections of essays and case law dedicated to freedoms rarely include specific references to the right to come and go as one pleases in national spaces.

So we can conclude that "national space" is not seen in any cardinal sense as a space of flow.

1.3 DEFINING AN INTERNATIONAL SPACE OF FLOW

In the international legal environment, two characteristic criteria of this environment are frequently used: its extraneous and international qualities.

Do these criteria allow us to assert the existence of an international space of flow?

In law, extraneity can be used to describe an otherness whose reference point is the State's legal order. That which is not national is foreign.

It is a criterion used in private international law to mark the existence, in a private context, of a factual or legal element located abroad and which can lead to the application of specific rules, such as the rule whereby a foreign law can be deemed applicable.

In public international law, this notion does not play a central role. Because this branch of the law is intended to operate beyond national/foreign distinctions, it only attaches secondary importance to the notion of extraneity (for example to describe a foreign State's compliance with its rules on its national territory).

When it comes to international space, any extraneous quality can be said to be antinomic.

To define international space, one must simply eschew any

notion of extraneity. For example, to assert a space formed by a set of substantive international rules presupposes the circumvention of considerations relating to any internal legal order, i.e. national or foreign. International maritime and air space can only exist by erasing State territories and thereby any distinction between national and foreign. This is even more true of transnational space (merchandise, sporting activities, organised crime, etc.), which literally penetrates borders (on this topic, see: WYLER; PAPAUX, 1999).

And what about the international criterion?

This is a highly multifaceted criterion. Looking at the most common ways in which it is understood, we will now consider to what extent or whether it can be used to define international space.

One understanding of the international dimension is that it stems from extraneity. Any situation of an extraneous nature is international. This minimum requirement can be characterized by the realisation of a material fact: part of the situation to be governed is located in a foreign country. It may also be the product of a legal construct: the situation becomes international because the parties involved decide to invoke a foreign legal instrument, thus rendering it international (e.g. parties to a purely internal contract choosing a foreign legal system; or creating a legal entity in application of foreign law).

Another understanding is that the international dimension marks the departure beyond purely national (and foreign) considerations, with legal questions taking on a truly international quality. For example, a rule governing public order will be said to be truly international. Similarly, an adjudicator (such as an arbitrator) is said to have a veritable international scope.

The international dimension is also said to have a systemic quality. References to an international legal order clearly reflect this point of view. We may be talking about a legal order with an essentially inter-State dimension, as is the case in public international

law when it is the international legal order that primarily determines the relations between States. But from a broader perspective, we could also be talking about transnational legal orders capable of organising any type of activity (standardisation, sport, trade, etc.).

The final understanding of the international dimension is that it is of an allegorical nature. For example, when legal scholars refer to the "search for solutions of international harmony" (private international law), to the existence of "an international community or society" (public international law or transnational law) or to "the needs of international trade" (law of international trade or arbitration), these are not established concepts but rather figurative and all-encompassing representations that play a very important role in the construction of legal domains.

To what extent do these different interpretations of the international dimension allow us to describe the existence of an international space?

In the first interpretation, the notion of what is international presents the same shortcomings as extraneity (see above). It is not therefore in itself sufficient to describe the existence of an international space.

The second and third interpretations offer more interesting perspectives. Inherent in the assertion of an international or transnational rule, adjudicator or legal order is the erasure of a purely territorial division in favour of the emergence of new spaces. Generally speaking, there are no international territories specific to such legal entities. However, there are international (or transnational) spaces within which these different concepts play out.

The fourth interpretation is probably the most fruitful. You might say that the poetic reference to solutions of international harmony, the international community or society and the needs or interests of international trade loosens the spirit of schemas essentially constructed on the notion of the State's legal order. The extent of

this looseness varies. But to describe the environment in which all of these notions are evolving, referring to a space (international or transnational) may prove very useful (on this topic, see POILLOT-PERUZZETTO; MARTY, 2002).

Given that the extraneous criterion, whether taken alone or intertwined with the international criterion, cannot be used to designate spaces, it is impossible to argue that it helps shape spaces of flow.

However, we can look at the potential offered by the other three interpretations of the international criterion in terms of asserting the existence of international spaces of flow.

To what extent do they allow this?

The answer is that the legal discourse on this specific question displays a great deal of relativity.

If one reads the texts affirming the existence of rules and adjudicators with an international dimension, an international or transnational legal order, solutions of international harmony, an international community or society or the needs and interests of international trade, one can hardly say that the watchword is movement.

Movement is of course sometimes addressed. The intervention of a rule or an adjudicator with a truly international dimension can occur as part of a situation in movement. The affirmation of an international economic legal order (e.g. WTO) is initially correlated with the doctrines of free trade. The first stage on which the transnational order for merchandise or organised crime played out was the sale and transport of merchandise or the illegal trafficking thereof. Solutions of international harmony can be based on mechanisms of referral or recognition that to some extent structure the *circulation* of national legal solutions. The international community or society is built on a wide range of mechanisms for the exchange of information and practices. And the needs and interests of international trade are a vector for a discourse on free trade designed to protect its interests.

But all of these discourses are very much relative when it comes to asserting the existence of international spaces of flow.

In the eyes of the law and of legal scholars, there can only truly be international spaces of flow in scenarios in which the law effectively participates in the organization thereof. This is far from being systematically the case.

The law's contribution is very unequal from one situation to the next. This is true, for example, of solutions of international harmony which require more than the mere "goodwill" of stakeholders to coordinate different systems. True international harmony demands a very high level of legal construction which all too often is not achieved on an international scale. The same can be said of the international community or society whose achievements are not all thanks to the formation of an international space of flow, far from it.

Indeed, the law very often plays no more than a bit part in international movement, which is a paradigm that is essentially foreign to the law and its constructs. Its primary origins lie in political economics.

And so one must accept that, for different reasons from those that mark national spaces, international space cannot be analysed on the face of things as a legal space of flow.

In short, movement has not been theorised as part of international space. It is of course present there but only incidentally.

1.4 DEFINING A EUROPEAN SPACE OF FLOW

By European space, we refer here only to the context of the European Union, which offers an unparalleled example in the world today in terms of movement not found in the law of the Council of Europe.

In the law of the EU, it is a well-established theme. Europe has given rise to a space of flow. But what terms should we use to discuss it?

The EU has given rise to 2 major "spaces": its internal market and the area of freedom, security and justice (AFSJ).

These dimensions – "internal market" and "freedom, security, justice" – have been carefully unpacked. This is true of the internal market (originally known as the "common market"), which served as the foundation for the European Economic Community (EEC). This market was theorised in the legal world and all of the new legal constructs deployed therein were the fruit of extensive efforts.

More recently, European law on the freedom of movement, security and justice has also been theorised. This is particularly demanding work. It is a heterogeneous area of law. To tackle it, one must combine legal specialisations that are almost exclusive of one another (public, private, civil, criminal, internal and international law).

In these two spaces, movement is omnipresent. In the internal market, it has four components: goods, services, capital and persons. As for the AFSJ, its first dimension "freedom" is directly linked to the movement of European citizens (not including economic entities, who fall under the internal market) and third country nationals. The two other dimensions are "security" and "justice". But they also contain provisions relating specifically to movement in areas that are particularly demanding (exchanges of information relating to security, "movement" of judicial decisions, evidence, etc.).

This rather advantageous landscape masks a significant weakness, however.

From the theoretical perspective, what is meant in legal terms by the space of the "internal market" and "freedom, security and justice"?

We should remember that the notion of space is distinct from that of territory, which in the language of EU law (particularly in the two treaties on the European Union and how it functions) refers to the territories of member States.

In so far as it is incorrect in EU law to refer to the existence of any "European territory", one might think that the notion of a "space" is simply used as a substitute.

But such a justification by default is not satisfactory.

The term "space" is not only applied as a layer atop the territories of member States. It carries its own meaning, especially when, as is very common in European law, it is associated with vast phenomena of movement.

And, as far as the author is aware, this term has not been the focus of any significant research (see for example: LENAERTS; Van NUFFEL, 2011).

The uniqueness of European law is such that considerable efforts have been made to extricate it from the dual cradle of national and international law. This was often a fraught battle, with various pioneers emerging, and can now be said to be a reference in the composite world of legal experts (academics, judges, lawyers, legal advisers, etc.).

But with hindsight one could be forgiven for thinking that things became a bit unhinged!

Here's why.

The ambition to legally construct a European space of movement spanning various national territories is an extraordinarily difficult one. This is true of any legal construct addressing movement.

As advances were made in European law, a striking trend emerged which was to expand or exaggerate the reach of European freedoms of movement. This trend is now well-established. It can be

observed in various European countries and potentially among all legal scholars, whether or not they feel in sync with the European project.

This over-emphasis, somewhat similar to the metaphorical approaches to movement adopted in the international context, clouds our understanding of the European space of movement. It is already probably the world's most developed supranational space in terms of movement, so is there any need to go even further and heighten its potential beyond what is provided for in the European treaties?

To illustrate this, we will look at two major developments in the case law of the European Court of Justice (ECJ).[4]

The first relates to what is known as the passive freedom to provide services. The Court's case law has underpinned a particularly significant extension of free movement in this area.[5] This extension resulted from the enshrinement of the right of beneficiaries of such services to benefit from free movement. These beneficiaries are not expressly referred to in the European treaties, which only refer to service providers. But the ECJ recognised that tourists, recipients of medical care, business travellers or students should be seen as beneficiaries of services to whom the principle of free movement grants the right to travel to another State and avail themselves of a service there. All nationals of member States who, without benefiting from any other freedom guaranteed by the Treaty, intend to do this fall under the provisions relating to the freedom to provide services. Although rarely criticized by specialists in the area, this extension of European freedoms of movement raises certain questions. It places Europe's mechanisms, in particular that which ensures free trade, in relationships that include non-service providers, with all of the

[4] On the central role played by the Court of Justice in the development of EU Law, see Maduro and Azoulai (2010).

[5] See in particular: European Court of Justice (ECJ), 2 February 1989, Cowan, Case 186/87. For an example of the instrumentalization of the passive freedom to provide services by a national judge (UK) inclined to circumvent an internal public policy rule on the prohibition of post-mortem insemination, see our article (BERGÉ, 1999).

additional constraints that that implies for national public authorities. In other words, it marks the upheaval of the initial ambition in the treaties, which were much more modest.

The second development, at times linked to the first, relates to the affirmation of a subjective European right to movement. This is a long-standing affair. Those who know the genealogy of a key ruling in the European construct (CJEU, 5 Feb. 1963, 26/63, Van Gend en Loos) will know that the affirmation of this subjective right found its way into one of the translations of the Court's judgement, even though the expression did not appear in the original text. Other ECJ judgements provided opportunities to discuss this topic, and it has been a recurring theme in the doctrine in various guises. What is most striking in the affirmation of the subjective right to movement and its variants is the willingness to give this legal concept quasi--automatic application. If such a subjective right exists, then it essentially depends on the will of its holder. We should not be afraid to say that this approach can rarely be verified in practice. One need simply look at the Court's body of case law as a whole in this area to understand that freedoms of movement, when it comes to their practical implementation, clash with the local and national contexts in which they are exercised. It is all too often forgotten that European law is of a profoundly incomplete nature. It is therefore very often an exaggeration to assert that the European Union has established a prerogative of movement in a multi-territorial space that is equivalent to a comprehensive subjective right.

2 THE DIFFICULTIES OF DISTINGUISHING BETWEEN DIFFERENT SPACES OF FLOW

To understand the uncertainties inherent in the legal distinction between national (2.2), international (2.3) and European movement (2.4), one must consider the scenarios in which this distinction clearly reveals three different bodies of rules (2.1).

2.1 WHAT ONE CAN EXPECT FROM THE LEGAL DISTINCTION BETWEEN SPACES

Each time the law sets out to tackle a situation in movement, this raises the question of defining the different legal regimes according to the national, international and European dimension of that movement.

By way of illustration, let's return to the circulation of waste. In order to be treated or recycled, waste must often first be moved. This circulation is highly regulated. The law can, for example, favour short waste treatment circuits. It can frame, limit and even prohibit the export or import of certain types of waste.

Depending on the territory or territories affected by the transport of waste, the applicable legal rules are not necessarily the same.

An example can be found in one EU regulation[6] which distinguishes between no fewer than five different legal regimes governing movement:

- transfers within the European Union, whether or not they transit through third countries;

- transfers exclusively within each member State;

- exports from the EU to third countries;

- imports into the EU from third countries;

- transits through the EU beginning and ending in third countries.

This type of breakdown between different bodies of rules can lead to long-haul legal battles.

[6] Regulation (EC) N°1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

An example of this is the case of S.D. Myers Inc. vs. Canada (1998–2002) about the transport of waste on the Canadian–US border.[7] The case was approached in light of the free trade agreement between the two countries (NAFTA). The court of arbitration (with jurisdiction in application of the rules of the UNCITRAL) ruled against Canada for refusing to export waste even though it contained substances (polychlorinated biphenyls or PCBs) that are now forbidden under international regulations (2001 Stockholm Convention on persistent organic pollutants, ratified by Canada). As the legal arguments played out, the discussion addressed the merits of the cross-border transport of waste compared to internal transport within Canada intended for a treatment facility located further away than the one in the United States.

This manufactured state of affairs is undermined each time the distinction between national, international and European situations is blurred by phenomena of movement.

To begin, we will look at the case of purely domestic situations faced with such phenomena.

2.2 PURELY DOMESTIC SITUATIONS AND SPACES OF FLOW

The term "purely domestic situation" is generally used to refer to a national (domestic) space in opposition to international or European space. The aim is to lay down the limits between spaces to avoid international or European legal rules interfering with national ones intended to govern situations that are exclusively located within a single State.

This is a notion heavily drawn upon in the EU when it comes to freedom of movement. Implicit in the benefit of the rights

[7] On this case, see: https://www.uncitral.org/transparency-registry/registry/data/can/s.d._myers_inc.html.

associated with the freedom of movement is travel within the Union. "Purely domestic situations" therefore fall outside the scope of this freedom.[8]

We also find this notion in international law, each time the international dimension of a situation is a precondition for the applicability of a rule not intended to produce effects within the domestic order.[9]

However, great uncertainties remain in relation to this compartmentalisation of domestic space.

In EU law, it is common for purely domestic situations to be subjected to EU rules. For example, in the name of the freedom of movement enjoyed by European citizens, member State nationals have been authorised, even in the absence of any proven mobility, to invoke European law to supersede their national authorities.[10]

In international law, the compartmentalisation of the rules governing movement is not always possible. The Basel Convention, for example, not only contains rules on the import and export of waste: as the end of its title suggests, it also sets out the rules applicable to the disposal of waste, rules which have an impact on national waste as well as on that which is imported or exported.

This type of example shows that, even in a scenario in which a legal rule is only intended to apply to European or international movement, it is quite common for it to spill over that framework and affect purely domestic situations.

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[8] See for example, European Court of Justice (ECJ), 28 March 1979, Saunders, Case 175/78.

[9] See for example, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), which defines specific rules for the import and export of waste.

[10] See for example, European Court of Justice (ECJ), 2 October 2003, Garcia Avello, Case C-148/02; ECJ, GC, 8 March 2011, Zambrano, Case C-34/09.

There are many reasons for this overspill. For example, it may be that a national territory does not wish to deprive its citizens of the rights granted to those who participate in some form of movement, so it can avoid situations of so-called "positive discrimination".

But it may also be due to the tremendous difficulty of containing a situation in movement within precise boundaries. It is as though movement resisted any stasis imposed by the law. When the law tackles movement, it must accept that its contours are uncertain, especially where it spills over into situations considered domestic.

2.3 INTERNATIONAL SITUATIONS AND SPACES OF FLOW

In this section focused on international situations and movement, the aim is to show how the law is capable, for a given legal situation, of either establishing a link between movement and the international dimension or completely overlooking it.

The example chosen to illustrate this is the definition of an international contract.

In the French *Pélissier du Besset* case[11], judge Matter lent his name to a famous doctrine under which payment is deemed international if the related contract produces "ebb and flow across borders". Much was at stake in this qualification, since it involved determining whether cross-border payment could escape the application of rules intended to govern national payments. Movement here plays a central role in defining the international nature of the situation, and the image of twofold movement is made perfectly explicit.

This approach to the international dimension of a contract based on movement is completely absent from a key instrument of

[11]Cour de cassation (Ch. civ.) - 17 May 1927, *Dalloz Périodique* 1928 I. 25, case note H. Capitant.

today's applicable positive law: the EU regulation 'Rome I'.[12] While the rules of the Regulation are intended to apply "in any situation involving a choice between the laws of different countries" (Art. 1.1), it stipulates that "The fact that the parties have chosen a foreign law [...] shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract" (Art. 3.3). In other words, under the provisions of this text, parties to a purely domestic contract can artificially create the conditions for a situation involving a choice between legal systems by choosing to apply the law of another State. Here, there is no reference to the notion of movement. It is not a precondition for the application of a rule specially designed for international contracts.

The comparison between these two solutions clearly shows that movement is not a clear characteristic indicative of an international situation. The explanation for this is to be sought in the recurring difficulties of defining an international contract.[13] But the fact remains that movement can be at the heart of such a contract just as it can be totally absent from it.

2.4 SITUATIONS IN EUROPE AND SPACES OF EU FLOW

The third scenario relates to the definition of European situations and their relationship with movement.

The rules of the internal market only apply, in principle, to journeys within the European Union. Such is their very purpose. For example, the Treaty on the Functioning of the European Union[14]

[12] Regulation (EC) N.º 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[13] On the relative and functional nature of internationality applied to international contracts, see Ancel, Deumier and Laazouzi (2019, p. 5 et seq.).

[14] Articles 45, 49 and 56 of the TFEU.

only provides for the free movement of persons within the EU.

However, in some cases, the provisions on the free movement of persons can affect regulations with a global reach covering cases of mobility with or between third countries as well as European mobility. The ECJ has recognised that in such cases European law can affect an international regulation as a whole provided a minimum link can be established with the territory of an EU member State.[15]

This type of ruling shows that, while the application of European provisions on free movement requires "localisation" in an EU territory, European law does not subordinate its application to the condition of movement being effectively observed within the European area.

The notion of movement here is uncertain. The law on European movement applies to situations in third countries in which there is no strictly European movement as such.

3 THE DIFFICULTIES OF ADDRESSING THE MODALITIES OF MOVEMENT IN LEGAL TERMS

The law has seen significant developments in addressing the modalities of movement. This is a challenging area with significant uncertainties remaining, whether in domestic (3.1), international (3.2) or European law (3.3).

3.1 THE DOMESTIC LEGAL ENVIRONMENT

In domestic law, one might ask whether a thing's state of movement plays a role in the way it is dealt with by the law.

At first glance this question seems simple: should a thing's movement be made a characteristic trait of its legal regime?

[15] For an example in the field of sports regulation: European Court of Justice (ECJ), 12 December 1974, Walrave, Case 36/74.

But the response is not as simple as first appears.

One answer would be to say that putting something into a state of movement does not fundamentally change the way it is dealt with by the law.

An opposing answer would be to argue that something in a state of movement has specific characteristics with a significant impact on its legal regime.

One type of movement generated by humans has been the stage for such discussions: road traffic.

The earliest cases related to horse-drawn vehicles and in France were usually treated in reference to the laws on liability for injury caused by animals, equivalent to the laws on liability for injury caused by things.

With the emergence and mass development of motor-powered land vehicles, the question was seen in a new light. Should these vehicles be seen as ordinary things that would fall under the laws on liability for injury caused by things? Or, on the contrary, was a new specific legal regime needed for this category?

Such questions are now seeing new developments with the prospect of self-driving vehicles being put into circulation. Will this new mode of transport, without the need for human intervention, lead to reflections on the creation of a new legal regime?

Faced with such questions, it is worth considering just how difficult an issue this is to resolve. To do this, we will focus on the case of French law governing traffic accidents.

A piece of legislation was amended in 1985 in this area.[16] Both the debate that preceded the legislation and that which opened up immediately after it came into force show the extent of its complexity.

[16] Law n.º 85-677, 5 July 1985, "tending to improve the situation of victims of traffic accidents and to speed up compensation procedures".

To put it simply, there was one conservative view that fought tooth and nail to defend the need to maintain traffic accidents within the realm of the ordinary legal mechanisms for civil liability, in particular liability for injury caused by things. In contrast, another reformist view argued that traffic accidents needed to be taken out of this regime and placed under a new one.

The introduction of the 1985 legislation sealed the win for the reformists.

Without exploring all the aspects of the legal regime finally chosen by the legislature and subsequently consolidated by case law, it is worth noting that this approach to the regulation of traffic was essentially developed as a legal regime for traffic accidents. In particular, the statistical approach to accidents (sometimes referred to as "accidentology") played an absolutely fundamental role in this key reform of French law.

Indeed, the notion of movement inherent in traffic played very much a secondary role.

What counted above all was managing the risk of "accidents".

This state of affairs points to the somewhat uncertain nature of the legal regime governing traffic. Instead of tackling the issue head-on and addressing the question of whether a thing in a state of movement has a different legal regime to one in a state of inertia, the reverse approach was adopted. Things with their own independent dynamism were assimilated to inert things. Doubtless they played a role in profoundly modifying the legal reasoning underpinning the 1985 legislation, but it would seem that recognising that these legal changes were the direct consequence of the presence of things in a state of movement with their own legal nature is a step that has never been collectively taken in French legal thinking.[17]

[17] On the French liability regime for traffic accidents, see Viney, Jourdain and Carval (2017, n.º 129 s).

3.2 THE INTERNATIONAL LEGAL ENVIRONMENT

We will begin by looking at private international law in relation to "movement", in particular the legal mechanism for settling "mobile conflicts".

The notion of a mobile conflict in private international law is about whether, in dealing with a private international situation, one must take into account the change in location. For example, if a rule in private international law states that it is the law in the item's location that is to be applied, which law applies if that item is moved from one State to another? Similarly, if the rule provides for the application of an individual's domestic law, what happens if that person changes nationality?

Faced with this difficulty, authors (including Etienne Bartin, who came up with the term "mobile conflict") have suggested different approaches, including reliance on the theory of acquired rights or the application of the principles of transitory law. The least that can be said is that such proposals have hardly been retained in positive law. The generally recognised trend is that the change in location is dealt with by interpreting the rules of private international law. Some rules involve taking into consideration a past event (such as a person's nationality at the time of their birth), whereas others on the contrary require a reference to more recent events (such as the item's current location).

Without needing to go into the details of these highly technical discussions, it may be worth exploring the way in which the discourse on movement is or is not taken into account when dealing with so-called mobile conflicts.

There are two striking features of the analyses.

First, if the term "mobile conflict" is not used to refer to a rule of (mobile) conflict that is specific to such a situation, and if ultimately one must return to the stipulation of each specific rule for

legal conflicts, as in the case of positive law, then its only use is to refer to a difficulty without providing a solution. It is therefore of little use.

Second, whatever the analysis, mobility is reduced to two separate events from which to choose: the location before or after the movement. This approach, driven by the logic of the rules that are being applied, does not address the situation in movement as such. Either the mobility is denied in the event that the original location prevails, or it is dealt with in terms of the effects produced by the changing situation. But under no circumstances is the conflict actually "mobile". It is attached to one of the two locations. And so the word "mobility" has a meaning that is at the very least uncertain.[18]

Another illustration can be found in international transport law when it aims to develop what is termed a "multimodal" approach.

Transport law is compartmentalised into different families of legal rules depending on the mode of transport in question: maritime, land, air, rail, road, waterway. From an international perspective, analysts have asked how it can be possible to organise a veritable transport chain in which the merchandise moves from a ship to a train and onto a truck. The legal spaces concerned by this type of practice may be internal, international or European, or even all three at once. But the approach is intended to be global insofar as all of these aspects are considered at the same time in an effort to make all the legal instruments converge towards the same objective: the end-to-end organization of transport involving a succession of different modes of transport.

To accompany such a highly elaborate system, the law has taken several different initiatives. But as specialists recognise, these have not worked. Examples include:

[18] For a presentation of the theories involved and the legal solutions at two different periods, see in particular, Batiffol and Lagarde (1993, n.º 318 et seq.); Audit and d'Avout (2018, n.º 306 et seq.).

- the fact that the 1980 UN Convention on multimodal transport never came into effect due to insufficient ratification;

- the major difficulty of organising such transport based on contract law, given the divergent regulatory approaches (particularly when it comes to freight brokers);

- the particularly laborious process of ratifying the 2008 Rotterdam Convention, developed by the UNCITRAL, on the international carriage of goods wholly or partly by sea.

This trend is not the reserve of international law. There have been many difficulties at a European level in promoting specific initiatives (such as the Integrated Services in the Intermodal Chain, or ISIC project) as well as domestic difficulties (particularly in France) in developing this type of combined transport, especially via waterways, railways and roads.

These difficulties essentially related to the fragmentation of the applicable legal rules. The notion of "multimodal movement" has not become sufficiently rooted to achieve convergence between the multiple international legal instruments. It is a legally uncertain notion (for an overview, see SPANJAART, 2017).

3.3 THE EUROPEAN LEGAL ENVIRONMENT

The third illustration relates to the way in which European (EU) law has a tendency to develop an unclear discourse on the issue of movement, despite being accustomed to working closely with it. This example is taken from a sequence of European Court of Justice (ECJ) rulings on the EU's external competence.

In 2017 the Court issued two opinions respectively on the EU's exclusive competence to sign the 2013 Marrakesh Treaty

to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled[19] and on the EU's exclusive and shared competence to sign a free trade agreement with the Republic of Singapore (2018).[20]

These two opinions brought two distinct areas face-to-face: common commercial policy (hereafter referred to as trade policies) and the protection of intellectual property. To distinguish between the two related legal regimes when it came to the EU's external competence, the European judge dedicated a significant portion of his analysis to movement.

In opinion 3/15, he wrote,

> It is thus apparent not only that the cross-border exchange promoted by the Marrakesh Treaty is outside the normal framework of international trade but also that the international trade in accessible format copies which might be engaged in by ordinary operators for commercial purposes, or simply outside the framework of exceptions or limitations for beneficiary persons, is not included in the special scheme established by that treaty (pt. 97).

In opinion 2/15, he argued that

> in the light of the key role [...] that the protection of intellectual property rights plays in trade in goods and services in general, and in combatting unlawful trade in particular, the provisions of Chapter 11 of the envisaged agreement are such as to have direct and immediate effects on trade between the European Union and the Republic of Singapore (pt. 127).

So what are we to make of these two opinions specifically in light of the Court's discourse on movement?

[19] European Court of Justice (ECJ) Opinion 3/15, 14 February 2017.
[20] European Court of Justice (ECJ) Opinion 2/15, 16 May 2017.

On the one hand, the Marrakesh Treaty is said not to relate "specifically to international trade" and to be "outside the normal framework of international trade", even though at the same time it sets the objective of "facilitating access to published works" protected by intellectual property law.

On the other, one finds the free trade agreement with Singapore which, even though it contains a "set of provisions" designed to ensure "an adequate level of protection of their intellectual property rights" and "standards of protection of intellectual property rights", "in no way falls within the scope of harmonisation of the laws" but rather sets out to "govern the liberalisation of trade", even stipulating that where intellectual property law plays a key role in international trade, the dedicated provisions in a free trade agreement are "such as to have direct and immediate effects on international trade".

All of this does not stand up to scrutiny. The ECJ may assert in opinion 3/15 that "international trade", including "for commercial purposes", is not included in the specific regime established by the treaty, but it struggles to convince. Article 5 of the Marrakesh Treaty focuses on the "cross-border exchange of accessible format copies", Article 6 on the "importation of accessible format copies" and Article 9 on "cooperation to facilitate cross-border exchange". The purpose of the Marrakesh Treaty may be highly specialized, but it would be difficult to argue that it does not contain entirely innovative provisions on the cross-border movement between signatory States of works protected by copyright intended for a targeted readership (blind, visually impaired and otherwise print disabled persons).

As for opinion 2/15, the ECJ quite simply contradicts itself. On the one hand, we are told that the free trade agreement with Singapore does not seek harmonisation of intellectual property laws, and on the other that it lays down "standards of protection of intellectual property rights displaying a degree of homogeneity" within the area of EU–Singapore free trade. Furthermore, one need

simply read Chapter 10 of the agreement to note that many of the provisions have a substantive dimension, meaning that they relate to the subject of intellectual property itself. To take just one example: durations for the protection of intellectual property rights are set out in the free trade agreement that stretch beyond the minimum provisions provided for in the founding treaties (Paris and Bern, cited above). So the authors of the free trade agreement clearly intended to govern the question of intellectual property rights, just as the Marrakesh Treaty does in a specific area. To say that these provisions have "direct and immediate effects on international trade" takes nothing away from either their nature or purpose.

What is clear is that the ECJ has ventured into an argumentative territory relating to movement that has been insufficiently elaborated and constructed. It can be described as uncertain.[21]

4 THE DIFFICULTIES OF ADDRESSING THE LACK OF MOVEMENT IN LEGAL TERMS

This scenario, used here to deconstruct the law's discourse and non-discourse on movement, is somewhat unusual. Considering movement also implies, in some cases, working on the lack thereof. In such cases, what can be said of how the law has responded?

We will distinguish circumstantial (4.1) and postulated (4.2) lack of movement.

4.1 *CIRCUMSTANTIAL LACK OF MOVEMENT*

How do legal experts respond to a circumstantial lack of movement? We will take two examples (which are not linked!): a plane crash and Brexit.

[21] For both a legal and economic analysis of this case law sequence, see our study co-authored with Harnay and Bergé (2019, p. 213).

Plane crashes, although fewer and fewer in number, raise legal difficulties even greater than those already examined and inherent in the endeavour of organising a flight, particularly between different countries.[22] It is almost as though the lawmaker's machinery that enables an aeroplane to move from A to B becomes jammed when this movement is lacking. There are many examples. We have repeatedly seen the immense challenge for all stakeholders of concentrating both civil and criminal claims before a single court, resulting in the dispute being spread out, the duration of procedures being dragged out and an increase in their cost. There is also the highly peculiar case of a veto being issued by one State (Russia) against the creation of an international criminal court following the explosion during Malaysia Airlines flight MH17 over Ukraine in July 2014.[23]

In an altogether different register, the case of Brexit is also an illustration of a circumstantial lack of movement (see for example, DOUGAN, 2017; BAHUREL; BERNARD; HO-DAC, 2017). Organising movement within the European area has required considerable efforts of legal construction for more than 60 years. The legal work necessary to deconstruct that movement is every bit as daunting. And legal experts are all too aware of this. As has been said, one must legislate to de-legislate! And this is no mean feat. One need simply look at the situation between Northern Ireland and the Republic of Ireland to the south of the island. It is extraordinarily difficult to reconstruct the legal regime of an external border to substitute that imagined by Europe based on the model of an internal border in a common area.

In both of these examples, it is clear that the law is placed in a situation of uncertainty. It has been constructed to address cases

[22] See in particular, McCormick adn Papadakis (2011). On the more general treatment in international law of disasters involving large movements of traffic, see Breau and Samuel (2016).

[23] Security Council fails to adopt proposal to create tribunal on crash of Malaysian Airlines flight MH17 - <https://news.un.org/en/story/2015/07/505392-security-council-fails-adopt-proposal-create-tribunal-crash-malaysian-airlines>.

of movement and struggles significantly to reconstruct itself where there is a lack of movement.

4.2 POSTULATED LACK OF MOVEMENT

Legal rules are sometimes intent on denying movement, including in scenarios where movement is an intrinsic part of the thing in question, as is the case for persons, data, capital and waste. This is a form of legal status in which the law postulates an abnormal situation of immobility so it can properly put in place a legal policy.

We will identify four scenarios in which a lack of movement is postulated by the law.

The first relates to migrants, whom various legal mechanisms seek to immobilise. This is true, for example, of house arrest mechanisms put in place under national regulations while waiting for measures of expulsion or relocation to be taken.[24] It can also be seen in the lack of European will to mobilise the existing instruments to enable nationals from third countries to benefit from a humanitarian visa enabling them to issue a request for international protection in the territory of a member State.[25]

The second relates to data storage requirements. Whether for the general protection of personal data[26] or data protection for security reasons[27], the law seeks to closely contain data circulation

[24] See, for example, the numerous provisions devoted to house arrest in the French code on the entry and residence of foreigners and the right of asylum.

[25] See in particular: European Court of Justice (ECJ), GC, 7 March 2017, case X. and X. v Belgian State, C-638/16 PPU.

[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[27] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties and on the free movement of such data.

to prevent stored data from being disclosed or altered.

The third scenario relates to the freezing of assets, another area that has seen the implementation of many different mechanisms, including in recent years some on a global scale (United Nations) as part of the fight against terrorism (so-called "smart sanctions").[28]

The final scenario is that of landfill, which has been the subject of regulations in an effort to limit the risk of dissemination.[29]

All of these scenarios should be seen as paradoxical.

By their very essence, migrants, capital, data and waste circulate, and a great many legal mechanisms address this fact.

Yet it is possible to legally counter this quasi-ontological status of movement by postulating a lack of movement. The law can defy the most flagrant realities and construct its own world, as we have revealed since the introduction above.

But you might say this comes at a cost.

All of these legal mechanisms built on the notion of a lack of movement are undermined, particularly in scenarios of total movement beyond control.

One can of course sustain legal discourse on such lack of movement and ignore the paradox.

But it is worth questioning both the meaning and scope of these uncertain mechanisms.

[28] For a historical example: Security Council Resolution 1373 (2001) which gave rise within the European Union to Common Position 931/2001/ CFSP and Council Regulation (EC) N°2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism.

[29] See, for example, the provisions of the French environment code, which devotes several articles to the issue.

5 DIFFICULTY OF LEGALLY DEFINING CONTROL

The polysemy of *control* (5.1) in the presence of ordinary movement refers to all those cases in which its exact meaning is not clear when it refers to the possibility of controlling situations in movement. The phenomenon can be observed in different contexts (5.2) or to different objects (5.3).

5.1 POLYSEMY OF THE LEGAL DISCOURSE ON THE CONTROL OF MOVEMENT

In everyday language, controlling movement may mean measuring, releasing, orienting, stopping or reversing it.

Control may refer to:

- measuring movement: collecting data on circulation is one way to control it; data is indispensable when it comes to creating a circulation model that can make it intelligible;

- releasing movement: release is obviously a form of control, since the stakeholder with the power to initiate movement can simply decide not to do so;

- orienting movement: deciding to steer a flow in one direction rather than another is another form of control; choosing one circuit over another has consequences;

- stopping movement: this is the flipside of releasing movement; being able to stop the flow that one has set in motion or that was set in motion by another is clearly an exercise of control;

- reversing movement: the ability to make flows completely reversible is no doubt the most comprehensive expression of control as it involves forms other than those mentioned above (measuring, releasing, orienting and stopping).

But when the law uses the word “control”, it is not always easy to determine its precise meaning. Does it at once cover all of the meanings listed above, or only some of them? Are there other possible interpretations?

Looking at the traditional legal corpora – doctrine, law, case law –, it is quite easy to see that this word can have multiple meanings and that it is not always easy to determine which one is intended.

5.2 ILLUSTRATIONS IN DIFFERENT CONTEXTS

Illustrations of this can be found in the triple context of domestic (French), international and European law.

We will examine them in turn.

France’s Transport Code, adopted in 2010, contains 686 occurrences of the word “control”. Without wishing to study these in detail, the following observations can be made:

- the text contains numerous definitions (introduced with the expression “what is meant by [...]”), yet the word “control” is not defined at any point;

- “control” is used in very different ways in the Transport Code: the control body (highly frequent occurrence), the person in control of the vehicle (e.g. driver), one body in control of another within the chain of responsibility (e.g. a company controlled by another), the object controlled (vehicle, transport documents, driver, network access, etc.);

- the word “control” is only directly associated with the word “circulation” (which appears 274 times) on 20 occasions, many of which are redundant.

If we broaden our perspective, it can be noted that the word “control” is absent from the Code’s index (Editions Dalloz).

This can be easily explained: the notion of control is omnipresent in transport law, and so the word is highly polysemic, making it difficult to define or index.

Nonetheless, control is not really an autonomous legal notion insofar as it usually relates to the use of other notions.[30]

Many international texts have focused on illegal trafficking, i.e. the movement of goods or persons in conditions considered contrary to international public order.

These include the Unidroit Convention on stolen or illegally exported cultural objects (Rome, 1995). This relatively short instrument comprises a preamble and 21 articles.

At no point does it use the word "control". Yet that is precisely what it is about, since the purpose of this convention is to establish sophisticated procedures for the restitution or return of stolen or illegally exported cultural objects.

Although the instrument is an original text, uses the tools of both public and private law, and sets out both procedural and substantive legal rules, it fails to develop any specific discourse on the "control" of the illegal movement of cultural objects.

Control here simply underlies other notions, in particular that of the "return" and "restitution" of cultural objects, each of which has its own distinct meaning.

This situation can be likened to the many initiatives, including by the United Nations, as part of the fight against all kinds of trafficking (drugs, humans, organs, wild species, weapons, etc.) and which repeatedly refer to "control" yet fail to provide a consistent nomenclature for this concept.

[30] On the difficulties encountered in the exercise of control in the field of road transport, see Carré (2000, p. 597).

This makes the discourse on control all the more variable and uncertain.[31]

In EU law, and particularly the laws governing the internal market, the ECJ plays an important role in controlling the obstacles to the various freedoms of movement. This is based on the compatibility test that allows it to check whether national obstacles to the free movement of persons, goods, services or capital can be justified based on various criteria.

If we take the decision-making practices of the European jurisdiction in this area as our point of reference, we note a dual contingency in the way this control is exercised. There are two duplications in this contingency: that of judges since control is very frequently exercised as part of an interlocutory procedure between a national judge and the European jurisdiction; and that of regulations given that the obstacle usually originates in domestic regulations (in the broad sense) which are then tested against the requirements of the Treaty on the functioning of the EU.

This complex configuration means that no party – national or European – has complete control over the obstacle in question. The case law generated by the ECJ is a tributary of national specificities. This state of affairs is reflected in the Court's decision-making practices by close references to domestic context in its appreciation of the obstacle. And so it is not unusual for it to write something like "[...] which it falls to the national judge to verify [...]", whereby the European judge leaves it up to his or her domestic counterpart to truly implement the compatibility check with all of the margin of appreciation that implies.

This might be termed "judiciary subsidiarity", a phenomenon that is doubtless more marked nowadays than in the past. European judges carefully weigh up their reasoning, no doubt believing that

[31] On the conceptual difficulties encountered in the international fight against trafficking, see Chaumette (2016).

much of their doctrine on obstacles has been fabricated, and nor are they unaware of the criticisms made against their interventionism, sometimes deemed excessive by member States.

The contingent nature of the "control" exercised by the ECJ is only compounded by this. It is difficult to place the control of obstacles to trade under a single model. There are several different models with varying levels of gradation depending on the case.[32]

5.3 ILLUSTRATIONS TO DIFFERENT OBJECTS

We propose to distinguish four important objects involved in the process of circulation: persons, data, capital and waste.

Let's start by persons.

The distinction between national and foreign plays a key role in the rights – especially public and political – that the different States in the world attribute to individuals. It is a tool of control over the movement of foreigners who are given lesser prerogatives than national citizens. For example, since banishment is punishable under international law, a State can refuse to expel one of its citizens but allow itself to expel foreigners.

The complexity of situations can nonetheless trouble the waters of this overarching distinction. In practice, a foreigner may have more links with a given national territory than one of its own citizens. For example, a foreigner who has been living in France for

[32] On the subject of monitoring barriers in internal market law by the European Court of Justice (ECJ), see Azoulai (2011). For an emblematic case of judicial subsidiarity in which the Court of Justice referred back to the national judge the task of verifying whether an internal regulation on the fixing of minimum lawyers' fees was such as to guarantee a certain level of quality of service (something which, not only falls under an economic rather than legal analysis, but, by the very admission of economists specialising in these matters, proves impossible to establish!), see European Court of Justice (ECJ), 5 December 2006, Cipolla and Macrino, cases C-94 and 202/04.

a long time and has given birth to children who then acquired French nationality has potentially greater links with its national territory than a French citizen who has always lived abroad with children who decided not to opt for French nationality.

To address such a situation, the (controversial) concept of "quasi-nationality" has been developed. This is the "small steps" technique at work. As a foreigner integrates more and more, they acquire more and more rights until such time as their status no longer really reflects the traditional split between national and foreign.

In such circumstances, it must be said that the State's control over the foreigner's movement differs from that exercised over a foreigner who has no particular links with its national soil. One might even say that this form of control is close to that exercised over national citizens. Yet a quasi-national is not a national and continues to obey certain rules specifically applicable to foreigners, particularly in terms of mobility.

A third category can be added to the two traditional categories of control exercised over nationals and foreigners. It is one that carries its share of uncertainty. It often requires a case-by-case assessment of the situation that can make it difficult to reverse the attribution of rights close to those enjoyed by nationals and which have been acquired by a foreigner over time.

The result is that there is not one form of control over foreigners distinct from that exercised over national citizens but rather several forms of control depending on the level of integration of each foreigner as they move closer to the situation enjoyed by nationals.[33]

The second illustration concerns data protection mechanism.

[33] On the notion of quasi-nationality, see with the various references cited: Carlier and Sarolea (2016, n.º 16).

The EU's GDPR regulation[34] contains many occurrences (525 to be exact) of the word "control".

The question is whether this term carries a specific meaning in the legislative corpus or whether it is undermined by polysemy, not to say uncertainty.

To begin with, it should be noted that the word does not appear as such in Article 4 of the regulation, which is specifically dedicated to definitions. It only refers to "controllers" without explicitly explaining what is meant by the notion of control.

As for its general usage in the regulation, the word "control" at once relates to that exercised by natural persons over personal data, that exercised by the processor of said data, by national or European authorities, by other authorities (e.g. judicial) or by a group of undertakings in one form or another (e.g. health checks, improving security features, monitoring tax fraud).

As for the object of control, we can see that it varies considerably depending on the person exercising that control and the ends being pursued. Rights and duties in relation to the control of data refer at once to the prerogatives specifically granted to natural persons over the use of their data, those granted to the processor of that data and all entities that fall under its authority, those granted to supervisory authorities, etc.

Finally, specifically on the question of the control over the movement of data, the use in the text of different standards, for example "reasonable measures", "specific and suitable measures", "measures to ensure lawful and fair processing", tells us that there is no attempt to pin down the measurement, release, orientation, stoppage or reversal of movement.[35]

[34] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[35] On the complexity of the notion of control in this area, see Lazaro and Métayer (2015).

The third illustration relates to capital.

Legal acts naturally play a central role in the movement of capital. We can safely say that they are a major tool of control – in the sense of releasing – this type of movement, which in principle requires the consent of the person who holds the rights over the assets concerned.

This form of control exercised over the movement of capital through legal acts stands in contrast to the much more meagre possibilities of monitoring this movement. Legal acts that constrain or govern the movement of capital are subjected to the principle of their relative effect.[36] Under this widely observed principle, legal acts can only have binding effects on those to whom they apply. It follows that anyone releasing a capital flow can in general only impose a restriction on the subsequent movement of that capital on the direct contracting party. Except in situations, as in the domain of securities, where the law establishes a veritable tracing right which, as the name indicates, literally makes it possible to "trace" the capital, a legal act does not enable comprehensive control over movement of capital.

This state of affairs shows that when it comes to the ordinary movement of capital through legal acts, the term control is interpreted in two opposing ways. Whereas it is central to the moment when the capital flow is released, it is intended, except in specific circumstances, to be relinquished for subsequent movements.

The final illustration is about waste.

In the world of waste, the act or fact of abandonment or defection plays a central role in the way waste is defined.

When it comes to control, the law generally adopts the same analytical approach regardless of whether or not the abandonment or defection is part of a controlled procedure. At this stage of defining

[36] On the relativity of obligations, see in particular the historical analysis of Palmer (2006).

waste, the voluntary abandonment of waste is in principle analysed in the same way as one's involuntary defection from it.

This neutralisation of the question of control at the specific moment of abandonment or defection is pushed to its paroxysm in scenarios in which the original matter combines with others and thereby takes on new forms, without any human intervention. Such a scenario arises in land or sea pollution caused by fossil fuels, where case law, particularly in Europe[37], has led to the waste being considered as the final substance produced by the agglomeration between fossil fuels and other matter. And so the soil or sediment transformed via this contamination itself becomes waste.

This extended definition of waste serves only one purpose: to expand the scope of the "polluter pays" principle by placing the (distant) consequences of abandonment of or defection from the original matter – that caused the subsequent, uncontrolled formation of waste – under the responsibility, i.e. control, of the person or body behind that act.

Ultimately, we can see that control and the loss of control coincide in an almost circular fashion in this type of legal construct. Control is equivalent to the loss of control, which is ultimately analysed as an object of control!

6 THE LAW AND THE ILLUSION OF CONTROL

Looking again at the four examples studied above – persons (6.1), data (6.2), capital (6.3) and waste (6.4), we need to determine the extent to which the law constructs solutions of control, even when the situation is, materially speaking, out of control.

A general impression prevails: the law is often built on an illusion of control.

[37] European Court of Justice (ECJ), 7 September 2004, MP v. Van de Walle, case C-1/03; European Court of Justice (ECJ), GC, 24 June 2008, Commune de Mesquer (Erika case), case C-188/07.

6.1 MOVEMENT OF PERSONS: THE LOSS OF CONTROL JUSTIFIES THE REINFORCEMENT OF CONTROL!

When it comes to the movement of natural and legal persons, the spectre of a loss of control is a powerful tool that serves the reinforcement of control.

The mere allegation, even false or difficult to verify, of a loss of control drives the creation of new initiatives, especially regulatory initiatives, intended to reinforce control.

It is rare to find cases in which the loss of control is effectively assumed in the legal discourse since, on the contrary, one only speaks of a loss of control to fuel the illusion that it is useful to reinforce control.[38]

Multidisciplinary research studies have perfectly shown the extent to which control over the movement of persons results in the permanent blurring of categories (migrants, immigrants, emigrants, refugees, asylum seekers, etc.) whose only purpose is to mask situations in which control is lost (see in particular: ORTAR; SALZBRUNN; STOCK, 2019).

6.2 MOVEMENT OF DATA: THE LOSS OF CONTROL IS PUSHED TO THE MARGINS!

Much effort has been made on the movement of data to generate a climate of trust. In the different ages of the transfer and sharing of data, one can safely say that the spectre of a total loss of control has been deliberately relegated by both public and private authorities to the rank of unproductive myth.

In the contemporary period, attention is naturally focused on the sharp rise in the circulation of digital data.

[38] On the role of European agencies in the development of the legal discourse on external border control, see Mehdi (2020).

There is a fear of losing control, especially in Western society. Proof of this can readily be found in the examples of public mistrust towards certain tools that collect and transmit data on a large scale.

But the vast majority of legal initiatives are turning towards another approach. They are tirelessly seeking to construct a safe environment for the circulation of digital data which in the long term is expected to accompany, not to say govern, our lifestyles.[39]

6.3 MOVEMENT OF CAPITAL: THE ASSUMED LOSS OF CONTROL OVER CAPITAL FLOWS IS BURIED UNDER THE MYTH OF CONTROL OVER THEIR CAUSES AND EFFECTS!

When it comes to the movement of capital, it is also of primordial importance to establish a climate of trust, the only way to facilitate the release of capital flows.

If we simplify things to the extreme, it can be said that a climate of trust is achieved in two main ways.

The first is to strengthen the existing mechanisms for the liberalisation of assets. We have come a long way since the time when banking and financial activities aimed to closely control capital flows. The dominant model is to liberalise capital and payment methods, which drives investments and the development of economic activities generally.

This loss of control over capital flows is compensated for by a second approach: the development of robust mechanisms to control the origins of capital flows and their effects. Because it is not "politically correct" to speak of the control of monetary and financial flows as such, every effort is made to try and reassure stakeholders that there are alternative tools of control out there. This is no less

[39] For an outreach presentation of the loss of control hypothesis in this area, see Bergé (2017a).

than an attempt to bury the assumed loss of control over capital flows under the development of other restrictive approaches.

In this respect, it is possible to count all of the initiatives set up to address the quality of banking and financial information in circulation, the transparency of the players involved and the prudential and crisis management mechanisms in place.[40]

6.4 MOVEMENT OF WASTE: THE TREND TOWARDS CONVERGENCE (SOMETIMES BUT NOT ALWAYS) BETWEEN THE MYTH AND REALITY OF THE LOSS OF CONTROL!

Waste may be the only domain in which the loss of control is increasingly recognised.

Although the discourse on the effective control of movement continues to be predominant, at times we see an awareness of the need to tackle the problem at its root, by drying up the source of waste, given our inability to control its movement.

The most significant example of this is of course plastic. Faced with the scale of this movement phenomenon, the idea is gradually taking hold that we could simply ban part of its production, in particular single-use plastics.

Our total loss of control, long seen as the worst-case-scenario, relegated to the rank of myth by most stakeholders, is increasingly being accepted as a potential reality that could see a number of practices overhauled.

In this type of discourse, adopted in relation to other forms of ultimate waste, the myth and reality of the total loss of control are tending towards convergence.

[40] For an outreach presentation of the loss of control hypothesis in this area, see Bergé (2017b).

But this is not a general trend. One example can be found in the so-called compensation measures that convey the idea of "zero net", i.e. compensating for the damaging effects of human action on the environment with measures that favour the environment through other human actions. This type of policy, which not only concerns environmental damage due to the production of waste, is fuelled by an illusion of control. It is because we have lost control in activity A that we try to compensate with environmentally friendly behaviour in activity B. But the loss of control persists whatever we say, even if we try to find a way to no longer speak of it![41]

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All these considerations on movement and control should invite us to think differently about the law. This article notes a number of limits in our legal reasoning. Further work is needed to reconstruct our understanding of the law on circulation and control[42].

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[41] For an outreach presentation of the loss of control hypothesis in this area, see Bergé (2017c).

[42] See our legal essay published in French in April 2021, in Bergé (2021)). For an adaptation of this work in English for a wide audience, see *Rethinking Flow beyond Control: an Outreach Legal Essay*, to be published (online edition: http://www.universitates.eu/jsberge/?p=26156).

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