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Global Regulatory Competition on Digital Rights and Data Protection: A Novel and Contractive Form of Eurocentrism?

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**Global Regulatory Competition on Digital Rights and Data Protection:
A Novel and Contractive Form of Eurocentrism? (*Forthcoming in
Global Constitutionalism*)**

Gürkan Çapar *

ABSTRACT: Global regulatory competition is a recent phenomenon that confronts us in various different fields, ranging from food and chemical safety to climate change, and animal welfare to environmental law. The digital economy is not immune to this trend, and it seems highly unlikely that this will soon come to an end when we consider the radical differences between the European Union and the United States with respect to the importance they assign to the right to privacy and the right to freedom of speech. Nevertheless, despite their differences in content, it can be contended that they both tend to disregard the interest of others even though they have enough resources at their disposal to take them seriously. This becomes visible when the recent case law of the CJEU and the recent regulations such as the GDPR and the US CLOUD Act are taken into account. Their similar attitude to regulating for the globe raises the question of whether we are confronted with a new type of Eurocentrism, which is more contracted and introverted than the previous expansionist version. The article argues that unilateralism should be a selfless one and that it should necessarily consider outsiders if it is to acquire legitimacy.

KEY WORDS: Inter-legality, global regulatory competition, global data governance, unilateralism, Eurocentrism

1. Introduction

Global regulatory competition is a recent phenomenon encountered in various fields such as food and chemical safety, climate change, and animal welfare. The digital economy is not immune to this trend, and it seems highly unlikely that regulatory competition between big powers will soon come to an end. Despite the early pessimistic views which suggested that global regulatory competition would lead to forum shopping, deregulation, and a ‘race to the bottom’¹, recent studies have revealed that this represents only half of the story². Phenomena such as the ‘California Effect’ or the ‘Brussels Effect’³ have already demonstrated that a race to the top is as possible as a race to the bottom. The EU, as Bradford points out, has been supplying the global market with global standards not because its rules are the least restrictive, but because the EU links its stricter regulations to its market power. As such, its ‘ability to set global rules alone is always contingent on it preferring the highest rule’⁴. This is in addition to factors such as globalization, its regulatory capacity and market power⁵.

The internet is a medium that, by nature, is ‘global and borderless’⁶ therefore is always running the risk of extraterritorial regulation⁷. The use of the internet highlights the same question that confronts us in almost every discipline: How does one square unilateral regulation with the principle of state sovereignty? A possible answer to this question rests on how we perceive data and the internet and how this perception differs from other global commons. How are the issues caused by the internet different from issues caused by telephones, video cassettes, or computers to our existing legal concepts? It is plausible to argue, like Easterbrook, that there is nothing new on the internet, and therefore there is no need to create a new branch of law

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¹ B Frydman, ‘A pragmatic approach to global law’ Available at SSRN 2312504, 8-11; see for the same argument in the data protection context K Kowalik-Bańczyk and O Pollicino, ‘Migration of European Judicial Ideas Concerning Jurisdiction Over Google on Withdrawal of Information’ (2016) 17 German Law Journal 3, 315, 336

² See for the California Effect D Vogel and RA Kagan, Dynamics of regulatory change: How globalization affects national regulatory policies (Univ of California Press (eds.) 2004).

³ A Bradford, The Brussels effect: How the European Union rules the world (Oxford University Press, 2020).

⁴ A Bradford, The Brussels effect (n3) 47.

⁵ See for the conditions of the Brussels effect Ibid. 25-63.

⁶ MJ Schmidt-Kessen, ‘EU Digital Single Market Strategy, Digital Content and Geo-Blocking: Costs and Benefits of Partitioning EU’s Internal Market’ (2017) 24 Colum. J. Eur. L. 561, 561.

⁷ AK Woods, ‘Litigating data sovereignty’ (2018) 128 Yale LJ 328, 328

titled ‘the Law of the Horse’⁸. Conversely, one may claim that data is different because of its mobility, divisibility and partitioning, and its independence from location⁹. When viewed from this perspective, data seems like an exception to our conventional legal concepts that prevent the application of pre-existing legal categories to the new challenges posed by technology¹⁰. Nonetheless, irrespective of the position we take on this debate, it is necessary for any legal scholar to consider the territorial challenges posed by data, namely, the unavoidable extraterritorial effect of data even if it is regulated by observing the territorial limitations arising from legitimate regulatory power. We are confronted with *Schrödinger’s cat* in that we cannot pinpoint where it is located or whether it exists. As such, it is better to admit that data cuts to the heart of the issue of territoriality; it renders the distinction between territorial and extraterritorial highly imperceptible¹¹.

It is highly telling that there appears to be a tendency, in both the exceptionalist and anti-exceptionalist camps, to accept unilateral global regulation as fact and to find solutions to legitimize it. For example, Woods, as an anti-exceptionalist, holds that extraterritoriality of data regulation is an age-old problem that can be addressed by the rules of comity¹². On the other hand, Daskal, as an exceptionalist, suggests that it is necessary to design new jurisdictional rules capable of representing the legitimate interests of states in extraterritorial regulation as well as the countervailing interests of foreign states¹³. Similarly, Scott contends that regulatory territorial extension can be justified if only because we have a right to avoid being complicit with the global wrongdoings committed abroad¹⁴. Likewise, Ryngaert asserts, decoupling the notion of unilateralism from egoism and selfishness, that unilateral actions can be justified, insofar as it is motivated, not by parochial interests, but by the common interests of the international community. This should be selfless intervention pursuing a cosmopolitan agenda

⁸ FH Easterbrook, ‘Cyberspace and the Law of the Horse’ (1996) U. Chi. Legal F., 207; “...data is just another globally distributed good...” AK Woods, ‘Litigating data sovereignty’ (n 7) 328.

⁹ J Daskal, ‘The Un-Territoriality of Data’ (2015) 125 Yale LJ. 326, 365-378.

¹⁰ GN Mandel, ‘Legal evolution in response to technological change’ in R Brownsword, E Scotford, and K Yeung (eds) *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2017) 225.

¹¹ J Daskal, ‘The Un-Territoriality of Data’ (n 9) 365-330; K Kowalik-Bańczyk and O Pollicino, ‘Migration of European Judicial Ideas’ (n 1) 337.

¹² AK Woods, ‘Litigating data sovereignty’ (n 7) 351.

¹³ J Daskal, ‘Borders and Bits’ (2018) 71 *Vand. L. Rev.*, 179, 228.

¹⁴ J Scott, ‘The global reach of EU law’ in M Cremona and J Scott (eds.) *EU Law Beyond EU Borders* (Oxford University Press 2019) 21-63.

and aiming to promote the general interest of the global community as opposed to the parochial interests of the states¹⁵.

Research dealing with global governance of the internet may take two different approaches: concentration on institutions or concentration on norms. If stress is put on institutions, then focus would be on associations, organizations, and meetings such as the Budapest Convention of the Council of Europe, the World Summit on the Information Society, or the World Conference on International Telecommunications¹⁶. In this article, however, the focus is on norms, specifically, the way in which norms governing digital rights and data flows began to crystallize and how norm generation plays out in the global regulatory sphere. In doing so, it looks for the ways in which unilateral regulation can be considered legitimate under the conditions where the choice is between unilateralism and inaction, as reaching a multilateral consensus on global data regulation seems to be highly unlikely. Admitting that neither output (the best regulation) nor input (consent-based) legitimacy may provide us with a framework for legitimate ways of global unilateral regulation, it confines its attention to the following question: How to avoid Eurocentric legal domination when data forces any regulator into going global? Revisiting concepts such as comity, benevolent unilateralism, and inter-legality, it asserts that any attempt to global regulation, to be accepted as legitimate, should be inclusive and take on an other-regarding perspective as well as bear the responsibility of assuming the role of a global regulator. And it may lead up to its commitments only if it remains genuinely committed to taking others' perspectives seriously instead of showing a late sympathy after an already decided one-right answer was already imposed on them. As things stand, the only way to realize this is to brush aside the logic of harmonization in favor of mutual recognition.

The presence of competition between different actors does not always mean that the approaches taken by the competitors are dissimilar. A competitive attitude may display a common mode of governance below the surface, despite there being divergent practices at first glance. For example, the EU takes a rather cosmopolitan and global approach by imposing its conception of digital rights onto the world. The US, however, abstains from regulation on the

¹⁵ C Ryngaert, *Selfless Intervention: The Exercise of Jurisdiction in the Common Interest* (Oxford University Press, 2020) 11; see for a similar argument confining the scope of extraterritorial intervention to the domain of some highly crucial issues such as non-refoulement and environmental externalities M Kumm, 'Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities and the Proper Domain of the Consent Requirement in International Law' (2016) 79 *Law & Contemp. Probs.*, 239.

¹⁶ See for an institutional approach to the problem of global internet governance D Flonk, M Jachtenfuchs, and AS Obendiek, 'Authority conflicts in internet governance: Liberals vs. sovereigntists?' (2020) 9 *Global Constitutionalism* 2, 364-386.

grounds that it will impair innovation¹⁷. Nevertheless, both tend to disregard the interests of the other, adopting similar versions of unilateralism, notwithstanding their robust regulatory capacities able to include outsiders. The human rights impact assessment is a case in point. Even though it is analysed whether the regulation is compatible with the human rights law, the question of how inclusive the impact assessments are generally overlooked. This article examines, taking the question of legitimacy to the centre stage, the problem of extraterritoriality as a special case of global regulatory competition (II). It then covers the EU and US approaches toward data regulation and digital rights (III and IV), with a focus on the debate surrounding the right to be forgotten (II. 1 and 2), data transfer from the EU to the other countries (III. 3 and 4), and the US CLOUD Act, enacted following the *Microsoft* case (IV). It then turns to the points on which the EU and the US diverge (V. 1) and converge (V. 2) with respect to digital rights. After this, it examines ways to cope with the extraterritorial characteristics of data, suggesting that Ryngaert's selfless intervention (VI. 1) and Woods' comity-based proposal (VI. 2) may be useful in legitimating unilateral regulation. By illustrating how these approaches appear in relation to one another, the paper concludes by suggesting that they can be subsumed under the headings of inter-legality (VI. 2 and 3) and that it is possible to sustain plurality of legalities without falling victim to global monism, notably due to mutual accommodation and recognition (VII)

2. Global Regulatory Competition as Diffusion of Law

Interaction between legal orders is not a novel phenomenon; on the contrary, legal isolationism is the exception rather than the rule when viewed from a historical and comparative perspective¹⁸. It is, therefore, not surprising that numerous terms exist that address the phenomenon of diffusion of norms; these include transplant, borrowing, reception, transfer, imposition, transposition, expansion, and spread¹⁹. However, our current form of norm diffusion – one that has captivated the attention of numerous scholars such as Anu Bradford,

¹⁷ The line is, I think wrongly, generally drawn between liberal Western states defending free data flows and multilateralism and conservative Global South militating for state control and intergovernmentalism. See e.g., *Ibid.*

¹⁸ W Twining, 'Diffusion of law: A Global Perspective' (2004) 36 *The Journal of legal pluralism and unofficial law* 49, 1, 6.

¹⁹ See e.g., A Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993); E Öricü, 'Law as transposition' (2002) 51 *Int'l & Comp. LQ*, 205; G Frankenberg, 'Constitutional transfer: The IKEA theory revisited' (2010) 8 *International Journal of Constitutional Law* 3, 563-579; A Neto, *Borrowing Justification for Proportionality* (Springer 2018).

Joanne Scott, Marise Cremona, and Ionna Hadjiyianni – differs from its precursors²⁰. First, it departs from the state-centric, modernist explanation of the interaction between different legal orders *and* the post-modernist approach epitomized by the legal pluralist movement. In the former, the diffusion of law is generally associated with the migration of legal codes from one state to the other, be it as part of a modernization movement²¹ or as a colonial imposition. By contrast, norms emanating from different legal orders, which are by nature un-hierarchical and pluralist, take up the time of legal pluralist in the latter²². Nevertheless, the states take the pride of place in today’s global regulatory competition, or diffusion of norms, despite the very crucial role played by transnational actors, private regulators, and digital platforms²³.

Regulatory competition between states is an indirect consequence of globalization, which has a ‘destructive effect’²⁴ on the uniform and homogenous international legal order of the post-WWII period. It has played such a key role in questioning our traditional understanding of territorial legal systems, depicted as the black-box model composed ‘of self-contained and self-sufficient normative and institutional boxes’²⁵, that today it is possible to spot new legal norms burgeoning in the interstices between national and international law. In short, the crisis generated by globalization has provided ample opportunities for an inductive *jurisgenerative* process²⁶. This mismatch between territorially bounded states and new transnational regulatory actors, such as digital platforms, internet service providers, private organizations, and NGOs gives birth to ‘a transnational struggle for law’ in which ‘each state is trying to impose its own standards on the others by using ISPs as soldiers for the defense of national values’²⁷. Hence, the conditions under which this global regulatory competition holds closely resemble Hobbes’ state of nature where global players ‘pursue their own goal and thus aim to establish norms that

²⁰ I Hadjiyianni, *The EU as a Global Regulator for Environmental Protection: A Legitimacy Perspective* (Bloomsbury Publishing 2019); M Cremona and J Scott, *EU Law Beyond EU borders: The Extraterritorial Reach of EU Law* (Oxford University Press 2019).

²¹ E Örüçü, ‘Law as transposition’ (n 19) 205.

²² See e.g., B de S Santos, *Toward a New Legal Common Sense: Law, Globalisation and Emancipation* (Butterworths. London, 2002).

²³ “...regardless of the dynamics of globalization, ... when addressing transnational or global challenges, states continue to give pride of place to the core principle of the law of jurisdiction: the principle of territoriality”. C Ryngaert, *Selfless Intervention* (n 15) 211.

²⁴ B Frydman, ‘A pragmatic approach to global law’ (n 1) 1.

²⁵ K Tuori, ‘From pluralism to perspectivism’ in G Davies and M Avbelj (eds.) *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing, 2018) 40. The black-box theory is introduced by William Twining see W Twining, *Globalisation and Legal Theory* (Cambridge University Press 2000).

²⁶ B Frydman, ‘A pragmatic approach to global law’ (n 1) 7.

²⁷ B Frydman, L Hennebel, G Lewkowicz, and E Rousseau, ‘Internet Coregulation and the Rule of Law’ in E Brousseau, M Marzouki, and C Meadel (eds.) *Governance, regulation and powers on the Internet* (Cambridge University Press, 2012) 148-149.

are favorable to their interests'²⁸. This, in turn, leads to a situation that Frydman calls 'pannomie, where norms spring up from everywhere, enacted by improvised legislators, public or private'²⁹. However, this is not something to drive us to despair, for in the dearth of the global legal system that may tell apart law from non-law³⁰, the interaction and competition between different legal orders is the only hope for 'the emergence and crystallisation of new norms'³¹.

As Rudolf von Jhering succinctly states, 'the life of the law is a struggle, —a struggle of nations, of the state power, of classes, of individuals'³². The struggle is the essence of law; it is not something to resort to in exceptional situations. It is a struggle between incompatible interpretive judgments, yet it is never tantamount to pure power and politics. It only points to the undergirding reality upon which law is founded, i.e., law is a means to reach certain social and political ends³³. It is a gateway through which politics is transformed to normativity. In summary, the regulatory competition between states is not an aberration. On the contrary, it exhibits the very nature of law: Law flows from the clash of competing interests and normative standpoints. Nevertheless, despite this conflictual, competitive, and political dimension of law, it is still a global law when seen from the perspective of Walker's reading. For global law is, he submits, 'a practical endorsement of or commitment to the universal or otherwise global-in-general warrant of some laws or some dimensions of law'³⁴. Thus, it is global not because it springs from a global source, but because it aspires to regulate the globe for the sake of some 'globally defensible good reasons'³⁵. In a nutshell, pluralism that arises from regulatory competition in the global sphere is not incompatible with global law, but rather, is a perfect example thereof.

Scott distinguishes extraterritorial legislation and territorial extension to reveal how global regulatory power can be legitimately brought to bear. She classifies the former as an illegitimate form of global regulation owing to its failure in establishing the necessary territorial

²⁸ B Frydman, 'A pragmatic approach to global law' (n 1) 11.

²⁹ Ibid. 12.

³⁰ J Raz, *Practical reason and norms*. (Oxford University Press, 2nd ed., 1999) 129.

³¹ B Frydman, 'A pragmatic approach to global law' (n 1) 12; see, e.g., how global regulatory competition on climate change has stimulated many recalcitrant states to adopt policies consistent with the targets laid down in Paris Agreement G Çapar, 'What have the Green New Deals to do with Paris Agreement?: An Experimental Governance Approach to the Climate Change Regime'(2021) *Rivista Quadrimestrale di Diritto Dell'Ambiente* 2, 141-176.

³² R Von Jhering, *The struggle for law* (Callaghan Publishing 1915) 1.

³³ R Von Jhering, *Law as a Means to an End* (The Boston Book Company, 1913).

³⁴ N Walker, *Intimations of Global Law*, (Oxford University Press, 2014) 18.

³⁵ Ibid. 22.

connection, serving as a legitimating factor for the latter³⁶. Her distinction has considerable explanatory power in many diverse areas, including regulations about aviation in the emission trading scheme, financial services, and maritime transport³⁷; nevertheless, data escape any type of territorial connection. The fact that any superpower, arrogating to itself the legitimate role of global legislator, can establish a legitimate connection with data³⁸, seriously undermines the explanatory power of her distinction in telling us when a global regulation is legitimate.³⁹ Admitting that Scott's categorization falls short of covering global data regulation, an experimental classification is needed, which pays less attention to how the alleged global regulator presents itself than its hidden attitudes and motivations. Here, the underlying logic of Scott's distinction may prove useful. She rests her classification on the view that global regulation, if it is to be legitimate, should "ensure a sufficient international orientation"⁴⁰. In a nutshell, it should bear the responsibilities that comes with the role of the global regulator by leaving aside, at least to a certain extent, its autonomous objectives, and giving the other's perspective and interests a modicum degree of consideration. And this can only be done when the logic of harmonization is put aside in favour of mutual recognition. They differ significantly in the ways how they promote convergence of norms. For mutual recognition, as an alternative to harmonization, does not confine itself with one all-encompassing regulation (one-right answer) but aims at reaching this objective by preserving the diversity and autonomy of the others⁴¹. Bearing this in mind, the article dwells on, not being content with any sort of dubious territorial connection, the attitudes of alleged global regulators with a view to shedding light on how responsible global regulation differs from the self-interested ones.

³⁶ J Scott 'Extraterritoriality and territorial extension in EU law' (2014) 62 *The American Journal of Comparative Law*, 1, 87-126

³⁷ See for highly detailed and illustrative examples Ibid. 96-114

³⁸ The most excessive version of territorial connection is what Scott calls "effect-based jurisdiction" by which home state may claim legitimate right to regulate any event, no matter from where they are originated, influencing their citizens. She also takes a rather critical stance towards this type of territorial connection. Ibid. 95-96

³⁹ I would like to thank anonymous reviewer for pushing me forward to propose a different conceptualization in analyzing what makes legitimate any attempt to global regulation, which made me explore the underlying logic of Scott's distinction.

⁴⁰ Ibid.124

⁴¹ A Brink, 'Horizontal federalism, mutual recognition and the balance between harmonization, home State control and host state autonomy' (2016) 1 *European Papers*, 3,932,935.

3. Global Reach of the EU: In the Name of Digital Rights

3.1. *The EU's Internal Contradiction: Her Values or Interests*⁴²

It is now widely believed amongst lawyers, that the EU is a global regulator. This is something observed not only by legal scholars⁴³ but also made explicit in the reports of the European Commission⁴⁴. Indeed, the EU has long prepared itself for seizing the regulatory opportunities to be arisen out of global common problems. In order to comprehend the global reach of the EU regarding data governance, one can review key events occurring over the past two decades. Since 2007, official EU documents such as the European Green Deal and Europe's Digital Decade present the EU as a 'global regulator' or any other description⁴⁵. For example, in implementing its Green Deal, the EU initiated a process of global regulatory competition in international environmental law⁴⁶. Regarding data governance, the EU, with its policies that it has pursued over the past decade, including its Global Data Protection Regulation (GDPR)⁴⁷, the Regulation on the free flow of non-personal data (FFD)⁴⁸, the Cybersecurity Act⁴⁹, the Open Data Directive⁵⁰ has already become one of the most important players in the global competition of data regulation. It has also exercised 'digital diplomacy'⁵¹ by ruling the level of protection provided by 13 countries as 'adequate' and signing two successive agreements with Japan that connects international trade to data protection.⁵²

In the Commission's recent communication, 'A European Strategy for Data', it is clearly noted that 'the EU has a strong interest in ... shaping global standards and creating an

⁴² This recalls the famous book of Koskeniemi and his critical remarks as to the nature of international legal argumentation, M Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006).

⁴³ I Hadjiyianni, 'The European Union as a Global Regulatory Power' (2021) 41 *Oxford Journal of Legal Studies* 1, 243-264.

⁴⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A single market for 21st century Europe {COM(2007) 725 final} (makes explicit that it will use its market power as leverage to be a global regulator)

⁴⁵ For instance, being a global role model, developing digital standards and promoting them internationally, setting global standards.

⁴⁶ G Çapar, 'From Conflictual to Coordinated Inter-legality: The Green New Deals Within the Global Climate Change Regime' (2021) 7 *Italian Law Journal* 2.

⁴⁷ Regulation (EU) 2016/679.

⁴⁸ Regulation (EU) 2018/1807.

⁴⁹ Regulation (EU) 2019/881

⁵⁰ Directive (EU) 2019/1024.

⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy for Data (Com/2020/66 Final)

⁵² European Commission Press Release IP/19/421, European Commission Adopts Adequacy Decision on Japan, Creating the World's Largest Area of Safe Data Flows (Jan. 23, 2019); European Commission Press Release IP/18/6749, EU-Japan Trade Agreement on Track to Enter into Force in February 2019 (Dec. 12, 2018)

environment in which economic and technological development can thrive, in full compliance with EU law⁵³. The EU is able to leverage its market power by indirectly setting global standards or it may restrict access to its market based upon countries providing substantively equivalent protection⁵⁴. In both cases, the EU connects its market power to its regulatory capacity, as it has been doing for decades regarding its internal policies, which can be summarized as ‘integration through law’. That is not to say that the EU sees law merely as a means to its political ends. To the contrary, it uses law as an end to itself, treating it as a tool. Just as law has been the driving force of the EU’s internal integration process, it is now helping in ‘engaging in shaping, importing and promoting international legal norms’⁵⁵ outside. The EU is destined to oscillate between its own interests and its own values⁵⁶. On the one hand, it must respect ‘the principles of the United Nations Charter and international law’. But on the other hand, the EU is subject to the guidance of ‘the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world’⁵⁷. It is therefore, by nature, torn between its values and interests, from which it can only liberate itself if EU sets the standards for the globe⁵⁸. However, the question whether it bears the full responsibility of being a global regulator still hangs in the air, as the EU is still under the spell of “harmonization”⁵⁹.

3.2. *The EU’s Digital Rights*

On 13 May 2014, the CJEU held, in a landmark ruling, that Google was obliged to remove the search results pertaining to a ‘Mr. Gonzalez’, on the grounds that he was entitled to the right to be forgotten⁶⁰. In the ruling, the Court draws attention to the balance between an individual’s right to be forgotten and the public’s right to access information, pointing out that this balance

⁵³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Strategy For Data Com/2020/66 Final

⁵⁴ Bradford calls them market and treaty-driven harmonization, see A Bradford, *The Brussels effect* (n3) 67.

⁵⁵ M Cremona, ‘Extending the Reach of EU Law: The EU as an International Legal Actor’ in M Cremona and J Scott (eds.) *EU Law Beyond EU Borders* (Oxford University Press 2019) 11.

⁵⁶ See Article 3(5) TEU (laying down that the EU “shall uphold and promote its values and interests” in its external relations.)

⁵⁷ Article 21(1) TEU

⁵⁸ C Kuner, ‘The Internet and the Global Reach of EU law’ in M Cremona and J Scott (eds.) *EU Law Beyond EU Borders* (Oxford University Press 2019) 112-145.

⁵⁹ See for the importance attributed to the notions such as “global convergence in the area of data protection”, “fostering a global culture of respect for privacy”, and “promoting convergence of data protection standards at international level” Communication from the Commission to the European Parliament and the Council, Data protection as pillar of citizen’s empowerment and EU’s approach to the digital transition- two years of application of the General Data Protection Regulation Com/2020/224 Final

⁶⁰ Case C-131/12, *Google Spain v. Agencia Española de Protección de Dato* (May 13, 2014), para. 92 (Hereinafter *Google Spain*)

may change depending on the degree of importance assigned to the data subject and the content of the information at stake⁶¹. This ruling did *not* disambiguate on whether Google's responsibility is limited to the geographical boundaries of the country where the complainant filed its application, or if it extends to the globe. In other words, the territorial scope of the right to be forgotten is still a matter of controversy. *Google Spain*, rather than claiming a universal jurisdiction, opined that even though it does not directly have jurisdiction over Google, this does not mean that it lacks jurisdiction over Google Spain, and so indirectly Google⁶².

Against this backdrop, the CNIL (French Data Protection Agency) imposed a penalty on Google in 2015 on the basis that it failed to apply de-referencing requests globally and limited its scope of application to the country-specific borders through its geo-blocking technology. In September 2019, the case came before the CJEU, where it ruled that the EU law does neither require nor prohibit ordering a global de-referencing request⁶³ because it falls within the competence of each member state to determine the exact scope of de-referencing, depending on the balance struck between competing rights⁶⁴. The Court, however, made it clear that the principle of uniform application of the EU law entails that 'the de-referencing in question is, in principle, supposed to be carried out in respect of all the Member States'⁶⁵. One month later, in October 2019, the CJEU ruled, in a fashion bearing out its ambivalent and indeterminate approach towards the scope of the right to be forgotten, that the Member States are not precluded from 'ordering a host provider to remove information ... worldwide'⁶⁶. In those two judgments, the EU applied what Scott calls territorial extension by establishing a territorial connection, yet data, as already shown above, eludes territory. And this brings into question whether it is still legitimate to establish an artificial territorial connection.

3.3. *The EU's Data Transfer Standard: Between Mutual Recognition and Harmonization*

On 6 October 2015, in *Schrems*, the CJEU was called upon to rule on the compatibility of the Commission Decision 2000/520/EC (Safe Harbour Principles), which ensures that the

⁶¹ *Google Spain*, para.81

⁶² See for a similar argument K Kowalik-Bańczyk and O Pollicino, 'Migration of European Judicial Ideas' (n 1) 324.

⁶³ Case C-507/17, *Google LLC. v. Commission nationale de l'informatique et des libertes (CNIL)* (September 24, 2019), para.72 (Hereinafter CNIL)

⁶⁴ CNIL, para.72

⁶⁵ CNIL, para.66

⁶⁶ Case C- 18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Ltd* (October 3, 2019) para.53

US provides an adequate level of protection and allows data transfer from the EU to the US. The Court, highlighting the crucial importance of the right to effective judicial remedy⁶⁷ and the proportionality principle⁶⁸ and specifying the necessity of reading the Commission Decision in light of the Charter of Fundamental Rights, found the level of protection to be inadequate. By doing so, it drew attention to Article 7 (right to privacy), Article 8 (right to data protection), and Article 47 (right to an effective remedy and fair trial). However, the Court's emphasis on 'the essence of the fundamental rights' goes one step further than proportionality review because even a proportionate measure may be deemed to compromise the essence of that right. Thus, it leaves undetermined the question when and which measures will trench upon the essence of the right as well as what is expected from foreign authorities in finding a proportionate balance between data protection and competing interests. As such, it gives almost a free hand to the ECJ in assessing the level of protection provided by the other legal orders.

Schrems I is also challenging with regards to balancing, because the CJEU tilts the balance away from criminal surveillance and undermines the importance of data flow for surveillance and cooperation in criminal matters⁶⁹. Epstein contends that the Court in *Schrems I* adopted a highly dogmatic methodology that was reminiscent of the judicial reasoning of the conceptual jurisprudence of the 19th century. In not assessing the impact of data privacy on surveillance, it gives a one-right-answer to the delicate balance between access to information and data protection: 'the privacy right in data ... (is) a fundamental interest deserving the highest protection'⁷⁰. However, despite all these criticisms and the ambivalent nature of balancing focusing on the essence of right, the ruling can still be palatable, when the legal conditions prevalent in the US considered. For instance, the safe harbour principles are "applicable solely to self-certified United States organizations receiving personal data from the European Union, and United States public authorities are not required to comply with them"⁷¹. Further, in case of conflicting obligations originating from national security concerns, self-certifying organizations may be obliged to comply with them. And this may seriously

⁶⁷ "... legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data, does not respect the essence of the fundamental right to effective judicial protection", Case C-362/14, Maximilian Schrems v. Data Protection Commissioner (October 6, 2015) para.95 (Hereinafter Schrems I)

⁶⁸ "... legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter" Schrems I, para.94

⁶⁹ RA Epstein, 'The ECJ's Fatal Imbalance: Its Cavalier Treatment of National Security Issues Poses Serious Risk to Public Safety and Sound Commercial Practices' (2016) 12 *EuConst* 330, 333-335.

⁷⁰ Ibid 336.

⁷¹ Schrems I, para.82

undermine the right's holders right to effective judicial remedy, as the US legal system does not vest data subjects with required "administrative or judicial means of redress"⁷². So, the absence of such mechanism to assess the necessity of measures taken by the US authorities, particularly when they oblige self-certified organizations to deviate from the safe harbour principles, provided a legitimate base for the Court's ruling.

This decision effectively ended the large-scale data transfer from the EU to the US, which was not surprising given that, in 2013, Edward Snowden had revealed the surveillance activities of the US intelligence services. Within a very short period, in August 2016, the EU and the US reached a new agreement in order to re-open the data flow from Europe to the USA. The Privacy Shield, contrary to its predecessor, gave US authorities such as FTC and DOJ the power to oversee whether companies voluntarily pledging to follow the EU standards were indeed observing the rules. Further, it established an independent supervisory institution, the US Ombudsman, to provide a forum through which individuals could raise their grievances if they suspected that their digital rights were being violated⁷³. However, the Privacy Shield could not succeed in saving itself from the same fate that the Safe Harbour suffered. In July 2020, the Court, building upon its arguments in *Schrems I*, stated that 'the limitations on the protection of personal data arising from the domestic law of the United States ... are not circumscribed in a way that satisfies requirements that are essentially equivalent to those required, under EU law, by the second sentence of Article 52(1) of the Charter'⁷⁴.

This ruling is highly controversial when seen in the light of principle, worded by the ECJ in numerous occasions, as to the meaning that the term 'adequate protection' does not necessitate an identical level of protection, rather it entails 'a level ... that is essentially equivalent to that guaranteed within the European Union'⁷⁵. That is so because equivalent protection principle is an alternative to harmonization that demands a one-right-answer (the EU's answer) to the balance between data protection and, say, criminal surveillance, and thus it requires granting a certain margin of appreciation to the other legal orders. Nevertheless, this appears to be highly unlikely if the CJEU lays down the application of proportionality analysis

⁷² Schrems I, para.90

⁷³ PM Schwartz and KN Peifer, 'Transatlantic Data Privacy Law' (2017) 106 *Geo. LJ* 115, 160-165.

⁷⁴ Case C-311/18, Data Protection Commissioner v. Facebook Ireland and Maximilian Schrems, (July 16, 2020) para.185 (Hereinafter Schrems II)

⁷⁵ Schrems I, para.73

as it is applied by itself as a condition for regarding foreign law adequate without leaving enough discretion to the foreign authorities.

On its face, *Schrems II* may seem more palatable than *Schrems I* because the Court, adjusting its proportionality analysis and giving up its “essence of right” discourse in favour of a more flexible balancing exercise, assesses the minimum safeguards provided by the foreign law in light of the Charter of Fundamental Rights⁷⁶. However, when it is read in depth and contextually, a different picture begins to emerge. First, unlike AG Saugmandsgaard’s detailed analysis in which he weighs how the measures taken by the US authorities for national security concerns impact on the EU’s digital rights⁷⁷, the CJEU’s balancing exercise seems to be afflicted with the right to effective judicial remedy. However, those are different issues to be separated from each other. Finding a balance between digital rights and national security is independent from whether the essence of right to effective judicial remedy is compromised. In *Schrems II*, the CJEU seems to confuse these different rights, as it, even in the balance between digital rights and national security, appears to be obsessed with the right to effective judicial remedy⁷⁸. Its recourse to the notion of “effective of enforceable rights”⁷⁹ can be interpreted as an attempt to create a connection between digital rights and the EU’s understanding of right to effective judicial protection, which may only be met when data subjects are endowed with actionable rights “before the courts against the US authorities”⁸⁰.

The Court, therefore, in its analysis of the right to effective judicial protection (Art. 47), affirms that none of the regulations in the US legal system “grants data subjects rights actionable in the courts against the US authorities, from which it follows that data subjects have no right to an effective remedy”⁸¹. Seen in this light, any legal system that falls short of providing an effective judicial protection owing to its different legal tradition is deemed inadequate from the perspective of the CJEU, which seems more aligned with the logic of harmonization than mutual recognition. This argument can also be observed in the references

⁷⁶ M Tzanou, ‘Schrems I and Schrems II: Assessing the Case for the Extraterritoriality of EU Fundamental Rights’ in F Fabbrini, E Celeste, and J Quinn (eds.) *Data Protection Beyond Borders: Transatlantic Perspectives on Extraterritoriality and Sovereignty* (Hart Publishing, 2020) 114-115.

⁷⁷ Case C-311/18, *Data Protection Commissioner v. Facebook Ireland and Maximilian Schrems*, (July 16, 2020), Opinion of AG Saugmandsgaard (AG *Schrems II*), see for balancing between the digital rights and national security in para. 254-308, for balancing between the right to effective judicial protection and national security para. 309-342.

⁷⁸ *Schrems II*, para. 183-190. I would like to thank anonymous reviewer for inducing me to highlight clearly how proportionality analysis is differently used in *Schrems I* and *II*.

⁷⁹ Para. 181-182, 188

⁸⁰ Para.181

⁸¹ Para.192

made to the ECtHR's case law in *Schrems II*, contrary to the AG's elaborate legal reasoning engaging also with the ECtHR's case law⁸². As such, it is misleading to expect from the CJEU that it takes notice of the differences between legal orders when it shies away from even referring to the ECtHR. *Schrems II*, when evaluated contextually, turns out to be rather problematic, because it comes right after the legal adjustments made by the US legal system to align its legal order with the expectations of the CJEU. And against this backdrop a question springs to mind: Is there any adequate measure that is not identical to the EU legal system but meets the demands of the CJEU? As stated clearly by Christakis, *Schrems II* "is without a doubt a constitutional judgment" attempting to create a "holistic and coherent regime of protection" and thereby raises the suspicion of European legal imperialism⁸³.

3.4. *Opinion 2/15 and the GDPR: Still Going Global?*

There are two additional incidents that demonstrate how the EU has recently expanded its global regulatory reach. With the first, in 2015, the CJEU found an international draft agreement on the transfer of passenger-related data from the EU to Canada incompatible with the EU's digital rights. The Court upheld its equivalent standard developed in *Schrems* then also expanded its scope of application by assessing whether an international agreement is congruent with the *Schrems' standard*⁸⁴. *Shrems* involved the evaluation of the adequacy of foreign law through the mediation of the EU Commission's decision. However, in *Opinion 1/15*, the Court made a straightforward evaluation as to the compatibility of an international agreement with the Charter of Fundamental Rights (CFR) by using the charter as a standard in the assessment of international treaties.⁸⁵ This ruling prompted significant criticism for ruling that the level of protection provided by a country like Canada as inadequate. Given that Canada's level of protection does not meet CJEU's standards, one can assume that it would be all but impossible to find a significant number of other countries that could satisfy the EU's expectations. This may, in turn, lead to data balkanization. Critics of the ruling centred on the

⁸² This point is important because the level of protection accorded to digital rights in ECHR regime is lower than the EU legal order, which may be observed in the detailed analysis of Advocate General, see particularly AG Schrems II para. 282.

⁸³ T Christakis, 'After Schrems II: Uncertainties on the Legal Basis for Data Transfers and Constitutional Implications for Europe' (2020) *European Law Blog*, 21.

⁸⁴ C Kuner, 'International Agreements, Data Protection, and EU Fundamental Rights on the International Stage: Opinion 1/15, EU-Canada PNR' (2018) 55 *Common Mkt. L. Rev* 3, 857, 876,881.

⁸⁵ *Ibid.* 858.

EU's blind unilateralism and voiced concerns that the CJEU was using data protection as 'a vehicle'⁸⁶ in its aspirations to be a global regulator.

The second incident occurred in May 2018 when the EU rolled out its new generation data protection regulation (GDPR) as a successor to the 1995 Data Protection Directive⁸⁷. It attracted significant attention, so much so that the rollout date of May 25 has been nominated by some as the world GDPR day⁸⁸. The GDPR contains a critical provision regarding extraterritoriality, which serves an important role in this paper's analysis. Article 3 of the GDPR stipulates that the regulation 'applies to the processing of personal data of data subjects who are in the Union' even if the controller is 'not established in the Union' either when the processing activities can be tied to data subjects⁸⁹ or when they occur in a place 'in a place where Member State law applies by virtue of public international law'⁹⁰. By placing the emphasis on data subjects, the directive extends its scope of application, and therefore goes one step further than Google Spain's location-based approach. As such, it provides a fertile ground for the EU to further extend its regulatory reach by imposing obligations on foreign companies that are not even physically located in the EU. The GDPR extends its 'territorial regulation with far-reaching extraterritorial effect'⁹¹ to such a degree that even international organizations such as the UN have been affected, particularly in areas such as refugees, health research, and migration⁹². This step could be construed as a move that is simply concerned with its own residents rather than foreigners, even though it has some secondary consequences going far beyond⁹³. According to this argument, the directive does not amount to a unilateral imposition of its own values, for it is more concerned with the level of data protection provided for the EU citizens than the non-EU citizens⁹⁴. But this still does not provide a sufficient justification for the legitimate use of global regulatory power, as it does not concern itself with how the others are affected from the regulation.

⁸⁶ Ibid.

⁸⁷ It is also classified by many scholars as a global regulation under the guise of an EU regulation, see e.g., C Ryngaert and M Taylor, 'The GDPR as Global Data Protection Regulation?' (2020) 114 *AJIL Unbound*, 5-9

⁸⁸ PM Schwartz, 'Global data privacy: The EU way' (2019) 94 *NYUL Rev.* 771, 772.

⁸⁹ GDPR 3(2)

⁹⁰ GDPR 3(3); see also for a study analyzing the interaction between Article 3, regulating the territorial scope of the GDPR and Chapter V of the GDPR designed to regulate data transfer procedures to non-EU parties. C Kuner, 'Territorial Scope and Data Transfer Rules in the GDPR: Realising the EU's Ambition of Borderless Data Protection' (2021) University of Cambridge Faculty of Law Research Paper No:20/2021.

⁹¹ J Daskal, 'Borders and Bits' (n 13) 212.

⁹² FL Bordin, 'Is the EU Engaging in Impermissible Indirect Regulation of UN Action? Controversies over the General Data Protection Regulation' (11 Dec 2020) *EJIL:Talk: Blog of the European Journal of International Law*.

⁹³ C Ryngaert, *Selfless Intervention* (n 15) 199.

⁹⁴ Ibid.

Actual intentions aside, this directive makes it apparent that the EU engages in extraterritorial regulation, be it in the form of market-driven or treaty-driven harmonization. However, the EU is not the only actor having global aspirations and extending its regulatory arm. China is developing its own understanding of digital rights and data governance with its Great Firewall, banning a large number of apps and websites from China's digital territory. These include YouTube, Google, Twitter, and The New York Times⁹⁵. Similarly, the US, the hallmark of the libertarian approach embodied in Silicon Valley⁹⁶, also makes attempts to widen its regulatory jurisdiction, although generally it tends to fly under the radar. By way of an example, in February 2019, the US issued an executive order under Trump's administration, aiming to sustain American leadership in AI by embracing policies such as the development of technical standards for reducing barriers to open data and the open market⁹⁷. The US, similar to the EU, has used law as a tool to protect its global power. To this end, the US advocates for an open data policy whereby data may flow without barriers and AI can run smoothly⁹⁸. In the next section, surveillance for criminal observation and counterterrorism are examined, spheres where the US uses its regulatory power as leverage to maintain its global power.

4. Global reach of the US: For the sake of Criminal Surveillance

The case involving *Microsoft Ireland* provides an excellent example of the US approach to data and criminal surveillance. Although the case eventually became moot when it was before the Supreme Court, after Congress's enactment of the Clarifying Lawful Overseas Use of Data (CLOUD), replacing the 1986 Stored Communication Act (SCA), it can still shed light on the perception of rights that is prevalent in the US. The saga began with Microsoft's refusal to comply with a search warrant that demanded access to e-mail accounts belonging to a suspected drug- trafficker. Microsoft based its argument on the fact that the relevant data was stored in Ireland and giving access would be an extraterritorial application of the SCA, which is also at odds with the original intention of the act⁹⁹. Although several district courts sided with the government by placing the emphasis on the location of the company, the Second Circuit reversed these judgments, stressing the importance of the location of the data. The Circuit Court

⁹⁵ SA Aaronson and P Leblond, 'Another Digital Divide: The Rise of Data Realms and Its Implications for the WTO' (2018) 21 *Journal of International Economic Law* 2, 245, 262- 270.

⁹⁶ Ibid. 264.

⁹⁷ Executive Order 13859, Maintaining American Leadership in Artificial Intelligence (11 February 2019)

⁹⁸ SA Aaronson and P Leblond, 'Another Digital Divide' (n 96) 248

⁹⁹ US Second Circuit, *Microsoft Ireland*, para.41, accessed at <https://cases.justia.com/federal/appellate-courts/ca2/14-2985/14-2985-2016-07-14.pdf?ts=1468508412> (Herein *Microsoft Ireland*)

further stated that to enforce such a Warrant, ‘insofar as it directs Microsoft to seize the contents of its customer’s communications stored in Ireland, constitutes an unlawful extraterritorial application of the Act’¹⁰⁰.

Unfortunately, it was not possible to obtain a US Supreme Court decision because the CLOUD Act provided a political resolution to the dispute. The CLOUD Act, amending the pertinent article of the SCA, issued that any ‘provider of electronic communication service or remote computing service shall comply with the obligations of this chapter to ... disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber ... regardless of whether such communication, record, or other information is located within or outside of the United States’¹⁰¹. The Act also stipulates that the Court, in cases where its obligation conflicts with that of an instruction made by a foreign government, should take into consideration a manifold of other factors such as the interest of the foreign government, the provider’s ties to the US, the importance of the investigation, and the possibility of less restrictive means¹⁰². In short, although the CLOUD Act obliges all US-based companies to disclose information regardless of where the data is located, it also enumerates the grounds on which foreign states conflicting interests may be taken into consideration.

One of the problems the CLOUD Act claims to address is highly relevant to the concept of extraterritoriality: The fact that the SCA did not allow the US to disclose data to foreign countries¹⁰³. As such, foreign governments, when in need of the US-held data, had to resort to the mutual legal assistance treaty (MLAT), which was burdensome and inefficient, the process often lasting up to one year.¹⁰⁴ In order to address this issue, the CLOUD Act created a mechanism for foreign governments by which they would enter into a bilateral agreement rather than the MLAT, provided that the data subject is not someone who is an American citizen or inhabitant¹⁰⁵. It is, therefore, still not possible for foreign countries to access data gathered and stored by a US company, outside of the MLAT mechanism. This reflects the underlying rationality of the fourth amendment, which differentiates the persons located in the US from

¹⁰⁰ US Second Circuit, Microsoft Ireland, para.41.

¹⁰¹ CLOUD Act Section 3, accessed at <https://www.congress.gov/bill/115th-congress/house-bill/4943/text>

¹⁰² Ibid.

¹⁰³ J Daskal, ‘Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0’ (2018) 71 *Stan. L. Rev. Online*, 9, 13.

¹⁰⁴ Ibid. 13.

¹⁰⁵ Ibid. 14.

the foreigners and excludes the latter from the purview of the Bill of Rights¹⁰⁶. This therefore creates a double standard by endowing US citizens with a higher degree of protection while leaving non-US citizens at the mercy of the US government's political preferences.

The beginning of this section outlined the arguments proposed by the two sides of the dispute in the *Microsoft Ireland* case. Namely, the government's argument is founded on the location of the company (access point), and Microsoft's argument is that the location of the data is relevant to determine the competent authority and jurisdiction. However, neither of these arguments is entirely sound. Assuming, *arguendo*, that the jurisdiction of the court depends on the location of the data, this will lead us to accept that the jurisdiction of the court will depend on the choices of the internet service provider as to where to locate their data¹⁰⁷. From this, it follows that every government, with the intention of regaining its jurisdictional competence, will resort to data-localization and compel the ISPs to store their data within its own border¹⁰⁸. Conversely, if, *arguendo*, the jurisdiction of the court is based upon the location of the company, then the vast majority of data-related cases will fall under the US's jurisdiction as most of the ISPs are based in the US. Hence, I conclude that it is necessary to find a middle ground between data-localization and universal jurisdiction. Under this scenario, data will become accessible even if it is located abroad, and the states will show mutual respect and deference to the autonomy and interests of each other¹⁰⁹.

5. The Reasons for Divergence and Underlying Similarities

5.1. *Two types of culture: Cultures of authority and justification*

The US has always been an exceptional country, and law is by no means an exception to the rule of exception. By means of illustration, the US has the most antiquated constitution in the world, over 200 years old, with a unique federal system¹¹⁰. It is impervious to what is

¹⁰⁶ See, e.g., J Daskal, 'The Un-Territoriality of Data' (n 9) 334-365; see for a detailed comparative analysis scrutinizing how different legal regimes such as the US, the EU, and the ECHR strike a balance between the right to privacy and the state's surveillance activities F Bignami and G Resta 'Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance' in E Benvenisti and G Nolte (eds.) *Community Interests Across International Law* (Oxford University Publishing, 2018)

¹⁰⁷ Ibid. 390.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. 393.

¹¹⁰ There are different methods through which the US creates an exceptional domain for its own policies: i) exceptionalism, ii) double-standard, and legal isolationism. The US exceptionalism referred here stands for legal isolationism, which suggests that the US legal system is more inclined to teaching than learning from others. M Ignatieff, *American Exceptionalism and Human Rights* (Princeton University Press, 2009) 4-11; see for a work on

referred to as the global model of constitutional rights, a model that includes social and economic rights, grants horizontal effect to rights, incurs positive obligations to the state, and uses proportionality analysis as a legal method in balancing competing rights¹¹¹. In the same vein, the US maintains its exceptionalism in data regulation by according an extensive protection to the freedom of speech¹¹². As such, it is apparent that there is a ‘conceptual gulf’¹¹³ between the US and the EU in terms of data protection.

In fact, this gap emanates from dissimilar conceptions of rights, regulation, legal systems, and legal culture prevalent in the EU and the US. According to Porat and Cohen-Eliya, the US represents an example of the culture of authority in which ‘rights are viewed as demarcating the boundaries of the governmental sphere of action and as imposing restrictions on governmental action and authority’¹¹⁴; the EU, by contrast, provides an example of the culture of justification in which ‘every exercise of power is expected to be justified’¹¹⁵. Accordingly, the legal culture in the US is founded on the idea that autonomous individuals should be protected from the infringement of the state, so rights are considered as exclusionary reasons, trumps, or side-constraints against state intervention¹¹⁶. By contrast, the EU presumes that rights can only be materialized if the state undertakes positive steps¹¹⁷, so rights lose the moral power they possess in the US. They are devaluated to the level of mere interests, values, or principles in the continental tradition that can be balanced against competing community interests. Basic rights, therefore, is thought to be “‘equally constitutive’ for both individuals and society”, as they “encompass their own limitations”¹¹⁸. As such, the right to privacy and

the compatibility of proportionality with the US model K Möller, ‘US Constitutional Law, Proportionality, and the Global Model’ (2016) LSE Law, Society, and Economy Working Papers 06/2016.

¹¹¹ K Möller, *Global Model of Constitutional Rights*, (OUP 2012) 2-15

¹¹² F Schauer, “The Exceptional First Amendment” in M Ignatieff, *American Exceptionalism and Human Rights* (Princeton University Press, 2009)

¹¹³ PM Schwartz and KN Peifer, ‘Transatlantic Data Privacy Law’ (n 74) 156

¹¹⁴ M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013) 118.

¹¹⁵ E Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 1, 31, 32.

¹¹⁶ M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (n 115) 52-65; see for the conception of rights as principles R Alexy, ‘The Construction of Constitutional Rights’ (2010) 4 *L. & Ethics Hum. Rts.*, 19. Schauer counters this argument, contending that the substantive difference in the rights protection between the US and Europe does not result from the distinctive methodologies espoused. Even though Schauer rejects the argument that the First Amendment is a categorical, rule-based, and balancing-excluding nature, he admits the role played by the one-sided nature of the First Amendment’s text by prioritizing the right to freedom of speech and press. F Schauer, ‘The Exceptional First Amendment’ (n 113) 30-32, 44-45.

¹¹⁷ In German context’s balancing requires “the establishment of a proportional correlation between individual rights and community interests” and was aimed at the “optimization of competing values” J Bomhoff, *Balancing constitutional rights: the origins and meanings of postwar legal discourse* (Cambridge University Press, 2013) 93.

¹¹⁸ *Ibid.* 109.

the right to data protection has recently ascended to the level of rights not because rights are more valued in the EU, but because they are less valued in the EU than in the US.

This demonstrates why there are two different paradigms on the two sides of the Atlantic with respect to the relationship between individual, market, and state. Whereas Europeans are disposed to be suspicious of the market and to be more comfortable with state intervention¹¹⁹, the market in the US is perceived as more of an opportunity where an individual may reap the rewards of his own decisions rather than as a threat to be guarded against¹²⁰. It follows from this distinction that Europeans are more risk averse and pro-regulation than Americans who prefer risk-taking and ex-ante solutions. Therefore, where Europeans opt for an approach based upon ex-ante regulation in order to alleviate unexpected risks and outcomes, Americans defer the distribution of resources first to the market, then to the courts with a tort system¹²¹. To conclude, Europe represents a tradition in which the individual is embedded in society and therefore the state may intervene in both the market and the private sphere in order to rectify the market/individual failures. Conversely, the presumption of individual autonomy and the proper functioning of the market is almost irrebuttable in US legal culture.

I think this diverging stance towards regulation is due to the role attributed to law in different legal traditions. As made clear by Bomhoff, in his recent historical analysis focusing on the question of how balancing is understood differently in the US and Germany, balancing is seen as a tool for reaching “a perfect constitutional order” in Germany (and now in the EU) while it was treated as “a dangerous doctrine” in the US legal scholarship¹²². Digital rights also bear the imprint of the foregoing distinctions. The underlying regulatory logic in the US is that intervention with digital rights is legitimate unless proscribed by the law, as opposed to the EU, which presumes that any infringement with a fundamental right is a violation unless it is justified¹²³. The EU has a model of rights protection in which individual autonomy prevails over consent, and thus this is a regime where ‘rights talk’¹²⁴ rather than a system where individual consent is deemed to hold the ultimate value. In summary, the EU, by placing special

¹¹⁹ A Bradford, *The Brussels effect* (n3) 39.

¹²⁰ Schauer describes this negative stance towards regulation as “culture of distrust” that marches hand in hand with libertarianism and laissez-faire, F Schauer, ‘The Exceptional First Amendment’ (n 113) 30-32, 46-47.

¹²¹ A Bradford, *The Brussels effect* (n3) 41-43.

¹²² J Bomhoff, *Balancing constitutional rights* (n 118) chapter III and IV.

¹²³ I Tourkochoriti, ‘Snowden Revelations, the Transatlantic Trade and Investment Partnership and the Divide Between US-EU in Data Privacy Protection’ (2014) 36 *The University of Arkansas at Little Rock Law Review*, 161-176.

¹²⁴ PM Schwartz and KN Peifer, ‘Transatlantic Data Privacy Law’ (n 74) 138; SA Aaronson and P Leblond, ‘Another Digital Divide’ (n 96) 245, 257.

emphasis on individual autonomy, protects an individual for her own sake, contrary to the US where an individual is viewed as a customer and protected for the sake of the market¹²⁵.

This has further implications for the general framework set out. Unlike the US's compartmentalized and vertical structure, the EU has developed a comprehensive horizontal model centred on proportionality analysis and applicable to any type of rights collision¹²⁶. Thus, contrary to the EU where digital rights have already gained the status of constitutional rights, the US, giving priority to data privacy over data protection, has taken a piece-meal, sector-specific approach, like 'a mosaic of normative instruments covering a variety of issues'¹²⁷. The US's positive approach to the free flow of information in the marketplace of ideas¹²⁸ is another point of divergence that follows from the differences between the EU and the US described above. Whereas the EU pushes forward for stricter and more comprehensive protection of digital rights – the rights to privacy and data protection-, the US is a staunch defender of the freedom of speech, innovation, and the free flow of data. Internet regulation is another case supporting the so-far developed argument. Whereas the US embraces a system of internet regulation, grounded in the idea of self-regulation, the EU adopts a system of co-regulation that depends on the collaboration amongst government, individuals, and ISPs¹²⁹. To illustrate, the US's Communication Decency Act's Section 230 shields ISPs from any sort of civil and criminal liability as long as they only store and broadcast content created by others¹³⁰. Further, it does not hold them accountable if they voluntarily act 'in good faith to restrict access to or availability of material'¹³¹ deemed to be illegal, obscene, and harmful. In a nutshell, it creates an environment conducive to the self-regulation and empowerment of ISPs¹³². Conversely, the

¹²⁵ PM Schwartz and KN Peifer, 'Transatlantic Data Privacy Law' (n 74) 147-155.

¹²⁶ B Frydman, L Hennebel, G Lewkowicz, and E Rousseau, 'Internet Coregulation and the Rule of Law' (n 27) 140.

¹²⁷ E Celeste and F Fabbrini, 'Competing Jurisdictions: Data Privacy Across the Borders' in T Lynn, JG Mooney, L van der Werff, and G Fox (eds.) *Data Privacy and Trust in Cloud Computing* (Springer, 2021) 43, 46.; F Bignami and G Resta, 'Transatlantic Privacy Regulation: Conflict and Cooperation' (2015) 78 *Law and Contemporary Problems*, 231, 232-235

¹²⁸ F. Bignami and G Resta, 'Transatlantic Privacy Regulation' (n 128) 236.

¹²⁹ B Frydman, L Hennebel, G Lewkowicz, and E Rousseau, 'Internet Coregulation and the Rule of Law' (n 27) 135-146. This is made clearer with Schrems II, where the Court imposes an obligation to the local Data Protection Agencies, data exporter and importer companies to carry out an investigation on whether the level of protection is adequate in the third country concerned. See for further explanations concerning privatization/decentralization in data governance oversight, T Christakis, 'After Schrems II' (81).

¹³⁰ 47 USC 230 (c) (1) "No provider or user of an interactive computer service shall be treated as publisher or speaker of any information provided by another content provider"

¹³¹ See 47 USC } 230 (c) (2)

¹³² There are also some sectors that are more prone to state intervention such as prevention of child pornography, fight against terrorism and protection of copyrights. See B Frydman, L Hennebel, G Lewkowicz, and E Rousseau, 'Internet Coregulation and the Rule of Law' (n 27) 136-139.

EU's Electronic Commerce Directive of 2002, is more sympathetic to the ISPs' liability than the US equivalent and leaves ample room for state intervention¹³³. In sum, law carries out different functions and assumes different roles in the EU and the US, which have important implications for the form global data regulation is supposed to take.

5.2. *The Points of Convergence: Are they that different?*

It is also worth emphasizing that while these approaches are normative preferences that reflect historical and cultural values, they reflect also the stances taken with respect to global politics and regulatory competition. That is, the notion of digital sovereignty, the discourse of fundamental rights, and the global reach of EU digital rights mirrors the EU's recent efforts 'to fill the economic gap distancing them from American and Asiatic technology giants'¹³⁴. Thus, although they diverge significantly from each other with respect to the content of the regulation, they converge on one point: Aspiration towards regulating the globe. Even more, the EU and US adapt very similar policies and pay almost no regard to the interest of other states. Even the EU, which seems highly flexible in terms of giving consideration to the interests of others as exemplified in the Inuit exemption¹³⁵, can be seen in a different light when the GDPR is read in conjunction with the CJEU's recent rulings. As mentioned in section 3, the CJEU, particularly in *Schrems II* and *Opinion 1/15*, comes very close to equating an adequate standard with its own standard. Even before these judgments, the CJEU was criticized for prioritizing 'a European perspective on privacy interests, but not necessarily a global one'¹³⁶. This one-right-answer approach the CJEU adopted, particularly in *Schrems II* and *Opinion 1/15*, bears the risk that its 'commitment to promoting rules-based 'multilateral solutions to common problems will turn into an attempt to promote its own legal solutions by equating the latter with universal values'¹³⁷. Thus, the EU should grant a wider margin of appreciation to other countries than it leaves to its own member states. It is a logical consequence that the more global the regulation, the wider the margin of discretion should be.

¹³³ Ibid. 139-140. In December 2020, the EU Commission proposed two legislative initiatives -The Digital Services Act and the Digital Markets Act – in order to replace the twenty years old E-Commerce Directive. See for explanations, and pertinent documents <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>

¹³⁴ E Celeste and F Fabbrini, 'Competing Jurisdictions: Data Privacy Across the Borders' (n 128) 53.

¹³⁵ See for the Inuit exemption granted by the EU Seal Regulation to the seals hunted by the Inuits, and allows their import to the EU J Scott, 'The global reach of EU law' (n 14) 21-63.

¹³⁶ K Kowalik-Bańczyk and O Pollicino, 'Migration of European Judicial Ideas' (n 1) 329.

¹³⁷ M Cremona and J Scott, 'Introduction: EU law beyond EU borders' in M Cremona and J Scott (eds.) *EU Law Beyond EU Borders* (Oxford University Press 2019) 4.

With regards to the US CLOUD Act, as Woods points out, it fails to factor in the other states' interests and thereby leaves US companies with no choice but to unilaterally enforce US laws across the globe¹³⁸. As such, it also pushes foreign countries toward data localization¹³⁹, for they cannot access data gathered by US companies because of the CLOUD Act. In other words, this approach 'encourages the balkanization of the Internet into multiple, closed-off systems protected from the extraterritorial reach of foreign-based ISPs'¹⁴⁰. However, as Woods points out, this would have been avoided by adding a minor clause to the CLOUD Act stating that the act does not 'apply to law enforcement requests made outside the United States and that U.S. companies are therefore free as a matter of U.S. law to comply with those requests'¹⁴¹.

In this light, it seems abundantly clear that the regulatory competition does not stem from a differing notion of rights. Instead, it emanates from the very similar unilateral attitudes towards global regulation, which is clearly visible in the procedural clauses of the GDPR and CLOUD Act. The CLOUD Act makes access to data stored in the US territory¹⁴² conditional upon a bilateral agreement in the same way as the GDPR obliges the foreign countries to a data transfer agreement. Given that the alternatives are highly cumbersome and ineffective, they serve as a default sanction, and countries, in some sense, are forced to align their policies with the GDPR or the CLOUD Act. Furthermore, this bilateral agreement, using the same logic as the GDPR, will not only be subject to periodic review by the US government, but it also obligates the foreign government to grant the same access to the US government¹⁴³. Daskal points to the similarities between the CLOUD Act and the GDPR by asserting that just like GDPR, which is applicable to any company doing business with the EU, the CLOUD Act "represents an effort by the United States to set international standards, but via domestic regulation rather than a global meeting of governments"¹⁴⁴. For Daskal, this is a new *mode* of international law-making because it uses technology giants as leverage to reach the globe by

¹³⁸ AK Woods, 'Litigating data sovereignty' (n 7) 399-402.

¹³⁹ "...clubs lead to anticlubs" Ibid. 401.

¹⁴⁰ J Daskal, 'The Un-Territoriality of Data' (n 9) 326, 333.

¹⁴¹ AK Woods, 'Litigating data sovereignty' (n 7) 401; see also Daskal's criticism of the Belgian courts due to their recent Yahoo and Skype rulings in which they extended the scope of their jurisdiction to such an extent that "any operator or provider that actively aims its economic activities" on Belgian customers or "any activity participating in the economic life in Belgium" will be subject to the Belgian jurisdiction J Daskal, 'Borders and Bits' (n 13) 192-198.

¹⁴² Not all the data is not located in the US, and neither is it always possible to determine the location of data. Here, the phenomenon to which the term US-based refers is that the data gathered, processed, and stored by the US companies which are originated from the territorial borders of the US.

¹⁴³ J Daskal, 'Microsoft Ireland, the CLOUD Act, and International Lawmaking 2.0' (n 104) 9, 13-14.

¹⁴⁴ Ibid. 15.

merely regulating domestic incidents¹⁴⁵. The only difference between the EU and the US seems to be the source from which they derive their powers: Whereas the US derives its power from the data collected by US companies, the EU's power is grounded in its market and data-generating human capital.

6. How to Regulate?

6.1. *Ryngaert's Selfless Intervention and Benevolent Unilateralism*

Good intentions do not always make good consequences, and as such, we may end up in a situation that is diametrically opposed to our normative preferences. This is the case that we face with the GDPR and the CLOUD Act¹⁴⁶. The GDPR has been one of the main causes of data localization because it “has led cloud computing providers to offer services storing personal data on servers exclusively located in the EU” in order to avoid the strict and demanding provisions of the GDPR for transferring data abroad¹⁴⁷. Similarly, the CLOUD Act left foreign countries with no viable alternative other than data-localization¹⁴⁸. Therefore, any investigation into ways in which unilateralism can be used more constructively must also address the shortcomings of these regulations and their monolithic approaches.

Given that international institutions and international law have suffered losses against global issues such as climate change, migration, human rights, etc., unilateralism, in its restrictive and bounded forms, seems to offer a promising alternative to multilateralism. At a time when ‘the choice is not between unilateralism and multilateralism, but between unilateralism and inaction’¹⁴⁹, unilateralism, bounded by subject matter and time, may be more defensible than simply standing back and observing as the multilateralism mess worsens. Intervention, for the sake of global commons and responsive to unilateralism's anti-democratic nature, could be a very promising solution to the tragedy of multilateralism. Ryngaert refers to

¹⁴⁵ Ibid.

¹⁴⁶ see also for HJ Brehmer, ‘Data Localization: The Unintended Consequences of Privacy Litigation’ (2017) 67 *Am. UL Rev.* 927 (arguing that Schrems and Microsoft cases, albeit their short-term positive effects with respect to the privacy and digital rights, have taken their toll on in the long term by creating incentives for data localization)

¹⁴⁷ E Celeste and F Fabbrini, ‘Competing Jurisdictions: Data Privacy Across the Borders’ (n 128) 50.

¹⁴⁸ N Mishra, ‘Data Localization Laws in a Digital World: Data protection or Data Protectionism?’ (2015) 4 *The Public Sphere* 1, 135-158; WK Hon C Millard, J Singh, I Walden, and J Crowcroft, ‘Policy, Legal and Regulatory Implications of a Europe-only Cloud’ (2016) 24 *International Journal of Law and Information Technology* 3, 251-278.

¹⁴⁹ Daniel Bodansky, ‘What's So Bad about Unilateral Action to Protect the Environment?’ (2000) 11 *EJIL* 339, 339

this as benevolent unilateralism¹⁵⁰ because it takes seriously others' interests, right to self-determination, and right to be free from domination¹⁵¹.

Benevolent unilateralism does not depend on output legitimacy; it has a normative dimension that gives a prominent place to the idea of consent. As such, mechanisms through which affected states and parties could raise their voices, such as the right to access to justice and information as well as principles such as transparency and accountability, might prove useful¹⁵². Additionally, instruments such as consultations, making impact assessments, and expanding the right to access to justice¹⁵³ could help improve input legitimacy. Another way to increase input legitimacy is through equivalent standard clauses, by which a regulating country treats the regulations enacted in another country as adequate as long as they provide a level of protection above a certain threshold¹⁵⁴. It is of utmost importance to incorporate the perspective of outsiders into the decision-making process, no matter how limited it is, for it carves out a space in which a dialogic relationship unfolds between insiders and outsiders. In this case, decisions draw their legitimacy, neither from the output nor from the input, but from the process itself, and this comes very close to the type of legitimacy recently referred to as throughput legitimacy¹⁵⁵.

It also resembles the integration method the EU fosters by developing iterative and continuous dialogue between different legal orders with judicial techniques such as the Solange jurisprudence and principles like subsidiarity and proportionality. As may be recalled, the BVerfG, in *Solange I*, denied the principle of supremacy of EU law, affirming that it will continue to carry out fundamental rights review so long as the EU legal order fills its gap of fundamental rights protection¹⁵⁶. Nevertheless, the Court, 12 years later in 1986, ceased to

¹⁵⁰ C Ryngaert, *Selfless Intervention* (n 15) 18.

¹⁵¹ P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) 175-179.

¹⁵² See for the role of these principles for holding transnational and international organizations to account. B Kingsbury, N Krisch, and RB Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and contemporary problems* (3/4), 15-61.

¹⁵³ See for a study considering the right to access to justice as a foundational right owing to the role it plays in jurisgenerative process. G Palombella, 'Access to Justice: Dynamic, Foundational, and Generative' 34 *Ratio Juris* 2, 121-138.

¹⁵⁴ C Ryngaert, *Selfless Intervention* (n 15) 125-130.

¹⁵⁵ "Output legitimacy requires policies that work effectively while resonating with citizens' democratic ideals, values and identity. Input legitimacy depends on citizens expressing demands institutionally and deliberatively through representative politics while providing constructive support via their sense of identity and community. And throughput legitimacy *needs processes that work efficiently and inclusively while promoting constructive interaction*" VA Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 1, 2, 10 (emphasis added)

¹⁵⁶ "As long as [Solange] the integration process [in the European Communities] has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity,

carry out its fundamental rights review, finding the level of protection ensured by the EU legal order substantially equivalent to that of Germany. It further admitted that it will abstain from such a control activity, ‘as long as the European Communities ensure effective protection of fundamental rights’¹⁵⁷. As may be inferred from the foregoing, it is incongruent with the logic of harmonization and seeks the ways in which the logic of mutual recognition may set in motion a process of gradual norm-accumulation.

Hence, Solange Jurisprudence is a method that uses time as a tool by giving each party enough time and space for mutual accommodation, and places significant importance on the process. It is an iterative, dialogic process between the CJEU and the high courts of member states, oscillating relentlessly between two opposing poles: More conflictual Solange I type rulings such as *Maastricht*, *Lisbon*, and *PSPP* and more coordinated *Solange II* type rulings such as the BVerfG’s *Banana* judgment¹⁵⁸. Unsurprisingly, other higher courts in a more horizontal context where interaction transpires between heterarchical legal orders, such as the ECHR, the EU, and the UN, has recently taken advantage of the Solange method. To illustrate, whereas the ECtHR’s *Bosphorus* case exemplifies the Solange II type¹⁵⁹, the CJEU’s *Kadi* case is a good example of the Solange I type. In short, it is a method that serves as an interface between different legal orders, which may also be considered as special case of judicial comity¹⁶⁰. It is grounded in the idea that when states ‘*seek to set global standards, it is quite obvious that they should keep in mind the impact of their policies on others, and that they should balance the others’ interests against their own*’¹⁶¹.

6.2. Comity as Part and Parcel of Inter-Legality

The problem of extraterritoriality is indeed a problem of allocation of authority, for states pass judgments on issues that have a bearing on other jurisdictions. As such, this brings to the fore the question of sovereignty, authority and autonomy. This may seem like an age-old

which is adequate in comparison with the catalogue of fundamental rights contained in the [German] Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings [involving conflicts of Community secondary law and fundamental rights under the German Basic Law] ... is admissible and necessary” . BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß (29 May 1974) accessed from <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>

¹⁵⁷ BVerfGE 73, 339 2 BvR 197/83 Solange II-decision 22 October 1986 accessed from <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572>

¹⁵⁸ See for explanations concerning the cases and the dialogic process between the BVerfG, the CJEU and the EU in general N Lavranos, ‘The Solange-method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals’ (2008) 30 *Loy. LA Int’l & Comp. L. Rev.* 275, 313-323.

¹⁵⁹ *Ibid.*, 324.

¹⁶⁰ *Ibid.*

¹⁶¹ E Benvenisti, ‘The Future of Sovereignty: The Nation State in the Global Governance Space’ in S Cassese (ed.) *Research Handbook on Global Administrative Law* (Edward Elgar Publishing, 2016) 492.

doctrinal dilemma that calls for finding a compromise between different authoritative institutions¹⁶². However, the persistent questions, such as how to apply comity and when to defer to a foreign authority, are still challenging because they, first and foremost, compel us to strike a balance between two competing interests: (i) the state's interest to solve the case pursuant to its own law and (ii) the foreign state's countervailing interest in deciding the case according to its own law¹⁶³. Hence, comity entails, in this view, that the deferring authority should strike a balance between competing interests rather than show absolute deference to foreign authority¹⁶⁴.

Contrary to this balancing-based approach to comity, it is also plausible to think of comity as a *presumptive* rule requiring an authoritative institution to show deference to the judgment of another one. In this narrower reading, comity is not a matter of absolute discretion that is granted to a deferring authority but instead is about an obligation to show respect towards the foreign authority even though it is not bound by the decision of the latter¹⁶⁵. For instance, Endicott posits that comity does not stem from 'the rights of the first (foreign) authority, nor even from the first authority's success in carrying out its duties but from the second (deferring) authority's duties to those whom the second authority serves, and to those whom the first authority serves'¹⁶⁶. He, further, makes clear the link between comity and subsidiarity by claiming that the former is a special (horizontal) version of the latter¹⁶⁷. He argues, embedding this relationship between authoritative institutions in Raz's service conception of authority¹⁶⁸, that 'general reasons for comity are found in the service that the second authority (the one acting with comity) ought to provide to persons subject to its own authority, and in the value of the first authority's capacity to provide a service to persons subject to it'¹⁶⁹. Thus, there is an indirect relationship of duty between two authoritative institutions deferring to each other mediating through the individuals that they are supposed to serve. In sum, comity derives its legitimacy directly from the people residing in the territory of the other states¹⁷⁰ and from the service deferring authority provided to this people, not from the due respect accorded to sovereign authority.

¹⁶² AK Woods, 'Litigating data sovereignty' (n 7) 370-371.

¹⁶³ Ibid. 378; and he further alludes to the five principles to be considered in balancing, see on the same page.

¹⁶⁴ "Comity requires the courts to weigh competing government interests, but it does not per se prohibit regulation of extraterritorial conduct" AK Woods, 'Litigating data sovereignty' (n 7) 388.

¹⁶⁵ T Endicott, 'Comity Among Authorities' (2015) 68 Current Legal Problems 1, 4

¹⁶⁶ T Endicott, 'Comity Among Authorities' (n 166) 1.

¹⁶⁷ Ibid. 8-9.

¹⁶⁸ See T Endicott, 'Comity Among Authorities' (n 166) 11.

¹⁶⁹ Ibid. 3.

¹⁷⁰ "... comity towards the French authorities is not for the sake of the French Republic. It is for the sake of the persons who are subject to the authoritative acts of French institutions". Ibid. 12.

It can be asserted that comity necessarily requires taking other legalities into account, and thus it can be said that it is closely associated with inter-legality, which concerns itself primarily with the interaction of legalities¹⁷¹. For inter-legality, it is a mistake to confine the scope of legality to the territorial borders of a legal system or sectoral boundaries of a legal regime. It is a necessity to take an intersectional approach to the legalities at stake in a world which is inevitably interconnected. It is, in the end, about ‘changing the epistemic standpoint’¹⁷² by decoupling legality from the idea of systemic validity¹⁷³ because when legality is saved from the shackles of systemic validity, it would be possible to observe legality even at the intersection of different legal orders. Thus, it problematizes one-dimensional and monolithic approaches rendering the outsider’s perspective immaterial¹⁷⁴ just as Ryngaert’s benevolent unilateralism and selfless intervention are committed to do. It is, therefore, inherently connected to the underlying principles of comity, i.e., taking the other legalities or legal authorities into account. Even though it is generally preoccupied with the problem of monolithic judicial reasoning in the case law¹⁷⁵, it is a mistake to confine inter-legality to the realm of judges and to questions of what a judge can do when confronted with seemingly incompatible ought-judgments arising from different legal orders¹⁷⁶. In today’s closely connected and interdependent world, inter-legality appears to be a vital tool in addressing the question of how legalities should respond to each other and how they can solve the problem of plural normativity that emanates from the interaction itself.

When viewed from this angle, inter-legality appears to address also the issue of how our policies bear on others. To address the question of how legalities respond to the intervention and extension of other legalities, it is useful to treat each legality as a legal order ‘having its own administrative machinery’¹⁷⁷. As argued by Chiti, at the heart of inter-legality lies the process of recognition, which is triggered when legalities interact, and determines the responses towards the other legalities¹⁷⁸. Solange jurisprudence, a special case of the principle of comity,

¹⁷¹ “... from the perspective of inter-legality, *interconnectedness* is itself a legal situation” G Palombella, ‘Theory, Realities and Promises of Inter-legality. A Manifesto’ in J Klabbers and G Palombella (eds.) *The Challenge of Inter-Legality* (Cambridge University Press, 2019) 378.

¹⁷² Ibid. 374.

¹⁷³ Ibid. 380.

¹⁷⁴ G Çapar, ‘From Conflictual to Coordinated Inter-legality’ (n 47) 20.

¹⁷⁵ See for a study approaching inter-legality from the perspective of judges and adjudication A di Martino, ‘The Importance of Being A Case. Collapsing of the Law upon the Case in Interlegal Situations’ (2021) 7 *Italian Law Journal* 2.

¹⁷⁶ See for the argument that inter-legality is relevant to legislation as well as adjudication G Palombella, ‘Interlegality: On Interconnections and “External” Sources’ (2021) 7 *Italian Law Journal* 2.

¹⁷⁷ E Chiti, ‘Shaping Inter-legality: The Role of Administrative Law Techniques and Their Implications’ in J Klabbers and G Palombella (eds.) *The Challenge of Inter-Legality* (Cambridge University Press, 2019) 272.

¹⁷⁸ Ibid. 276.

along with other ‘pluralist procedural mechanisms, institutional designs, or discursive practices that maintain space for consideration of multiple norms from multiple communities’¹⁷⁹ can all be considered examples of inter-legality. In these cases, inter-legality unfolds during a sequence of events in which legalities interact with each other¹⁸⁰. From the Solange Jurisprudence to comity or to the procedural proportionality review¹⁸¹, these tools serve as an interface to the process. Here, inter-legality, rather than focusing on one case, one judge and one thought process, expands its scope by focusing on the process in which interaction plays out. One can observe how legalities recognize the existence of other legalities and how they allocate authority by using these so-called interface norms. Lastly, inter-legality, by forcing us to change ‘the epistemic standpoint’¹⁸², provides us with an opportunity to see the legalities beyond the legal systems and to counter the threat of legal domination of a one-right legal system, which is a permanent risk on which it is necessary to keep a wary eye¹⁸³. It warns us against the threats coming with the logic of harmonization, which seems today to be the dominant view among the global competitors.

6.3. *Data Governance from the Perspective of Inter-legality*

The claim that data protection has begun to emerge as a novel global value seems almost uncontroversial today¹⁸⁴. Nevertheless, any attempt at unilateral regulation, in the absence of a global regulator that may enact global data regulation, poses significant problems from the perspective of the principle of sovereign equality. However, since unilateral regulation appears to be the only possible way forward, it is imperative to find ways to mitigate the externalities generated by unilateralism and transform it into something more inclusive and participatory. Here, principles such as showing mutual respect and accommodation and considering the other’s perspective¹⁸⁵ seem to be viable alternatives. It is also important to consider a selection of undesirable cases that are to be avoided, and some representative examples that can be found

¹⁷⁹ PS Berman, ‘Understanding Global Legal Pluralism: From Local to Global, From Descriptive to Normative’ in PS Berman (ed.) *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press, 2020) 25.

¹⁸⁰ Here the term legality avails itself of wider interpretations, which are not confined to the domestic legal orders, but also contains sectoral regimes and even internet as a self-regulating environment. See a study how inter-legality unfolds in the domain of copyright law, prompting interpreters to take into account EU and national legal orders, as well as ECHR regime and internet G Priora, ‘The “Two Sun” of EU Digital Copyright Law: Reconciling Rightholders’ and Users’ Interests via Interlegality’ (2021) 7 *Italian Law Journal* 2.

¹⁸¹ I Bar-Siman-Tov, ‘Semiprocedural Judicial Review’ (2012) 6 *Legisprudence*, 3, 271-300.

¹⁸² G Palombella, ‘Theory, Realities and Promises of Inter-legality. A Manifesto’ in J Klabbers and G Palombella (eds.) *The Challenge of Inter-Legality* (Cambridge University Press, 2019) 374.

¹⁸³ G Palombella, ‘Theory, Realities and Promises of Inter-legality,’ (n 183) 382.

¹⁸⁴ C Ryngaert, *Selfless Intervention* (n 15) 195.

¹⁸⁵ AK Woods, ‘Litigating data sovereignty’ (n 7) 335,384,393.

in data governance. These examples are: (i) blocking statutes, (ii) global injunctions, and (iii) lack of comprehensive impact assessments. These approaches harm the principle of comity and inter-legality by fostering selfish unilateralism.

Blocking statutes ‘prevent compliance with another country’s laws’¹⁸⁶, and the US CLOUD Act is a good example of this. Even though global injunctions are not, per se, detrimental to inter-legality, they risk neglecting the legitimate interests of the other side, and thereby are one of the primary concerns for the inter-legal approach. As an example, the Canadian Supreme Court’s *Equustek* judgement, despite it being an example of a global injunction, presents a good example of the inter-legal approach. The Court stated, giving a prominent weight to the arguments from comity adduced by Google, that ‘(i)f Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, ... it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application’¹⁸⁷.

Inversely, the EU has taken a rather controversial stance towards data transfer from the EU to the US. First, it should be clarified once again that the EU’s position was much more defensible before *Schrems II*¹⁸⁸ because of the Snowden Revelations and apparent lack of effective judicial remedy in the US legal order. Today, it can be asserted that the EU has jurisdiction over digital platforms because ‘data processors are using computer equipment located within the EU; for example, by collecting data from EU-located computers by means of ‘cookies’, JavaScript, ad banners and spyware’¹⁸⁹. As such, it seems highly indefensible that the GDPR’s global reach is somehow a reflection of the EU’s many distinctive characteristics versus simply the unilateral imposition of European rules. The EU’s still functioning colonial ties, its highly accessible and easily transferable regulatory model, and its culture of integration based upon the idea of mutual accommodation and compromise¹⁹⁰ are the properties that are supposed to be the driving force behind the EU’s global regulatory reach. However, this functional explanation has lost much of its explanatory power, particularly in the wake of *Schrems II*, and it has become highly vulnerable to the criticism of Eurocentrism. It is possible

¹⁸⁶ AK Woods, ‘Litigating data sovereignty’ (n 7) 384.

¹⁸⁷ *Google Inc. v. Equustek Sols. Inc.*, [2017] 1 S.C.R. 824, 827-28 (Can.).

¹⁸⁸ PM Schwartz, ‘Global data privacy: The EU way’ (n 89) 771, (explicitly stating that the EU’s adequacy standard is based upon the idea of mutual accommodation and flexibility)

¹⁸⁹ J Scott, ‘The Global Reach of the EU Law’ (n 14) 39.

¹⁹⁰ See e.g., PM Schwartz, ‘Global data privacy: The EU way’ (n 89) 807-818 (attributing the GDPR’s globalization to its accessibility and the EU’s culture of flexibility)

to raise similar concerns regarding the US CLOUD Act, brought into existence in the aftermath of the *Microsoft* case, because it also makes access to data contingent upon the acceptance of terms unilaterally imposed by US companies.

As it may be inferred from the examples above, the practices of global injunctions and blocking statutes do violate the basic tenets of inter-legality; they harm its pluralist component by leaving a very limited scope for the outsider's perspective. They represent serious interventions to the plural co-existence of legalities, which may foster the sectoral fragmentation of international law, for sectoral fragmentation comes with global regulation and sectoral closure. In short, these practices suffocate the plurality inherent in inter-legality. One further fact worth mentioning is that the EU does scarcely factor in the negative externalities engendered by extraterritorial intervention¹⁹¹, as pointed out by Scott in his study of the global reach of EU law. Scott gives an example from an impact assessment conducted by the EU Regulators regarding measures taken against countries allowing non-sustainable fishing. She notes that 'no assessment of the negative impact of the EU measures on small-scale fisheries and associated downstream industries within the Faroe Islands'¹⁹² was carried out by the EU. Similarly, Kuner contends, with respect to data regulation, that even though EU legal documents contain comprehensive human rights impact assessments, it is fair to claim that they are inclined to consider only their impact on the EU, rather than on third countries.¹⁹³

7. In lieu of Conclusion: A novel Type of Eurocentrism?

Achille Mbembe speaks of a utopian borderless world, where every individual is endowed with the right to free movement, and more importantly, inalienable rights.¹⁹⁴ Mbembe's cosmopolitan ideal, nourished by post-colonial and post-modern critiques, reminds us of the artificiality of borders, which are erected to exclude some to the advantage of the others. However, exclusion does not come only in the form of physical borders, boundaries and frontiers; it may also come in the form of epistemological borders that dismiss one's knowledge, perspectives and ideas as irrelevant by rendering them invisible. Seen from this perspective, any form of unilateralism, be it in the form of internal regulation with extraterritorial effects or

¹⁹¹ Recall that this corresponds to the above-mentioned Ryngaert's suggestion about compensation in the cases of negative externalities.; J Scott, 'The Global Reach of the EU Law' (n 14) 59.

¹⁹² Ibid. 60.

¹⁹³ Kuner, C. (2019). The Internet and the global reach of EU law' (n 59) 142.

¹⁹⁴ A Mbembe, I Chaize, 'Deglobalization' (2018) 12 *Esprit*, 86-94.

stealth unilateralism in the form of the Brussels Effect, should be met with the following questions: ‘Whose law is it?’ and ‘Is it inclusive?’

These are laws that flow from Western powers – namely, the EU and the US – even though they appear to stand in conflict with one another. They are problematic due to their apparent disregard for how their policies impact third parties and deny them a forum for active participation. As such, they violate the fundamental principle of plurality: ‘(T)he duty to take into account the third country interest’¹⁹⁵. Granted, this principle does not carry much weight in the ideal world of the law of disconnected orders, yet as we have witnessed, legal orders are interconnected in today’s highly global and digital worlds. Viewed in this light, to impose the one-right solution, be it GDPR or the CLOUD Act, would be tantamount to legal imperialism or Eurocentrism. As Klabbers points out, ‘any attempt to espouse universal values almost automatically carries the suspicion of domination. Hence, in order to prevent domination, some consent-like mechanism is required’¹⁹⁶.

It is true that inter-legality does not necessarily lead to non-conflictual relationships between legal orders, and it may evolve into a more contradictory and conflictual approach over time. However, as mentioned above, it has a thin normative dimension, which highlights the flaws of monolithic, one-dimensional approaches, be they local or global. From here arises the idea of avoiding injustice because justice ‘is (also) a matter of “responsibility”, which requires gathering diverse sensitivities and reaching a kind of more comprehensive view by dissolving one-sidedness and ensuring the perspectives of others are heard’¹⁹⁷. In a world where European judges have a penchant for teaching, rather than learning, or even hearing, it is likely that the world will see new legal ‘fortresses’ being built around the world, similar to the (GDPR) in Europe. The GDPR has been described as ‘impregnable’¹⁹⁸, providing a maximum level of digital rights protection, but doing so by forfeiting flexibility. Flexibility is to be protected, as it ensures the EU’s unilateralism does not lead to legal imperialism¹⁹⁹. The image of an impregnable Europe brings about thoughts of Ruben Östlund’s film, ‘*The Square*’, where people enjoy equal rights and obligations in a trusting and caring environment tailored to the

¹⁹⁵ M Cremona and J Scott, ‘Introduction: EU law beyond EU borders’ (n 138) 17-18.

¹⁹⁶ J Klabbers, ‘Law-making and Constitutionalism’ in J Klabbers, A Peters, and G Ulfstein (eds.) *The Constitutionalization of International Law* (Oxford University Press, 2011) 114.

¹⁹⁷ G Palombella, ‘Theory, Realities and Promises of Inter-legality’, (n 183) 383.

¹⁹⁸ K Kowalik-Bańczyk and O Pollicino, ‘Migration of European Judicial Ideas’ (n 1) 335.

¹⁹⁹ See for a similar argument Ibid. 336; flexibility is also one of the major factors turning illegitimate extraterritorial extension into legitimate territorial extension in Scott’s conceptualization Scott, J. (2014). ‘Extraterritoriality and territorial extension in EU law’ (n 36) 110,116,117

needs of (Western) humans²⁰⁰. Similarly, Mbembe²⁰¹ recently put forward the idea that “the totality of earth belonged to the West”. Today’s Eurocentrism is based upon separation, contraction and retraction; it is, therefore, less about extraction, conquest and exploitation than ‘cutting ties with the rest’ and building a fortress²⁰². This argument is like the points made by Koskenniemi, who notes:

*‘whether non-Europeans were either “included in” or “excluded from” the system of international law. The question is based on the (Eurocentric) assumption that being included is good (because international law is “good”) whereas exclusion needs to be condemned. But this cannot be right: the key question is not whether somebody is included or excluded but what “inclusion” and “exclusion” mean’*²⁰³.

Eurocentrism is an approach that puts Europe at the centre of all knowledge by marginalizing other perspectives due to their immaturity and/or inferiority. This view assigns ‘truth only to the Western way of knowledge production’²⁰⁴, thus negating the knowledge produced outside the borders of the West. This gives rise to ‘self-referentiality, or solipsism where the Europe engages in a monologic relationship with others’²⁰⁵. Accordingly, ideas, developments or cultural differences from outsiders do not carry much importance, because Europe has no need to interact with other states. Nonetheless, any type of methodological nationalism or Eurocentrism as such bring about Western political and moral superiority or priority, the prevention of which requires at least a modicum of other-regarding-ness. We should decentre Europe by demarginalizing the already marginalized outsiders. In short, if the West is to eschew methodological Eurocentrism, by imposing its own views to the World unilaterally, it should question the potential impacts of its regulations upon the others. As Cover reminded us, every legal order has its own narrative, its own interpretation and its own *nomos*, and when they

²⁰⁰ I would like to thank Deniz Berfin Ayaydın for drawing my attention to the movie and helping me establish this connection.

²⁰¹ ‘Provincializing Europe’ with Dipesh Chakrabarty, 16th March 2021. A recording of the webinar can be found here: <https://www.youtube.com/watch?v=nb1k8xxS1fA>

²⁰² This contractive form of Eurocentrism recalls Wendy Brown’s “Walled States and Waning Sovereignty” and invites us to further question whether the Fortresses do signify weakness. See W Brown, *Walled States and Waning Sovereignty* (Princeton University Press, 2010).

²⁰³ M Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (2011) 19 *Rechtsgeschichte-Legal History* 152, 175. Law Publishing, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=1425485>, p.10

²⁰⁴ A Mbembe, ‘Decolonizing Knowledge and the Question of the Archive’ (2015). Accessed at <https://wiser.wits.ac.za/system/files/Achille%20Mbembe%20-%20Decolonizing%20Knowledge%20and%20the%20Question%20of%20the%20Archive.pdf>

²⁰⁵ I Kerner, ‘Beyond Eurocentrism: Trajectories Towards a Renewed Political and Social Theory’ (2018) 44 *Philosophy & Social Criticism* 5, 550-570.

interact with each other, the judges as ‘people of violence’²⁰⁶ kill one interpretation in favour of the other. However, the fact that every interpretation is a *jurispathetic* activity does not mean that it should be tantamount to *epistemicide*, i.e., the murder of knowledge²⁰⁷.

As indicated above, there is a close connection between non-domination and consent-like mechanism; nevertheless, there is also one other dimension that comes with the idea of non-domination that needs to be stressed: the sense of responsibility. Even if it is not possible to have recourse to the consent of the others, it is still possible to feel morally and political responsible towards them. Aristotelian conception of responsibility includes two minimal conditions for the attribution of responsibility to someone: i) the agent should have a minimum degree of control over the action (control condition) and ii) know what she is doing (epistemic condition)²⁰⁸. Nevertheless, any conception of responsibility is doomed to failure unless it takes seriously the perspective of the agent who is affected from the action (patient). That is, it should not confine itself to the perspective of the responsible agent. The question of to whom the agent is responsible bears at least as much importance as the minimum conditions of individual responsibility. In short, it should shift its focus from an agent-centric approach to a relational one that is more interested in the quality of relationship than the attitudes of agent²⁰⁹. When viewed from relational perspective, the role played by epistemic condition in the responsibility attribution significantly changes. For once, responsibility requires agents to provide explanation and clarification about why they decided to take particular action as well as to be aware of how their actions affected the lives of the patients²¹⁰. This is to say that, when responsibility is seen from a relational perspective, epistemic condition takes a turn to justification, obliging the agents not only to be aware of their actions but also “be able to explain decisions *to* someone, to be able to answer someone who rightfully and reasonably asks “Why?” when given a decision or when acted upon”²¹¹. Thus, the scope of responsibility is all but impossible to grasp without paying due regard to the social context it is embedded because it is a social, dialogical, and necessarily relational concept²¹². It insists on answerability and justification.

²⁰⁶ RM Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 *Harv. L. Rev* 4, 40,42,53.

²⁰⁷ B de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Routledge, 2015)

²⁰⁸ M Coeckelbergh, ‘Artificial Intelligence, Responsibility Attribution, and a Relational Justification of Explainability’ (2020) 26 *Science and Engineering Ethics* 4, 2051, 2052-2054.

²⁰⁹ *Ibid.* 2063.

²¹⁰ *Ibid.* 2058-2060.

²¹¹ *Ibid.* 2061.

²¹² *Ibid.* 2062.

Responsibility is, therefore, different from accountability. For instance, accountability is related to hold someone into legally account, and thus confined to a legal perspective. Responsibility, however, is a term that goes beyond legal obligations. In that regard, the courts are “*responsible* courts”²¹³ only if they succeed in hearing the voices coming from the other side of the border even though they are always accountable to their own legal order. As such, being a responsible court requires to hear the grievances raised from another legal orders even if they are legally immaterial from an accountability perspective. The distinction between responsibility and accountability may be explained with a distinction made by Amartya Sen. He argues that being sympathetic towards others is individuated from being committed to doing something. According to Sen, whereas “(s)ympathy is combinable with self-interested behaviour” and “does not signify a departure from self-love as the only accepted reason for action”, committed attitude “is a clear departure from self-interested behaviour”²¹⁴. The latter forces us to leave our point of view and adopt an other-regarding attitude²¹⁵. It demands us to leave our comfort zone and commit ourselves to take the perspective of the patient seriously. For instance, the blocking statutes, global injunctions or insufficient impact assessments fall all short of meeting the demands of a committed attitude even if they all become compatible with the demands of sympathy. As above pointed out, data regulation has a natural bias to going global and so it calls for responsibility, which may only be realized if one takes a committed stance rather than a sympathetic one, bearing in mind the relational dimension of responsibility. It requires to become more inclusive, either in the process of regulation or at the time of implementation of the unilaterally designed regulation.

²¹³ G Palombella, ‘Theory, Realities and Promises of Inter-legality, (n 183) 390.

²¹⁴ Ibid.

²¹⁵ Amartya Sen, *The Idea of Justice* (Penguin Books, 2009) 188.